



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable

Case no: 482/2025

In the matter between:

FAKO PHILLIP CHETANE

APPELLANT

and

THE MINISTER OF POLICE

FIRST RESPONDENT

THE NATIONAL DIRECTOR OF PUBLIC

PROSECUTIONS

SECOND RESPONDENT

Neutral citation: *Chetane v The Minister of Police and Another* (482/2025) [2026]

ZASCA 110 (21 August 2026)

Coram: ZONDI DP and KEIGHTLEY, UNTERHALTER, KOEN and
NORMAN JJA

Heard: 20 May 2026

Delivered: 21 August 2026

Summary: Delict – criminal procedure – unlawful arrest and detention in terms of s 40(1)(b) of the CPA – malicious prosecution – whether the appellant’s arrests on

two occasions and his detention following the second arrest were lawful – whether appellant’s prosecution was malicious – trial court relying on grounds of arrest not pleaded – failure to cross examine the appellant, leaving his version uncontested – reliance by the high court on repealed provisions of Schedule 1 to the CPA.

ORDER

On appeal from: Free State Division of the High Court, Bloemfontein (Opperman J, sitting as a court of first instance):

- 1 The appeal is upheld to the extent set out in paragraph 2 below, with costs.
 - 2 The order of the high court is set aside and substituted with the following:
 - ‘1. The first defendant is directed to pay damages to the plaintiff in the sum of R200 000 in respect of the unlawful arrest and detention from 6 April to 13 April 2021.
 2. The plaintiff's further claims are dismissed.
 3. The first defendant is directed to pay the plaintiff's costs of suit.’
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JUDGMENT

Norman JA (Zondi DP, Keightley, Unterhalter, Koen JJA, concurring)

Introduction

[1] This is an appeal against a judgment of the Free State Division of the High Court, Bloemfontein (the high court). The high court dismissed the claims of the appellant, Mr Fako Phillip Chetane, for unlawful arrest and detention on 1 April 2021 and again on 3 April 2021, as well as the claim for malicious prosecution instituted on 6 April 2021. The appeal is with the leave of the high court.

Background facts

[2] On 1 April 2021, the appellant, a Lesotho foreign national, and his girlfriend Miss F[...] M[...] ('the complainant'), were involved in an altercation which led to a report being made to the South African Police Service (the SAPS) by the complainant. Members of the SAPS attended to the complaint. They did not find the appellant at home but left a message for him to report at the police station, which he did. He was then placed under arrest (the first arrest) for having threatened the complainant but was released on warning and issued with the SAPS 496 form. Upon his release, he was cautioned by Detective Mkhwanazi (Mkhwanazi) not to contact or approach the complainant. Mkhwanazi later assisted the complainant with collecting her belongings for removal to her parental home.

[3] On 3 April 2021, the appellant was arrested again (the second arrest). The SAPS was called by the manager at the complainant's place of employment. He had allegedly reported that the appellant was 'chasing' the complainant at her workplace. Upon arrival at the scene, Captain Mokoena (Mokoena) found the appellant standing outside the manager's office. The appellant contends that his presence at the complainant's workplace was for the purpose of seeking the intervention of the manager to mediate between him and the complainant. This was on the advice of the complainant's brother. The appellant was arrested, detained and remained in custody until his first court appearance on 6 April 2021.

[4] The complainant had submitted a statement to the SAPS evincing serious threats made against her and her children by the appellant. She stated that: the appellant threatened to kidnap her and make her vanish forever; he would kidnap her children and kill them with a gun, especially her 8-year-old daughter (B); this was not the first time as he had threatened her previously in the same manner on 10

March 2021; she tried to obtain a protection order but the office, presumably at court, was closed and the events occurred during the Covid-19 pandemic.

[5] When the appellant appeared in court for the first time on 6 April 2021, bail was not entertained because the investigating officer was not present at court. Ms Mahlakoane (Mahlakoane), an aspirant prosecutrix, after considering the docket and the statement of the complainant, decided to charge the appellant with assault by threat and with malicious injury to property.

[6] The appellant was remanded in custody until 9 April 2021 for verification of his passport, and again to 12 April 2021 for confirmation of his residential address. These postponements were made in terms of s 50(6) of the Criminal Procedure Act 51 of 1977 (the CPA). Upon confirmation of the address, the appellant was released on bail on 13 April 2021.

