



**IN THE HIGH COURT OF SOUTH AFRICA  
EASTERN CAPE DIVISION, MTHATHA**

Case No: 5369/2017

In the matter between:

**LUBABALO SIPHUNGU**

Plaintiff

and

**MINISTER OF POLICE**

First defendant

**NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS**

Second defendant

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**JUDGMENT**

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**CHITHI AJ**

Introduction

[1] This is an action for unlawful arrest, detention and malicious prosecution which has been instituted against the Minister of Police and National Director of Public Prosecutions as the first

and second defendants respectively for the actions which were taken by their members acting within the course and scope of their employment with the defendants. The plaintiff's action therefore comprises two claims. The alleged unlawful arrest occurred on 31 May 2015 at Nqgwala Locality in Viedgesville, Mthatha. Pursuant to his arrest the Plaintiff was detained at Bityi police holding cells and thereafter at Mthatha Correctional Centre until he was released on bail on the 18 June 2017. The Plaintiff claims damages in the sum of R 500 000.00 in respect of the first claim for unlawful arrest and detention and R 150 000.00. in respect of the second claim for malicious prosecution.

[2] The issue of liability and quantum were not separated in terms of rule 33(4) of the Uniform Rules of Court ("the Rules"). So, the case is to be decided on both the issue of liability and quantum. As a matter of law, the *onus* in respect of the unlawful arrest and detention is on the defendants whereas the *onus* of proof in relation to the claim of malicious prosecution is on the plaintiff.

[3] Before proceeding further, I should mention that although this matter was defended when the matter was called after 09:30 there was no appearance for the defendants. Counsel for the plaintiff however advised the court that the defendants' counsel was in East London and had requested for the matter to be rolled until the next morning Tuesday 18 October 2022. The court outrightly rejected the request by the defendants' counsel since the matter was adjourned on the previous occasion by agreement between the plaintiff and defendants' counsel for trial to the 17 October 2022.

[4] Notwithstanding the court's outright rejection of the request to roll the case until the next morning, the plaintiff's counsel still required an opportunity to take instructions both from his correspondent attorneys and his client on the request for the matter to be rolled over until Tuesday 18 October 2022. The plaintiff's counsel was requested to convey the court's sentiments to the defendants' counsel. The matter then stood down until 11:30. When the matter was recalled at 11:30 counsel for the plaintiff reported that the defendants' counsel indicated that he thought that the court would be amenable if the matter was rolled until the next day 18 October 2022. Moreover, he reported that his correspondent attorneys as well as his client were not amenable to the postponement of the matter until the next day in that the matter was crowded out on 19 January 2022 and had to be postponed for trial to 23 May 2022. On 23 May 2022 the matter was postponed by agreement between the parties to 17 October 2022 for trial which postponement was at the request of the defendant. For these reasons both his correspondent attorneys as well as his client were not amenable to the postponement of the matter any further.

[5] The court then requested counsel for the plaintiff to get hold of the state attorney responsible for the matter and request her to be at court by no later than 12:50. The matter stood down until then. When the matter was recalled at 12:50 counsel for the plaintiff reported that he only managed to speak to the defendant's counsel and not to the state attorney responsible for the matter but he was assured by the defendants' counsel that the defendants' counsel had spoken to the state attorney responsible for the matter and conveyed the court's request. However, the defendants' counsel did not indicate whether the state attorney responsible for the matter would come to court. The matter then proceeded on an undefended basis. I will deal this issue later in the judgment.

### The issues

- [6] The court was called upon to determine broadly the following issues:
- 6.1 whether the arrest of the plaintiff on 31 May 2015 and his subsequent detention from then until he was released on bail on 18 June 2015 was wrongful and unlawful.
  - 6.2 whether the plaintiff's prosecution was malicious.
  - 6.3 In the event of the court finding that the plaintiff's arrest and detention was wrongful and unlawful and the plaintiff's prosecution malicious to determine what the reasonable damages which the plaintiff suffered as a result thereof.

