REPUBLIC OF SOUTH AFRICA

THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NO.: 2019-16567

DELETE WHICHEVER IS NOT APPLICABLE:

(1) REPORTABLE: **YES**/~~NO~~

(2) OF INTEREST TO OTHER JUDGES: **YES**/~~NO~~

(3) REVISED: NO

DATE: 21 MAY 2026 SIGNATURE: [redacted]

In the matter between:

WALTER NDLOVU **PLAINTIFF**

and

THE MINISTER OF POLICE **FIRST DEFENDANT**

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS **SECOND DEFENDANT**

Delivered: *This judgment was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 21 May 2026.*

JUDGMENT

MARUMOAGAE AJ:

A INTRODUCTION

1. I wish to apologise to the parties for the delays associated with the delivery of this judgment. In this matter, the Plaintiff instituted an action against the First Defendant for unlawful arrest and detention. He claims an amount of R 3 000 000.00 (three million rands). The Plaintiff is also suing the Second Defendant for malicious prosecution and claims payment of R 1 000 000.00 (one million rand). In both claims, the Plaintiff claims 10% per annum. As such, the court is required to determine whether the Plaintiff was unlawfully arrested and detained and whether he was maliciously prosecuted.

2. While it was clear that the Plaintiff had the onus to prove his malicious prosecution claim, it was less clear which party bore the onus for the unlawful arrest and detention claims, an issue that also requires determination by the court. The trial proceeded on both the merits and the quantum. Both defendants are cited herein and sued in their official capacities.

B BACKGROUND

i) Common Cause Facts

3. The Plaintiff was the only witness who testified in support of his case. The First Defendant called two witnesses, and the Second Defendant called three witnesses. On or about 28 December 2017, at or near Dynamo Street, Power Park, Pimville Soweto, the Plaintiff was arrested by members of the First Respondent. The arrest led to the Plaintiff's detention at Kliptown Police Station. The Plaintiff's first appearance was on 2 January 2018 at the Lenasia Magistrates Court.

4. The police officers who arrested and detained the Plaintiff were acting on behalf of the First Defendant and did so in the scope of their employment with the First Defendant. Equally so, the prosecutors who prosecuted the Plaintiff did so in the scope of their employment with the Second Defendant.

ii) Plaintiff's Case

5. The Plaintiff testified that on 28 December 2017, at or around 6:00 am, he took his dog for a walk to the mountain in Pimville, Soweto. After spending about four hours at the mountain, he saw the complainant, whom he did not know at the time. The complainant was holding stones in his hands and walking towards the Plaintiff's direction. The Plaintiff was looking at the complainant and realised that the complainant wanted to attack him. The Plaintiff decided to run away from the complainant. He ran towards the area where security officers were standing, and the complainant ran after him. The complainant threw stones at the Plaintiff while chasing him. When the Plaintiff got to the security guards, the complainant dropped the stones.

6. The complainant got to where the Plaintiff was standing and an argument ensued between them. The security guards asked them what happened between them. The complainant told the security guards that the Plaintiff robbed him of his cellphone and R 50.00 with a knife. The Plaintiff denied this allegation. Community members were also present when the Plaintiff and the complainant were arguing. The Plaintiff was holding his dog with a rope. He removed the rope from the dog to let the dog to go to his house. The Plaintiff fought with the complainant. The complainant tried to remove the rope from the Plaintiff's hand to tie the Plaintiff with it around his neck. The complainant alleged that the Plaintiff placed the cellphone and money in his boots, then demanded that the Plaintiff remove his boots, but the Plaintiff refused.

7. After a while, two police officers arrived. The complainant repeated the robbery allegations to these police officers. One of the police officers asked to search the Plaintiff. The Plaintiff agreed to remove his boots for the police officers to see that he did not have the items allegedly taken from the complainant. The police officers searched the Plaintiff and found nothing on the Plaintiff. The Plaintiff also told the police officials that he had also lost his small cellphone in the mountain. The police

officers, together with about twelve community members, went up the mountain to look for the robbed items. They did not find anything on their way up, and also could not find anything when they went down the mountain. The Plaintiff was also looking for his lost cellphone, which he had lost while running away from the complainant.

8. When they reached the base of the mountain, one of the police officers handcuffed the Plaintiff. The police officer concerned informed the Plaintiff that he was being arrested for robbery. This police officer asked where the Plaintiff resided. The Plaintiff gave the police officers directions to his home, which was about 600 meters from the mountain. The police officers took the Plaintiff to his home, where they met the Plaintiff's 92-year-old grandmother. The police officers informed the Plaintiff's grandmother that the Plaintiff had been arrested for robbery and asked whether the Plaintiff resided in that house. The Plaintiff's grandmother confirmed that she resided with the Plaintiff.

9. According to the Plaintiff, his rights were not read out to him. The police officers arrested him and took him to the Kliptown Police Station, where he was detained without being charged. The Plaintiff testified that the conditions of the cell where he was detained were appalling. He was given a dirty blanket that smelled badly. These blankets also had blood stains. He was also given a very thin mattress to sleep on. Nonetheless, he was provided food while in detention. Despite being arrested on Thursday, 28 December 2017, he was only charged on Saturday, 30 December 2017, which made it difficult for him to apply for bail at the police station or be taken to court on Friday, 29 December 2027, to apply for bail.

10. The Plaintiff was only taken to the Lenasia Magistrates' Court on Tuesday, 2 January 2018, for his first appearance. In his testimony, the Plaintiff reiterated that, because the event occurred more than 7 years ago, he did not clearly remember certain issues. He testified that the bail issue was not canvassed when he first appeared before the magistrate. However, it was correctly put to the Plaintiff during cross-examination that the magistrate informed him that he is entitled to apply for bail. However, the bail application could not proceed because the Plaintiff was charged with a Schedule 6 offence and bail had to be applied for formally. Further, the Plaintiff chose to apply for legal aid, which had to be confirmed first.

11. The matter was postponed for the first time to 10 January 2018. On this date, legal aid and the Plaintiff's address had not yet been confirmed. The case was postponed for the second time to 24 January 2018. On this date, legal aid had been confirmed, and the Plaintiff formally applied for bail. Bail was refused because the magistrate found that the Plaintiff did not prove exceptional circumstances warranting release on bail. The Plaintiff also has a previous conviction and a pending case. The matter was postponed for the third time to 28 March 2018 for further investigations. The Plaintiff was taken to the Johannesburg Correctional Centre, which is known as Sun City. When he arrived at Sun City, he was placed in a cell with more than 50 people. At times, he slept on the floor. He was forced to share the cell with awaiting prisoners who smoked cigarettes and drugs, even though he does not smoke. There was a food shortage at Sun City.

12. The Plaintiff further testified that after the dismissal of his bail application, his legal aid attorney withdrew. He employed a private attorney. The Plaintiff's case was transferred to the Protea Magistrates Court and was subjected to several postponements. The case was postponed to these dates: 28 March 2018; 30 May 2018; 7 June 2018; 26 June 2018; 7 July 2018; 27 July 2018 and 29 August 2018, for a variety of reasons which included further investigations; provision of the copies of the docket; trial; and the complainant's failure to come to court. According to the Plaintiff, the complainant never appeared in court on any of the dates on which the matter was heard. On 29 August 2018, the charges against the Plaintiff were withdrawn.

13. The Plaintiff further testified that before his arrest, he had a shop which was full of stock. Due to his arrest, he lost his shop. He has a 20-year-old child who was about 13 years old at the time. The child was troubled by not seeing him at home. The private lawyer the Plaintiff hired had to be paid despite the Plaintiff's detention. He had to settle the legal fees after he was released. It was argued on behalf of the Plaintiff that the arrest reduced his dignity in the community.

iii) The first Defendant's case

14. Sergeant Mantlhaga was the first witness who testified on behalf of the First Defendant. He testified that he is the police officer who arrested the Plaintiff. On the day of the incident, he was patrolling with his crew member, Warrant Officer Tshabalala. They were stopped by an unknown person, later identified as Mr Zolani

Mini, while driving around the University of Johannesburg in Soweto. Mini informed them that someone was being chased by the community at the mountain, which was not far from where we were stopped. They drove towards the mountain and met the complainant and several community members. The complainant informed them that they chased and caught the Plaintiff after robbing people of their belongings with a knife. The complainant pointed at the Plaintiff as the person who robbed him of his cellphone and money. Mini informed Mantlhaga and Tshabalala that he was willing to serve as a witness in this case because he had witnessed everything that happened.