[7] The matter was thereafter postponed for further investigations to 14 May 2021. On 14 May 2021, the matter was further postponed to 31 May 2021. On 31 May 2021, the case was removed from the roll owing to the absence of the docket at court. The appellant was subsequently subpoenaed to appear on 3 November 2022 in the Phuthaditjhaba 'A Court' on a charge of assault by threat. In January 2023, the prosecution was withdrawn.

[8] The appellant sued the first respondent, the Minister of Police (the Minister) and the second respondent, the National Director of Prosecutions (the NDPP) and claimed damages for unlawful arrest and detention against the Minister (first claim) and for malicious proceedings against the NDPP (second claim). In respect of the first claim the appellant claimed damages in the amount of R500 000. He claimed

damages in the amount of R150 000 in respect of the second claim against the NDPP. He claimed interest on both amounts at the rate of 7% from the date of summons until the date of payment plus costs of suit. Where convenient, I shall refer to the Minister and the NDPP collectively as respondents.

[9] The respondents opposed the claims and denied liability. They filed a plea as ‘defendants’. Both the first and second arrests were admitted and reliance was placed on the provisions of s 40(1)(b) of the CPA to justify the arrests. In justifying the first arrest, the respondents pleaded that the appellant intimidated the complainant. It was pleaded further that on 3 April 2021 the appellant continued to intimidate the complainant at her workplace and was charged with intimidation, common assault and malicious damage to property and was lawfully detained by members of the SAPS. In relation to the malicious proceedings, the respondents pleaded that the appellant was brought before court within the time limits prescribed in s 50(1)(d)(i) of the CPA. They also pleaded that ‘because the appellant is not a South African citizen having been accused of intimidation in domestic violence cases poses a risk to the life of the complainant’. They denied that the proceedings were malicious. The matter proceeded before the high court on the merits and quantum of damages.

[10] The facts testified to by both parties are to a great extent common cause. They are as follows. There was a quarrel between the appellant and the complainant which led to the first arrest. The appellant was issued with the SAPS 496, a written warning to appear in court on 15 April 2021. Before that date, the appellant went to the complainant’s workplace. On his version he went there to seek mediation of his dispute with the complainant by the manager, but the members of the SAPS arrived before that could take place. On the respondents’ version the members of the SAPS were called by the manager alleging that the appellant was chasing the complainant

inside the workplace. The members of the SAPS, including Mokoena, did not witness any incident upon their arrival.

[11] Without any investigations, the appellant was ordered to leave the complainant's workplace and was thereafter taken to the police station where he was placed under arrest, charged and detained. He denied that he chased the complainant or even interacted with her at her workplace. This evidence was not contradicted. The manager was not called as a witness as he was apparently indisposed. There was no explanation why the other SAPS member who was present at the second arrest, Mr Mothapo (Mothapo), was not called.

[12] The appellant's evidence, that he was never informed at court that the reason he had to be remanded in custody was for purposes of verifying his nationality, was not challenged. Mahlakoane, the aspirant prosecutrix at the Phuthaditjhaba Magistrate's Court, who enrolled the appellant's case, testified. She is the one who preferred the charges as follows: Assault: 'by threatening her with assault and kidnap and drawing a knife to further intimidate her'; on a charge of malicious injury to property: by 'intentionally damage the bag of the complainant by stabbing it with a knife'. Under cross-examination she conceded that she made a 'mistake' by making reference to a knife, because that was not contained in the complainant's statement. She explained that she misread the word 'grabbed my handbag' to read 'stabbed my handbag'.

The high court findings

[13] The high court found that: the facts of the case invoke s 40(1)(q) of the CPA and s 3 of the Domestic Violence Act 116 of 1998 (the DVA), which although not pleaded, should be regarded as the law to be applied; the evidence against the

appellant was overwhelmingly prima facie proof of the crimes he allegedly perpetrated; the police, the prosecutor and the court did all they could to protect the interests of the complainant; the appellant acted in complete contempt of the constitutional rights of others and the law of this country; he misbehaved to the extent that his conduct was criminal; and his claims were unacceptable and could not be entertained.