### Common cause facts

- [7] The following were common cause facts between the plaintiff and the defendants:
- 7.1 The plaintiff was arrested at his home at Nqgwala Locality in Viedgesville on 31 May 2015 without a warrant of arrest.
  - 7.2 The plaintiff first appeared in court on 03 June 2015.
  - 7.3 The plaintiff was remanded in custody via a closed-circuit television by the presiding judicial officer until 18 June 2015.
  - 7.4 During the plaintiff's first appearance the question of bail was never entertained.
  - 7.5 The arresting officer and the investigating officer were not present in court during the plaintiff's first appearance on 03 June 2015.
  - 7.6 The plaintiff was released on bail on 18 June 2015.
  - 7.7 The plaintiff was prosecuted.
  - 7.8 The prosecution terminated in the plaintiff's favour on 24 June 2016.

- [8] The plaintiff's bundle of documents comprising the arresting statement by Constable Nketshe, witness statement by Sibusisiwe Mphethukana, the Plaintiff's arresting statement and the statement by the rape complainant was handed up and marked as exhibit 'A.'

### The plaintiff's evidence

- [9] In an effort to prove the case the plaintiff, Lubabalo Siphungu who was a sole witness to testify for the plaintiff testified that he was 45 years of age having been born on 8 August 1978. If the Plaintiff was born in 1978 as he said he was 44 years of age and not 45 years. He stays at

Nqgwala Locality in Viedgesville in the district of Mthatha. He is separated from his wife since 2012. They have two children who are twenty-one years and nine years respectively. These two children are in the care of their mother. He is however liable for their maintenance which he pays on a monthly basis in the sum of R 1 500.00. He is self employed as a spaza shop owner and made an average amount of R 5 000.00 a month. He operated the spaza in question in May 2015. However, following upon his arrest the spaza shop collapsed and closed. He has a standard nine level of education which he passed in 2006 before he dropped off at school. It was never made clear during the evidence of the plaintiff whether he ever stopped school and then went back to have been doing standard 9 when he was 28 years. He is a member of the Anglican Church and holds a position of a church warden.

[10] On 31 May 2015, he was arrested by the members of the South African Police Service ('the SAPS') while at his home in Nqgwala locality in Viedgesville. He was arrested round about 06:00 in the morning. At the time of his arrest, he was together with Busisiwe Mphethukana whose full name later came to be known to the Court as Sibusisiwe. When the police arrived at his home they knocked and he opened. They thereafter enquired if he was Lubabalo to which enquiry his answer was in the affirmative. The police asked him to dress up and told him that he was being arrested in relation to the allegations of rape against him. They told him that the complainant was Matozana Bhonxa. The police then took him and loaded him into the back of a police van. They then turned the corner into the neighbour's house. They called the complainant and asked complainant if the plaintiff was the person who perpetrated the rape on her. The complainant's answer was in the affirmative. They then started the motor vehicle and took him to Bityi Police Station where he was detained in the police cells.

[11] There were four policemen who came to arrest him. Of the four policemen he only knew constable Nketshe and one Sandile Kobo. Between the two police officers he was arrested by Constable Nketshe. When the police told him that they were placing him under arrest he told them in no uncertain terms that he was not present at the locality when the alleged rape incident occurred on Friday 29 May 2015, as he spent time together with his girlfriend Sibusisiwe Mphethukana at his girlfriend's place at Fortgale. At Fortgale not only was he in the company of his girlfriend present was also Bubele Mphethukana who is the brother to his girlfriend. When he tendered this explanation, the police were not prepared to listen to him whatsoever.

[12] When he was lodged into the police cells, he found seven other inmates. This cell was approximately five meters by four meters in extent and it was filthy. The ablution facility to the cells were dirty with the toilet seat dirty and dark, the walls to the cells were also dirty. There was completely no privacy in the cells. They dined in the same cell with ablution facilities which had a half built a wall. When they had to relieve themselves, they had to go behind this half-built wall and sit on the toilet seat and hide behind the half-built wall. The ablution facility was structured more like a witness box. When each inmate had to relieve himself, he did not do so in the private, the other inmates were there. The food was put through the burglar bars. The blankets which were offered to the inmates were dirty. The mattresses were small, thin, and hard to sleep on. He found those circumstances to have been humiliating, dehumanising and hurt his feelings. He spent about three days in the cells having been detained there from Sunday, Monday, and Tuesday when he went to court on Wednesday whereafter he was transferred to Mthatha Correctional Centre. In the holding cells of the courthouse where he was kept on

Wednesday before and after his appearance and before he was taken to Mthatha Correctional Centre, the conditions were no different to those of the police holding cells in Bityi.

