

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case no: 515/24

In the matter between:

SUNDAY IKECHUKWA OKORO **APPLICANT**

and

THE MINISTER OF POLICE **RESPONDENT**

Neutral citation: *Okoro v The Minister of Police* (515/2024) [2026] ZASCA 153 (13 November 2026)

Coram: NICHOLLS JA and MJALI and MOLITSOANE AJJA

Heard: 25 May 2026

Judgments: Mjali AJA: (minority judgment) [1] to [48]

Molitsoane AJA: (majority judgment) [49] to [88]

Delivered: 13 November 2026

Summary: Superior Courts Act 10 of 2013 – Appeal – application for special leave – reconsideration in terms of 17(2)*(f)* – whether a case made out that a grave failure of justice would otherwise result or the administration of justice may be brought into

disrepute by dismissal of petition, justifying reconsideration of rejection by High Court and Supreme Court of Appeal.

ORDER

On application for reconsideration referred in terms of s 17(2)*(f)* of the Superior Courts Act 10 of 2013:

The application for reconsideration is struck off the roll with costs which includes the costs of two counsel where so employed.

JUDGMENT

Mjali AJA

[1] The application comes to this Court by way of referral by the President of this Court in terms of s 17(2)*(f)* of the Superior Courts Act 10 of 2013 (the Act) for reconsideration and potential variation of the refusal of leave to appeal by two judges of this Court on petition against dismissal of the applicant's claim for damages by the KwaZulu-Natal Division of the High Court, Durban (the high court). In addition, the President referred the application for leave to appeal for oral argument in terms of s 17(2)*(d)* of the Act and warned the parties to be prepared to address the court on the merits if called upon to do so.

Background

[2] The applicant was arrested without a warrant by members of the South African Police Service (SAPS) on 3 July 2002 on suspicion that he had committed murder. He first appeared in court on 8 July 2002 and was remanded in custody as per the recommendation of the investigating officer. After an unsuccessful application for bail, he was incarcerated until 29 November 2002, when charges against him were

withdrawn. He sued the respondent in the high court for damages in the amount of R5 414 000 for the alleged unlawful arrest and detention, as well as the consequent loss and suffering.

[3] The respondent admitted the arrest and detention as well as the fact that the applicant was arrested without a warrant. Relying on the provisions of s 40(1)*(b)* of the Criminal Procedure Act 51 of 1977 (the CPA), the respondent averred that the arrest, as well as the subsequent detention, were lawful in that the applicant was on reasonable grounds suspected of having committed murder, an offence listed in Schedule 1 of the CPA. The respondent contended that the further detention of the applicant was at the instance of the members of the National Prosecuting Authority.

[4] The matter went to trial on liability only and the applicant's claim was dismissed with costs. It was dismissed on the basis that the respondent proved that the arrest and detention of the applicant were lawful in that it conformed with the jurisdictional requirements expounded in *Minister of Safety and Security v Sekhoto*.[1] The applicant unsuccessfully applied in the high court for leave to appeal that decision. Similarly, this Court dismissed his application for leave to appeal in terms of s 17(2)*(d)* of the Act, on the grounds that there are no reasonable prospects of success in the appeal and that there are no other compelling reasons why an appeal should be heard. That then prompted an application to the President of this Court for a reconsideration of the refusal by two judges of this Court to grant him leave to appeal. On 21 June 2024, the President referred such refusal to this Court for reconsideration in terms of s 17(2)*(f)* of the Act.

[1] *Minister of Safety and Security v Sekhoto and Another* [2010] ZASCA 141; 2011 (1) SACR 315 (SCA); [2011] 2 All SA 157 (SCA); 2011 (5) SA 367 (SCA) (*Sekhoto*) para 6.

[5] In its heads of argument as well as at the hearing of this application, the applicant submitted that if this Court finds that the test to be applied in this reconsideration application is proof that a grave failure of justice would otherwise result or the administration of justice may be brought into disrepute, the applicant has discharged that onus. In the respondent's view, the applicant in a reconsideration application must satisfy this Court that a grave failure of justice will result or that the administration of justice will be put into disrepute if the decision dismissing the petition is not reconsidered and/or varied. In this regard, it submitted that the applicant has failed to meet this jurisdictional fact and, for that reason, the respondent urged this Court to dismiss the application with costs.

The test to be applied

[6] The issue of the proper interpretation of s 17(2)*(f)*, as well as the test to be applied in applications referred for reconsideration in terms of that section, has been a subject of long debate and there are several conflicting decisions by this Court.[2] The attempt to put to bed the aforesaid divergent decisions in *4 Seasons Logistics*[3] seems to not have yielded the desired consequences, as there is still disagreement in this Court on the test to be applied in applications of this kind. The disagreement persists despite the very clear and binding judgment of the Constitutional Court in *S v Liesching and Others* (*Liesching I*).[4] In that matter the court dealing with s 17(2)*(f)* prior to its amendment, reasoned as follows:

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[2]*Avnit v First Rand Bank Ltd* [2014] ZASCA 132; *Mbatha v S* [2020] ZASCA 102; *Helen Suzman Foundation* v *The Speaker of the National Assembly and Others* [2023] ZASCA 6; *Bidvest Protea Coin Security (Pty) Ltd v Mabena* [2025] ZASCA 23; 2025 (3) SA 362 (SCA) (*Bidvest*); *Motsoeneng v South African Broadcasting Corporation SOC Ltd and Others* [2024] ZASCA 80; 2025 (4) SA 122 (SCA) (*Motsoeneng*); *4 Seasons Logistics CC v Kgotse* [2026] ZASCA 9; [2026] 1 All SA 415 (SCA) (*4 Seasons Logistics*).

[3] *4 Seasons Logistics*.

[4]*S v Liesching and Others* [2016] ZACC 41; 2017 (4) BCLR 454 (CC); 2017 (2) SACR 193 (CC) (*Lieshing I*) paras 54-57; Later endorsed in *S v Liesching and Others* [2018] ZACC 25; 2018 (11) BCLR 1349 (CC); 2019 (1) SACR 178 (CC); 2019 (4) SA 219 (CC) *(Lieshing II)*.

'The proviso in s 17(2)*(f)* is very broad. It keeps the door of justice ajar in order to cure errors or mistakes, and for the consideration of a circumstance, which, if it were known at the time of the consideration of the petition, might have yielded a different outcome. It is therefore a means of preventing an injustice. This would include new or further evidence that has come to light or that became known after the petition had been considered and determined.

The President is given a discretion, to be exercised judiciously, to decide whether there are exceptional circumstances that warrant referral of the matter to the court for reconsideration or, if necessary, variation. The President must therefore decide whether there are exceptional circumstances. This will depend on the facts and circumstances of each case.

In *Avnit,* Mpati P succinctly examined some cases wherein the words "exceptional circumstances" were discussed and analysed. He correctly came to the conclusion that "the overall interests of justice will be the finally determinative feature" *for the exercise of the President's discretion*.

Section 17(2)*(f)* does not distinguish between criminal and civil proceedings. The President may, of his or her own accord or on application, *if he or she concludes that there are exceptional circumstances, which in the interests of justice warrant reconsideration,* refer any previously determined petition to the court for reconsideration.' (Own emphasis added.)

[7] Post-amendment, the President of the Supreme Court of Appeal may exercise her discretion in terms of s 17(2)*(f)*, in circumstances where a grave failure of justice would otherwise result, or the administration of justice may be brought into disrepute. In terms of s 17(2)*(f)*, circumstances where a grave failure of justice would result or the administration of justice may be brought into disrepute are prerequisite for the exercise of the President's discretion to refer already refused petitions to a court for consideration. Read properly and in context, this section gives a discretion to the President of this Court to refer applications for leave to appeal to a court for reconsideration upon being satisfied of the existence of the aforesaid prerequisites. That discretion rests only with the President and only finds relevance at the time of

the exercise of his or her discretion, whether to refer or not. Put plainly, such circumstances are jurisdictional facts which must exist prior to the President's exercise of his or her discretion, which is only within the powers of the President. The President's exercise of discretion is not the subject matter for reconsideration by this Court.

[8] It is essential to understand that what was referred to this Court by the President for reconsideration and possible variation is the decision of the court dated 17 April 2024. That decision is a refusal of the application for leave to appeal on petition with costs. That much is clear from the order referring this matter to this Court which accords with the letter of the statute. The referral by the President to this Court was done upon being satisfied that a grave failure of justice or the administration of justice may be brought into disrepute if the decision refusing leave to appeal is not referred to court for reconsideration.