[14] The high court further relied on the repealed version of Schedule 1 to the CPA in support of its finding that both the first and second arrests were justified. It found that the appellant's detention following his second arrest was not unlawful because the police and prosecution were required to investigate his citizenship, confirm his address, and investigate the issue of the firearm; the appellant operated under an alias in South Africa; the SAPS had, brought the appellant before court within the prescribed 48-hour period, and upon verification of the necessary information, he was released on bail; the period of detention between 6 and 13 April 2021 was not unlawful, unconstitutional, or unduly extended and it fell squarely within the bounds of the law.

[15] Further, the high court held that the prosecution discharged its constitutional mandate under s 179(4) of the Constitution to act without fear, favour, or prejudice; the complainant's statement, coupled with the appellant's conduct, furnished reasonable and probable cause for the prosecution; no evidence of malice was discernible from the facts established; the prosecution did not fail in its duties in any respect. The high court, based on those findings, dismissed all the claims with costs.

Before this Court

[16] The issues for determination by this Court are the following: whether the first and second arrests and the appellant's subsequent detention, were lawful; whether the appellant proved malicious prosecution; whether the high court was entitled to rely on statutory provisions that were not pleaded by either party, specifically s 40(1)(q) of the CPA and s 3 of the DVA, in reaching its conclusions; and whether the reliance by the high court on the incorrect version of Schedule 1 to the CPA and s 3 of the DVA, vitiated its decision.

The appellant's submissions

[17] The appellant submitted that: the high court erred both in law and in fact by considering and applying incorrect versions of the relevant legislation, which exerted a direct and material influence upon its findings; both respondents failed to cross-examine him; his version of events remains more probable than that of the arresting officers; the arrests, detention and prosecution were unlawful as they were effected in the absence of any offences capable of justifying such measures; the high court erred in not finding in his favour and awarding damages, specifically in the form of solatium, to vindicate the infringement of his rights. On quantum, it was submitted that an amount of R500 000 would be just and fair compensation for unlawful arrest and detention, and R100 000 for malicious prosecution.

The respondents' submissions

[18] The respondents submitted that: on both occasions when the first and second arrests were effected, the members of the SAPS possessed sufficient grounds to entertain a reasonable suspicion that the appellant had committed acts of domestic violence; the high court did not err in considering aspects germane to domestic violence because both parties engaged with domestic violence-related issues during

evidence and the appellant's detention following his first court appearance was ordered by the magistrate. The appellant did not plead that any official of the respondents committed any further wrongful act after the arrests and initial detention that could have caused the continuation of his detention in custody; the appellant failed to discharge the burden of proving that his prosecution was malicious as it was undertaken in good faith, based on reasonable and probable cause, and in accordance with constitutional and statutory obligations; that the appeal should be dismissed with costs.

Discussion

[19] In order to justify the lawfulness of an arrest, the Minister is required to establish the presence of certain jurisdictional facts. These requirements were authoritatively set out in *Duncan v Minister of Law and Order*,¹ particularly in relation to arrests effected under s 40(1)(b) of the CPA. The Minister must prove that: the arresting officer was a peace officer; the officer harboured a suspicion; the suspicion was that the arrestee had committed an offence listed in Schedule 1 to the Act; and the suspicion was founded on reasonable grounds.

[20] It is common cause between the parties that the Minister bore the *onus* of establishing on a balance of probabilities that the arrests and detention were lawful. Conversely, the appellant, as plaintiff in the court *a quo*, carried the burden of proving malicious prosecution.

[21] The appellant is a foreign national whose presence in the country was, at the relevant time, legal because he possessed a work permit. The Bill of Rights enshrines

¹ *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A); [1986] 2 All SA 241 (A) at 818F-H. Dictum applied in *Minister of Safety and Security v Sekhoto and Another* [2010] ZASCA 141; 2011 (5) SA 367 (SCA); 2011 (1) SACR 315 (SCA); [2011] 2 All SA 157 (SCA) para 6.

the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.² The State is enjoined to respect, protect, promote and fulfill those rights. The starting point is that, unlike the apartheid system, which focused on the colour of the people's skin, the Constitution of this country protects every human being who lives in it, irrespective of the colour of their skin, creed or nationality.

