

SOUTH AFRICA / JUDGMENT

Mkhonza v Minister of Police (44821/21)

[2025] ZAGPJHC 513 (27 May 2025)

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South Gauteng High Court, Johannesburg

BEFORE

RC Thackwell

CASE / FILE NUMBER

44821/21

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Source record**REPUBLIC****OF SOUTH AFRICA****IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****DIVISION, JOHANNESBURG****Case****Number: 44821/21****(1)****REPORTABLE: YES****/ NO****(2)****OF INTEREST TO OTHER JUDGES: YES/NO****(3)****REVISED: YES/NO****27/05/2025****In****the matter between:**

Mangena
Azon Mkhonza
Plaintiff
and
Minister
of Police
Defendant

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties' legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date and time for hand-down is deemed to be 10:00 on 27 May 2025

JUDGMENT

THACKWELL AJ

Introduction

- [1] This is an action for damages arising from what the plaintiff says was his unlawful arrest and detention. The plaintiff, Mr. Mangena Azon Mkhonza, seeks damages against the Minister of Police for his arrest on 28 March 2019 and subsequent detention until 14 August 2020, a period of approximately 16 months and 17 days.
- [2] The plaintiff was arrested on suspicion of having raped a minor. He was detained first at Primrose Police Station and subsequently at Boksburg Prison. The plaintiff remained in detention from his arrest until he was released on 14 August 2020. The charges were withdrawn on 14 July 2020, one month prior to his release from detention.
- [3] The central issues for determination are:
- Whether the plaintiff's arrest on 28 March 2019 was unlawful;
 - Whether his detention from 28 March 2019 until 14 July 2020 was unlawful;
 - Whether the defendant is liable for the plaintiff's continued incarceration from 14 July 2020 until his eventual release on 14 August 2020; and
 - If liability is established, the quantum of damages to be awarded.
- [4] The matter turns largely on whether Sergeant Mthunzi Mehlomakulu, the arresting officer, had reasonable grounds for suspecting that the plaintiff had committed the alleged offence, and whether the continued detention was justified. The plaintiff contends that the arrest was arbitrary and based on insufficient grounds, while the defendant maintains that the arrest was lawful under Section 40(1)(b) of the Criminal Procedure Act 51 of 1977 and that the subsequent detention was justified given the serious nature of the alleged offence. With that, I turn to a brief overview of the applicable legal principles.

Applicable legal principles

- [5] The starting point is that any arrest without a warrant is prima facie unlawful. Once such an arrest is established, the onus rests on the defendant to prove its lawfulness. It is common cause in this case that the plaintiff was arrested without a warrant. Accordingly, the defendant bore the onus of demonstrating the lawfulness of the plaintiff's arrest.
- [6] For an arrest under Section 40(1)(b) to be lawful, the following requirements must be met:
- a. the arrestor must be a peace officer,
 - b. the arrestor must entertain a suspicion,
 - c. the suspicion must be that the suspect committed a Schedule 1 offence, and
 - d. the suspicion must rest on reasonable grounds.
- [7] The defendant's witness, Sergeant Mehlomakhulu, was a peace officer at the time he arrested the plaintiff. This is not in dispute. It can also be accepted that Sergeant Mehlomakhulu – subjectively at least – entertained a suspicion that the plaintiff committed a Schedule 1 offence. It is the fourth element (d) that requires an in-depth consideration and on which this case turns.
- [8] The test for reasonable suspicion was comprehensively articulated in *Mabona and another v Minister of Law and Order and others* (1988 (2) SA 654) at 658E-H:
- “The test of whether a suspicion is reasonably entertained within the meaning of s 40(1)(b) is objective (S v Nel and Another 1980*
- (4) SA 28 (E) at 33H). Would a reasonable man in the second defendant's position and possessed of the same information have considered that there were good and sufficient grounds for suspecting that the plaintiffs were guilty of conspiracy to commit robbery or possession of stolen property knowing it to have been stolen? It seems to me that in evaluating his information a reasonable man would bear in mind that the section authorises drastic police action. It authorises an arrest on the strength of a suspicion and without the need to swear out a warrant, ie something which otherwise would be an invasion of private rights and personal liberty. The reasonable man will therefore analyse and assess the quality of the information at his disposal critically, and he will not accept it lightly or without checking it where it can be checked. It is only after an examination of this kind that he will allow himself to entertain a suspicion which will justify an arrest. This is not to say that the information at his disposal must be of sufficiently high quality and cogency to engender in him a conviction that the suspect is in fact guilty. The section requires suspicion but not certainty. However, the suspicion must be based upon solid grounds. Otherwise, it will be flighty or arbitrary, and not a reasonable suspicion.