15. Mantlhaga testified that he asked the Plaintiff as to where the complainant's phone was and the Plaintiff replied that he did not know. The complainant informed Mantlhaga that he wanted to open a case. Manthlaga informed the Plaintiff of his rights and arrested him. Mini told Mantlhaga that he had seen everything that happened during the robbery. Mantlhaga testified further that he handcuffed the Plaintiff and put him into his unmarked car to take him to the police station. He also took the complainant to the Kliptown police station. He arrested the Plaintiff because he reasonably suspected that he had committed the alleged crime. The complainant opened the case, and Mini made a witness statement.

16. Mantlhaga refuted the allegation that at any point on the day the Plaintiff was arrested, he went up the mountain to search for the complainant's cellphone. He also disputed that he took the Plaintiff to his residence. He testified that there was no way he was going to go to the Plaintiff's residence while they were with the complainant. Under cross-examination, Mantlhaga testified that he searched the Plaintiff and found nothing on him. However, he testified further that he did not remember whether he asked community members at the scene who allegedly apprehended the Plaintiff whether they found the items that were allegedly robbed from the complainant. He testified that he did not see a point in further investigating the crime's circumstances. He testified that he was only concerned with the arrest and that the investigation would follow. He further testified that he was informed that the Plaintiff was with other suspects who outran the community members who were trying to apprehend them.

17. The second witness called by the First Defendant was Sergeant Ellen Mampitla Mofokeng. She is the police officer who was assigned to investigate the case. Mofokeng testified that she found the Plaintiff in the cell on the day the Plaintiff was

arrested. Even though she could not comment on the status of the blankets used by the Plaintiff, she knows that the blankets in the holding cells are usually washed. She received the Plaintiff's docket on 28 December 2017. She met with the complainant on the same day. The complainant made a statement and informed her that he was robbed of his cellphone and money by three males. The community apprehended the Plaintiff, while the other two suspects fled.

18. In her statement that was placed in the docket, Mofokeng stated that the complainant was robbed by three men, two of whom were arrested and attending court. After being challenged on this aspect during cross-examination, she pointed out, under re-examination, that it was an error. She further stated that the complainant was made to sign two pointing out statements. The first statement was dirty because ink spilled on it, and she was forced to take the second statement.

19. The second statement was derived from a black document given to the complainant to sign, which was later completed by Mofokeng. The complainant informed her that the Plaintiff was identified by his green and yellow cap. The complainant informed Mofokeng that Mini witnessed the robbery. However, Mofokeng could not find Mini. On 30 December 2017, Mofokeng charged the Plaintiff at 13:30 after visiting the area where the robbery allegedly occurred and finding nothing useful to advance the case. The complainant informed Mofokeng that he could not come to court because he had relocated to Limpopo.

iv) The second defendant's case

20. The first witness who testified on behalf of the Second Defendant was Mdluli, a Regional Court Control Prosecutor at Lenasia Magistrates Court. Mdluli received the Plaintiff's docket on 2 January 2018. He went through the docket and placed the matter on the roll after analysing the evidence. He was satisfied that the crime of robbery had been committed and that the complainant had identified the Plaintiff as the perpetrator. He noted that neither the items taken nor the knife that was allegedly involved in the robbery were found by the police. However, he testified that it was not uncommon in robbery cases to not receover stolen items.

21. The docket also indicated that there was a person who witnessed the robbery. From the information in the docket, Mdluli concluded that the state had a reasonable prospect of a successful prosecution because all the elements of

robbery with aggravated circumstances were present. He stated that the information on the docket revealed that a knife was used in the alleged robbery. The offence was committed around 9:00 in the morning. The complainant had time to observe the Plaintiff and identified him as wearing a yellow cap. The complainant also identified the Plaintiff through his gold tooth.

22. The second witness called by the First Defendant was Mthunzi Blessing Mchunu. He was the prosecutor who appeared for the state on the Plaintiff's first appearance in the Lenasia Magistrates Court. The Plaintiff was charged with robbery with aggravating circumstances. Mchunu testified that the Plaintiff was informed of his rights and asked whether he would apply for legal aid. The Plaintiff elected to apply for legal aid. The Plaintiff was charged with a schedule 6 offence and the state opposed bail. He testified that the matter was postponed for confirmation of legal aid and the Plaintiff's address, as well as obtaining the Plaintiff's profile. The case was remanded to 10 January 2018.

23. The Plaintiff's address was eventually confirmed, and the profile was also received. The profile indicated that the Plaintiff has a previous conviction, but did not list any pending cases. Mchunu told the court that, while he was testifying, the Plaintiff told the magistrate he had a pending case. On 10 January 2018, legal aid had not yet been confirmed, and the matter was postponed to 24 January 2018 for a formal bail application. Mchunu conceded that the wrong schedule was used against the Plaintiff. He testified that instead of schedule 6, the Plaintiff ought to have been charged with a schedule 5 offence.

24. However, Mchunu insisted that the Magistrate considered and concluded that it was not in the interest of justice to release the Plaintiff on bail. This is because the Plaintiff had a previous conviction of assault GBH. The matter was postponed again to 24 January 2018 to confirm legal representation by the state and to proceed with the bail application. According to Mchunu, on 24 January 2018, the Plaintiff applied for bail and stated that he had a pending case and a prior conviction. Bail was denied because he could not prove exceptional circumstances warranting release on bail.

25. The third witness called by the Second Defendant was Tumelo Maunye was the prosecutor who represented the state against the Plaintiff on 28 March 2018. He testified that legal aid was confirmed for the Plaintiff, but the Plaintiff chose to use

a private attorney. Bail was not fixed, and the Plaintiff was remanded in custody for further investigations. When the matter was brought back to court on 24 April 2018, the Plaintiff's private attorney did not appear. The investigations were finalised and the matter was postponed to 30 May 2018 for the contents of the docket to be given to the Plaintiff's attorney. The Plaintiff was also remanded in custody. On 30 May 2018, the Plaintiff's attorney was in court, and he confirmed receipt of the contents of the docket. The matter was transferred to the Protea Regional Magistrates' Court for the allocation of the trial date and postponed to 7 June 2018.

26. The final witness called by the Second Defendant was Zanda William Mthimunye, who was the Acting Senior Public Prosecutor. According to Mthimunye, the matter was set down for trial on 26 June 2018, and the complainant was not present in court. The matter was then postponed to 27 July 2018, and the complaint also did not come to court. It was postponed again to 29 August 2018, and the complainant also failed to appear on that date. Mthimunye testified that the docket indicated that the investigating officer unsuccessfully attempted several times to subpoena the complainant to attend court. He noted from the docket that the complainant had relocated to Limpopo and would not be coming to court. Because the docket indicated that the complainant was uncooperative, Mthimunye decided to withdraw the charges.

C LEGAL FRAMEWORK

i) Onus

27. It was surprising that the issue of onus in relation to unlawful arrests and detentions raises some controversy. There appear to be two judicial schools of thought on this issue. The first school of thought advances a view that the 'claimants' in these matters bear the onus of proving that their arrests and detentions were unlawful. The full court of the High Court in *Botha v Lues* was of the view that the Plaintiffs, who alleged to have been wrongfully arrested, bore the onus to establish the unlawfulness of such arrest.[1] The court was of the view that to succeed with the damages claim, the arrested person was obliged to prove that there were no reasonable grounds to suspect that an offence was committed.[2]

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[1] 1981 (1) SA 687 (O) 591.

[2] Ibid. *The court reasoned as follows '[h]ierinlater sal aangetoon word dat 'n verkeersinspekteur nie alleen statutêr gemagtig is nie maar ook ampshalwe verplig is om 'n motorbestuurder te arresteer wat*

28. In *Sihlali v Minister of Police,* it was held that *'[c]onsidering that the claims were denied from the onset, the trial proceeded on the basis that the plaintiff bore the onus of proving unlawful arrest, search and detention'*.[3] Similarly, in *Njikelana v Minister of Police and Another*, the court outlined that it was required to determine *'… whether the plaintiff's detention after his first court appearance was unlawful and attributable to the defendants; and second, whether the prosecution of the plaintiff was malicious' and concluded that '[t]he plaintiff bears the onus on both claims'*.[4]

29. In *Hassien v Minister of Police for the Republic of South Africa and Others* , the court noted that *'[t]he parties agreed that the plaintiff bears the onus of proof and duty to begin in all the claims'*.[5] In *Naves and Another v Minister of Police and Another*, the court was confronted with an unopposed claims for unlawful arrest, unlawful detention and malicious prosecution and it held that *'… the plaintiffs bear the onus to establish, on a balance of probabilities, each element of the causes of action advanced'*.[6] It was also stated in *L.N v Minister of Police and Another*, that *'[t]he plaintiff bears the onus to prove its case'*.[7]