[22] Ordinarily, the obligations of the police, when exercising their power to arrest and detain a person do not diminish because a person is a foreign national. This has always been the legal position. Persons to be arrested are entitled to the protection enshrined in the Bill of Rights. In one paragraph in the judgment of the high court the following is stated:

‘[58] The plaintiff, in complete contempt of the constitutional rights of others and the law of this country misbehaved to the extent of criminality and his claims in this case are unacceptable and cannot be entertained.’

[23] This statement conveys to the reader that there are claims that courts may find to be ‘unacceptable and cannot be entertained’, simply because a person has behaved in a manner that infringed another person's constitutional rights or has misbehaved in a criminal manner. That statement is not consistent with the legal position that our Constitution guarantees, such as access to courts in s 34.³ It is accordingly untenable.

² Section 7 of the Constitution states the following:

‘Rights

(1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.

(2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights.

(3) ...’

³ Section 34 of the Constitutes provides that:

‘Access to courts

Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

[24] The allegations made by the complainant against the appellant were serious and the members of the SAPS were obliged to act appropriately in terms of the law. That obligation entailed levelling charges against the appellant that were based on sufficient relevant facts presented by the complainant or witnesses.

[25] The SAPS had charged the appellant with intimidation after the first arrest because he had threatened the complainant and released him on warning. The first arrest had minimal effect on the appellant because in his evidence he stated: '*I was not arrested on that day*'. That does not mean that an arrest did not take place. In any event the respondents admitted it. The applicable test is whether the peace officer appreciated that arrest is not the sole means of ensuring a suspect's appearance in court. The officer must consider the three recognised procedural options, namely securing attendance by way of summons, warning, or arrest. Only after having properly evaluated these alternatives may the officer decide which course of action is justified on the facts. He was warned to appear in court on 15 April 2021. The actions of the SAPS on that day were based on the statement of the complainant and were considerate of the appellant's freedom hence he was given a warning. However, the arrest without a warrant was not mandated by law, in that, on the facts, none of the charges fell within the provisions of Schedule 1, as I shall explain.

[26] The charges linked to the second arrest were intimidation, common assault and malicious damage to property. These charges were based on the events of what was reported to Mokoena, by the manager at the complainant's workplace. Mokoena did not witness the incident. He did not interview or take down statements from the complainant, the manager and the appellant. He had no evidence at all of a Schedule 1 offence having been committed upon which he could rely in exercising the

discretion in effecting the second arrest. There was insufficient evidence, in discharging the onus that the Minister bore in relation to the second arrest and detention of the appellant. In this regard the high court erred, because it overlooked the absence of evidence, in concluding that the second arrest and the detention of the appellant were justified.

[27] It is crucial to analyse each of the charges and determine whether they fall within Schedule 1, so as to justify the arrest as envisaged in s 40(1)(b) of the CPA; on the basis of a reasonable suspicion of the commission of such offences.

Common Assault

[28] It is trite,⁴ that assault consists in unlawfully and intentionally: (1) applying force to the person of another; or (2) inspiring a belief in that other that force is immediately to be applied to him. This is based on, *inter alia*, the fundamental principle that every person's body is inviolate. A feature of the crime of assault is that our law punishes not only the actual infliction of force upon the person of another but also the mere inducement in the mind of the victim of an apprehension that he is to be assaulted. On the facts set out in the complainant's statement in respect of the first arrest, a common assault charge was supported.

[29] The next question is this: is common assault a charge that can justify an arrest without a warrant and detention of the suspect. The Minister relied on the provisions of s 40(1)(b) of the CPA in justifying the arrest. Section 40(1)(b) provides:

‘40 Arrest by peace officer without warrant

(1) A peace officer may without warrant arrest any person-

(a) ...;

⁴ JRL Milton, ‘*South African Criminal Law and Procedure Volume II: Common-law Crimes*’ 3 ed (1996) at 406.

(b) whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody;

(c) ...’

[30] Schedule 1, referred to in s 40(1)(b), above, as amended by s 11 of Act 13 of 2013 and by s 48 of Act 7 of 2013, defines ‘Assault’ in these terms: ‘*Assault, when a dangerous wound is inflicted.*’ This was the position at the time of the arrest of the appellant. No wound was inflicted on the complainant and therefore the provisions of Schedule 1 were not applicable.