[9] Upon referral, this Court effectively steps into the shoes of the judges who decided the petition and considers it afresh. As such, the test to be applied remains the same as postulated in s 17(1)*(a)* of the Act. This means that the applicant needs to prove no more than that the appeal would have a reasonable prospect of success or that there is some other compelling reason why the appeal should be heard, including whether or not there are conflicting judgments on the matter under consideration. Smith JA in *Tarentaal Centre Investments (Pty) Ltd and Another v Beneficio Developments (Pty) Ltd*,[5] aptly summarised the jurisprudence of both this Court and the Constitutional Court in regard to the application of s 17(2)*(f)*, as follows:

[5] *Tarentaal Centre Investments (Pty) Ltd and Another v Beneficio Developments (Pty) Ltd* (15/2025) [2025] ZASCA 38 (8 April 2025) paras 4-7.

'When the President referred the matter for reconsideration, the jurisdictional requirement for the exercise of her discretion in terms of s 17(2)(*f*) was the existence of "exceptional circumstances". That section was subsequently amended by s 28 of the Judicial Matters Amendment Act 15 of 2023, which came into operation on 3 April 2024. In terms of the amended section the jurisdictional facts for the exercise for the President's discretion are, "circumstances where a grave failure of justice would otherwise result or the administration of justice may be brought into disrepute". The amendment did not alter the nature of the President's discretion in any way since the Constitutional Court in *S v Liesching and Others* (*Liesching*) – which was decided before the amendment – held that the phrase "exceptional circumstances" encompasses the aforementioned jurisdictional factors.

In *Motsoeneng v South Africa Broadcasting Corporation Soc Ltd and Others*, this Court held that, "[t]he necessary prerequisite for the exercise of the President's discretion is the existence of "exceptional circumstances". If the circumstances are not truly exceptional, that is the end of the matter. The application under subsection (2)(*f*) must fail and falls to be dismissed". Once the President has referred the decision of the two judges refusing leave to appeal for reconsideration, "the court effectively steps into the shoes of the two judges" and may upon reconsideration, grant or refuse the application.

The question whether we are entitled, or for that matter obligated, to consider first whether exceptional circumstances warranted the exercise of the President's powers in terms of s 17(2)(*f*) did not arise in this appeal, nor was any argument presented to us in this regard. This was because in argument before us, the applicants' counsel accepted that they bore the onus of establishing exceptional circumstances, either in the sense of a probability of a grave failure of justice or the administration of justice being brought into disrepute. In this regard counsel submitted that a failure to reconsider the decision refusing leave to appeal will result in a "grave injustice".

The Constitutional Court cautioned in *Liesching* that s 17(2)*(f)* is not intended to afford litigants a further attempt at procuring relief that has already been refused. It is instead "intended to enable the President to deal with a situation where an injustice might otherwise result. Its does not afford litigants a parallel appeal process in order to pursue additional bites at the proverbial cherry".'

[10] At the hearing of this matter, both parties submitted arguments on the test to be applied. The applicant's counsel was of the firm view that it was not required of the applicant to satisfy the court to which referral under s 17 (2)*(f)* had been made that the grave failure of justice or the administration of justice would be brought into disrepute. The respondent held a contrary view and submitted that the application should be dismissed as the applicant had not met the threshold. On the binding authority of the Constitutional Court's decision in the *Liesching I* and *II* matters,[6] as well as this court's decision in *Avnit,* the jurisdictional facts for the exercise of the President's discretion to refer this matter for reconsideration to this Court are not open for this Court to again consider. That, in my view, would be tantamount to a review of the President's exercise of discretion, which simply has no basis in law. It is a true discretion that must be exercised by the President of this Court judiciously to prevent an injustice that might occur and not to afford disappointed litigants another bite at the proverbial cherry.

[11] What remains for consideration by this Court is only whether the decision refusing leave to appeal on petition should be varied. The decisions in *Bidvest Protea Coin Security (Pty) Ltd v Mabena* (*Bidvest*)[7] and *Motsoeneng v South African Broadcasting Corporation SOC Ltd and Others* (*Motsoeneng*),[8] on which the respondent relied, were clearly wrong for failure to follow the binding authority of the Constitutional Court in *Liesching I* and *II,* as well as this Court's earlier decision in *Avnit v First Rand Bank Ltd* (*Avnit*),[9] without making a distinction in facts or law or making a finding that it was clearly wrong. Dealing with the time-tested principle

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[6] *Lieshing I and Lieshing II* fn 4 above. See also Coppin JA's dissenting judgment in *Lorenzi v S* [2025] ZASCA 58; Matojane JA's dissenting judgment in *Schoeman v Director of Public Prosecutions* [2025] ZASCA 124; 2025 (2) SACR 561 (SCA); 2026 (1) All SA 95 (SCA); *4 Seasons Logistics* fn 2 above.
[7] *Bidvest* fn 2 above.
[8] *Motsoeneng* fn 2 above.
[9] *Avnit* fn 2 above.

of stare decisis, this Court in *Patmar Explorations (Pty) Ltd and Others v Limpopo Development Tribunal and Others* (*Patmar*)[10] reasoned as follows:

'. . . The basic principle is *stare decisis*, that is, the Court stands by its previous decisions, subject to an exception where the earlier decision is held to be clearly wrong. A decision will be held to have been clearly wrong where it has been arrived at on some fundamental departure from principle, or a manifest oversight or misunderstanding, that is, there has been something in the nature of a palpable mistake. This Court will only depart from its previous decision if it is clear that the earlier court erred or that the reasoning upon which the decision rested was clearly erroneous. The cases in support of these propositions are legion. The need for palpable error is illustrated by cases in which the court has overruled its earlier decisions. Mere disagreement with the earlier decision on the basis of a differing view of the law by a court differently constituted is not a ground for overruling it.'

[12] Yet another reason why *Bidvest* and *Motsoeneng* are clearly wrong lies in their improper interpretation of s 17(2)*(f)*, which, in my view, does not accord with the plain and logical wording of that section as well as its purpose. In *Liesching I*, the Constitutional Court considered s 17(2)*(f)* and concluded that it keeps the door of justice ajar in order to cure errors or mistakes and that it is therefore a means of preventing an injustice. The Constitutional Court made it plain that it is the prerogative of the President, upon being satisfied of the existence of the jurisdictional facts, to refer a decision refusing leave to appeal on petition to a court for reconsideration. This finding confirms Mpati P's judgment in *Avnit*.

[13] Accordingly, I hold that all that this Court needs to determine in this application is whether or not leave to appeal the decision of the high court dismissing the applicant's claim should have been granted. I proceed to do so according to the

[10] *Patmar Explorations (Pty) Ltd and Others v Limpopo Development Tribunal and Others* [2018] ZASCA 19; 2018 (4) SA 107 (SCA) para 3.

test envisaged in s 17(2)*(b)* with the added advantage of oral argument in terms of s 17(2)*(d)* of the Act.

Leave to appeal

[14] The application for leave to appeal is against the dismissal of the applicant's claim for damages arising from his arrest without a warrant and subsequent detention. In dismissing the claim, the high court held that the arresting officers had formed a reasonable suspicion on objective grounds that the applicant had committed murder as contemplated in s 40(1)*(b)* of the CPA. It also found that the consequent detention of the applicant was lawful. In *Duncan v Minister of Law and Order (Duncan),*[11] this Court laid down the following jurisdictional facts to justify an arrest without a warrant as envisaged in s 40(1)*(b)* of the CPA. They are: (i) the arrestor must be a peace officer; (ii) the arrestor must entertain a suspicion; (iii) the suspicion must be that the suspect (the arrestee) committed an offence referred to in Schedule 1; and (iv) the suspicion must rest on reasonable grounds. The Court went on to state:

'If these jurisdictional requirements are satisfied, the peace officer may invoke the power conferred by the subsection, ie, he [or she] may arrest the suspect. In other words, he [or she] then has a discretion as to whether or not to exercise that power. 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'.[12] (Citation omitted.)