[9] The law requires that before making an arrest, an officer must do more than simply form an initial suspicion. The suspicion must be reasonable when viewed objectively. Practically, this means the arresting officer needs to take concrete steps to validate their initial suspicion by investigating the essential elements and facts potentially relevant to the particular offence. The officer must examine and consider the veracity of the information she or he is presented with at the time. Only after conducting such an

investigation can an officer properly conclude that their suspicion is reasonable and that sufficient grounds exist to make the arrest. Absent such an investigation leading to the conclusion that the suspicion is based on 'solid grounds', an officer's

initial suspicion will not meet the test that their suspicion is based on reasonable grounds.

[10] Suspicion alone is insufficient. It must be transformed into a reasonable suspicion through active investigation of the available information and circumstances considering – in parallel – the severity of the invasion of a person's rights when arrested without a warrant. What this investigation entails will differ from case to case and there are no set requirements. The requirements in each instance will be derived from the particular set of circumstances in play.

[11] I now turn to the evidence presented in this case.

Evidence

[12] The plaintiff testified that on 28 March 2019, he was at his home in Marathon Squatter Camp, where he lived with his son, Amos Mkhonza. At the time, he was engaged in his business of selling cooked meat from his home premises.

[13] According to his testimony, two police officers, a female officer and a male officer whom he later learned was Sergeant Mehlomakulu, arrived at his home accompanied by a woman and a child. The plaintiff stated that he did not know either the woman or the child prior to this encounter.

[14] The plaintiff testified that when the officers arrived, the female officer did not speak, but the male officer (Sergeant Mehlomakulu) asked him if he knew the woman accompanying them. When the plaintiff replied that he did not, the officer informed him that this woman alleged he had raped her child. According to the plaintiff, he was arrested without being asked any substantive questions about the alleged offence, and despite his protests of innocence.

[15] The plaintiff's son, Amos Mkhonza (37), corroborated, to a large extent, his father's version of events. He testified that on the day of the arrest, he was inside their residence when his father called him to inform him that he was being arrested. Amos's evidence was that his father was a good man who was fond of children and had helped raise four children of his own. He testified that he was shocked by the allegations against his father, stating, in essence, that it was unthinkable that his father could have done what he was accused of, especially given that they were always working together in their business. He described their

business as successful, particularly busy on weekends, and explained that it involved buying meat at City Deep early in the mornings, and

then returning home to prepare and sell it.

[16] The plaintiff testified that after his arrest, he was taken to Primrose Police Station where he was detained. He was later taken to court where bail was denied. The plaintiff remained in detention at Boksburg Prison.

[17] The plaintiff provided a harrowing account of his time in detention. He described being housed in a cell with approximately 60 other inmates in unsanitary conditions where toilets were frequently blocked. He witnessed violence among inmates, including the stabbing

of an inmate who was next to him and another inmate being struck on the head with a blunt object. As a non-smoker at the age of 66 (born in 1953), he suffered from headaches and chest pains for about three weeks due to the various substances being smoked in the cell. He also stated that the food was inadequate.

[18] The plaintiff also testified about the impact his arrest and detention had on his life. He stated that after his release, he discovered that people in his community viewed him differently, with some referring to him as dangerous to children. This stigma followed him to his home village in Mpumalanga. His family suffered financially during his incarceration, with his wife having to return

to her parents' home due to lack of support, and the family having to sell his car to make ends meet. The plaintiff's business, which had been providing income for his family, was lost.

[19] My impression of the oral evidence adduced by both the plaintiff and his son was that it was genuinely given. I have no reason to doubt it.

[20] Sergeant Mehlomakulu testified that he was the investigating officer in the case. He stated that at the time of the incident, he

had been employed by the South African Police Service as a sergeant for nine years and had previously worked as a police officer for seventeen years, with eleven years of experience in cases involving the rape of minor children.