[13] When he appeared before court, he was not granted bail and instead his matter was postponed for a period of seven days. After the matter was postponed at court, he was then taken to Mthatha Correctional Centre where he was lodged in a cell that had more than seventy inmates. The extent of the cell was fifteen meters by ten meters. The conditions in Mthatha Correctional Centre were no better than the conditions in the holding cells in the courthouse and at Bityi holding cells. The plaintiff, in fact, said in isiXhosa '*yayingumgubo wengxowa enye*' which when loosely translated into English means it was the mielie-mielie of the same bag. He stated that his experience at Mthatha Correctional Centre was very bad, especially on the first day. There was a man who flirted with, and courted, him. In the morning when he went for breakfast, he asked from the warden to be changed from that cell which request was acceded to.

[14] He felt dehumanised and humiliated by the conditions under which he was detained at Mthatha Correctional Centre, and this made him feel very hurt. He was released on bail on 18 June 2015. During his detention eight of his sheep were stolen. His spaza shop collapsed and closed since one of his bail conditions was that he was not permitted to visit Nqgwala Locality in Viedgesville. His spaza shop collapsed because he was the only person in his homestead to have been responsible to run it, he had no siblings. His mother had passed on in 2009 and his mother was not married to his father.

[15] The charges were withdrawn against him on the 24 June 2016. He stated that he was of the view that the prosecution had no probable cause for the prosecution because first of all the police did not listen to him at the time, he told them that he was not there on the day the complainant was allegedly raped. In addition, they did not listen to his girlfriend Sibusisiwe when she told them that he was not at Nqgwala locality when the rape was perpetrated on the complainant. In the circumstances, he was not supposed to have been prosecuted. The police did not investigate the matter and did not go to the tavern in which he was on the day in question. He testified that the chances of him having had to be successfully prosecuted if the matter would have gone to trial were almost non-existent. He said there were two reasons why the chances of him being successfully prosecuted were non-existent and they were that (a) he was not at scene when the offence was allegedly committed but he was together with his girlfriend at Fortgale; (b) the DNA results excluded him as the donor of the DNA. He felt very aggrieved by the fact that the bail conditions prevented him from visiting Nqgwala locality. As a result of that, he had to live with his girlfriend in Fortgale. These bail conditions meant that he never got an opportunity to look for his stolen sheep. He confirmed that he was claiming damages in the sum of R 500 000.00 for unlawful arrest and detention and R 150 000.00 for malicious prosecution.

[16] Now reverting to the issue of the defendants' legal representation at the trial. In the middle of the court's clarification questions, a lady entered the courtroom. After I finished asking the questions, I enquired from the plaintiff's counsel whether the lady who entered the courtroom was not the state attorney responsible for the matter and he confirmed that she was. I then requested to come to the front. Before I said anything she profusely apologised to the court that she was unable to come to court at the time which was appointed by the court and for the



attire that she was wearing. She confirmed that counsel was on brief in the matter. When the court enquired what did she want to do since the witness had just completed testifying, she said she would not be able to cross-examine that witness as the person who was always seized with the matter was her counsel.

[17] She was therefore urged to ensure that she prepares heads of argument in relation to the matter as the court was prepared to hear her and not close the door. The court was of the view that it would allow the defendants' attorney to cross-examine the witness based on the pleadings. The matter was adjourned to Tuesday, 18 October 2022.