[15] In this matter, the crisp issues for determination were, first, whether the police, in effecting the arrest on 3 July 2002, acted on a reasonable suspicion that the applicant had committed the murder. Second, whether the detention of the applicant

[11] *Duncan v Minister of Law and Order (Duncan)* **[**1986] ZASCA 24; [1986] 2 All SA 241 (A); 1986 (2) SA 805 (A) at 818G-H.
[12] Ibid at 818H-I.

from the time of his arrest until his discharge on 29 November 2002 was justified. The question of the existence or otherwise of a reasonable suspicion on the arresting officer is objectively justifiable and depends on the facts of each case.[13] The suspicion need not be based on information that emerges after the arrest and that would subsequently be admissible in a court of law but rather on the available information at the crucial time of arrest. In *Biyela v Minister of Police* (*Biyela*), this Court stated clearly that:

'The reasonable suspicion must be more than a hunch; it should not be an unparticularised suspicion. It must be based on specific and articulable facts or information'.[14]

[16] What constitutes a reasonable suspicion within the meaning of s 40(1)*(b)* of the CPA was set out in *Mabona and Another v Minister of Law and Order and Others* (*Mabona*):[15]

'The test of whether a suspicion is reasonably entertained within the meaning of s 40(1)*(b)* is objective . . . 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

[13] *Minister of Law and Order and Others v Hurley and Another* [1986] ZASCA 53; [1986] 2 All SA 428 (A); 1986 (3) SA 568 (A) at 579H.
[14] *Biyela v Minister of Police* (1017/2020) [2022] ZASCA 36;2023 (1) SACR 235 (SCA) 1 April 2022) para 34.
[15] *Mabona and Another v Minister of Law and Order and Others* 1988 (2) SA 654 (SE) at 658E-H.

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.'

[17] The Constitutional Court in *Mahlangu and Another v Minister of Police*,[16] 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'

[18] In dismissing the applicant's claim, the high court reasoned that Warrant Officer Allen Mark Naidu (W/O Naidu) was the officer who arrested the applicant and that the requirements of s 40(1)*(b)* were therefore to be assessed with reference to his conduct. It found, according to W/O Naidu's evidence, that when he followed the applicant into the building, he suspected him of dealing in drugs. He believed that the applicant had seen him when he ran into the building. He did not contemplate what he subsequently discovered. In particular, the high court laid emphasis on W/O Naidu's observations as well as the fact that the applicant was renting the room in which the deceased was found. Further, he had seen the applicant exiting that room and that the applicant left the room while W/O Naidu was inspecting the scene. Warrant Officer Naidu found him in the foyer as he was about to leave the building. The apparent attempt to flee, as well as the fact that the applicant is of Nigerian

[16] *Mahlangu and Another v Minister of Police* [2021] ZACC 10; 2021 (7) BCLR 698 (CC); 2021 (2) SACR 595 (CC) para 25 (*Mahlangu*).

descent, posed a flight risk and fortified the high court's view that the arrest was effected in good faith and was rational. On the basis of that evidence, the high court held that W/O Naidu had formed a reasonable suspicion that the deceased could not have hung himself, particularly that his crew members also shared that view.

[19] Applying the test laid down in *Mabona* to this matter, the arresting officer should have been mindful of the fact that s 40(1)*(b)* authorises drastic police intrusion of fundamental right not to be deprived of freedom arbitrarily. In this regard it would have critically assessed and analysed the quality of information at his disposal, checked it where it needed to be checked rather than accepting it lightly. Here the applicant was arrested on suspicion of having committed murder in circumstances where an adult male was found hanging by a bedsheet in the shower of the room that the applicant had rented two days prior to the incident in a brothel where prostitution and drug dealing were rampant. The police concluded that the manner in which he was hanging was inconsistent with suicide but more like a staged suicide.

[20] The fundamental question to be determined is whether W/O Naidu, at the crucial time of arrest and on the available evidence at the time, reasonably suspected that the deceased was murdered and that the applicant is the one who committed the murder of the deceased. In this regard, W/O Naidu testified that on that day he was deployed together with Warrant Officer Sunil Seosunker (W/O Seosunker) to the Point Area to ensure the safety of the delegates who were attending an international conference. This also entailed general crime prevention duties. At 16h30, he was driving past the building, Evaleigh Court, when he saw the applicant outside. He knew him as 'Phillip' and as a person of Nigerian descent, as he had previously monitored him for possible drug dealing.

[21] When the applicant saw their vehicle, he quickly entered the building, prompting W/O Naidu to suspect that something was amiss. Warrant Officer Naidu and W/O Seosunker quickly alighted from their vehicle and pursued the applicant from different angles. On the first floor of the building, W/O Naidu saw the applicant exiting room number 7 in a hysterical state, screaming, calling the name 'Francine' repeatedly. Warrant Officer Naidu persuaded him to calm down and enquired from him as to why he was nervous and screaming. He searched the applicant but found nothing illegal on him. The applicant asked them to follow him into the room. Warrant Officer Naidu followed as requested and upon entering the room, which he described as very small with a shower in one corner, he noticed a man of Indian descent hanging by a bedsheet with a knot around his neck. He was facing away from the entrance but towards the geyser that was inside the shower. He noticed that his body was cold, stiff and had no pulse. He concluded that he was already deceased but called for an ambulance as well as for a detective on call.

[22] The applicant left the room while he was busy checking the deceased's condition. Warrant Officer Naidu searched for the applicant and found him on the ground floor as he was about to leave the building. However, under cross-examination, W/O Naidu conceded that he found the applicant talking to the other residents who had gathered in the foyer curious to know what had happened. He asked the applicant to accompany him back to the room and warned him that he was a policeman and that he was conducting enquiries regarding the possibility that the deceased was murdered. Warrant Officer Naidu warned the applicant of his right to remain silent and then questioned him as to why he exited the room. The applicant gave no response. Warrant Officer Naidu then questioned him about who the room belonged to, whereupon the applicant responded that he had booked the room two days prior to the incident. Further, he had no keys on him at the moment as he had

given one of the two keys he received for it to ‘Amanda’ and another one to ‘Aubrey’. He could not tell where they were at that time. When asked by W/O Naidu who ‘Francine’ was, the applicant could not explain as he was frantic. When asked about the identity of the deceased, he elected to remain silent.

[23] Warrant Officer Naidu proceeded to observe that the deceased was short and slender. He concluded that there was no way that he could have hung himself in the position in which they found the body hanging. In his view, what he observed looked like a staged suicide. Elaborating further on why he thought the deceased could not have hung himself, W/O Naidu stated that he was short, that the distance between his feet and the ledge in the shower was considerable, and that there was nothing below that could have held him up to the point where he would have hung himself. He also noticed the knot around the neck of the deceased was close to the ear. With the knot in that position, W/O Naidu opined that the deceased could still breathe. There was no sign of struggle in the room. The bed was made up and tidy. There was no suicide note. He made enquiries from the other occupants of the building who were outside the room and was informed that they received one set of sheets per room. After making all these observations and not getting answers from the applicant, he placed him under arrest.

[24] Under cross-examination, W/O Naidu testified that the applicant was nervous, shocked or scared when he exited the room and that he led them to the room and showed them the deceased. Further that, he is not an expert in strangulation and he could not dispute that the deceased could have committed suicide by tying a ligature to the geyser bracket.

[25] Whilst it is trite that the reasonable suspicion must exist in the mind of the arresting officer, W/O Naidu's evidence cannot be viewed in isolation but must be considered in light of all the evidence that is crucial at the time of arrest. Warrant Officer Seosunker's evidence contradicts W/O Naidu in the following respects. Unlike W/O Naidu, who stated that he was driving past the premises at around 16h30 and saw the applicant hurriedly entering Evaleigh Court when he saw them, W/O Seosunker testified that on that day, W/O Naidu had information about drugs at Evaleigh Court. He and W/O Naidu went there soon after 15h00 to do some observation outside those premises. They had been there for a period of 30-45 minutes when they noticed a group of males outside the entrance of Evaleigh Court, conversing. Amongst them was the one dressed in blue denim jacket and jeans. They saw a male dressed in a blue denim jacket and blue jeans entering Evaleigh Court and later exiting and speaking to the group of males that was outside the entrance and again entering the building. That male turned out to be the applicant.

[26] Warrant Officer Seosunker denied that the applicant hurriedly entered the building when he saw them. As the applicant was entering the building, W/O Naidu suggested that they follow him into the building. They split in different directions in pursuit of the applicant. He heard W/O Naidu from a distance speaking in a loud voice but couldn't make out what he was saying. In the foyer of the first floor, approximately five metres from room 7, he found W/O Naidu already with the applicant. They all entered room 7. It was a room with a bed and a little wall separating the shower. At first, W/O Seosunker found nothing suspicious until he was told to turn and look at the shower by W/O Naidu. He saw the deceased hanging by a bedsheet from the bracket of the geyser. His hands hanging by his sides and his neck slightly to the right. He noticed that the body was stiff, denoting that he must have died some time ago. There were no signs of struggle in the room. Unlike Naidu,

who testified that the bed was neatly made, W/O Seosunker noticed that the mattress was moved a bit. He requested W/O Naidu to call the patrol van and the mortuary. When W/O Seosunker said it was suicide W/O Naidu did not share a different view. He simply complied with W/O Seosunker's instructions of calling the patrol van and the mortuary.