[31] After the arrest of the appellant, Schedule 1 was amended on 5 August 2022 to read:

‘Assault-

(a) when a dangerous wound is inflicted;

(b) involving the infliction of grievous bodily harm; or

(c) where a person is threatened-

(i) with grievous bodily harm; or

(ii) with a firearm or dangerous weapon, as defined in section 1 of the Dangerous Weapons Act, 2013 (Act 15 of 2013)

[Item substituted by s.11 of Act 12 of 2021 (wef 5 August 2022).]’

[32] The respondents sought to rely on the amended Schedule 1 in justifying the arrests. The amendment is not available to the respondents because, on the version of Schedule 1 that applied on 1 and 3 April 2021, (the first and second arrests), the arrests of the appellant were not justified in terms of the law. The high court misdirected itself by relying on the amended version of Schedule 1 that was not in existence at the time of the first and second arrests.

Intimidation

[33] Intimidation is not a common law crime. It is an element in offences created by statute, such as the Prevention and Combating of Torture of Persons Act 13 of 2013, which defines torture, as:

‘...’

(iii) intimidate or coerce him or her or any other person to do, or to refrain from doing, anything; or ...’

[34] The Intimidation Act 72 of 1982 has had some of its provisions struck down or amended. It is intended to prohibit certain forms of intimidation and to provide for matters connected therewith. Section 1 thereof provides:

‘1 Prohibition of and penalties for certain forms of intimidation

(1) Any person who-

(a) without lawful reason and with intent to compel or induce any person or persons of a particular nature, class or kind or persons in general to do or to abstain from doing any act or to assume or to abandon a particular standpoint-

(i) assaults, injures or causes damage to any person; or

(ii) in any manner threatens to kill, assault, injure or cause damage to any person or persons of a particular nature, class or kind,

...

shall be guilty of an offence and liable on conviction to a fine not exceeding R40 000 or to imprisonment for a period not exceeding ten years or to both such fine and such imprisonment.’

[35] The fact that intimidation does not feature in the CPA as an identified Schedule 1 offence is telling because it was never designed to apply also to ordinary cases of assault. If the SAPS wishes to rely on intimidation to justify an arrest based on assault or threat to assault, there must be evidence to show that such assault or threat was done with an intent to compel or induce the consequences set out in s1(1)(a). Given the possible sentences prescribed under s 1(1) of the Intimidation

Act, Schedule 1 could nonetheless find application in respect of an act of intimidation depending on the facts of each case. Similarly, if the prosecution wishes to rely on intimidation, the specific Act dealing with intimidation must be specified in the charge sheet so as to enable an accused person to prepare his or her defence properly. It seems to me that both the SAPS and the prosecution did not appreciate what the offence of intimidation entails. In any event, it was never pursued as a charge before the magistrate's court or as a separate defence in justifying the arrest before the high court. In the circumstances no reasonable suspicion could have been formed to justify a charge of intimidation.

Malicious injury to property charge

[36] Although this charge was included in the charge sheet by Mahlakoane, it did not feature in the statement of arrest made by Mkhwanazi. In his evidence, Mkhwanazi testified that he did not know why there was a charge of malicious damage to property. It is not mentioned in the SAPS 496. As indicated the prosecutrix conceded that she misread the complainant's statement and that charge should not have been levelled against the appellant. That was information that was not known to the SAPS. The SAPS did not rely at all on malicious injury to property. An error that was not known to the SAPS, which happened after the arrest and detention, would not have played any role in the exercise of the discretion by Mokoena to arrest and detain the appellant.

[37] In so far as the second arrest is concerned and on Mokoena's own version, when he arrived at the scene, the appellant was not near the complainant, who was inside an office. The appellant was calm and was waiting to speak to the manager in an effort to obtain assistance with mediation. The appellant had not gone to confront the complainant, but rather to request the manager's intervention. There was no

direct observation of any offence by Mokoena, no corroborating statements, and no evidence of a Schedule 1 offence having been committed. There was no basis at all for this charge.

[38] While the requirements, above, are generally well established, it is important to note that the final jurisdictional fact, namely, the reasonableness of the suspicion is assessed objectively. As confirmed in *Lifa v Minister of Police and Others (Lifa)*,⁵ the enquiry focuses solely on the information available to the arresting officer at the time the arrest was effected. Subsequent developments or information uncovered during the investigation are irrelevant to the determination of whether the suspicion was reasonable at the time of arrest.