30. The second school of thought advances a view that a person accused of unlawful arrest and detention bears the onus to prove that both the arrest and detention were lawful. In *Mlisa v Minister of Police and Another*, it was held that *'[t]he onus rested on the first defendant to justify the plaintiff's arrest and detention'*.[8] In *Mohale and Another v Minister of the South African Police Service*, it was held that *'[t]he defendant bears the onus to prove that the arrest and detention of the first and second plaintiffs were lawful'*.[9]

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op redelike gronde verdink word nie sober te wees nie. Bestaan daar sodanige gronde kan die arrestasie nie onregmatig wees nie hoe krenkend dit ookal vir die gearresteerde mag wees want uitoefening van 'n bevoegdheid (en plig) wat van regsweë verleen word kan nie wederregtelikheid daarstel nie. Is qui jure publico utitur non videtur injuriae faciendae causa hoc facere (D 47.10.13.1) en qui suo jure utitur nemini facit injuriam (D 50.17.55 en 155; 9.2.5.1). Omrede dus, soos hierbo aangetoon, die onregmatigheidselement 'n aanspreeklikheidsvereiste is kan die gearresteerde gevolglik alleen sukses behaal indien hy daarin kan slaag om te bewys dat daar nie die bedoelde redelike gronde vir verdenking bestaan het nie. Hy dra dus die risiko van nie-oortuiging, of anders gestel, die onus om te bewys dat die arrestasie onregmatig was'.

[3] (1012/2020) [2025] ZAECMHC 79 (21 August 2025) para 6. The court further stated '[t]hese are civil proceedings and the plaintiff bears the onus to prove his case on a balance of probabilities' [para 25].

[4] (16845/2018) [2026] ZAWCHC 98 (4 March 2026) para 4.

[5] (612/2019) [2025] ZAECMHC 120 (18 November 2025) para 5.

[6] (2020/18097) [2026] ZAGPJHC 485 (8 May 2026) para 1.

[7] (22/19815) [2025] ZAGPJHC 710 (22 July 2025) para 24.

[8] (1342/2021) [2026] ZAECMHC 12 (17 February 2026) para 10.

[9] (1440/2020) [2025] ZANWHC 209 (3 November 2025) para 42. The court emphasised that '[i]t is trite that where a defendant denies the unlawfulness of an arrest, that defendant bears the onus to prove that the arrest was lawful' [para 5].

31. In *Minister of Law and Order v Hurley,* Rubie CJ, writing unanimously for the Appellate Division (as it then was), after criticising cases that held that people who were arrested have the onus to prove that the arrest was unlawful, authoritatively held that:

> *'[a]n arrest constitutes an interference with the liberty of the individual concerned, and it therefore seems to be fair and just to require that the person who arrested or caused the arrest of another person should bear the onus of proving that his action was justified in law'.*[10]

32. Hendricks JP in *Maritz v Minister of Police*, held that *'[t]he defendant bears the onus to justify the lawfulness of the arrest, as an arrest is prima facie unlawful and an invasion of a person's constitutional right to freedom and liberty. The defendant also bears the duty to begin'*.[11] It was also held in *Obini v Minister of Police*, that *'[t]here is nothing prohibiting a peace officer to arrest a person without a warrant. However, such arrest must be within the confines of the law and the onus rests upon the arresting officer to prove the lawfulness thereof'.*[12]

33. The Constitutional Court in *Zealand v Minister for Justice and Constitutional Development and Another*, held that:

> *'[i]t has long been firmly established in our common law that every interference with physical liberty is prima facie unlawful. Thus, once the claimant establishes that an interference has occurred, the burden falls upon the person causing that interference to establish a ground of justification'.*[13]

34. Unlike unlawful arrest and detention cases, it does not appear as if there is any controversy as to who bears the onus in malicious prosecution cases. It is generally accepted that the onus regarding malicious prosecution rests on the Plaintiff.[14] This exposition of the law has received academic endorsement. According to Okpaluba

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[10] 1986 (3) SA 568 (A) 589.
[11] 661/2021) [2025] ZANWHC 8 (15 January 2025) para 1.
[12] (996/2021) [2025] ZANWHC 167 (29 August 2025) para 6. See also generally *Ntombela v Minister of Police* (23541/2018) [2025] ZAGPJHC 1064 (24 October 2025).
[13] 2008 (6) BCLR 601 (CC); 2008 (2) SACR 1 (CC); 2008 (4) SA 458 (CC) para 25
[14] See *Thusi v Minister of Police and Another* (KP58/2018) [2025] ZANWHC 99 (11 June 2025) para 1. See also *Dukulae v Minister of Police* (885/2024) [2025] ZANWHC 129 (25 July 2025) para 2. See also This position has received support in several judgments in South Africa such as *Banda v Minister of Police and Another* (58/2023) [2025] ZANCHC 86 (5 September 2025) para 9 and 10 as well as *Mkhabela v Minister of Police and Another* (829/2023) [2025] ZAMPMBHC 71 (6 August 2025) para 20, where it was stated that '[d]etention is, in and by itself, unlawful. The onus rests on the detaining officer to justify it'.

'[i]n malicious prosecution the burden of proof is on the plaintiff, who must show that all four elements developed by the courts over the years are present'.[15]

ii) Unlawful Arrest and detention

35. Section 12(1) of the Constitution of the Republic of South Africa, 1996 ('Constitution'), provides that

> *'Everyone has the right to freedom and security of the person, which includes the right—*
> *(a) not to be deprived of freedom arbitrarily or without just cause;*
> *(b) not to be detained without trial'.*

36. The Constitutional Court in *Mahlangu and Another v Minister of Police*, held that

> *'[t]he prism through which liability for unlawful arrest and detention should be considered is the constitutional right guaranteed in section 12(1) not to be arbitrarily deprived of freedom and security of the person. The right not to be deprived of freedom arbitrarily or without just cause applies to all persons in the Republic. These rights, together with the right to human dignity, are fundamental rights entrenched in the Bill of Rights. The state is required to respect, protect, promote and fulfil these rights, as well as all other fundamental rights. They are also part of the founding values upon which the South African constitutional state is built'.*[16]

37. In terms of section 35(1)(d) of the Constitution:

> *'Everyone who is arrested for allegedly committing an offence has the right—*
> *to be brought before a court as soon as reasonably possible, but not later than—*
> *(i) 48 hours after the arrest; or*
> *(ii) the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day'.*

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[15] 'Reasonable and Probable Cause in the Law of Malicious Prosecution: A Review of South African and Commonwealth Decisions' (2013) 16 *PER / PELJ* 241 at 247. See also *Sandow v National Director of Public Prosecutions* (A93/2023; 82114/2017) [2025] ZAGPPHC 171 (18 February 2025) para 7.
[16] 2021 (7) BCLR 698 (CC); 2021 (2) SACR 595 (CC) para

38. In terms of section 35(2)(e) of the Constitution:

> *'[e]veryone who is detained, including every sentenced prisoner, has the right to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment'.*

39. The Constitutional Court in *De Klerk v Minister of Police*, held that

> *'The deprivation of liberty, through arrest and detention, is per se prima facie unlawful. Every deprivation of liberty must not only be effected in a procedurally fair manner but must also be substantively justified by acceptable reasons. … What matters is whether, substantively, there was just cause for the later deprivation of liberty. In determining whether the deprivation of liberty pursuant to a remand order is lawful, regard can be had to the manner in which the remand order was made'.*[17]

40. Section 40(1) of the Criminal Procedure Act[18] provides that:

> *'A peace officer may without warrant arrest any person whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody'.*

41. In *Damoyi v Minister of Police*,[19] it was held that

> *'[i]n terms of our law arrest and detention without a warrant is prima facie unlawful unless it fits the exceptions outlined under s 40 (1) of the Criminal Procedure Act 51 of 1977 (the CPA)'.*

42. The Appellate Division (now Supreme Court of Appeal) in *Duncan v Minister of Law and Order*,[20] held that:

> *'It may, however, be conducive to clarity … the basis on which an apparently lawful arrest may yet be held to be unlawful, is considered.*

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[17] 2019 (12) BCLR 1425 (CC); 2020 (1) SACR 1 (CC); 2021 (4) SA 585 (CC) para 62.
[18] 51 of 1977
[19] (628/2023) [2026] ZAECMKHC 3 (20 January 2026) para 13.
[20] 1986 (2) SA 805 (A)

The so-called jurisdictional facts which must exist before the power conferred by s 40 (1) (b) of the present Act may be invoked, are as follows:

(1) The arrestor must be a peace officer.

(2) He must entertain a suspicion.

(3) It must be a suspicion that the arrestee committed an offence referred to in Schedule 1 to the Act (other than one particular offence).