[27] Warrant Officer Naidu and the applicant exited the room, leaving W/O Seosunker alone. He, on further observation, noticed that the knot was slightly higher up towards the left ear. On the basis of the position of the knot, he formed an opinion that the deceased could have been able to breathe if he hung himself in that way. He noticed that the deceased's feet were not in line with the ledge of the shower. He estimated the distance between the feet and the ledge to be 5-7 centimetres. He moved the feet to see if they could touch the ledge and they didn't. He called W/O Naidu and pointed out the position of the knot and the feet to him. He told W/O Naidu that his initial view of suicide had changed to murder. Warrant Officer Naidu did not respond.

[28] Warrant Officer Seosunker conceded that he had only one previous experience with hanging and that he had received no training on suicide by hanging. Further, he gave no consideration to the fact that if the deceased wanted to hang himself, he could have leveraged on the lower bracket of the geyser to hang himself in that position and that, as such, a prop to stand on would not be necessary. He also did not consider that, given the 5-7 centimetre distance between the legion of the shower and the deceased, the deceased could have stood on his toes, stretched his body to hang himself. He also conceded that all that occupied his mind was that there was murder. He did not consider the question that someone else other than the

applicant could have murdered the deceased given the fact that the applicant was not the only person with access to that room.

[29] Warrant Officer Subramani Krishna (W/O Krishna) proceeded to the scene together with Captain Naiker, the duty detective, upon receiving a report that somebody had committed suicide. They arrived there at 18h00 and found the deceased still hanging in the shower. Significantly, W/O Krishna observed the distance between the deceased's feet and the shower ledge to be approximately 5 centimetres and on this basis concluded that the deceased was murdered. Yet on the police report accompanying the body to the mortuary, he gave the particulars of death as suicide. On the information he received upon enquiry at the reception, W/O Krishna testified that room 7 was always open and easily accessible to anyone in that busy building. On his arrival at the scene on that day, he noticed people living in the building going in and out of that room to identify the body. He found the scene to be disturbed and, as such, saw no need to have fingerprints taken from the coke and beer cans that they found in the room.

[30] Considering the evidence that the applicant had given the keys to two other individuals and that he had no keys on him at that moment, he clearly was not the only person who had access to that room. Significantly and in line with the evidence, there is no indication that W/O Naidu ever gave serious consideration or any consideration at all to this fact save for the mere enquiry as to the whereabouts of Amanda and Aubrey. When the applicant could not inform him of their whereabouts, he was arrested. On a proper consideration of the evidence that the applicant was first seen outside conversing with other males and the immediate pursuit by the police when they saw him enter the building, coupled with his frantic reaction when he discovered the already cold and stiff body of the deceased, to which he drew the

attention of the police, the suspicion that he could have been the one who murdered the deceased was not by any measure based on solid grounds. In fact, Naidu conceded that the applicant's reaction was that of a person that was shocked by what he saw, such that he had to calm him down. Even if the manner in which the deceased was found hanging in that shower justified a suspicion of murder, on its own and without the link based on solid grounds that the applicant is the perpetrator, that suspicion must fail on the objective reasonable man test enunciated in *Mabona*. [17]

[31] The circumstances linking the applicant in this matter are the fact that he had rented the room two days before the incident. Further that he was seen exiting the room in circumstances where he could only have entered the room for a very brief period given the fact that the police were pursuing him as he entered the building. The uncontroverted evidence is that he had no keys for the room as he had given the two sets of keys to Aubrey and Amanda. Save from a mere enquiry from the applicant as to the whereabouts of Amanda and Aubrey, the police showed no real appetite or at all of locating the two, prior to arresting the applicant. When the body was discovered rigour mortis had set in. A fact that militates against any suspicion of the commission of the murder when the applicant entered the room and seen exiting it when pursued by the police in that afternoon. The fundamental question to be answered is whether such circumstances justified a reasonable suspicion for the arrest of the applicant. In my view, on all the relevant evidence at the time of the arrest, no reasonable person would have entertained a reasonable suspicion that the applicant is the one who murdered the deceased, if at all this was homicide.

[17] I have, in this judgment, already found that the suspicion of the deceased being murdered cannot be justifiable on the available evidence at the time of arrest.

[32] The high court in its consideration of the evidence misdirected itself when it reasoned that 'Naidu was faced with a dead body of the deceased and on his observation and that of the three other police officers, the scene appeared to have been staged. He considered the manner in which the knot was tied and concluded that, under the circumstances, a Schedule 1 offence was committed. This belief was reasonably held under the circumstances'. Dealing with the issue of the arrest, the court held that 'Naidu's evidence was that he had to stop the plaintiff from exiting the building. Naidu knew the plaintiff was a Nigerian. Ms Hemraj argued that there was no other method of bringing him to court other than arresting him. She submitted that in any event, it was never suggested to Naidu that another method other than arrest existed. Accordingly, the arrest was exercised in good faith and rationally'. This reasoning is flawed for the following reasons. The law requires that the arrest be made on reasonable suspicion, which must be based upon solid grounds. Otherwise, it will be flighty or arbitrary. The exercise of good faith is not a requirement for effecting an arrest.

[33] The second misdirection by the court is that it took into account the observations of the other three police officers who were not arresting officers in arriving at its finding that the arrest was lawful. The law in this regard is trite. The reasonable suspicion must exist in the mind of the arrestor and who must have acted on that suspicion and not on the opinion of any other person to effect an arrest.

[34] There is yet another misdirection by the court in its consideration of the evidence and that is, the trial court wrongly inverted the enquiry by treating the absence of alternative means of securing the applicant's attendance in court as a necessary element for lawfulness of arrest rather than as a factor for the exercise of discretion. The question whether alternative means existed was not in issue at trial.

More fundamentally, once the jurisdictional fact of reasonable suspicion is established, the choice between arrest and other alternatives of securing attendance in court is a matter for the arresting officer's discretion. In this regard, interference by a court of appeal is warranted.

[35] Warrant Officer Seosunker conceded that they did not critically analyse all the factors that were available to them to arrive at their suspicion that the deceased was murdered at all, let alone by the applicant. That, together with W/O Krishna's evidence that, there was a lot of activity in that building with sex workers and drug dealers, fortifies the view that the respondent did not critically analyse and assess the quality of the information at their disposal but merely accepted it purely because the applicant had rented that room. The reliance by the respondent on the evidence of the security guard that the room was always locked and that only the applicant had access to it, not only goes against the grain of the totality of the evidence but is also irrelevant to the crucial decision to be made, as it was only obtained long after the arrest was effected.

[36] It must be borne in mind that what matters for the formulation of a reasonable suspicion is the information available at the crucial moment. What transpires later is immaterial to the decision to arrest. As such, on the conspectus of the relevant evidence, the respondent's suspicion fails on the test laid down in *Mabona*. A reasonable policeman under the circumstances of this case would have given due consideration to the crucial facts which Naidu conceded not to have considered. Had he done so, the outcome would in all probability be different.

[37] What was foremost in the arrestor's mind was the deceased's body, the suspicion that he could not have hung himself there and the fact that the applicant

was a man of Nigerian descent who was known to them for dealing in drugs. There doesn't appear to be any consideration of the drastic nature of the invasion of the right to liberty as well as any critical analysis and assessment of the quality of the information that Naidu had at his disposal at the time of the arrest. In this regard the suspicion that culminated in the arrest of the applicant falls flat on the test enunciated in *Mabona.* As such the arrest and the subsequent detention of the applicant was not based on reasonable grounds but was arbitrary. In the view I take of this matter, it is unnecessary to decide on the issue of the appropriateness or otherwise of the respondent's exercise of the discretion to arrest the applicant.

[38] Accordingly, I find that the arresting officer did not entertain a reasonable suspicion based on solid grounds, on the evidence that was at his disposal at the time of the arrest, that the applicant had committed murder. It follows that the respondent is liable for all the applicant's proven damages following his arrest and detention on 3 July 2002 until his release on 29 November 2002, as the police were acting within the course and scope of their duties. Further, were it not for the unlawful arrest, the applicant would not have been detained at all.