[39] In *Groves NO v Minister of Police and Another*,⁶ the Constitutional Court emphasised that, in cases of arrest without a warrant, a police officer is required to assess and assemble the relevant facts and to exercise a proper discretion with reference to the jurisdictional requirements set out in s 40(1) of the CPA. The Court further held that, prior to effecting such an arrest, the officer must be satisfied that all the necessary statutory requirements are present. Crucially, the exercise of this discretion must be capable of rational justification in the circumstances in which the arrest is made.

[40] On these facts, no reasonable suspicion capable of grounding both arrests under s 40(1)(b) could have been formed. An arrest and detention of a suspect

⁵ *Lifa v Minister of Police and Others* (2020/17691) [2022] ZAGPJHC 795; [2023] 1 All SA 132 (GJ) para 34.

⁶ *Groves NO v Minister of Police and Another* [2023] ZACC 36; 2024 (1) SACR 286 (CC); 2024 (4) BCLR 503 (CC) para 52.

without reasonable cause is inconsistent with the Constitution, in particular s 12,⁷ which guarantees the right to freedom and security of the person.

[41] Having analysed all the charges that the SAPS preferred against the appellant, I conclude that the SAPS failed to discharge the onus resting on it as it failed to meet ‘the reasonable suspicion standard’ on the facts. It must follow that both the first and second arrests were unlawful. The high court erred in its finding that the SAPS discharged the onus that rested on it.

Unlawful Detention

[42] Detention guidance is to be found in s 39(3) of the CPA which provides that: ‘the effect of an arrest shall be that the person arrested shall be in lawful custody and that he shall be detained in custody until he is lawfully discharged or released from custody’. What this means is that the immediate consequence of an arrest is detention. An arrest is a *conditio sine qua non* for detention. If an arrest is unlawful for any reason, then the subsequent detention based on the unlawful arrest is automatically unlawful as found in *Minister of Law and Order, Kwandebele and Others v Mathebe and Another*.⁸ The Constitutional Court dealt with lawfulness of the subsequent detention in assessing the SAPS liability for an unlawful arrest in *De Klerk v Minister of Police*,⁹ where it found:

⁷ ‘12 Freedom and security of the person

(1) 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;

(c) to be free from all forms of violence from either public or private sources;

(d) not to be tortured in any way; and

(e) not to be treated or punished in a cruel, inhuman or degrading way.

⁸ *Minister of Law and Order, Kwandebele, and Others v Mathebe and Another* 1990 (1) SA 114 (A); [1990] 4 All SA 98 (AD) at 122D.

⁹ *De Klerk v Minister of Police* (CCT) 95/18[2019] ZACC 32;2019 (12) BCLR 1425 (CC); 2020 (1) SACR 1 (CC) para 60.

‘From the outset, it appears that to the extent that *Ndlovu* and *Tyokwana* assume that legal causation does not need to be established to hold the police liable, they depart from established principle. The Supreme Court of Appeal’s minority judgment in this matter explains why. In establishing a delictual claim, a plaintiff needs to prove that the unlawful, wrongful conduct of the *police* (i.e. the arrestor) factually and legally caused the harm (post-court hearing deprivation of liberty). The plaintiff does not need to establish, necessarily, the unlawfulness of the harm (i.e. that the detention after remand was itself unlawful). The plaintiff need only establish that the harm was not too remote from the unlawful arrest. This is not to say that the unlawfulness of the post-court hearing detention is irrelevant. It is crucial if a plaintiff aims to hold the Minister of Justice liable. Furthermore, importantly, it is a relevant consideration in establishing legal causation. (Footnotes omitted.)

[43] Having found that both arrests were unlawful, it must follow on the facts of this case that, the appellant’s detention was automatically unlawful. I conclude that both the first and second arrests were unlawful and so was the detention that followed the second arrest.

