IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

APPEAL CASE NO: HCAA37/2024

COURT A QUO CASE NO: 9230/2022

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED: ~~YES~~/NO

03/06/2026
Date

[redacted]
Signature

In the matter between:

THATO CLEARENCE SHILABYE **APPELLANT**

And

THE MINISTER OF POLICE **RESPONDENT**

JUDGMENT

NGOBENI J

[1] This is an appeal against the whole judgment of Acting Judge Mashamba (court *a quo*) which was handed down on 24 July 2024, in which the appellant's claim for unlawful arrest and detention was dismissed. The court *a quo* granted leave to appeal the said judgment on 05 September 2024 to the Full Court of the Limpopo Division of the High Court, Polokwane. The appeal lies against the judgment in respect of the claim for unlawful arrest and detention. The claim against the National Director of Public Prosecutions (NDPP) was not pursued by the appellant.

[2] I will not restate the grounds of appeal verbatim, but a conspectus will suffice for purposes of this appeal. The appellant's submission is that the court *a quo* misdirected itself by evaluating the evidence in piecemeal and by not considering the totality of the evidence presented. Thus, the restated grounds of appeal are as follows:

(i) failure by the court *a quo* to find that the respondent (defendant) had complied with section 40 (1) (b), of the Criminal Procedure Act 51 of 1977 (CPA) by arresting the appellant without a warrant of arrest,

(ii) on the evidence tendered the defendant failed to discharge the onus on a balance of probabilities that the arrest and detention of the appellant (plaintiff) was lawful in terms of section 40 (1) of the CPA.

(iii) the court *a quo* erred in finding that any reasonable person in the position of the police who has received information pertaining to the identification of the appellant from the complainant would have reasonable suspicion that the identified person, being the appellant in this case, would have possibly committed the offence of rape and robbery.

(iv) the finding by the court *a quo,* that the appellant possibly committed the offences in question was erroneous, in that sergeant Teffo confirmed that the complainant made two statements, and he used the second statement to effect an arrest, and on the second statement, he relied on a friend to identify the appellant. No identification parade was held.

(v) the court *a quo* erred in finding that the further detention of the appellant was not as a result of any misconduct, misleading information or wrong act committed by the respondent.

(vi) the detention of the appellant was unlawful and was directly linked to misconduct committed by sergeant Teffo.

(vii) the court *a quo* should have ruled that section 40(1)(b) was never complied with and dismiss the respondent's defence.

[3] The claim of the appellant arose from an arrest and subsequent detention on 20 September 2020. He was arrested by sergeant Teffo (police officer/investigating officer) on the allegations of rape that was allegedly committed on 11 August 2020 at or around Moletji. The complainant was on the date mentioned on her way walking to school at around 05h50 in the morning, using the gravel road which goes through the bushes, when she came across a male person who was running as if he was exercising. The said male person asked her if she knows him, and she answered in the negative.

[4] The male person demanded her cell phone, which he took out of her school bag. He took out a knife and ordered her to go with him behind the mountain holding her by the hand and threatening her. When they arrived there, he forced her to take her clothes off and forcefully inserted his penis into her vagina without her consent. After finishing he ordered her to leave without screaming. She left and when she arrived at school,

she reported the incident to the managers, and she was taken to the clinic and the police were called.

[5] A week after the alleged incident, the complainant was coming from school with her friend when they met a cream white BMW motor vehicle, and in that motor vehicle she saw the person who sexually violated her on 11 August 2020. Her friend told her that she does not know the name of that person but knew where that person stayed. The complainant subsequently contacted sergeant Teffo to inform him as to who the suspect was and where he stayed after she had established the identity of the appellant. Sergeant Teffo and the complainant subsequently went to the home of the appellant but did not find him but only found his mother who confirmed his names.

[6] When the police officer went back to his office, upon investigations he found that the appellant had a previous conviction of rape. The police officer then saw it fit that the appellant be arrested because he already had a previous conviction of rape and that there were allegations of rape by the complainant that he was investigating. It only came out during cross examination of the police officer that the appellant actually handed himself at the police station after he was told that the investigating officer was looking for him. The appellant was then arrested, charged and detained by the investigating officer.

[7] In the appeal this court has to decide as to whether the court *a quo* misdirected itself by dismissing the claim of unlawful arrest and detention. This court must at the end determine whether the arrest of the appellant was justified or not. At this stage, I want to highlight some issues in the judgment of the court a quo which I will later on deal with fully. In dismissing the claim of the appellant on paragraph 42 of the judgment the court *a quo* clearly stated in its findings that the police made some investigations and found that the name given to them, was that of the appellant who has a previous conviction for a similar offence, and therefore any reasonable person who had received information on identification of the appellant from the complainant would have a reasonable suspicion that the appellant committed the said offences of rape and robbery.