[39] I have heard the pleasure of reading the second judgment. I do not agree with its reasoning on the issue of the correct interpretation of s 17(2)*(f)* as well as its reasoning and conclusion on the evidence in the following ways. Firstly, on the interpretation of s 17(2)*(f)*, the second judgment places its reliance on *Luphondo v The State*[18] (*Luphondo*) as being the final word on the standard to be applied in applications of this nature. *Luphondo* is a judgment of this court which endorses the various decisions I have earlier in my judgment found to have been wrongly decided

[18] *Luphondo v S* [2026] ZASCA 24; [2026] 2 All SA 238 (SCA); 2026 (1) SACR 613 (SCA) paras 60-62.

for the reasons stated in my judgment. The same goes for *Luphondo* in that it cannot overrule the Constitutional Court's decisions in *Lieshing 1*.

[40] Secondly, the second judgment concurs that in the assessment of whether the arresting officer entertained a reasonable suspicion that the applicant had committed the offence of murder, the evidence of the arresting officer must not be evaluated in isolation but must be considered in light of all the evidence that was crucial at the time of the arrest, but selectively dismisses evidence of what transpired before the police entered the room as irrelevant to the formulation of the reasonable suspicion.

[41] The stark contrast in the testimony of W/O Naidu and W/O Seosunker before they pursued the applicant into the building is crucially relevant. In particular, W/O Seosunker' s evidence that they had observed the applicant for approximately forty-five minutes conversing outside and that they decided to follow him when he entered the building militates against W/O Naidu's version that they saw the applicant as they were driving past and that he (the applicant) immediately ran into the building when he saw them and must have been aware that they were after him.

[42] If he wanted to evade the police by immediately entering the building, the question to be asked is, why would he go into the room where the deceased was hanging if he was complacent in the murder of the deceased. That coupled with the fact that he emerged out of that room visibly shocked and frantic to the extent that W/O Naidu had to calm him down. Further that he is the one who led the police to the room and showed them the deceased as well as W/O Naidu's concession that his behaviour was not akin to that of a guilty person renders any suspicion of the applicant's complacency to the murder of the deceased nugatory. Connection between the suspect to the offence is a necessary consideration before any decision

to arrest is made. Here even if the police could be said to have reasonably suspected that the deceased was murdered, their suspicion that the applicant could have killed the deceased was unreasonable on the quality of the evidence that was at their disposal at the time of arrest.

[43] The second judgment finds that there should be demarcation between the periods of detention before and after the applicant's first appearance in court. It holds that the order of the magistrate that he be kept in custody broke the chain of the Minister of Police's liability for post court appearance detention. I differ for the following reasons. The applicant's particulars of claim state that he was arrested without a warrant and wrongfully detained by the members of the SAPS. Further that as a result of the wrongful arrest and detention he suffered harm in respect of which he seeks to hold the respondent liable for the arrest and the whole duration of his detention.

[44] In *Chetane v The Minister of Police and Another*[19] this Court dealing with detention reasoned thus:

'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

[19] *Chetane v The Minister of Police and Another* (482/2025) [2026] ZASCA 110 (21 August 2026). *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. *De Klerk v Minister of Police* [2019] ZACC 32; 2019 (12) BCLR 1425 (CC); 2020 (1) SACR 1 (CC); 2021 (4) SA 585 (CC); 2020 (8K6) QOD 1 (CC) (*De Klerk*).

as found in *Minister of Law and Order, Kwandebele and Others v Mathebe and Another.*

[45] 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*, where it found:

'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.'

[46] In this matter the arresting officer indicated to the prosecutor that bail should be opposed and gave his reasons for his view. This is the attitude that pertained throughout until bail was refused. The main reason for the opposition to the granting of bail was that the police were still investigating and that the applicant is of Nigerian descent. As such he would be a flight risk. On the authority of *De Klerk* the wrongful arrest of the applicant is a *sine qua non* for his detention which is the harm caused by his arrest. He therefore does not need to prove the wrongfulness of the harm caused by his wrongful arrest. Accordingly, I find that this reconsideration is a far cry from giving a disappointed appellant a proverbial second bite on the cherry but rather a means of preventing serious injustice that might occur if the decision refusing leave to appeal on petition is not varied.

[47] As regards the issue of costs, I find that there is no reason to depart from the ordinary rule that costs follow the event. The respondent must be liable for costs starting from the trial of this matter right through to the reconsideration application in this Court.

Order

[48] Had I commanded the majority, I would have made the following order:

1 The application in terms of s 17(2)*(f)* of the Superior Courts Act 10 of 2013 referred to this Court for the reconsideration of the decision refusing leave to appeal is set aside.

2 Leave to appeal is granted.

3 The decision of the high court refusing leave to appeal is set aside and replaced with the following:

'1 Leave to appeal is granted.'

4 The decision of the high court dismissing the applicant's claim for damages with costs is set aside.

5 The respondent is held liable for the applicant's proven damages arising out of the unlawful arrest and detention for the whole duration of his detention.

6 The respondent shall pay costs of the trial in the high court, application for leave to appeal, as well as costs of the petition and the reconsideration of the dismissal of the petition. Such costs shall include the costs of two counsel where so employed.

G N Z MJALI

ACTING JUDGE OF APPEAL

Molitsoane AJA (Nicholls JA concurring):

[49] I have had the pleasure of reading the first judgment, but I respectfully disagree with its reasoning and conclusion. In my view, the applicant must establish circumstances in which a grave failure of justice may otherwise result or the administration of justice may be brought into disrepute, as contemplated in s 17(2)*(f)*. Whether that threshold has been met requires consideration of whether the arresting officer reasonably suspected, on the information available at the time of arrest, that the applicant had committed a Schedule 1 offence; and whether the respondent is liable for the applicant's detention, including the period after his first appearance in court. The lawfulness of the arrest does not, without more, determine liability for that subsequent detention.

[50] In the heads of argument, the following submission is made on behalf of the applicant:

'… As is clear from the wording of section 17(2)(*f*), the grave failure of justice/bringing the administration of justice into disrepute test is applied by the President in deciding whether to order a referral. It is not to be applied by the court which hears the referral application.

In exercising his discretion to refer the refusal of leave to appeal for reconsideration by the court, the President, in effect, found that there was a grave failure of justice or that the administration of Justice could be brought into disrepute. The President could not have granted the referral order in the absence of the jurisdictional requirements of Section 17(2)(*d*).

The President's decision (to refer) is not open to reconsideration by this court. It is therefore not open for this court to again consider whether grave failure of justice would occur, or the administration of justice would be brought into disrepute if the petition refusal was not reconsidered. The decision has been made; and is *res judicata*.' (Underlying in the original.)

[51] The first judgment has dealt in detail with the issue of the correct interpretation of s 17(2)*(f)* in various decisions of this Court. I disagree with the contention of the first judgment and feel constrained to refer to the following remarks of this Court in *Luphondo* [20] It is important to note that *Luphondo* refrained from preferring any of the divergent views on the basis of 'correctness' but rather chose to deal with the issue on the basis of the binding authority of decisions of the court with the same or similar status. I consider this panel bound by that decision. The court stated:

'I must emphasise that we are here not concerned with the correctness or otherwise of any of the divergent views expressed, on the other hand, in *Motsoeneng*, *Bidvest*, the majority judgment in *Schoeman*, and in the minority judgments in *Lorenzi*, *Schoeman* and the unanimous judgment in *4 Seasons*, on the other. It is about the jurisprudential comity, hierarchy and coherence of this Court. … [T]he judgments of this court hold the same status and authority, regardless of the number of judges on the bench. However, when there is a disagreement between a smaller bench and a larger one, the counting of heads, referred to in *Fellner*, is important. The judgment of the smaller bench yields to the larger bench, and the latter is the binding authority of this court. It is not about which one is the latest. That is the position about *4 Seasons* in relation to *Motsoeneng* and *Bidvest*.

Accordingly, to maintain jurisprudential coherence, I conclude that until *Motsoeneng* and *Bidvest* are authoritatively overruled by either the Constitutional Court, an equally constituted five panel bench, or a (preferably) larger panel, they remain binding authority in this Court. Whether that should no longer be the position will be determined only when an opportunity arises for an authoritative and definitive pronouncement on the recent divergent views.'

[20] *Luphondo* paras 60-62.

[52] This Court in *Kalagadi Manganese (Pty) Limited and Others v Industrial Development Corporation of SA Limited and Others*[21] recently dealt with the application in terms of s 17(2)*(f)* as follows:

'Section 17(2)*(f)* sets an exceptionally high threshold. This is so because the application does not come before the Court as an ordinary request for leave, nor even as a petition for special leave to appeal. By the time reconsideration under that provision is sought, leave to appeal has already been refused by the High Court and, thereafter, by two judges of this Court. The matter therefore reaches the President only after the ordinary appellate avenues have been exhausted and after more than one judicial determination has been made against the grant of leave.