[21] Sergeant Mehlomakulu testified that on 28 March 2019, he had read and considered the police docket before going to arrest the plaintiff. His testimony about the docket and the competency of his investigation was not compelling. Two points, in particular, struck me. Despite reference in the docket to the alleged victim and her friend (Khethiwe) having been raped by the same man, Sergeant Mehlomakulu did not seek to question Khethiwe. This was a critical omission. Moreover, there was also reference in the docket to threats by the victim's mother to beat her (the victim) in relation to the incident. The purpose behind these alleged threats is not clear to me. However, what is clear is that these alleged threats and the reasons behind them should have been properly investigated. Sergeant Mehlomakulu conceded that he did not interrogate this issue prior to arresting the plaintiff. This was

another critical omission.

[22] These two omissions alone make Sergeant Mehlomakulu's investigation inadequate. It is legally untenable to take the drastic step of arresting someone when there are obvious and relatively simple further lines of investigation that should have been done first and could have been done expeditiously (and which may have unravelled the arresting officer's initial suspicions).

[23] More generally, I did not find Sergeant Mehlomakulu to be an impressive witness. He was defensive and came across as evasive and,

at times, irritable. The defendant chose not to call the female officer who had accompanied Sergeant Mehlomakulu to the plaintiff's

residence on 28 March 2019. The defendant's case, in large part, stands and falls by Sergeant Mehlomakulu's evidence.

[24] Mr. Matsobane, the acting head of the Boksburg Medium A Correctional Centre, testified about the plaintiff's detention. He confirmed that according to computer records, the plaintiff was admitted to the prison on 29 March 2019 as a remand detainee based on a J7 form (warrant of detention).

[25] Mr. Matsobane testified that the prison received a warrant of liberation dated 14 July 2020 on 13 August 2020. He confirmed that

the plaintiff was only released on 14 August 2020 at 13:55, after verification of the warrant with the court.

Defendant's pleading objection

[26] Before addressing my substantive findings on liability, I first deal with the defendant's contention that the plaintiff's case regarding the arresting officer's failure to properly exercise his discretion was never pleaded. This contention is unsustainable for three reasons. Firstly, on the view I take, Sergeant Mehlomakulu was never vested with a discretion to arrest because the required (objectively defensible) suspicion never existed. Secondly, the defendant led evidence about the investigating officer's conduct and his decision-making process designed to demonstrate that Sergeant Mehlomakulu's conduct was in keeping with the required legal standards. I do not think a defendant can lead a case in defence and, at the same time, say that the case it seeks to defend and lead evidence on was not properly articulated in the pleadings. Thirdly, if the defendant had genuine concerns about the case it was supposed to meet, it should have made use of the remedies available to it through Rule 23 of the Uniform Rules of Court at the outset of the matter.

Findings on liability

[27] After careful consideration of the evidence presented, I make the following findings.

[28] The arrest of the plaintiff on 28 March 2019 was unlawful. Sergeant Mehlomakulu did not conduct an adequate investigation to transform his initial suspicions into an objectively defensible suspicion as required by law. Accordingly, the defendant has not discharged the onus of showing that the requirements of section 40(1)(b) of the Criminal Procedure Act were met in respect of having reasonable grounds for suspicion. Relatedly, the evidence in this case demonstrates that Sergeant Mehlomakulu

failed in his public law duty not to unnecessarily violate the plaintiff's right to freedom. The evidence also reveals that – at no stage – during the plaintiff's detention did Sergeant Mehlomakulu make any attempt to progress the inadequate

initial investigations, nor did he consider whether the continued detention of the plaintiff was appropriate.

[29] The evidence of Mr. Matsobane, the Correctional Services Officer, established that although the plaintiff's case was withdrawn on 14 July 2020, the warrant of liberation only reached the prison on 13 August 2020, resulting in the plaintiff's continued detention for an additional month. The defendant provided no real explanation for this significant delay. The failure to promptly communicate the withdrawal of charges against the plaintiff to the prison authorities resulted in his continued unnecessary detention, in violation of his constitutional right to freedom and security of person.

[30] The test of causation established in *Minister of Police v Skosana* 1977 (1) SA 31 (A) is relevant in this case. But for the unlawful arrest of the plaintiff on 28 March 2019, none of the subsequent harm would have materialised. The plaintiff would never have been detained at Primrose Police Station, never transferred to Boksburg Prison,

never subjected to the degrading conditions of overcrowded cells, never separated from his family and business, and never stigmatised

in his community as a suspected child molester. The heavy-handed arrest of an elderly man based on flimsy evidence represents exactly

the kind of arbitrary state action that our Constitution prohibits. I am satisfied that every day of the plaintiff's 505-day ordeal flows directly from that initial unlawful act. The causation is clear, direct, and unbroken in my opinion.