[18] When the matter resumed on Tuesday, 18 October 2022 both counsel and the attorney for the defendant presented themselves. After tendering an apology to the court and everyone else involved I asked them what did they intend to do with the matter. I proffered two options to them. The first option was whether they choose to obtain a transcript in view of the fact that they were not present when the evidence of the plaintiff was tendered and seek for the adjournment of the matter. The second option was whether they were prepared to proceed with the matter based on the pleadings. Counsel for the defendants chose to proceed with the matter based on the pleadings. Before recalling the plaintiff for the purposes of being cross-examined by the defendants' counsel I summarised the evidence which the plaintiff tendered. The plaintiff was then recalled to be crossed examined by the defendants' counsel. Under cross-examination nothing eventful emerged.

[19] The plaintiff confirmed that he knew Sandile Kobo because he came from the locality behind his and constable Nketshe always accompanied him. When these police officers told him that they were arresting him he kept quiet and never said anything and it was his girlfriend who said that he was not there on the day of the alleged rape. When Sandile Kobo emerged, he exclaimed 'is this you Luba?' He knew Matozana Bhonxa as she was his neighbour. He grew up in front of her in that locality. When he was confronted about why he did not say in his statement he left Nqgwala locality on Thursday 28 May 2022, he stated that he gave the answer in his warning statement according to the questions which were put to him by constable Sikhonyane. He was asked if his girlfriend said he went back to Nqgwala locality on 29 May 2015 at 12:00 what would he say and he answered by saying that his girlfriend would be making a mistake. He said the reason his girlfriend would be making a mistake is that part of the reason why he went there was to release his sheep to go to the veld and it would have been unusual for him to have released them at 12:00 midday. The plaintiff then closed his case.

#### Defendants' evidence

[20] In an effort to justify the arrest and to disprove the claim for malicious prosecution the defendants called one witness namely constable Sipiwo Nketshe. He testified that he was a constable stationed at Bityi Police Station. He joined the SAPS in 2012. Before that he worked for the Department of Public Works as a general worker. He also having previously worked for Coca-Cola in Johannesburg. He had a standard 10-level of education. He received in-house training with the SAPS in domestic violence and vulnerable children in 2015. He confirmed that on 31 May 2015 he arrested the plaintiff. He and constable Kobo were on duty. Those duties included patrols and attendance to complaints. They received the complaint that at Nqgwala

locality in Viedgesville there was a complaint wherein a complainant who was allegedly raped saw the person who had raped her. They went to the complainant and the complainant told them that the person who raped her was the plaintiff and she showed them where the plaintiff resides. The complainant's home was about 100 meters from the plaintiff's home. When they went to arrest the plaintiff, they left the complainant about 20 meters away from the plaintiff's home as they were doing this out of caution as they did not know what might confront them when they got to the plaintiff's home. When they got to the plaintiff's home, they found him together with his girlfriend. They introduced themselves as the police and told him that he was accused of raping the complainant. They further asked the plaintiff to accompany them to the complainant. The plaintiff had no difficulties with that. They then put him in the back of the police van and took him to the complainant and the complainant confirmed that the plaintiff was the person who raped her. They then placed the plaintiff under arrest and informed him of his rights. They took him to Bityi Police Station where he was detained in the holding cells. He then signed all the relevant police documents and left the police station. When they were about to arrest the plaintiff, the plaintiff told them that he was not there on the day of the alleged incident he was somewhere in town in Mthatha with his girlfriend. When the girlfriend wanted to say something to them about her boyfriend, they did not give her a chance because they were not there to visit her. If they did not arrest the plaintiff, he thinks that he would have killed the complainant and he would have fled. He indicated that he arrested the plaintiff without a warrant of arrest because the victim pointed at the plaintiff.

[21] He testified that he made no attempts to establish the *alibi* of the plaintiff as this was not his function. He was only there as the result of the complaint of the complainant who said she

had been raped by the plaintiff. Under cross-examination, he confirmed that in May 2015 he was a constable of 3½ years. When he went to arrest the plaintiff, he did not have the docket in his possession. He further confirmed that he never had sight of the docket prior to arresting the plaintiff. He denied that he had no information whatsoever about the complaint. He indicated that when he received the complaint he asked from his colleagues about the offence, and it transpired that this offence was reported.