For that reason, the requirements for reconsideration under s 17(2)(*f*) are significantly more exacting than those applicable to special leave to appeal under s 16(1)*(b)* of the Superior Courts Act. The test for granting special leave is whether there are 'special circumstances' justifying a further appeal. Examples of such circumstances include a substantial point of law, factual issues of great importance, or strong prospects of success. By contrast, an applicant invoking s 17(2)*(f)* must first surmount a distinct jurisdictional hurdle: it must show exceptional circumstances of the kind identified in the proviso, namely that a grave failure of justice may otherwise result or that the administration of justice may be brought into disrepute. Those requirements are exceptionally stringent, and the inquiry is both anterior to, and more demanding than the assessment undertaken in applications for leave to appeal. It is therefore not enough for the applicants to show that another court may reasonably come to a different conclusion, or even that the refusal of leave may have been wrong. What must be shown is something far more compelling: a truly exceptional basis for reopening the matter.'

[53] The applicant submits that this Court ought to intervene in terms of s 17(2)*(f)* on the grounds that 'the police investigating the case were either highly incompetent or complicit with members of the family of the deceased in advancing an insurance claim arising from the death of the deceased'. It is on this basis that it is contended

[21] *Kalagadi Manganese (Pty) Limited and Others v Industrial Development Corporation of SA Limited and Others* [2026] ZASCA 111; [2026] 4 All SA 1 (SCA) paras 9 and 10.

that the applicant has discharged his onus of showing that the administration of justice would be brought into disrepute and grave injustice would come to bear if the decision refusing leave to appeal is refused.

[54] In support of that contention, the applicant submits that the arresting officers were not qualified to determine whether the deceased had committed suicide or had been murdered. He contends that the police ought to have summoned a state pathologist, who was available on a 24-hour basis, to express a view on whether the death was attributable to suicide or homicide. He further submits that the police ought to have undertaken forensic investigations such as DNA testing, fingerprinting of relevant objects and interviewing of witnesses before arresting the applicant.

[55] It was never the pleaded case of the applicant that the police were complicit with the family of the deceased to claim the insurance benefits flowing from the death of the deceased. This Court in *Minister of Safety and Security v Slabbert* (*Slabbert*)[22] with reference to pleadings stated that:

'The purpose of the pleadings is to define the issues for the other party and the court. A party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at the trial. It is equally not permissible for the trial court to have recourse to issues falling outside the pleadings when deciding a case.

There are, however, circumstances in which a party may be allowed to rely on an issue which was not covered by the pleadings. This occurs where the issue in question has been canvassed fully by both sides at the trial. In *South British Insurance Co Ltd v Unicorn Shipping Lines (Pty) Ltd*, this court said:

[22] *Minister of Safety and Security v Slabbert* [2009] ZASCA 163; [2010] 2 All SA 474 (SCA) paras 11-12.

"However, the absence of such an averment in the pleadings would not necessarily be fatal if the point was fully canvassed in evidence. This means fully canvassed by both sides in the sense that the Court was expected to pronounce upon it as an issue".' (Footnotes omitted.)

[56] This Court went further in *Slabbert* and held that it was 'not bound by pleadings if a particular issue was fully canvassed during the trial'.[23] Although the deceased's insurance policies were raised during the trial, the allegation that the police were complicit with his family in securing payment of the insurance benefits was not properly canvassed by both parties. During the cross-examination of the public prosecutor, Ms Haripersad, she was questioned only about her knowledge of the insurance policies held by the deceased and a letter sent to the insurance company directing it to pay a named beneficiary. It was also never put to any of the witnesses of the respondent that they were complicit with the family of the deceased regarding the death of the deceased and the policy benefits. The high court did not make any reference to this allegation of connivance save to fleetingly mention that Ms Haripersad 'did not recall seeing a letter to Sage Life Insurance but recalled that there were policies of the deceased'. The applicant cannot, only at this stage, rely on alleged grave injustice from alleged complicity of the police with the family when that was not its case, either in the pleadings or the evidence.

[57] Section 40(1)*(b)* of the CPA provides:

'A peace officer may without warrant arrest any person-
(a). . .
(b) Whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody.'

[23] Ibid para 22.

[58] Where an arrest without a warrant is admitted, the respondent bears the onus of establishing its lawfulness. The jurisdictional facts to prove the lawfulness of the arrest are thus:

(a) The arresting officer was a peace officer;

(b) The arresting officer entertained a suspicion;

(c) That the suspect to be arrested committed an offence referred to in Schedule 1; and

(d) The suspicion rested on reasonable grounds.

[59] It is common cause that the applicant in this case was arrested by a peace officer without a warrant. It is not in dispute that he was arrested for the alleged commission of the offence of murder, a Schedule 1 offence. The dispute is whether on the available facts, without corroborating expert and forensic evidence, the police officers could have formed a reasonable suspicion that the applicant was the person who murdered the deceased. The enquiry therefore turns on the information available to W/O Naidu when he effected the arrest.

[60] In *Biyela* [24] this Court said the following:

'The question whether a peace officer reasonably suspects a person of having committed an offence within the ambit of s 40(1)*(b)* is objectively justiciable. It must, at the outset, be emphasised that the suspicion need not be based on information that would subsequently be admissible in a court of law.

The standard of a reasonable suspicion is very low. The reasonable suspicion must be more than a hunch; it should not be an unparticularised suspicion. It must be based on specific and articulable

[24] *Biyela* paras 33-36 and 38.

facts or information. Whether the suspicion was reasonable, under the prevailing circumstances, is determined objectively.

What is required is that the arresting officer must form a reasonable suspicion that Schedule 1 offence has been committed based on credible and trustworthy information. Whether that information would later, in a court of law, be found to be an inadmissible is neither here nor there for the determination of whether the arresting officer at the time of arrest harboured a reasonable suspicion that the arrested person committed a Schedule 1 offence.

The arresting officer is not obliged to arrest based on reasonable suspicion because he or she has a discretion. The discretion to arrest must be exercised properly. Our legal system sets great store by the liberty of an individual and, therefore, the discretion must be exercised after taking all the prevailing circumstances into consideration.'

[61] The high court held, although the arresting officer on the scene was not an expert in strangulation, his suspicion that the deceased had not hanged himself was based on his observations at the scene. I agree that the absence of expert qualifications did not, in itself, prevent him from forming a reasonable suspicion. The question remains whether his observations, assessed together with the other information available to him, provided objectively reasonable grounds for that suspicion. It is also necessary to distinguish grounds for suspecting that the deceased had been murdered from grounds for suspecting that the applicant had committed the murder.

[62] The first judgment dealt fully with the circumstances surrounding the arrest of the applicant subsequent to the discovery of the body in the shower of the room rented by him. It correctly emphasises that the arresting officer's evidence must not be evaluated in isolation. I agree that W/O Naidu's evidence must be assessed together with all the relevant evidence concerning the information available to him

when he effected the arrest. There were differences between his account and that of W/O Seosunker. I differ, however, from the first judgment's assessment of their significance for the question whether W/O Naidu's suspicion rested on reasonable grounds.

[63] In my view, any criticism that may be levelled at the evidence of the two police officers relates to the period before the police officers entered the room rented by the applicant. That evidence had nothing to do with the suspicion formed later. Of relevance, and where the two officers corroborated each other, is the evidence that: W/O Seosunker saw the applicant leaving the room before he was accosted by W/O Naidu; a body was found hanging in the shower as explained in the first judgment; crucially, it was W/O Seosunker who first noted that the feet of the deceased did not touch the ledge and suspected that the deceased had been murdered. Upon this observation, he called W/O Naidu and discussed his suspicions. Warrant Officer Naidu formed his own suspicions on his own observations of the scene, and W/O Seosunker' s observations corroborated it. I can find no contradiction in their evidence about the assessment of the scene as well as the views they both later held.

[64] The evidence of the arresting officer, and corroborated by W/O Seosunker, is that the deceased was found suspended in the shower with no object on which he could have stood to hang himself. The knot was, in the opinion of the arresting officer, and corroborated by W/O Seosunker, not tight enough to have prevented the deceased from breathing. These observations led the arresting officer to suspect that the scene had been staged to conceal a murder.

[65] The first judgment emphasises that the applicant had given the room's keys to two other persons and was therefore not the only person with access to it. That was

relevant information which the arresting officer was required to consider. It did not, however, necessarily eliminate reasonable grounds for suspecting the applicant's involvement. The police were not required to establish his exclusive access to the room or to exclude every other possible perpetrator before arresting him. Equally, his failure to identify the whereabouts of the other keyholders could not substitute for positive grounds of suspicion. The question is whether his connection with the room, considered together with his conduct and the circumstances of the discovery, provided an objectively reasonable basis for suspecting that he had committed murder.