(4) That suspicion must rest on reasonable grounds. If the jurisdictional requirements are satisfied, the peace officer may invoke the power conferred by the subsection, ie, he may arrest the suspect. In other words, he then has a discretion as to whether or not to exercise that power (cf Holgate-Mohammed v Duke [1984] 1 All ER 1054 (HL) at 1057). No doubt the discretion must be properly exercised. But the grounds on which the exercise of such a discretion can be questioned are narrowly circumscribed'.

43. In *Gwejela v Minister of Police and Another*, it was held that

> *'[a] suspicion, by definition, means the absence of certainty. In its ordinary meaning it is a state of conjecture or surmise where proof is lacking. The officer in question need not be convinced that the information in their possession was sufficient to commit for trial or convict, or to establish a prima facie case for conviction, before making the arrest. Suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is the end. When such proof has been obtained, the police case is complete; it is ready for trial and passes on to its next stage'.*[21]

44. It was emphasised in *Mahlaba v Minister of Police*, that *'[a] suspicion that a person committed an offence must rest on reasonable grounds'*.[22] In *Lasteless v Minister of Police*, it was held that *'[t]he suspicion must be genuinely held and must be objectively reasonable having regard to the information available to the officer at the time'*.[23] In *Nyarende v Minister of Police*, it was held that:

> *'[i]t is trite that the grounds of justification must be exercised objectively. The section requires suspicion and not certainty. However, the suspicion must be based upon solid grounds; otherwise, it would be arbitrary. The test is*

[21] (577/2021) [2025] ZAECBHC 28 (28 October 2025) para 6b.
[22] (Appeal) (A2024/094541) [2026] ZAGPJHC 24 (14 January 2026) para 24.
[23] (688/2021) [2025] ZANWHC 221 (14 November 2025) para 21.

whether a reasonable man in the position of the arresting officer and possessed of the same information would have considered that there were good and sufficient grounds for suspecting that the Plaintiff committed the offence/s'.[24]

iii) Malicious Prosecution

45. The Supreme Court of Appeal in *Minister of Justice and Constitutional Development and Others v Moleko*, held that

> *'In order to succeed (on the merits) with a claim for malicious prosecution, a claimant must allege and prove –*
> 1. *that the defendants set the law in motion (instigated or instituted the proceedings);*
> 2. *that the defendants acted without reasonable and probable cause;*
> 3. *that the defendants acted with 'malice' (or animo injuriandi); and*
> 4. *that the prosecution has failed'.*[25]

D. EVALUATION

i) Overview

46. It is a constitutional imperative to assess delictual cases against the Minister of Police and the National Prosecuting Authority, the First and Second Defendants in this matter, through a constitutional lens. This is because these important institutions have been constitutionally entrusted with enormous power to interfere with the liberty of everyone who finds themselves within the borders of South Africa, who is suspected or accused of having committed a crime. It is for this reason that there should be effective checks and balances to ensure that officials who act on behalf of these institutions do not arbitrarily interfere with the liberty of those accused of committing crimes. Most importantly, where it is justified for those employed by these institutions to interfere with the liberty of those accused of criminality, they must follow constitutionally permissible procedures to avoid unwarranted and unjustified infringement of rights.

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[24] (2678/2020) [2025] ZAMPMBHC 58 (20 June 2025) para 15
[25] [2008] 3 All SA 47 (SCA); 2009 (2) SACR 585 (SCA) para 8.

47. Where police officials and prosecutors who act on behalf of the First and Second Defendant fail to follow correct procedures or neglect to do their work as required, claims for unlawful arrest and malicious prosecution are likely to follow vicariously against the Minister of Police and the Director of National Prosecuting Authority, respectively. The facts of this case demonstrate the unfortunate reality to which some members of the South African Police Service and the National Prosecuting Authority are subjecting arrested and accused persons. This case illustrates how easy it is for people in South Africa to be arrested and detained, subjected to the intrusive criminal justice system, and later released as if nothing had happened, without any trial or conviction. The Plaintiff's liberty was interfered with through arrest, and he was detained in the police cells, only to have his case withdrawn after eight months and two days, which amounts to a total of 333 days.

ii) Onus

48. When the trial began, even though the Plaintiff led his evidence first, it was not particularly clear who bore the onus of proof for unlawful arrest and unlawful detention claims. It appears that this issue remains the point of confusion in South Africa. In *Njikelana v Minister of Police and Another*, it was held that *'[t]he plaintiff bears the onus of proving that his detention was unlawful. However, it is trite that once an arrest and detention are admitted or proved, the defendant bears the onus of justifying the arrest'*.[26] It is difficult to understand how the arrested person who brings a delictual claim against the state for unlawful arrest and detention by its officials can be said to bear the onus of proving that the arrest and detention were unlawful.

49. The approach that persons who bring unlawful arrest and unlawful detention claims bear the onus of proving that their arrests were unlawful is based on the trite principle of *'he who alleges must prove'*.[27] This principle was articulated by the Constitutional Court as follows:

> *'[t]he onus is on the applicants, as the alleging parties, to establish a prima facie case for the respondents to answer. The key question is whether there is sufficient evidence adduced to establish a prima facie case that their claims are correct. If at the conclusion of the case, their evidence is*

[26] (16845/2018) [2026] ZAWCHC 98 (4 March 2026) para 49.
[27] *Motsoane v Legal Aid South Africa and Others* (3449/2023; 5153/2022) [2024] ZAFSHC 267 (26 August 2024) para 8.

inconclusive or the probabilities are evenly balanced, the applicants cannot succeed with their claims, as they would not have discharged the onus resting on them'.[28]

50. However, this general principle does not apply to unlawful arrests and unlawful detention cases when the arrest was effected without a warrant. This is because the claim is not about the arrest. In fact, arrest in these cases is usually a factual issue that requires no proof, particularly when the accused is in detention. There is often no dispute, none whatsoever, that the person who is claiming from the Minister of Police was arrested. The issue is usually the unlawfulness of the arrest. The starting point is that the arrest is prima facie unlawful until proven lawful. This automatically burdens those who effect arrests to prove the lawfulness thereof. Placing the onus on the Minister of Police, rather than on the person who claims the arrest was unlawful, was a deliberate policy decision to burden those with authority to interfere with the fundamental right to liberty with the task of explaining and justifying the lawfulness of such infringement.

51. This policy decision was explained and confirmed by the Constitutional Court in *Zealand v Minister for Justice and Constitutional Development and Another*, that the onus is placed on the authority that has the power to interfere with physical liberty because *'… every interference with physical liberty is prima facie unlawful'*.[29] The onus arises once it has been established that police officials effected an arrest and detained a person within the scope and course of their employment. In *Tlhone v Minister of Police*, it was correctly held that *'[o]nce a plaintiff establishes the fact of arrest, the onus shifts to the defendant to justify the lawfulness of that arrest'*.[30]

52. Having regard to the Constitutional Court and Appellate Division's (as it then was) judgments in *Zealand* and *Hurley,* there can be no doubt that the school of thought that those who claim to have been unlawfully arrested and unlawfully detained by the police in South Africa bear the onus of proving the unlawfulness of such arrests is wrong. In other words, cases that place the onus on the arrested and detained persons to prove the unlawfulness of their arrests and detentions are wrong in law. In the current case, since it has been established that the Plaintiff was arrested and detained, the onus was on the First Defendant to prove that the arrest and

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[28] *Mncwabe v President of the Republic of South Africa and Others; Mathenjwa v President of the Republic of South Africa and Others* 2023 (11) BCLR 1342 (CC); 2024 (1) SACR 447 (CC) para 94
[29] 2008 (2) SACR 1 (CC); 2008 (4) SA 458 (CC) para 25.
[30] (745/2020) [2026] ZANWHC 27 (12 February 2026) para 14.

detention were lawful. Unlike arrest and detention, the onus of proving malicious prosecution was on the Plaintiff.

iii) Lawfulness of the Arrest and Detention

53. It is trite that police officers have the authority to arrest with or without a warrant. But they do not have the power to arrest suspects without a valid reason. First, the police are constrained by the Constitution, section 12 of which mandates that everyone has the right *'… not to be deprived of freedom arbitrarily or without just cause'.* An arrest will generally be regarded as arbitrary when it occurs without a valid legal basis or where police officials who effect the arrest and detention disregard due process. This will amount to undue deprivation of freedom. Nkosi correctly states that *'[t]here has been a general acknowledgment by the courts that the right to liberty is one of the most important rights afforded to a person … [and] an unlawful interference with a person's right to liberty is not only a common law issue, but is also a constitutional infringement'*.[31]

54. When adjudicating unlawful arrests and detention claims, courts must be alive to the fact that the events alleged to have led to these claims may implicate the arrested and detained persons' right to dignity.[32] In *Theobald v Minister of Safety and Security and Others*, it was convincingly held that:

> *'… arrest and detention of a person are a drastic infringement of his basic personality rights, in particular the rights to freedom and human dignity, and that, in the absence of due and proper legal authorisation, such arrest and detention are unlawful'.*[33]

55. Secondly, the officials of the First Defendant are constrained by section 40(1) of the Criminal Procedure Act. This provision permits arrest without a warrant only under circumstances where a police officer reasonably suspects a person they intend to arrest of having committed an offence referred to in Schedule 1. This means that for an arrest to be lawful, a police officer must demonstrate that, at the time the arrest was effected, the information available to them enabled them to form a reasonable suspicion that the person they intended to arrest committed a schedule one offence.