[22] He denied that he personally had no information and relied on the information from his colleagues. He asserted that the complaint was captured on their computer system when the docket was opened. The particulars of the complainant were captured there. The comments of what happened in the docket were captured. He, however, later conceded that personally, he did not have information at hand he relied on the information he gleaned from his colleagues. He confirmed that the plaintiff had told them that he was not at home at the time when the alleged rape was perpetrated on the complainant. He further confirmed that the plaintiff's girlfriend reiterated that version. Furthermore, he confirmed that he did not investigate that information and did not follow up on the accuracy of the information from the plaintiff's girlfriend as it was not his function to do so. In relation to the question whether he personally formulated any suspicion against the plaintiff he reacted by asking a rhetorical question 'suspect what?' He confirmed having acted solely on the information that he was given by the complainant. Moreover, he confirmed that he was not privy to the details of the alleged crime. He formulated no suspicion that the plaintiff committed the offence because he did not even know the plaintiff. He did not deny that the plaintiff was arrested on 31 May 2015 and only appeared before court for the first time on 03 June 2015. He was confronted about the fact that there is nothing in his

statement which talks about him having phoned the complainant to which question he said he did not write the statement word for word. He just summarised what he wanted to write in the statement. He was further confronted about the fact that nowhere in his statement did he talk about the verification of the information from his colleagues. To that he answered that if wrote everything in his statement that would have been tantamount to him writing the whole bible, his statement would have been very long. He was confronted about what is set out in paragraph 3 of his statement that he arrested the plaintiff at his residence as opposed to him having arrested the plaintiff upon the plaintiff being pointed out by the complainant. He conceded to have arrested the plaintiff at his residence. He was confronted about his entire version of events not having been put to the plaintiff and he indicated that he will not know the reasons as he was not there. This concluded the defendants' case.

The defendants' version as set out in the plea

[23] The first defendant denied that the plaintiff's arrest and detention was wrongful and unlawful. It contended that such an arrest and detention was lawful as it pertained to the crime of rape committed by the plaintiff on one Matozana Bhonxa. It is not clear from the first defendant's plea whether the plaintiff was allegedly arrested on the basis of section 40(1)(b) of the Criminal Procedures Act 51 of 1977 ('the CPA') as the first defendant does not specify in the plea whether he relies on this provision for his justification of the plaintiff's arrest. I will assume that reliance is placed on this section.

[24] The second defendant in relation to the claim for malicious prosecution contended that the second defendant had a reasonable and probable cause for prosecuting the plaintiff in that

upon receiving the docket and examining the evidence which was in the docket the plaintiff was indicted of the offence of rape.

#### Applicable law

[25] The jurisdictional facts which must be established for an arrest without a warrant to be justified under section 40(1)(b) of the CPA are the following:

- 25.1 The arrester must be a peace officer;
- 25.2 The arrester must entertain a suspicion;
- 25.3 The suspicion must be that the suspect committed an offence referred to in Schedule 1 of the CPA;
- 25.4 The suspicion must rest on reasonable grounds.

[26] Once these jurisdictional facts are present the discretion whether to arrest arises.<sup>1</sup> In view of the fact that the first defendant has admitted the arrest and detention of the plaintiff, the *onus* of proving the lawfulness thereof rested on the first defendant.<sup>2</sup> The circumstances giving rise to the suspicion must be such as would ordinarily move a reasonable man to form the suspicion that the arrestee has committed a Schedule 1 offence. The question of the reasonableness of the suspicion has to be approached objectively.<sup>3</sup> Apart from the fact that there is nowhere in the first defendant's plea where it is alleged that at the time when constable Nketshe arrested the plaintiff, he had a reasonable suspicion that the plaintiff had committed a Schedule 1 offence quite surprisingly he also did not say this during his testimony.

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<sup>1</sup> *Duncan v Minister of Law & Order* 1986 (2) SA 805 (A) at 818 G-H; *Minister of Safety & Security v Sekhoto & Another* 2011(1) SACR 315 (SCA) paras [6] and [28].

<sup>2</sup> *Mhaga v Minister of Safety & Security* [2001] 2 All SA 534 (Tk) at 5371 - J.