[66] In my view, those circumstances assessed cumulatively, provided reasonable grounds for the arresting officer's suspicion. The applicant had rented the room in which the deceased was found and was seen emerging from it. His connection with the scene therefore extended beyond mere presence in the building. The officer's observations of the position of the body and the knot led him to suspect that the apparent hanging concealed a murder. The applicant's distress and his conduct in drawing the police's attention to the body might be consistent with an innocent discovery but did not necessarily dispel the suspicion that he was the perpetrator. Nor did the condition of the body. Access by other persons remained a possible explanation requiring later further investigation. These considerations weakened the inference against the applicant, but did not, in my assessment, render it unreasonable at the comparatively low threshold applicable to suspicion under s 40(1*)*(*b*).

[67] The first judgment further holds the high court erred by taking into account the observations of three other police officers who were not the arresting officers. In my view, the high court was alive to the issue of who the arresting officer was. It said in its judgment: 'Warrant Officer Naidu arrested the plaintiff, it is mainly to him

that s 40(1)*(b)* applied'. The high court then dealt extensively with the testimony of W/O Naidu to establish why, upon arrest, he held a reasonable suspicion that the applicant had committed the murder. Warrant Officer Naidu inspected the scene himself and formed his own view on the position of the body and the tightness of the knot. An arresting officer is entitled to take into account what fellow officers at the scene observed, provided he forms his own suspicion on the whole of the information. The testimony of the remaining officers corroborated the suspicion W/O Naidu had upon arrest.

[68] The insistence that the police ought to have called the state pathologist to carry out a forensic investigation before deciding to arrest the applicant, would result in elevating the standard required by s 40(1)*(b)* of the CPA to one of certainty before arrest. The decision to arrest does not demand that the arresting officer should have evidence which would amount to proof of a case beyond a reasonable doubt. What is expected of the arresting officer, is merely to entertain a reasonable suspicion, resting on reasonable grounds, and based on facts available at the time, that the applicant committed a Schedule 1 offence. I am satisfied that, at the time of the arrest, the arresting officer had reasonable suspicion that the applicant had murdered the deceased.

[69] It is common cause that when the applicant was arrested, the post-mortems on the body of the deceased had not been performed. Dr Kirk performed a post-mortem a day after the arrest of the applicant but before his first appearance in court. Another pathologist, Dr Perumal was commissioned by the family, also conducted a postmortem on the body of the deceased.

[70] During the trial, Dr Kirk was asked to comment on Dr Perumal's assertion that the death was likely homicidal. To this, Dr Kirk testified as follows:

'What I disagreed with was any assertion that this was more likely a homicidal, a case of homicide rather than suicide. It's not something that as a forensic pathologist we are required to normally form an opinion on, but there's nothing in the findings of my examination in this report that would make me suspicious about the case not fitting into a suicidal hanging.'

He went on to say:

'… Yes, I would still say that it's based purely on postmortem findings one can never dogmatically say this was a homicide or a suicide, you require other parts of the investigation. That's why it's for either the Inquest Court or Criminal Trial Court to make that determination, but there are no findings from the postmortem that would not be consistent with the findings in a typical suicidal hanging.'

While he held the view that this case was more likely a suicide, he also conceded that murder could not be excluded. In this regard, he said:

'No, I think, as I would express it, that the findings at postmortem would be consistent with those found in a suicide hanging, but I cannot exclude completely the possibility of a homicidal strangulation disguised as a, a homicidal ligature strangulation [indistinct] disguised as a hanging.'

[71] Dr Kirk's evidence must be considered in its proper temporal context. His examination was conducted after the arrest, and his subsequent findings could not retrospectively determine whether the suspicion entertained by the arresting officer was reasonable on the information then available. The lawfulness of the arrest must be assessed on that information. Dr Kirk's findings of consistency with suicidal hanging was relevant to the assessment of the case as the investigation progressed and, in particular, to the justification of the applicant's continued detention. I consider that question separately below.

[72] Before dealing with the detention of the applicant after the arrest, it is necessary to deal with the issue raised by the first judgment insofar as it pertains to the discretion to be exercised by the arresting officer upon arrest. It holds that the high court, in considering whether there was a reasonable suspicion to arrest, dealt with an issue never raised during the trial, namely whether there were any other means of securing the applicant's attendance at court. Section 38 of the CPA[25] sets out the methods of securing the attendance of an adult accused before court for the purposes of trial: arrest, summons, written notice and an indictment.

[73] Once the jurisdictional facts under s 40(1)*(b)* are present, a discretion whether to arrest arises. The arresting officer is not obliged to arrest. The officer must collate the facts, exercise the discretion on those facts, and be able to justify its exercise. The discretion must be exercised in good faith, rationally and not arbitrarily. The standard is not breached because an officer exercises the discretion in a manner other than the one a court regards as optimal. The discretion is not a further jurisdictional fact which the Minister must prove. A party who alleges the arresting officer failed to exercise the discretion, or exercised it improperly, must plead the allegation and bears the onus of proving it. To the extent *Louw and Another v Minister of Safety and Security and Others*[26] held an arresting officer must exhaust less invasive means before arresting, it did not survive the decision of this Court in *Sekhoto*.[27]

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[25] Section 38 provides:
'**38 Methods of securing attendance of accused in court**
(1) Subject to section 4 (2) of the Child Justice Act, 2008 (Act 75 of 2008), the methods of securing the attendance of an accused who is eighteen years or older in court for the purposes of his or her trial shall be arrest, summons, written notice and indictment in accordance with the relevant provisions of this Act.
(2) The methods of securing the attendance of an accused who is under the age of eighteen years at a preliminary inquiry or child justice court are those contemplated in section 17 of the Child Justice Act, 2008.'
[26] *Louw and Another v Minister of Safety and Security and Others* 2006 (2) SACR 178 (T) 187 C-E.
[27] *Sekhoto* paras 10-11. (supra)

[74] This Court, citing the Constitutional Court, recently held as follows in *Chetane v The Minister of Police and Another*[28]*:*

'In *Groves NO v Minister of Police and Another*, 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 section 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.' (Footnotes omitted.)

[75] The distinction is between requiring the arresting officer to exhaust alternative means of securing attendance and considering whether the decision to arrest was rational. The former is not an additional jurisdictional requirement under s 40(1)*(b)*. The latter concerns the exercise of the discretion arising once the jurisdictional requirements have been satisfied. The high court's consideration of the rationality of the arrest did not, merely because it referred to alternative methods of securing attendance, establish that it had imposed an additional jurisdictional requirement. Whether an improper exercise of the discretion was an issue requiring determination depended on the pleadings and on what was fully canvassed at trial. The nature and purpose of that discretion was explained in *Sekhoto*[29] as follows:

'While the purpose of arrest is to bring the suspect to trial the arrestor has a limited role in that process. He or she is not called upon to determine whether the suspect ought to be detained pending a trial. That is the role of the court (or in some cases a senior officer). The purpose of the arrest is no more than to bring the suspect before the court (or the senior officer) so as to enable that role to be performed. It seems to me to follow that the enquiry to be made by the peace officer is not how best to bring the suspect to trial: the enquiry is only whether the case is one in which that decision ought properly to be made by a court (or the senior officer). Whether his decision on that

[28] *Chetane v Minister of Police and Another* (482/2025) [2026] ZASCA 110 (21 August 2026) para 39.
[29] *Sekhoto* para 44.

question is rational naturally depends upon the particular facts but it is clear that in cases of serious crime- and those listed in schedule 1 are serious, not only because the Legislature thought so – a peace officer could seldom be criticized for arresting a suspect for that purpose. On the other hand there will be cases, particularly where the suspected offence is relatively trivial, where the circumstances are such that it would clearly be irrational to arrest. This case does not call for consideration of what those various circumstances might be. It is sufficient to say that the mere nature of the offences of which the respondents were suspected in this case – which ordinarily attract sentences of imprisonment and are capable of attracting sentences of imprisonment for 15 years – clearly justified their arrest for the purpose of enabling a court to exercise its discretion as to whether they should be detained or released and if so on what conditions, pending their trial.'