Malicious proceedings

[44] ‘Malicious prosecution is an abuse of the process of the court by intentionally and wrongfully setting the law in motion on a criminal charge.’¹⁰ The requirements for establishing a claim of malicious prosecution are trite. In *Minister of Justice and Constitutional Development and Others v Moleko*,¹¹ this Court stated the essential elements that a plaintiff is required to prove that: the defendant instituted or instigated the criminal proceedings; the proceedings were terminated in the

¹⁰ 28(1) *Lawsa* 3 ed para 5.

¹¹ *Minister of Justice and Constitutional Development and Others v Moleko* [2008] ZASCA 43; 2009 (2) SACR 585(SCA); [2008] 3 All SA 47 (SCA); para 8. See also *National Director of Public Prosecutions v Mdhlovu* [2024] ZASCA 85; 2024 (2) SACR 331 (SCA) para 18.

plaintiff's favour; and the defendant acted in the absence of reasonable and probable cause.

[45] The error on the part of the prosecution was a genuine one. Mahlakoane explained how the error that led to the inclusion of the charge of malicious injury to property occurred. There was no suggestion even under cross-examination that she had improper motives and or that she acted with malice in the commission of the error. The statement of the complainant was written in long hand and as she explained, she read 'grabbed' as 'stabbed'. As indicated earlier in this judgment, the allegations in that statement were serious and the prosecution was not at liberty to reject them out of hand. Most importantly, the SAPS members had raised various factors such as the nationality of the appellant, different names, and verification of his residential address. The prosecution relied on that information. The appellant failed to discharge the *onus* resting on him to prove malicious proceedings and his claim in this regard must fail.

[46] It follows that the high court erred in its finding that both the arrests and detention were lawful and justified. I now proceed to deal with the provisions that relate to domestic violence relied on by the high court on its own.

Reliance by the high court on s 40(1)(q) of the CPA and s 3 of the DVA

[47] Litigation is for the parties. The obligation to identify the issues for adjudication rests with the parties. In *Fischer and Another v Ramahlele and Others*,¹²

¹² *Fischer and Another v Ramahlele and Others* [2014] ZASCA 88; 2014 (4) SA 614 (SCA); [2014] 3 All SA 395 (SCA) para 13. See also *Codevilla v Kennedy-Smith N O and Others* [2024] ZASCA 136; 2025 (2) SA 42 (SCA); [2024] 4 All SA 637 (SCA) para 14. This dictum was confirmed by the Constitutional Court on several occasions. See *South African Police Service v Solidarity obo Barnard* [2014] ZACC 23; 2014 (6) SA 123 (CC); [2014] 11 BLLR 1025 (CC); 2014 (10) BCLR 1195 (CC); (2014) 35 ILJ 2981 (CC) paras 210, 220 and 233. See also *Molusi and Others v Voges N O and Others* [2016] ZACC 6; 2016 (3) SA 370 (CC); 2016 (7) BCLR 839 (CC) para 28.

this Court affirmed that it is incumbent upon the parties to set out and define the nature of their dispute, and for the court to determine only those issues. This principle applies even where constitutional rights are implicated. It is impermissible for a party to rely on a cause of action or legal basis that has not been pleaded. However, the Court recognised a limited exception: a court may, *mero motu*, raise a question of law where it arises clearly from the evidence and is necessary for the proper determination of the case, provided that doing so does not occasion prejudice to any party. This approach was endorsed by the Constitutional Court in *Public Protector v South African Reserve Bank*.¹³

[48] The high court dedicated at least four pages to dealing with what it termed as ‘The Law of Domestic Violence’. Section 40(1)(q) provides:

‘40 Arrest by peace officer without warrant

(1) A peace officer may without warrant arrest any person-

...

(q) who is reasonably suspected of having committed an act of domestic violence, as contemplated in section 1 of the Domestic Violence Act, 1998 and which constitutes an offence in terms of any law.’

[49] Section 3 of the DVA provides:

‘3 Arrest by peace officer without warrant and assistance to complainant

(1) A peace officer who attends the scene of an incident of domestic violence, may without a warrant, arrest any respondent who such peace officer reasonably suspects of having committed an act of domestic violence which constitutes an offence in terms of any law.’