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[31] 'Balancing deprivation of liberty & quantum of damages' (2013) (April) *De Rebus* 62.
[32] Section 10 of the Constitution.
[33] 2011 (1) SACR 379 (GSJ) 389.

56. The crime of robbery is listed in Schedule 1 of the Criminal Procedure Act. As such, where a police officer reasonably suspects that a suspect has committed a robbery, an arrest can be effected without a warrant. However, the suspicion must not only be on reasonable grounds,[34] it must also be genuinely held and objectively reasonable, having regard to the information available to the officer at the time.[35] In the current case, the arresting officer was allegedly called to the scene by Mini and found community members at the scene. The Plaintiff's testimony that there were security guards at the scene was not challenged. It is not clear why the arresting officer, when he arrived at the scene, did not speak to the security guards to verify the allegations of robbery against the Plaintiff.

57. It also seems like the arresting officer did not seek to interrogate the information that the complainant allegedly provided to him. It was alleged that the complainant was robbed by three unknown men, one of whom was the Plaintiff. It is alleged that the Plaintiff pretended to urinate and then attacked the complainant with the knife to take his cellphone and money. There is no testimony regarding the other two suspects' participation in the robbery. It is not clear when the Plaintiff managed to take the cellphone and the money from the Plaintiff and what happened to those items. Throughout the trial, there was no reference to the contents of the statement allegedly made by Mini when the Plaintiff was arrested. Surely, one could reasonably expect to find details of the robbery in that statement, since Mini allegedly witnessed it. Even worse, Mini was not called to testify in this matter.

58. It remains unclear what really transpired during the robbery. Did the Plaintiff pass the robbed items to the other suspects, and if so, when and how? At what point did the community members chase after the three suspects? Was it after the robbery, or while the robbery was in progress? Did any community members see who took the stolen items? These questions make it difficult to conclude that the arrest was justified. It appears that no one saw what happened to the items because, at some point, the complainant allegedly asked to search the Plaintiff in the presence of community members. In fact, when the arresting officer arrived at the scene, he searched the Plaintiff without any difficulty and found nothing on the Plaintiff.

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[34] *Mahlaba v Minister of Police* (Appeal) (A2024/094541) [2026] ZAGPJHC 24 (14 January 2026)
[35] *Lasteless v Minister of Police* (688/2021) [2025] ZANWHC 221 (14 November 2025) para 21.

59. It is a common cause that when the arresting officer arrived at the scene, the complainant and the Plaintiff had either spoken or were speaking with each other. The court was told that the complainant identified the Plaintiff through his gold tooth, clothes, and cap. It is not surprising that the complainant would use the Plaintiff's distinctive features to identify him after arguing with him. The complainant's version was narrated by witnesses who were not at the scene of the robbery. Neither the complainant nor Mini was called to corroborate or verify this version. As such, the version is purely hearsay and cannot be used to rebut the Plaintiff's version.

60. It is not clear why the arresting officer, before effecting the arrest, did not speak to the security guards to establish what happened or verify the story allegedly narrated by the complainant. I am not convinced that the arresting officer had solid grounds to effect an arrest. Most importantly, I am not convinced that a reasonable man in the position of the arresting officer and assessing the '… *same information would have considered that there were good and sufficient grounds for suspecting that the Plaintiff committed the offence/s'.*[36]

61. It seems to me that the arrest was based on the general knowledge of the criminal activities that the court was told are usually perpetrated at the place where the Plaintiff was arrested. The arresting officer took it for granted that, because crimes are usually perpetrated in that area, the Plaintiff must have committed the alleged crime. It does not appear as if there was any appetite from the arresting officer to probe the allegations further to establish good and sufficient grounds to formulate a suspicion that the Plaintiff might have committed the alleged offence.

62. This does not mean that the evidence of the Plaintiff was perfect, but most of it remains unchallenged. The Plaintiff is the only person who testified who was at the scene. Had the First Defendant called the complainant, Mini, any of the community members, or any of the security guards who were at the scene, any of these witnesses would have been in a better position to rebut the version of the Plaintiff in relation to the alleged robbery. Whether the Plaintiff was taken to his home after the arrest or directly to the police station is totally irrelevant to the question of unlawful arrest and detention. What is important is that the arresting officer failed in his duty to ascertain the circumstances of the alleged robbery to formulate a

[36] *Nyarende v Minister of Police* (2678/2020) [2025] ZAMPMBHC 58 (20 June 2025) para 15

reasonable suspicion that the Plaintiff robbed the complainant of his items. The First Defendant failed to discharge the onus of proving that the arrest was lawful. It follows, therefore, that the detention was also unlawful.[37]

63. Crime in South Africa is out of control. Everyone who commits a crime must be arrested and prosecuted. However, it is important to avoid a situation where people are arrested, denied bail and detained for months to later have their cases withdrawn as if nothing happened. The police have a constitutional policing mandate, which includes arresting those who are suspected of having committed crimes. But where arrests are effected without warrants, it is important for police officers to be slow to arrest and only do so when they have satisfied themselves that the arrest is justified, having regard to the provisions of section 12 of the Constitution and section 40 of the Criminal Procedure Act. These important constitutional and statutory safeguards were totally ignored in this case. The arresting officer effected the arrest as part of a routine of arresting suspects without carefully assessing whether there was a reasonable suspicion to arrest the Plaintiff in this case.

iv) Investigation and bail

64. The Plaintiff's unlawful arrest and detention exposed him to inhumane conditions at the cell where he was detained at the Kliptown Police Station. The Plaintiff testified that he was provided with dirty, blood-stained blankets and a thin mattress. Mofokeng was unable to contradict this testimony. She could not confirm or deny that the Plaintiff was given a dirty blanket and a thin mattress. Mofokeng merely said she knew the blankets in the cells were generally washed. She did not indicate when or how many times they are washed. The Plaintiff's version remains unchallenged in this regard. The Plaintiff was subjected to conditions of detention that are inconsistent with human dignity.[38]

65. Mofokeng's testimony demonstrated the lackadaisical approach of some of the police officers within the South African Police Service. She failed to charge the Plaintiff and bring him to court within 48 hours, despite having the opportunity to

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[37] See *Mkhabela v Minister of Police and Another* (829/2023) [2025] ZAMPMBHC 71 (6 August 2025) para 28, where it was held that 'I have, *in casu*, already found that the arrest is unlawful. No lawful detention can follow from an unlawful arrest of the nature herein where, by the evidence of the police officer and the prosecutrix, the plaintiff could not be linked in any way to the commission of the offence'. See also Unity Prosper Nkabeni 'The court erred: Unchangeable nexus between unlawful arrest and detention' (2026) Apr *De Rebus* 32.

[38] Section 35(2)(e) of the Constitution.

do so. The Plaintiff was arrested on Thursday, 28 December 2017. A criminal court was sitting on Friday, 29 December 2029. However, Mofokeng decided not to process the Plaintiff and bring him to court for bail consideration on Friday.

66. Mofokeng testified that she wanted to investigate before bringing the accused to court because she had 48 hours to do so. It did not occur to her that if the accused was not brought to court on Friday, the only available opportunity to bring him to court would be the following week, on Tuesday, 2 January 2018, because Monday was a public holiday. Mofokeng merely saw another accused who could be brought to court at her leisure without serious consideration of the Plaintiff's constitutional rights. This is totally unacceptable. Mofokeng ought to have ensured that the Plaintiff was brought to court at the earliest opportunity within the prescribed 48 hours.

67. As if this were not enough, Mofokeng claims to have located the complainant in this issue and made her sign a statement, which Mofokeng later completed in her absence. In other words, what is contained in the complainant's statement is information that was completed by Mofokeng after the complainant had signed a blank document provided to him by Mofokeng. This means that the complainant did not make a statement. However, Mofokeng did not mention this aspect in her own statement. Mofokeng also failed to secure the complainant's attendance in court. The complainant was not cooperative from the start of the case, but Mofokeng did not indicate this in the docket before the Plaintiff's first appearance in court. These are important factors that would have assisted prosecutors and the court in their bail consideration. Most importantly, Mofokeng failed to locate and secure the so-called 'eyewitness' in the criminal case against the Plaintiff.