[76] I turn to the applicant's continued detention. The first judgment concludes that the respondent is liable for the entire period, including the detention following the applicant's first appearance in court. That liability requires consideration distinct from the lawfulness of the arrest. An unlawful arrest may factually and legally cause detention after a court appearance, but liability for further detention does not follow automatically from the unlawfulness of the arrest. Conversely, a lawful arrest does not preclude liability where subsequent wrongful and culpable police conduct causes further detention. Having concluded that the arrest was lawful, it remains necessary to consider whether the police nevertheless wrongfully caused or prolonged the applicant's detention. The intervention of the prosecutor and the court is relevant to that enquiry, but does not, without more, exclude the respondent's liability.[30]

[77] The applicant appeared in court on 8 July 2002. Upon his appearance, the State, represented by Ms Haripersad, had in its docket, inter alia, the statements of the two police officers who chased the applicant into Evaleigh Court, the witness

[30] *De Klerk v Minister of Police* [2019] ZACC 32; 2021 (4) SA 585 (CC) (*De Klerk*) paras 60-63 and 74-75; *Woji v Minister of Police* [2014] ZASCA 108; 2015 (1) SACR 409 (SCA) (*Woji*) paras 28-32.

statement of Mr Milton Dlungele (Mr Dlungele), a security guard at Evaleigh who stated that the applicant had rented room 7 and he had seen him entering and leaving the said room on three occasions on the day the deceased was found hanging in the room. Mr Dlungele stated that he saw the applicant at 10h30, 12h30 and 16h30. There were also the postmortem reports of the pathologists, Drs Kirk and Perumal. Dr Kirk is in the employment of the State while Dr Perumal was commissioned by the family to conduct an independent investigation into the cause of death of the deceased.

[78] Ms Haripersad held the view that there was a *prima facie* case against the applicant hence she independently decided to enrol the matter for the applicant to appear before court. She was not influenced by the police in taking the decision to prosecute the applicant. The National Prosecuting Authorities' decision to prosecute the applicant is not challenged. It was this decision that had a significant bearing on subsequent detention of the applicant.

[79] The medical evidence did not conclusively determine whether the deceased had committed suicide or had been murdered. Dr Kirk's findings were consistent with suicidal hanging and therefore weighed against the inference of homicide. They did not, however, require the other evidence to be disregarded. The prosecution also had the police statements concerning the scene and Mr Dlungele's statement that the applicant had rented the room and had been seen entering and leaving it on three occasions that day. As the investigation progressed, Dr Perumal's contrary opinion also became relevant. In my view, the medical uncertainty did not extinguish the significance of the evidence connecting the applicant with the room. Considered together, that material provided a basis for the prosecution to continue investigating the applicant's possible involvement, notwithstanding the absence of a conclusive

medical finding of homicide. In any event, no case of malicious prosecution was pleaded.

[80] Ms Haripersad considered it necessary to verify the applicant's personal particulars and residential address before the bail proceedings commenced. Those matters were relevant to assessing whether he would stand trial and whether appropriate conditions could secure his attendance. Section 50(6)*(d)* of the CPA permits a court to postpone bail proceedings to obtain information necessary for their determination, subject to the requirements of that provision and a limit of seven days at a time. The request for a postponement therefore served a recognised purpose. Although the applicant's nationality did not itself establish a risk of absconding, the need to verify information relevant to bail was a legitimate consideration. Ms Haripersad testified that she independently considered the postponement necessary, notwithstanding that the police had requested further time to obtain that information.

[81] During her testimony, Ms Haripersad referred to W/O Swindon's docket entry of 8 August 2002, recording Dr Perumal's opinion that the apparent hanging was likely to conceal a murder. That opinion supported the continuation of the investigation, notwithstanding Dr Kirk's findings. The State subsequently opposed bail on grounds which included the applicant's circumstances and the perceived risk that he would not stand trial. It relied on his financial dependence on his wife and the absence of children or other relatives in South Africa. Those considerations had to be assessed together with his marriage to a South African woman and the other evidence relevant to his ties to this country. The court ultimately refused bail. The significance of that decision for the respondent's liability must be considered in light of the information placed before the court and the principles governing causation.

[82] In *De Klerk v Minister of Police*,[31] the Constitutional Court held the police liable for detention following an unlawful arrest, including the period after the applicant's first appearance. The arresting officer had actually foreseen that the applicant would be routinely remanded without consideration of bail. The Court held that liability for the subsequent detention depended on factual and legal causation, and that a remand order did not necessarily break the causal chain. Even a proper exercise of judicial discretion would not invariably do so; the enquiry remained sensitive to the particular facts. The present matter differs because, for the reasons already given, I consider the arrest lawful. The subsequent detention cannot therefore be attributed to an unlawful arrest. That distinction does not end the enquiry but directs attention to whether subsequent wrongful police conduct caused or prolonged the detention.

[83] In *Woji v Minister of Police (Woji)*,[32] the investigating officer inaccurately represented that video footage clearly identified the accused participating in the commission of the offence. That evidence materially influenced the refusal of bail. The court held that the officer had wrongfully and negligently failed to present the evidence accurately, and considered what the magistrate probably would have donehad the true position been disclosed. The respondent was consequently liable for the resulting detention. In *JF Mahlangu and Another v Minister of Police (Mahlangu)*,[33] the police concealed that a confession had been obtained through assault and torture, allowing the prosecution and detention to continue on a materially false basis. The Constitutional Court emphasised that the duty of the police to disclose material information to the prosecutor persists for as long as the

[31] Ibid paras 60-63 and 74-81.
[32] *Woji* paras 28-32.
[33] *Mahlangu* paras 33-37.

information remains relevant to detention. These decisions require an examination of the accuracy and completeness of the police information and its effect on continued detention.

[84] *Woji* and *Mahlangu* are distinguishable from the facts of the case before us. After the procurement of the two postmortems, murder could not be excluded and the court ordered the further detention of the applicant. To conclude on this aspect, in his testimony during the bail application, W/O Swindon testified as follows:
'It's doubtful with regard to exactly how deceased had died because there's a difference of opinion from two experts, but they arrive at a primary cause which would be strangulation. Is that correct – Your Worship, I can answer, 'yes' to that'. There is no evidence that the police misled or deliberately gave incorrect information to the prosecution and the court in order to ensure that the applicant remained in custody. In fact, the conduct of the investigating officer demonstrated his bona fides in that, during the bail application, he alluded to the contradictions in the postmortems of the pathologists.

[85] Considered together, these circumstances do not, in my assessment, establish any police conduct which wrongfully contributed to the applicant's post-appearance detention. Ms Haripersad explained the evidential basis upon which she proceeded and the need to obtain information relevant to bail. Warrant Officer Swindon acknowledged the uncertainty concerning the manner of death. The medical findings did not conclusively resolve that question, and the prosecution also had evidence connecting the applicant with the room where the deceases was found. *Woji* and *Mahlangu* are distinguishable in that misleading information was placed before the court by the police which caused the further detention of the applicants in those cases. Here, the evidence considered above does not establish a culpable

misstatement or omission by the police which materially influenced the decisions to detain the applicant. Nor does the eventual withdrawal of the charge retrospectively establish such misconduct. I accordingly find no basis on that evidence to hold the respondent liable for the applicant's detention after his first appearance.

[86] The application must accordingly fail as I find that the applicant has failed to establish any grave injustice or the administration of justice being brought into disrepute if leave to appeal is not reconsidered. This Court thus lacks the jurisdiction to reconsider the two judges order refusing leave to appeal. Even on the assumption that a more stringent test was applicable as found by the first judgment, the applicant has failed to reach that threshold.

[87] I feel that I must express my consternation about the delay in the finalisation of this case. This incident happened on 3 July 2002, about 24 years ago. It appears that the summons was issued around October 2003. The trial in this case only commenced on 19 October 2020, about eighteen years later for reasons which are not clear from the record. This delay is in inordinate and unacceptable, and apart from being prejudicial to the litigants, it undermines public confidence in the justice system. It also infringes on the right to a hearing within a reasonable time. Prejudice may manifest itself in memory loss which would affect the rights of the parties to justice. It is unacceptable that the legal representatives on both sides would not use the mechanism in the rules to ensure the speedy finalisation of cases. With this said, reading the record, I did not get any impression that any of the litigants felt prejudiced by the delay. It would seem that by luck, all the relevant witnesses were still available to testify. Delays like these must be discouraged and frowned upon. There is no reason why costs should not follow the result.

[88] I make the following order:

The application for reconsideration is struck off the roll with costs which includes the costs of two counsel where so employed.

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P E MOLITSOANE

ACTING JUDGE OF APPEAL

Appearances:

For the appellant:	T N Aboobaker SC
Instructed by:	Abdul Shaikjee Attorneys Inc., Durban
	Honey Attorneys, Bloemfontein
For the respondent:	K Shazi
Instructed by:	State Attorney, Durban
	State Attorney, Bloemfontein.