[8] The court *a quo* also found that the further detention of the appellant was as a result of the findings of the Magistrate, after considering several factors including the fact that the appellant had previous convictions, and could therefore not find fault on the part of the respondent with regard to the further detention of the appellant.

[9] The defendant's plea is based on the defence contained in Section 40(1)(b) of the CPA which provides as follows:

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

[10] Section 40(1)(a) of the CPA is the provision that requires the presence of a police officer who is empowered to arrest without a warrant if the offence is committed in his/her presence. In terms of section 40(1)(b), it is not a requirement that the alleged offence must have been committed in the presence of a police officer. There are jurisdictional requirements as developed by case law which are applicable where the matter has to be decided under the provisions of section 40(1)(b) of the CPA.These jurisdictional facts were set out in *Duncan v Minister of Law and Order*[1] as follows:

(a) The arrestor must be a peace officer;

(b) The arrestor must entertain a suspicion;

(c) The suspicion must be that the suspect (the arrestee) committed an offence referred to in Schedule 1,

(d) The suspicion must rest on reasonable grounds.

[1] [1986] 2 All SA 241(A) at 818G-H.

[11] The jurisdictional facts cited above, were still confirmed by the same court as in the *Duncan* case, *supra,* being the Supreme Court of Appeal (SCA) in *Minister of Safety and Security v Sekhoto and Another*[2]. The Bill of Rights guarantees the right of security and freedom of the person which includes the right 'not to be deprived of freedom arbitrarily or without just cause'. In cases of this nature, it is trite that the onus rests on the respondent to justify an arrest, as was the position in the case at hand.

[12] In *Minister of Law and Order v Hurley*[3] the court as per Rabie CJ, as he then was, stated as follows:

'An arrest constitutes an interference with the liberty of the individual concerned, and it therefore seems 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.'

[13] The Constitutional Court in *Zealand v Minister of Justice and Constitutional Development*[4], confirmed that the burden is always on the defendant to justify the arrest and detention.

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[2] 2011(1) SACR 315 (SCA).

[3] [1986] 2 All SA 428 (A).

[4] 2008 (4) SA 458 (CC) paragraphs 24 and 25, 'Reasonable and probable cause in the law of malicious prosecution: A review of South African and commonwealth decisions' by Professor Chuks Okpaluba.

[14] It will be ideal to deal with this appeal according to the jurisdictional facts or requirements as set out in the *Duncan* case, *supra*. The appellant in this appeal argues that the court *a quo* erred in finding that the respondent had complied with the provisions of section 40(1)(b) of the CPA in arresting the appellant without a warrant. It is now for this Court to assess as to whether the evidence upon which the court *a quo* relied on for its decision met the jurisdictional facts as set down in the cases of *Duncan* and *Sekhoto*, *supra*.

(i) The arresting officer must be a peace officer.

[15] Section 40(1)(b) provides that a peace officer may without a warrant arrest any person whom he reasonably suspects of having committed an offence classified under schedule 1. It must be understood that the schedule 1 that is referred to, is the one classified under the CPA, which makes provision for classification of offences into 8 schedules relating to different sections in the CPA. Schedule 1 offences are serious offences that are referred to in sections 40 and 42 of the CPA, and the offences of rape and robbery are classified under this schedule. Section 1 of the CPA defines a peace officer to include a police official.

[16] A police official in terms of the CPA means any member of the force as defined in Section 1 of the Police Act No. 7 of 1958 which has been

amended by section 1(b) of the Criminal Procedure Amendment Act 5 of 1991, which just took out some text, which is not relevant for this discussion, but what remains is that the word 'police' has a corresponding meaning to the word 'police official'. It is common cause that the police officer who arrested the appellant and detained him is a member of the South African Police Service (SAPS). It is also common cause that sergeant Teffo was acting within the course and scope of his employment with the respondent.

(ii) The peace officer must entertain a suspicion

[17] The crucial question that remains is whether the court *a quo* misdirected itself by finding that the investigating officer entertained a reasonable suspicion by arresting the appellant. The evidence of the complainant as outlined in her first affidavit is to the effect that she did not know the person who robbed and raped her. The submission by the appellant is that she did not even state in her statement whether she would identify that person if she saw him again or not. After the alleged incident one week later, she then called the investigating officer and told him that she has been told the name of the person who violated her, and she even knew where he was staying. That prompted the investigating officer to go to that particular home, although they did not find that suspected person.