<sup>3</sup> *Minister of Safety & Security & Another v Swart* 2012(2) SACR 226 (SCA) para [20].

[27] When considering the question of whether the suspicion is reasonable one cannot do so without having to refer to the *dictum* by Jones J in the case of *Mabona & Another v Minister of Law & Order & Others*<sup>4</sup> where the following was stated:

‘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, i.e., 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.’ (My added emphasis.)

[28] During cross-examination constable Nketshe conceded that at the time he went to arrest the plaintiff he was not in possession of the docket and has in fact never had sight of the docket. He personally did not have any information at hand before the arrest of the plaintiff he relied on the information he had received from his colleagues. When he was asked whether personally did, he formulate any suspicion he responded by asking a rhetorical question ‘suspect what.’ What was decisive in relation to this case was constable Nketshe’s answer when he was asked because he was not privy to the details of the alleged crime therefore, he formulated no suspicion that the plaintiff committed the offence against the complainant. To that question, he answered that because he did not even know the plaintiff so he would not have formulated any suspicion. So, the arrest of the plaintiff in this case was clearly not on the strength of any suspicion by constable Nketshe.

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<sup>4</sup>1988 (2) SA 654 (SE) at 655E - H.

[29] One of the other difficulties for the first defendant is that there is nowhere in the plea where the first defendant alleges that the police were entitled to arrest the plaintiff as he was reasonably suspected of having committed an offence of rape which is an offence listed in Schedule 1 of the CPA and therefore arrested the plaintiff in terms of the provisions of section 40(1)(b). Even if I assume in the first defendant's favour that what is set out in paragraph 4 of the first defendant's plea wherein the first defendant denies that the plaintiff's arrest and detention was wrongful and unlawful and further goes on to contend that such arrest and detention was lawful as it pertained to the crime of rape committed by the plaintiff on Matozana Bhonxa to mean that the police reasonably suspected the plaintiff to have committed a Schedule 1 offence and therefore were entitled to have arrested the plaintiff based on the provisions of section 40(1)(b) of the CPA, this will not resolve the first defendant's difficulties. The reason being that constable Nketshe conceded that he personally formulated no suspicion against the plaintiff. What further compounds the first defendant's difficulties is that what emerges from the evidence of constable Nketshe is that he did not analyse and assess the quality of the information that was at his disposal critically.

[30] Constable Nketshe was confronted about whether he investigated the plaintiff's *alibi* and whether he investigated the plaintiff's exculpatory explanation that he was not at the scene on the night of the alleged incident, he retorted to this question by saying this was not his function. He was further confronted on whether he followed up on the accuracy of the information of the plaintiff's girlfriend, Sibusisiwe Mphethukana which was also an exculpatory explanation which was tendered on behalf of the plaintiff and he retorted that they did not give her a chance to speak because they were not there to visit her.



[31] In *Louw & Another v Minister of Safety & Security & Others & Another*<sup>5</sup>, the court stated that the investigating officer's failure to investigate the plaintiff's exculpatory explanation amounted to a dereliction of duty. This decision was followed in the case of *Liebenberg v Minister of Safety & Security*<sup>6</sup> where the court stated that:

'Police officers who purport to act in terms of section 40(1)(b) should investigate exculpatory explanations offered by a suspect before they can form a reasonable suspicion for the purposes of a lawful arrest.'

[32] When the issue of exculpatory explanation by an arrestee is considered it is well to remember what Harms DP (as he then was) stated in *Sekhoto*<sup>7</sup> where he stated:

'The four express jurisdictional facts for a defence based on s 40(1)(b) have been set out earlier, but, to repeat the salient wording: 'a peace officer may without warrant arrest any person whom he reasonably suspects of having committed an offence referred to in Schedule 1.' Schedule 1 offences are serious offences.

With all due respect to the different High Court judgments referred to, applying all the interpretational skills at my disposal and taking the words of Langa CJ in *Hyundai* seriously, I am unable to find anything in the provision which leads to the conclusion that there is, somewhere in the words, a hidden fifth jurisdictional fact. And because legislation overrides the common law, one cannot change the meaning of a statute by developing the common law.'