Findings on damages

[31] Having determined the liability issue, I now turn to the question of the appropriate quantum of damages.

[32] The plaintiff has claimed general damages in the amount of R30,300,000.00, calculated at R60,000.00 per day for a period of approximately 505 days (from 28 March 2019 to 14 August 2020).

[33] In considering an appropriate award, I am guided by the principle articulated in *The Minister of Safety and Security v Seymour* 2006 (6) SA 320 (SCA) at paragraph 20:

“Money can never be more than crude solatium for the deprivation of what in truth can never be restored and there is no empirical measure for the loss.”

[34] As explained in *Minister of Safety and Security v Tyulu* 2009 (5) SA 85 (SCA) at paragraph 26:

“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. It is therefore crucial that serious attempts be made to ensure that the damages awarded are commensurate with the injury inflicted. However, 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.”

[35] The Constitutional Court in *Mahlangu and Another v Minister of Police* 2021 (7) BCLR 698 (CC) emphasised that the awarding of damages in such cases is intended to deter and prevent future infringements of human rights by organs of the state, and constitutes a goodwill gesture for successful plaintiffs rather than attempting to rectify the wrong committed.

[36] In assessing the quantum in this case, I have considered:

- a. the personal circumstances of the plaintiff;
- b. the length and conditions of detention;
- c. the effect of the detention on the plaintiff; and
- d. comparable awards in similar cases.

[37] The plaintiff was 66 years old at the time of his arrest. He had never been arrested before and had no previous criminal record.

He was a family man with a wife and four adult children, who operated a small business selling cooked meat that supported his family.

[38] Moreover, the conditions of his detention were severe (evidence of which was uncontested by the defendant), as I explained above. The duration of his detention – approximately 16 months and 17 days – is exceptionally long for a case where the charges were ultimately withdrawn, and no real evidence identified in support of those charges (at any stage).

[39] The effect of the detention on the plaintiff was profound. His business collapsed and his family suffered financial hardship to the

point that his wife had to return to living with her parents. Upon his release, he faced stigma in his community and even in his home village in Mpumalanga, where people viewed him as a child molester. This reputational damage continues to affect him and, in all likelihood, will continue to do so.

[40] I considered various cases in assessing a fair award:

- a. In *Khanyi v Minister of Police* [2023] ZAGPJHC 434, the court awarded R250,000.00 for unlawful arrest and detention for approximately three days.
- b. In *Motladile v Minister of Police*

[2023] ZASCA 94, the Supreme Court of Appeal awarded R200,000.00 for four days of detention.

- c. In *Diljan v Minister of Police* [2022] ZASCA 103, damages of R120,000.00 were awarded for arrest and detention for approximately three days.

[41] While these cases involved significantly shorter periods of detention than the present case, they provide guidance on the daily rates of compensation that courts have considered appropriate. From these recent cases, the daily rate of compensation ranges from approximately R40,000.00 to R60,000.00 per day. However, it would be inappropriate to simply multiply such a daily rate by the 505 days of the plaintiff's detention, as this would result in an unreasonably high award.

[42] Taking all these factors into account, I consider that a fair and appropriate award in this case is R1,500,000.00. This amount reflects both the long duration of the detention and the severe impact it had on the plaintiff's life, while remaining within reasonable bounds in comparison to other awards for unlawful arrest and detention.

Order

[43] In the result, I make the following order:

- a. The arrest and detention of the plaintiff without a warrant was unlawful;
- b. The defendant is ordered to pay to the plaintiff the sum of R1,500,000.00 (one million five hundred thousand rand) in damages;
- c. The defendant is ordered to pay interest on the aforesaid amount at the prescribed rate from the date of this judgment to the date of payment;
- d. The defendant is ordered to pay the plaintiff's costs of suit on the party and party scale (Scale B), such costs to include the costs of one counsel.

RC THACKWELL

ACTING JUDGE OF THE HIGH COURT

JOHANNESBURG

For the plaintiff:

Adv BB Ntsimane instructed by TN Ramollo Inc.

For the defendant:

Adv EP Kotsoana instructed by the State Attorney

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