[18] The confirmation of the reasonable belief in the mind of sergeant Teffo formed when he went back to the office and upon investigation found that the person that he went to look for had a previous conviction of rape. He then in his own evidence in court, as reflected on page 10 of the transcribed record said the following:

"MR TEFFO: ... and the fact that I have seen M'Lord that he already has a conviction of rape against him M'Lord I saw it fit that the suspect should be arrested".

[19] Sergeant Teffo went on to impress on how the issue of the previous conviction bolstered his reasonable belief that the appellant was the perpetrator of the alleged offences by saying the following on pages 31 to 32 of the transcribed record:

"MR TEFFO: M'Lord before I discover the previous conviction the complainant already had the name of the suspect. So, for me to get that previous conviction just confirmed more".

[20] It is clear from the two paragraphs that I have quoted above, that the need to investigate the matter further was curtailed because the investigating officer had a reasonable belief that the appellant is the one who committed the offences because he even had a previous conviction

of rape. The court *a quo,* also fortified the reasonable belief of the appellant in its judgment by stating that the belief of the police officer was reasonable and justifiable. That appears in the judgment of the court *a quo* on paragraph 42 of the court's findings, and the following was said:

"The police further made some investigation and found that the names given to them are for the plaintiff who have (sic) a previous conviction of similar offences. The police reasonable (sic) suspected that the plaintiff might have committed the offence of rape and robbery. In my view, any reasonable person in position (sic) of the police who has received the identification of the plaintiff from the complainant, would have a reasonable suspicion that the identified person, in this case the plaintiff, has possibly committed the said offence of rape and robbery"

[21] It is clear from the paragraph that I have quoted above that the court *a quo* in its findings, took into consideration that one of the aspects that influenced the reasonable belief that the appellant committed the offences he was charged with to the extent that arrest and detention were justified was the issue of his previous conviction. I also take into consideration that the statement of the friend of the complainant, who told or showed her where the appellant stays was obtained on 13 March 2021, whereas the appellant was arrested on 20 September 2020. The question should then be what supported the version of the complainant if

the statement of the friend of the complainant was only obtained the following year after the arrest and detention of the appellant.

[22] Having analysed the reasonable suspicion that the investigating officer relied on to arrest and detain the appellant, I find that the mind and reasoning of the investigating officer was clouded by the fact that the appellant had a previous conviction of rape, and he therefore stopped investigating the complaint and arrested the appellant on that basis. In law that is unfortunately not the standard that is applied and that should be discouraged in the strongest terms so that a wrong precedent is not created. If that thinking and reasoning is not nipped in the bud, we will have chaos in the criminal justice system if it is encouraged that people be judged according to their past conduct.

(iii) The suspicion must be that the suspect committed an offence referred to in the subsection.

[23] I have already dealt with the provisions of section 40 and 42 of the CPA which deals with Schedule 1 offences to which the offences of rape and robbery fall under, and therefore not necessary to repeat same.

[24] The Court however, in the *Sekhoto* case, *supra*, in paragraph 30 of the judgment stated that the decision to arrest must be based on the

intention to bring the arrested person to justice. The appellant handed himself over to the police. If the purpose of arrest is to bring the arrested person to justice, in my view the appellant should have just been charged and taken to court without necessarily being detained. I must however be clearly understood, as I am not saying that every person who hands himself/herself over to the police must not be arrested and detained, but the circumstances of each case would determine and dictate as to how the case should be handled.

[25] In the case at hand I find that the arrest and detention was not justified because the issue of identity was crucial in this case. If the investigating officer was applying his mind reasonably, without being clouded by the appellant's previous conviction, he might have allowed him to appear in court without being detained and continued to further investigate the case or investigate first before he could let him appear in court. I find that the investigating officer acted arbitrarily and without justification by detaining the appellant without a warrant before he could investigate and form a reasonable suspicion or entertain a belief that the appellant committed the offences in question.

(iv) The suspicion must be based on reasonable grounds.

[26] The suspicion of sergeant Teffo for arresting and detaining the appellant without a warrant was clearly not based on reasonable grounds as I have dealt with that aspect in the preceding paragraphs of this judgment, and there is no need for repetition.

[27] In the result, the decision by the court *a quo* that the arrest and detention of the appellant on 20 September 2020 was based on lawful reasonable grounds, stands to be set aside. In the circumstances I find that the arrest and detention of the appellant was unlawful. Further, that the respondent is liable to compensate the appellant 100% of the proven damages for his unlawful arrest and detention.