[33] In *Brits v Minister of Police & Another*<sup>8</sup> the Supreme Court of Appeal stated that there is an obligation on an arresting officer to take into account the information which is reasonably available to him and that the version of the arrestee should also be considered.

[34] It is now settled law that the failure to first investigate an exculpatory explanation proffered by a suspect does not *per se* and without more render an arrest in terms of section 40(1)(b) unlawful.<sup>9</sup>

<sup>5</sup> 2006(2) SACR 178 (T) at184E.

<sup>6</sup> (GNP) unreported case no 18352/07 of 18 June 2009 para [19.23].

<sup>7</sup> *Sekhoto* (note 1 above) paras [21- 2].

<sup>8</sup> (SCA) unreported case no 759/2020 of 23 November 2021.

<sup>9</sup> See: *Wani v Minister of Police & Another* (ECB) of 20 March 2018;

[35] As I have indicated before constable Nketshe was confronted for having failed to investigate the plaintiff's *alibi* and for having failed to follow up on the accuracy of the *alibi* from the plaintiff's girlfriend Sibusisiwe Mphethukana. In view of the paucity of the information that was at the disposal of constable Nketshe and within the context of what I said in the four preceding paragraphs I find that this was a case which called for constable Nketshe to first investigate the exculpatory explanation which was proffered by the plaintiff. In addition, he should have also considered the explanation which was proffered by the plaintiff's girlfriend Sibusisiwe Mphathukana. In this case constable Nketshe instead of considering the information which was reasonably available to him, he elected to completely ignore it. The reason which he proffered for completely ignoring the exculpatory explanation of the plaintiff and that of his girlfriend is twofold. In the first instance he states that it was not his function to establish the *alibi* of the plaintiff. He was at the scene as a result of the complaint of the complainant. It was going to be the function of the investigating officer to pursue the matter further. In the second instance he states that they did not give the plaintiff's girlfriend a chance to speak because they were not visiting her at the scene. This was clearly a dereliction of duty where constable Nketshe while he was the one effecting the arrest elected to defer the investigation of the exculpatory explanation which was proffered by the plaintiff and his girlfriend to the investigating officer. This is particularly so because the offence in question was perpetrated upon the complainant at night.

[36] When constable Nketshe was confronted about not personally having information and having only relied on the information from his colleagues as a basis to arrest the plaintiff, he

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*Noemdoe v Minister of Police* 2022 JDR 1307 (ECP) paras [33 - 6].

retorted by saying that he accessed the computer database in which the particulars of the case were captured. In addition, he asserted that he phoned the complainant and enquired from her telephonically what were the details of the case. This version which constable Nketshe sought to posit was never put the plaintiff. When constable Nketshe was further confronted about the fact that he never mentioned in his statement that he accessed the computer database of the SAPS which had the details of this complaint he could not offer any plausible explanation. He further could not offer any plausible explanation when confronted about not having mentioned in his statement that he verified the relevant information from his colleagues and telephonically enquired from the complainant about what the details of the case were.

[37] Mr Ngadlela counsel for the defendants he also adopted the same approach during his cross-examination of the plaintiff and confronted the plaintiff about the omissions which were in his warning statement which he made to the police. Mr Ngadlela confronted the plaintiff about why he never mentioned to the police that he was not Nqgwala locality from Thursday 28 May 2015 and as to why his girlfriend would have said that he left Fortgale at about 12:00 when he himself testified that he left Fortgale at about 07:00 in the morning to switch off electric lights and to tend to his livestock. It was these omissions that both Mr Vapi and Ngadlela urged me to consider in determining this matter.

[38] I invited both counsel to address me on the issue of omissions in statements in relation to what was stated in the case of *S v Mafaladiso & Others*<sup>10</sup> and *S v Bruiners en 'n Ander*.<sup>11</sup>

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<sup>10</sup> 2003(1) SACR 583 (SCA).

<sup>11</sup> 1998(2) SACR 432 (SE).