68. Even worse, Mofokeng did not bother to go and verify the Plaintiff's address between 28 December 2017 and 2 January 2018, leading to the bail application being postponed to, among others, allow Mofokeng to go and verify the Plaintiff's address. Surely, the verification of the 'accused' address is not something that police officers should necessarily be instructed by the court or the prosecuting authority to do. This is something that the investigating officer can do, particularly when the 'accused' resides closer to the police station where he is detained, soon after the arrest of the ' accused '. Address verification is an important element that can result in bail not being granted or the hearing thereof being postponed. The Plaintiff's address was stated in the arresting officer's statement dated 28

December 2017. Mofokeng could have gone to this address on 28 December 2018 to confirm whether the Plaintiff resided there.

69. At all times, both in the criminal proceedings and in these proceedings, everything said about the complainant and Mini is purely hearsay. The court was informed that the complainant could not attend the criminal case because he had relocated to Limpopo. This was ironic because the arresting officer is now stationed in Limpopo but was prepared to give testimony in both the criminal court and this court. In fact, he was one of the witnesses who testified in this matter. The only inference that can be drawn from this is that the complainant knew the allegations he made against the Plaintiff were unsustainable; hence, he was not interested in participating in either the criminal or this court.

70. Eventually, the Plaintiff was brought to court on 2 January 2018. Even though the Plaintiff incorrectly said that bail was not considered, it is clear from the record and testimony provided on behalf of the Second Defendant that the magistrate informed the Plaintiff of his right to bail on this date. The information prepared by Mofokeng indicated that the Second Defendant's officials intended to oppose bail, and a formal bail application had to be made. However, it is strange that the charge against the Plaintiff was not only recorded as robbery with aggravating circumstances due to the alleged use of the knife that was not seen by anyone or recovered by the police but also elevated to a Schedule 6 offence. This meant that, to be released on bail, the Plaintiff had to demonstrate that there were exceptional circumstances warranting his release and that granting bail was in the interests of justice. This made it even more difficult for the Plaintiff to be released on bail.

71. The prosecutor who opposed the bail application conceded that the wrong schedule was preferred against the Plaintiff and that the Plaintiff ought to have faced a schedule 5 offence. What is even more bizarre is that the reasons for classifying the charge to be a schedule 6 offence were that the accused had a previous conviction of assault and a pending case. While the previous conviction was established through the SAP 69 document, it does not appear that the court probed further to understand the circumstances of the alleged pending case. It is not clear from the record what this pending case was for, and Mchunu could not assist in this regard. It remains doubtful that the Plaintiff had any pending case when bail was considered.

72. This was a total failure of justice and a misapplication of the law. It is clear from the Criminal Procedure Act that there are only two circumstances where robbery with aggravating circumstances can be classified as a schedule 6 office. The first instance is when the accused is charged with murder, when the death of the victim was caused by the accused in committing or attempting to commit or after having committed or having attempted to commit robbery with aggravating circumstances.[39] The second instance is when the alleged robbery involves the use of a firearm, the infliction of grievous bodily harm, or the taking of a motor vehicle by the accused or co-participant.[40]

73. The Plaintiff was neither charged with the use of a firearm nor murder that occurred because of robbery. The use of the wrong schedule resulted in the wrong test being applied when the Plaintiff applied for bail, leading to bail being refused. This was a fundamental infringement of the accused's right '… to be released from detention if the interests of justice permit, subject to reasonable conditions'.[41] This led to the Plaintiff's further unlawful detention. The fact that the accused was represented by a legal aid attorney is of no consequence. The magistrate ought to have realised that the accused had been forced to face a wrong schedule that would make attaining bail difficult.

v) Malicious Prosecution

74. According to Okpaluba *'[i]n South Africa, malicious prosecution is an aspect of delictual liability arising from "malicious proceedings" which may occur where a person abuses the process of the court by wrongfully or maliciously setting the law in motion against another'*.[42] To be liable for the payment of damages, the person who set the law in motion must have done so intentionally, maliciously, and without reasonable and probable cause. In other words, a person alleging that they have been subjected to malicious prosecution must establish that they were prosecuted without reasonable and probable cause in circumstances where the officials of the Second Defendant were acting with malice and that the prosecution failed.[43]

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[39] Schedule 6 of the Criminal Procedure Act.
[40] Schedule 6 of the Criminal Procedure Act.
[41] Section 35(1)(f) of the Constitution.
[42] 'Proof of malice in the law of malicious prosecution: A contextual analysis of Commonwealth decisions' (2012) 37 (2) *Journal of Juridical Science* 65 at 68
[43] *Minister of Justice and Constitutional Development v Moleko* 2008 [3] All SA 47 (SCA) para 8 and *Koji v Director of Public Prosecutions* [2025] 1 All SA 680 (NWM) para 21.

75. *'Malicious prosecution consists in the wrongful and intentional assault on the dignity of a person encompassing his good name and privacy'.*[44] A claim for malicious prosecution can only be instituted when the proceedings the Plaintiff was subjected to have been completed, concluded, or withdrawn.[45] The first requirement is to show that prosecution proceedings were instituted against the Plaintiff. In this case, the Plaintiff appeared in the Lenasia Magistrates Court where he was charged with a schedule 6 offence of robbery with aggravating circumstances. The Second Defendant set the law in motion against the plaintiff. The first requirement is satisfied.

76. The second requirement is whether the First Defendant or its officials acted without reasonable and probable cause. Schreiner JA in *Beckenstrater v Rottcher and Theunissen,* explained the concept of 'reasonable and probable cause' to mean prosecution in circumstances where *'… there is no reasonable cause for prosecuting'*.[46] He understood this to mean circumstances where the prosecution does not have such information that would lead a reasonable man to conclude that the Plaintiff had probably been guilty of the offence charged but nonetheless proceeds to prosecute.[47] In this case, when the control prosecutor received the docket, he read the 'docket'. It is not clear which statements were on the docket when the control prosecutor received it. It appears that the arresting officer's statement was in the docket, together with the pointing-out statement.

77. It appears further that the decision to prosecute was made solely based on the arresting officer's statement, which is dated 28 December 2017. This statement is vague at best, and no reasonable prosecutor can decide to charge based on it without further information from the investigating officer. This statement merely states that the arresting officer was stopped by an unknown person who informed him that there was a person caught robbing people with a knife. There is no information provided relating to the 'other people' who also robbed the complainant. It is further stated in this statement that when the arresting officer arrived there, the complainant pointed at the Plaintiff as a person who robbed him, and that the community apprehended him.

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[44] *Magwabeni v Liomba* (198/2013) [2015] ZASCA 117 (11 September 2015) para 9.
[45] 'Reasonable and Probable Cause in the Law of Malicious Prosecution: A Review of South African and Commonwealth Decisions' (2013) 16 *PER / PELJ* 241 at 252.
[46] 1955 (1) SA 129 (AD) at 136A-B.
[47] Ibid.

78. Nothing is said in this statement about the three people who robbed the complainant and the two who allegedly outran the community members. There is no indication that the arresting officer satisfied himself as to whether the alleged robbery took place or whether the items that were robbed were recovered. Even worse, nothing is said in the statement about the alleged knife. Objectively viewed, the information contained in the arresting officer's statement was wholly inadequate to justify the prosecution. Despite this, the control prosecutor decided to refer the matter for prosecution.

79. To make matters worse, the prosecutor in court decided to raise the stakes by classifying the charge as a Schedule 6 offence. The prosecution viewed the alleged robbery differently from the investigating officer. In the warning statement, the accused was informed that he was being detained and investigated for committing 'common' robbery, which would have been a schedule 1 offence. To be fair, when it was established that the Plaintiff had a previous conviction of assault, this made the charge against the Plaintiff a Schedule 5 offence. Mchunu correctly conceded this fact. In my view, the Second Defendant or its officials acted without reasonable and probable cause.