[28] I now deal with the issue pertaining to *quantum.* The submission by the appellant is that the respondent must compensate the appellant for the whole period that he has been incarcerated, being 20 September 2020 to 09 March 2022 when he was released. The duration of the detention as submitted by the appellant is 492 days, which the appellant submits that an amount of R37 500-00 must be allocated for each day which will then make a total of R18 450 000-00.

[29] The appellant explained that he was initially detained at Seshego police holding cells under filthy and horrible conditions, as the cell in which he was kept had a bad smell due to the condition of the toilet. There were no

beds in the cell he was, and he slept on the floor with one blanket which was very dirty and had bed bugs which caused him to itch. The showers were not working and there was no water. He stayed there for three months. He was later moved to Polokwane Correctional Service Centre (prison), where he stayed for one year three months, and it was at the peak of the corona virus pandemic, and he was given one musk for the whole duration of his stay.

[30] The appellant in that regard referred the court to three cases, but I will only refer to one of them, which I could find easily when I searched, being the case of *Mvu v Minister of Safety and Security and Another*[5], where an amount of R30 000-00 was awarded to the plaintiff who was detained just for a day. The plaintiff in the said case, Mnoneleli Maxwell Mvu was an Inspector in SAPS, charged with malicious damage to property. The difference in the *Mvu* case, supra, and the case at hand is that the social standing differs, which is one of the aspects that the court has to consider when awarding damages.

[31] The appellant specifically asks this court to award an amount which is calculated at R37 500-00 per day, following the practice that has developed in the North West Division of the High Court (North West) of

[5] 2009 (2) SACR 291 (GSJ) (31 March 2009).

awarding R15 000-00 per each day that a person is in detention. However, in the case at hand the proposed amount was even taken higher following the case of *De Klerk v Minister of Police*[6], which the appellant submits was calculated at R37 500-00 per day.

[32] The trend or practice of the automatic calculation of damages which the SCA in *Motladile v Minister of Police*[7], referred to as a 'one size fits all' practice which was followed in North West in several cases[8] was discouraged. It is however comforting that North West, following the *Motladile* judgment, *supra,* acknowledges that the trend of mechanical approach of calculation of damages that they followed in many cases cannot be sustained, and that was illustrated in *Sediro v Minister of Police*[9], where Wessels AJ said the following on paragraph 23 of the judgment:

"23. In Motladile, the SCA specifically criticized the practice that had developed in North West Division of applying a 'one size fits all' approach of R15 000-00 per day to damages claims for unlawful

[6] [2019] ZACC 32 (22 August 2019).
[7] (414/2022) [2023] ZASCA 94; 2023(2) SACR 274 (SCA) (12 June 2023).
[8] Mocumi v Minister of Police and Another Case number CIV APP9/2021 (3 December 2021), Tobase v Minister of Police CIV APP MG 10/2021 (3 December 2021), Ngwenya v Minister of Police (924/2016) [2019] 3 ZANWHC 3 (7 February 2019), Gulane v Minister of Police CIV APP MG 21/2019, Matshe v Minister of Police CIV APP RC 10/2020, Nabuihe v Minister of Police 2273/2019 NWHC (9 March 2022).
[9] (534/2021) [2026] ZANWHC 73 (26 March 2026).

arrest and detention, holding that such a mechanical approach constitutes a misdirection ...

24. This Division has since applied the principles enunciated in Motladile in a manner that reflects the importance of tailoring each award to the specific facts of the case. In Lenoke v Minister of Police[10] Reddy J reaffirmed that the assessment of damages is not a mechanical exercise that regards only the number of days spent in detention and awarded R30 000 for approximately three hours of detention coupled with assault. In Mmadu v Minister of Police[11] Hendricks JP awarded R60 000 for detention of 28 hours, together with a separate award of R100 000 for a severe assault involving suffocation and loss of consciousness".

[33] I have demonstrated that the SCA discourages the mechanical manner of calculation of damages, and in *Motladile, supra*, the court clearly stated that each case must be decided on its own merits. The SCA went further to give direction as to what the courts should consider when awarding damages, and for the sake of context I am going to quote paragraph 17 of the *Motladile* judgment, *supra,* which states that:

[10] (CIV APP MG 27/2023) [2024] ZANWHC 277 (6 November 2024).
[11] (3058/2019) [2024] ZANWHC 143 (21 June 2024).