[50] Both these provisions deal with arrest without a warrant. They differ in terms of circumstances under which the powers to arrest are exercised. Under s40(1)(q),

¹³ *Public Protector v South African Reserve Bank* [2019] ZACC 29; 2019 (9) BCLR 1113 (CC); 2019 (6) SA 253 (CC) paras 234-235.

an arrest without a warrant is effected in instances where an act of domestic violence is suspected. Section 3 of the DVA applies in instances where the peace officer who attends the scene of an incident of domestic violence, suspects that an act of domestic violence has been committed, and may arrest without a warrant and assist the complainant.

[51] There must be facts to support such actions and they must be pleaded. First, the criminal charges levelled against the appellant were not based on the DVA. Second, in relation to the first arrest no incident was attended to by the peace officer because a report was made by the complainant to the police. Third, in relation to the second arrest, no incident was witnessed by the members of the SAPS and they never even spoke to the complainant when they were called to her workplace. Fourth, the respondents did not rely on these provisions in defending the claim. While a court is not entirely precluded from considering unpleaded issues, this power is exercised sparingly and subject to strict safeguards aimed at preserving fairness and the adversarial nature of proceedings.

[52] The high court, in relying on these unpleaded statutory provisions acted to the prejudice of the appellant. The appellant was not afforded an opportunity to address or advance submissions in relation thereto, thereby undermining his right to a fair hearing as envisaged in s 34 of the Constitution.

[53] Moreover, the introduction of these provisions, without having been pleaded or properly ventilated, materially influenced the ultimate outcome of the civil trial. This constituted a departure from established principles of procedural fairness in the adversarial process, in terms of which parties are entitled to know and meet the case

against them. It must follow that the invocation of these provisions in the circumstances of this case were misplaced and thus constitute a misdirection.

Compensation

[54] In *Minister of Safety and Security v Tyulu*,¹⁴ this Court stated that the purpose of compensation in cases of unlawful arrest and detention is not to enrich a claimant but to provide a *solatium* for injured feelings. It was further accepted that it is mathematically impossible to determine an accurate amount of compensation, a number of variables must be taken into account to reach a reasonable award.

[55] In *Motladile v Minister of Police*,¹⁵ certain factors for consideration when a court is to determine a reasonable award were listed, although not exhaustive, being: the circumstances under which an arrest and detention occurred, the presence of improper motive, the conduct of the SAPS and the nature of deprivation, and the conditions of detention.

[56] The appellant was arrested and detained from 6 April 2021 until 13 April 2021, for a period of 8 days. Having had regard to the facts of this case, various comparative authorities, including amongst others, the considerations in *Mahlangu and Another v Minister of Police*,¹⁶ the evidence of the appellant in relation to the conditions of the cell where he was incarcerated, the treatment he received and related trauma, an amount of R200 000, constitutes reasonable compensation.

¹⁴ *Minister of Safety and Security v Tyulu* [2009] ZASCA 55; 2009 (5) SA 85 (SCA); 2009 (2) SACR 282 (SCA); [2009] 4 All SA 38 (SCA) para 26. Dictum applied in *Van Der Nest N O v Minister of Police* [2025] ZASCA 42; 2025 (5) SA 152 (SCA); [2025] 2 All SA 655 (SCA) para 28.

¹⁵ *Motladile v Minister of Police* [2023] ZASCA 94; 2023 (2) SACR 274 (SCA) para 17.

¹⁶ *Mahlangu and Another v Minister of Police* [2021] ZACC 10; 2021 (7) BCLR 698 (CC); 2021 (2) SACR 595 (CC) (14 May 2021) paras 55-56.

[57] On the issue of costs, there are no reasons to depart from the normal rule that costs should follow the result. The first respondent is liable for the costs of the appeal.

[58] In the result, the following order is granted:

- 1 The appeal is upheld to the extent set out in paragraph 2 below, with costs.
- 2 The order of the high court is set aside and substituted with the following:
‘1. The first defendant is directed to pay damages to the plaintiff in the sum of R200 000 in respect of the unlawful arrest and detention from 6 April to 13 April 2021.
2. The plaintiff’s further claims are dismissed.
3. The first defendant is directed to pay plaintiff’s costs of suit.’

T.V. NORMAN
JUDGE OF APPEAL

Appearances

For the appellant: C Zietsman
Instructed by: Loubser Van Wyk Attorneys, Pretoria
c/o Jacobs Fourie Inc., Bloemfontein

For the respondent: G J M Wright
Instructed by: State Attorney, Bloemfontein.