80. The third requirement is to determine whether the Second Defendant (or its officials) acted with malice. For malice to be established, it was held in *Minister of Justice and Constitutional Development and Others v Moleko*, that:

> *'[t]he defendant must thus not only have been aware of what he or she was doing in instituting or initiating the prosecution, but must at least have foreseen the possibility that he or she was acting wrongfully, but nevertheless continued to act'.*[48]

81. The control prosecutor, failing which, Mchunu, as the first prosecutor assigned the task of prosecuting the Plaintiff, ought to have been aware that from the facts placed on the docket, there was no case that justified prosecution. Mchunu, in particular, ought to have foreseen the possibility that they were acting wrongfully. Most importantly, when they decided to oppose the bail application, they ought to have verified which schedule was applicable to prevent the violation of the Plaintiff's rights. They ought not to have charged the Plaintiff with an incorrect

[48] [2008] 3 All SA 47 (SCA) ; 2009 (2) SACR 585 (SCA) para 64

schedule that led to bail being denied. By so doing, they acted with malice to the Plaintiff's prejudice.

82. Malice is also reflected by the fact that there were several postponements in this matter. It is not clear whether the prosecutors did not receive an update on the investigations in this matter. It was clear from the Plaintiff's first appearance that the case was very weak against the Plaintiff. As the matter kept on being postponed, Mofokeng struggled to get hold of both the complainant and the Mini, the alleged eyewitness. It became clear that the complainant lost interest in the case. Notwithstanding this, the case was dragged on for eight months while the Plaintiff was detained. It was only after the matter was removed from Mchunu and transferred to Protea, and following several postponements, that the charges were ultimately withdrawn. I am convinced that the third requirement is also met.

83. Finally, it goes without saying that the charges were withdrawn and the Plaintiff was unnecessarily and unjustifiably made to spend 8 months in detention. Surely, the court cannot disregard this and pretend that nothing happened. No one should be subjected to what the Plaintiff has been subjected to. Uncontested evidence provided to the court is that the Plaintiff's detention led to him losing his livelihood in the form of a shop that had stock at the time of his arrest. There is also uncontested evidence that the Plaintiff has a child whom he was forced to stay away from for 333 days in unlawful detention. The prosecution failed, and there was a wrongful and intentional assault on the Plaintiff's dignity, encompassing his good name and privacy. The Plaintiff was maliciously prosecuted and is entitled to compensation.

E QUANTUM

i) Unlawful Arrest and Detention

84. It cannot be disputed *that '… in cases involving deprivation of liberty, the quantum of damages to be awarded is in the discretion of the trial court, to be exercised fairly, and generally calculated according to what is equitable and just, and on the merits of the case itself*'. In *Minister of Safety and Security v Tyulu*, the SCA held that:

'[i]n the assessment of damages for unlawful arrest and detention, it is important to bear in mind that the primary purpose is not to enrich the aggrieved party but to offer him or her some much-needed solatium for his or her injured feelings. It is therefore crucial that serious attempts be made to ensure that the damages awarded are commensurate with the injury inflicted'.[49]

85. Nugent JA in *Minister of Safety and Security v Seymour*, opined that *Money can never be more than a crude solatium for the deprivation of what in truth can never be restored and there is no empirical measure for the loss'*.[50] Nonetheless, it appears to be generally accepted that when considering what just compensation would be in relation to unlawful arrest and detention claims, courts should evaluate the claimant's constitutional right to freedom by reflecting on the actual facts of his or her case to establish his or her personal circumstances, the extent and nature of the insult to his dignity and personal worth to determine what would be fair and reasonable compensation to award.[51]

86. Over the years, courts have developed useful guidelines on the exercise that should be undertaken to determine the damages that should be awarded. Usually, similar cases are assessed to give a sense of what might constitute just compensation. However, each case should be determined on its own merits, as no two cases are factually the same, and previous awards offer only guidance in assessing general damages.[52] While the SCA did not provide a sense of the importance of or the weight that should be placed on the factors that ought to be considered, it nonetheless provided a list of 'some' of the factors that can be considered when a court is determining damages that should be awarded in unlawful arrest and detention claims.

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[49] 2009 (5) SA 85 (SCA); 2009 (2) SACR 282 (SCA); [2009] 4 All SA 38 (SCA) para 26, the court further held that '[h]owever our courts should be astute to ensure that the awards they make for such infractions reflect the importance of the right to personal liberty and the seriousness with which any arbitrary deprivation of personal liberty is viewed in our law. I readily concede that it is impossible to determine an award of damages for this kind of injuria with any kind of mathematical accuracy. Although it is always helpful to have regard to awards made in previous cases to serve as a guide, such an approach if slavishly followed can prove to be treacherous'. See also *Brits v Minister of Police & Another* [2021] ZASCA 161; 2021 JDR 2998 (SCA) para 33, where it was state that 'Although awards of damages made in previous decisions may serve as a guide in the consideration of an appropriate amount of damages for the injury resulting from unlawful arrest and detention, such awards are not to be followed slavishly, for every case must be determined on its facts. It must be borne in mind that the primary purpose of an award of damages for unlawful arrest and detention is not to enrich the aggrieved party but to offer him or her some solatium for their injured feelings'.

[50] [2007] 1 All SA 558 (SCA); 2006 (6) SA 320 (SCA) para 12

[51] *Sihlali v Minister of Police* (1012/2020) [2025] ZAECMHC 79 (21 August 2025) para 39

[52] See generally *Protea Assurance Co Ltd v Lamb* 1971(1) SA 530 (A) 535.

87. These factors include: the number of days the claimant was incarcerated; the circumstances under which the arrest and detention occurred; the presence or absence of improper motive or malice on the part of the defendant; the conduct of the defendant; the nature of the deprivation; the status and standing of the Plaintiff; the presence or absence of an apology or satisfactory explanation of the events by the Defendant; awards in comparable cases; publicity given to the arrest; the simultaneous invasion of other personality and constitutional rights; and the contributory action or inaction of the plaintiff.[53] This is not a closed list.

88. When determining the compensation that ought to be awarded, the SCA in *Diljan v Minister of Police*, among others, considered: the condition of the police cell in which the claimant was detained, which was filthy with no hot water; dirty and smelling blankets she was given; and the blocked toilet without toilet paper.[54] In *Rahim v The Minister of Home Affairs*, the SCA found that the circumstances under which the deprivation of liberty took place, the conduct of the Defendants, and the nature and duration of the deprivation were important factors to be considered when determining the amount of compensation.[55]

89. Apart from awards in previous cases, it is not clear how these other factors assist in quantifying the compensation that ought to be awarded. The main challenge is that judges are generally trained to assess the facts and apply the law to those facts. Not all judges have the financial or actuarial skills to accurately determine the compensation that fits the facts before them. Some judges have extensive experience dealing with delictual claims generally, while others may not. This means that the process of determining what fair compensation is in each case would differ depending on the presiding judge's expertise. Nonetheless, there is judicial consensus that extravagant awards should be avoided.[56]

90. After conducting a survey of awards in previous cases, Mocumie JA in *Van der Nest NO v Minister of Police,* usefully observed that:

> *'[f]rom a survey of the cases, it is reasonable to conclude, without setting a bar, that the courts have awarded damages ranging from R15 000 to R30*

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[53] *Motladile v Minister of Police* (414/2022) [2023] ZASCA 94; 2023 (2) SACR 274 (SCA) (12 June 2023) para 17.
[54] (746/2021) [2022] ZASCA 103 (24 June 2022) para 22
[55] 2015 (4) SA 433 (SCA); [2015] 3 All SA 425 (SCA) para 27.
[56] *Sihlali v Minister of Police* (1012/2020) [2025] ZAECMHC 79 (21 August 2025) para 39.

000 per night, with awards varying in light of the circumstances of each case. The award must be just to reflect the importance of the fundamental constitutional right infringed, the right to freedom of movement and residence. And in this instance the right to dignity and privacy'.[57]

91. In my view, an amount of compensation per night or per day presents a useful quantification tool for determining the just amount of compensation. However, the challenge is that there is no useful judicial guidance on the matrix for the actual amount of compensation to be awarded per day or per night spent in detention. It is not clear what would justify the amount of R 15 000 rather than R 25 000.00 or even R 30 000.00 per night as at 2021. This appears to be one of those arbitrary decisions that judges have no choice but to make.