"[17] The assessment of the amount of damages to award a plaintiff who was unlwfully arrested and detained, is not a mechanical exercise that has regard only to the number of days that a plaintiff had spent in detention. Significantly, the duration of the detention is not the only factor that a court must consider in determining what would be fair and reasonable compensation to award. Other factors that a court must take into account would include (a) the circumstances under which the arrest and detention occurred; (b) the presence or absence of improper motive or malice on the part of the defendant; (c) the conduct of the defendant; (d) the nature of the deprivation; (e) the status and standing of the plaintiff; (f) the presence or absence of an apology or satisfactory explanation of the events by the defendant; (g) awards in comparable cases; (h) publicity given to the arrest; (i) the simultaneous invasion of other personality and constitutional rights; and (j) the contributory action or inaction of the plaintiff[12] *".*

[34] In *casu,* the appellant was arrested after the complainant had opened a case, but the investigating officer's mind was clouded by the previous conviction that the appellant has, but that in my view cannot be said to be improper motive or malice on the part of the investigating officer, because in my view he just wanted to arrest the appellant as he thought

[12] JM Potgieter et al, Visser & Potgieter Law of Damages 3 ed (2012) at 545-548; HB Klopper Damages (2017) at 255-259.

that he had enough evidence, including record of the previous conviction. There was no embarrassing public display of his arrest in front of his co-villagers as he handed himself over to the police. The appellant is a relatively young man who was 34 years of age when he testified on 23 May 2024.

[35] He was not married at that time. He did not have children at that time. He has been having a stall at the market at Moletji taxi rank since the year 2018. With the greatest of respect to the appellant, there is nothing outstanding about him which the court *a quo* was told when he testified. The appellant does not hold a job as a professional in the competitive workplace out there. I do take into consideration that the appellant was detained in horrible conditions. The period upon which the appellant was detained, is relatively long.

[36] In the case at hand it is common cause that after the appellant was arrested and detained, he was taken to court to appear where at first appearance the matter was postponed so that the profile of the appellant could be obtained before he could bring a bail application. It has become apparent that as at the time when the matter was postponed, the investigating officer was already in possession of information pertaining to the profile of the appellant, meaning that it was not actually necessary to postpone the case at that stage for the profiling of the appellant

because that information was already available, his was just to bring a bail application.

[37] The submission by the respondent is that after the appellant appeared in court, his detention henceforth was as a result of the Magistrate not granting the appellant bail, and therefore the respondent even if it is found that the arrest and detention were unlawful, after the postponement by the Magistrate, the respondent must not be held liable after the first appearance of the appellant in court. The appellant however prays that the respondent be held liable for all the period that the appellant was incarcerated. The Constitutional Court (CC) settled that issue in the *De Klerk*'s case, *supra,* by not confirming the majority judgment in the *Sekhoto* case, *supra,* which held that the respondent cannot be liable for the applicant's detention after his first court appearance, where the SCA' s reasoning was that what happened in court and thereafter cannot be placed before the doorstep of the respondent.

[38] In order to determine liability after first appearance of the appellant in court, I am guided by the explanation in the *De Klerk*'s majority judgment on the differentiation between factual causation and legal causation. Factual causation relates to the question whether the act or omission caused or materially contributed to the harm, whereas legal causation is concerned with the remoteness of the damage. The CC succinctly

explained what factual causation is by saying the following in paragraph 24 of the judgment:

"[24] ...The "but for" test (conditio sine qua non) is ordinarily applied to determine factual causation. If, but for a wrongdoer's conduct, the harm would probably not have been suffered by a claimant, then the conduct factually caused the harm". (Footnotes left out).

[39] In the case at hand, had it not been for sergeant Teffo, who arrested the appellant, the appellant would not have appeared before the Magistrate, who then remanded the appellant in custody. The respondent is therefore liable for damages that resulted from the detention of the appellant for the whole period that the appellant was detained.

[40] In Minister of Security v Tyulu[13], on paragraph 26 the SCA said:

"In 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."

[13] 2009 (5) SA 58 (SCA).

[41] On the issue of costs, there is no reason why costs should not follow the result.

[42] In the result the following order is made:

(i) the appeal is upheld,

(ii) the order of the court *a quo* dated 24 July 2024 is set aside, and replaced with the following order:

"(a) the Minister of Police (respondent) is ordered to pay R1 500 000-00, with interest at the prescribed rate from 24 July 2024 (date of judgment in the court *a quo*) to date of payment,"

(iii) the Minister of Police is ordered to pay costs on party and party scale, including counsel's fee on scale B.

J.T. NGOBENI

JUDGE OF THE HIGH COURT

I AGREE

M.F. KGANYAGO

JUDGE OF THE HIGH COURT

I AGREE

M.H.M MASILO

ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

For the appellant:	Adv. Mokwena
Instructed by:	Ntiyiso Mathebula Attorneys
For the respondent:	Adv. E.K. Tsatsi SC
Instructed by:	Office of the State Attorney, Polokwane
Date heard:	24 April 2026
Date of delivery:	03 June 2026