92. In *Van der Nest NO,* the claimant was arrested at 18:00 on 11 November 2019 and released on 12 November 2019 at around 15:00. With reference to comparable cases, following a finding of unlawful arrest and detention, the High Court awarded compensation of R 15 000.00. The SCA was of the view that a proper assessment of previous cases should have led the High Court to award compensation of R 30 000 rather than R 15 000. The court then considered the 'deterioration in the value of the currency over the years' and regarded R50 000 to be an appropriate award for the claimant's unlawful arrest and detention in 2025.[58]

93. I doubt, however, if it would be just to follow *van der Nest NO* in this case. This is because the determination of quantum is not an exercise of precedent but relates to the unique facts of the case. If this approach is followed, it may result in an extravagant award of compensation, given that the plaintiff spent 333 days in detention. It appears to me that guidance should be sought from the Constitutional Court's decision of *Mahlangu and Another v Minister of Police*,[59] where the two claimants were unlawfully arrested and detained for eight months. The Constitutional Court found that the Minister of Police was liable to compensate the claimants for the entire period of their detention, from the date of their arrest to the date of their release, amounting to eight months and ten days.[60] The court ordered

[57] [2025] 2 All SA 655 (SCA); 2025 (5) SA 152 (SCA) para 33.
[58] Ibid paras 32 to 35.
[59] 2021 (7) BCLR 698 (CC); 2021 (2) SACR 595 (CC).
[60] Ibid para 49.

that they should be awarded amounts of R 550 000.00 and R 500 000.00, respectively.[61] This order was made in 2021.

94. This case is comparable to the current case, with the major difference being that in *Mahlangu*, the claimants were assaulted after arrest, while in the current case, the Plaintiff was given dirty, blood-stained blankets and a thin mattress to sleep on while he was incarcerated, thus subjected to inhumane conditions. It is worth noting that in *Payi v Minister of Police and Another*, where the claimant was subjected to unhygienic conditions in the cells the court awarded an amount of R 800 000.00 for further detention of 30 days.[62] Equally so, in *Tikoe v Minister of Police* awarded compensation of R 850 000.00, for being unlawfully arrested and detained from 1 September 2022 to 15 February 2023.[63] The court *'… considered the steady decline in the value of money'* in 2025.

95. The factors that should be considered in the current case include the fact that the Plaintiff was detained for 333 days; he was subjected to indignity by being forced to sleep with dirty blankets that not only smelled badly but also were stained with blood, thereby jeopardizing his health; the detention led to the loss of his livelihood, even though there was no specific claim in this regard; he was forced to be away from his child; and he was unfairly denied bail. He deserves to be compensated for the harm he suffered. It is difficult to reconcile the amount awarded by the Constitutional Court with that awarded in *Payi*.

96. In any event, if in 2021 it was considered appropriate to award R 550 000.00 to a person who was unlawfully arrested and detained for about 8 months, it would not be unjust to award R 900 000.00 in 2026, in line with comparable High Court judgments. For instance, in *Ndhamini v Minister of Police and Another*,[64] an amount of R 750 000 was awarded for unlawful arrest and detention claims in circumstances where the claimant was detained for over eight months, from 22 January 2019 to 16 October 2019. I am not convinced that the amount of R 3 000 000 claimed by the Plaintiff is just under the circumstances.

ii) Malicious Prosecution

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[61] Ibid paras 56 and 57
[62] (2063/2019) [2024] ZAECQBHC 14 (22 February 2024) para 74.
[63] (1634/2023) [2025] ZANWHC 73 (15 April 2025) para 41.
[64] (1655/2020) [2025] ZAMPMBHC 72 (6 August 2025) para 40.

97. In *Nakana v Claassens and Others*, the SCA held *that '[t]he amount to be awarded for general damages in a claim for malicious prosecution is at the discretion of the court. The discretion is one in the true sense'*.[65] This court further held that:

> *'[t]he factors that a court must consider in awarding general damages in a claim for malicious prosecution include the gravity of the charges; the nature of the prosecution; the length of time the individual was subjected to the prosecution, absence of reasonable and probable cause in setting the law in motion; the presence of improper motive or malice in initiating or instigating the prosecution; the deprivation of liberty; the status, age, and health of the plaintiff; the publicity given to the criminal proceedings and the absence of a reasonable explanation or apology by the defendant. This is not a closed list'.*

98. The Plaintiff was subjected to prosecution proceedings for a period of eight months while he was under unlawful detention. The Plaintiff claimed R 1 000 000.00 for malicious prosecution. Determining the appropriate amount of compensation for malicious prosecution in these circumstances is also not easy. In most previous decisions, courts appear to lack an appetite for explaining how they arrived at the amount of compensation they awarded for malicious prosecution. They generally provide a figure and state that the stated amount constitutes a fair and reasonable amount of compensation for the Plaintiff's damages resulting from his malicious prosecution.[66]

99. While the factors listed in *Nakana* are useful, they do not necessarily assist in arriving at the value of compensation that ought to be awarded. Nonetheless, having regard to the duration of the Plaintiff's detention and the conduct of the officials of the Second Defendant's officials in the Lenasia Magistrates Court, and

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[65] (137/2024) [2025] ZASCA 52 (7 May 2025) para 33.

[66] See generally *Mlisa v Minister of Police and Another* (1342/2021) [2026] ZAECMHC 12 (17 February 2026) para 85; *Lentoro v Minister of Police and Another* (936/2022) [2025] ZANWHC 50; [2025] 2 All SA 496 (NWM) (11 March 2025) para 66, where R 200 000.00 was awarded to a claimant who was detained for fourteen days; *Payi v Minister of Police and Another (*2063/2019) [2024] ZAECQBHC 14 (22 February 2024) para 74 where R 300 000.00 was awarded to a claimant who was detained for thirty days; *Hassien v Minister of Police for the Republic of South Africa and Others* (612/2019) [2025] ZAECMHC 120 (18 November 2025) para 69, where 250 000 was awarded to a claimant who was detained for three nights. Significantly lower amounts have also been awarded without any explanation of the quantification method used. See *Nakana v Claassens and Others* (137/2024) [2025] ZASCA 52 (7 May 2025) para 27, where R 80 000.00 was awarded to a claimant who was detained for almost three days; *Mlisa v Minister of Police and Another* (1342/2021) [2026] ZAECMHC 12 (17 February 2026) para 85, where R 60 000.00 was awarded to a claimant who was detained for twenty two days; *Mkhabela v Minister of Police and Another* (829/2023) [2025] ZAMPMBHC 71 (6 August 2025) para 53, where R 100 000.00 was awarded was awarded to a claimant who was detained for thirty one days.

the Magistrate's failure to ensure that the Plaintiff is charged with the correct schedule, as well as the insistence on proceeding with prosecution for almost eight months even though it was clear that the case was extremely weak against the Plaintiff, a substantially higher amount of compensation is warranted. However, it would not be just to award the amount of compensation claimed by the Plaintiff, as it is excessive. I am of the view that a fair and reasonable amount of compensation for malicious prosecution would be R 200 000.00.

D. CONCLUSION

100. It is worth noting that most of the testimony on behalf of the two defendants was hearsay in nature and not helpful towards the determination of the core issues in this matter. Most of it concerned the complainant and the so-called eyewitness, both of whom are alive and were not called to testify in this court. Most of the Plaintiff's evidence remains unchallenged. Apart from the disputed evidence of whether the Plaintiff was taken to his grandmother's house, the people who could have challenged the Plaintiff's evidence were not called as witnesses. As such, the First Defendant failed to discharge its onus of proving that the Plaintiff's arrest and detention were lawful. The First Defendant is 100% vicariously liable to compensate the Plaintiff regarding the unlawful arrest and detention claim. The Plaintiff discharged his onus of proving that he was maliciously prosecuted, and the Second Defendant is 100% vicariously liable to compensate him for the harm suffered.

ORDER

101. In the premises, the following order is made:

101.1. The First Defendant is liable for 100% of the Plaintiff's proven damages in respect of Claim A.

101.2. The First Defendant, **THE MINISTER OF POLICE**, is ordered to pay the Plaintiff an amount of R 900 000.00 (Nine Hundred Thousand Rand) for his unlawful arrest and detention from 28 December 2017 to 29 August 2018.

101.3. The First Defendant is ordered to pay 10.25% interest on the amount stated in paragraph 98.2. of this order, calculated from the date of this judgment to the date of final payment.

101.4. The Second Defendant is liable for 100% of the Plaintiff's proven damages in respect of Claim B.

101.5. The Second Defendant, **NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS**, is ordered to pay the Plaintiff an amount of R 200 000.00 (Two hundred Thousand Rand) for maliciously prosecuting him.

101.6. The Second Defendant is ordered to pay 10.25% interest on the amount stated in paragraph 98.5 of this order, calculated from the date of this judgment to the date of final payment.

101.7. The First and Second Defendants shall pay the Plaintiff's costs on scale B jointly and severally, the one paying the other to be absolved.

C MARUMOAGAE

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION

JOHANNESBURG

Counsel for the Plaintiff	:	Adv M Mathe
Instructed by	:	Nhlanhla Mthembu Attorneys
Counsel for the First and Second Defendants	:	Adv T Tshifhango
Instructed by	:	State Attorney
Date of the hearing	:	4, 5, & 6 November 2025
Date of Closing Arguments	:	21 November 2025
Date of judgment	:	21 May 2026