[39] Firstly, in considering the evidence relating to statements it is important for the court not to lose sight of the circumstances under which the statements were made. Secondly and most importantly the time factor between the incident and the trial is also a factor which is of critical importance in the determination of what is to be made of what is said in the statement to underscore the effect of the delay between the taking of the statement and the trial. It is perhaps apposite to borrow from Didcott J when he stated:

‘Inordinate delays in litigating damage the interests of justice. They protract the disputes over the rights and obligations sought to be enforced, prolonging the uncertainty of all concerned about their affairs. Nor in the end it is always possible to adjudicate satisfactorily on cases that have gone stale. By then witnesses may no longer be available to testify. The memories of ones whose testimony can still be obtained may have faded and become unreliable. Documentary evidence may have disappeared. Such rules prevent procrastination and those harmful consequences of it.’<sup>12</sup>

[40] Although Didcott J said this in a different context and that context having been in relation to the notices which have to be given before the institution of any litigation against state entities, his *dictum* holds true for this case. The charge sheet in this case could not be obtained because it apparently destroyed in the fire which gutted the magistrate’s court and destroyed some of the documents which it housed. The investigation diary too was not part of the police docket which served before me and therefore the parties could not be able to ascertain either from the charge sheet or the investigation diary what the true date of the plaintiff’s first appearance in court was.

[41] Thirdly, the context in which the statements of the plaintiff and constable Nketshe must be viewed is that when they made those statements, they were not giving evidence and within the context of the *dicta* of the cases I refer below.

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<sup>12</sup> *Mohlomi v Minister of Defence* 1997(1) SA 124 (CC) para [11].

[42] In any matter in which contradictions and inconsistencies arise, the aim is not to establish which of the versions is correct but rather to satisfy oneself that the witness could err, either because of a defective recollection or because of dishonesty. The SCA set out the approach to be followed when a court is faced with evidence of this nature. The following approach to contradictions between two witnesses and contradictions between the versions of the same witnesses (such as, *inter alia*, between his/her *viva voce* evidence and a previous statement), is identical. The SCA per Olivier JA set out the approach as thus:

‘The juridical approach to contradictions between two witnesses and contradictions between the versions of the same witness (such as, *inter alia*, between her or his *viva voce* evidence and a previous statement) is, in principle (even if not in degree), identical. Indeed, in neither case is the aim to prove which of the versions is correct, but to satisfy oneself that the witness, could err, either because of a defective recollection or because of dishonesty. The mere fact that it is evident that there are self-contradictions must be approached with caution by a court. Firstly, it must be carefully determined what the witnesses actually meant to say on each occasion, in order to determine whether there is an actual contradiction and what is the precise nature thereof. In this regard the adjudicator of fact must keep in mind that a previous statement is not taken down by means of cross-examination, that there may be language and cultural differences between the witness and the person taking down the statement which can stand in the way of what precisely was meant, and that the person giving the statement is seldom, if ever, asked by the police officer to explain their statement in detail. Secondly, it must be kept in mind that not every error by a witness and not every contradiction or deviation affects the credibility of a witness. Non-material deviations are not necessarily relevant. Thirdly, the contradictory versions must be considered and evaluated on a holistic basis. The circumstances under which the versions were made, the proven reasons for the contradictions, the actual effect of the contradictions with regard to the reliability and credibility of the witness, the question whether the witness was given a sufficient opportunity to explain the contradictions - and the quality of the explanations - and the connection between the contradictions and the rest of the witness' evidence, amongst other factors, to be taken into consideration and weighed up. Lastly, there is the final task of the trial Judge, namely to weigh up the previous statement against the *viva voce* evidence, to consider all the evidence and to decide whether it is reliable or not and to decide whether the truth has been told, despite any shortcomings’<sup>13</sup>

[43] When Olivier JA set out the dictum, she was in fact restating the position of the SCA on the subject which was stated as thus:

‘Deviations which are not material will not discredit the witness. Police statements and statements obtained from witnesses by the police, are notoriously lacking in detail, are inaccurate and often

<sup>13</sup> *Mafaladiso* (note 10 above) at pp 593E - 594H.

incomplete. A witness statement is in the main required to enable the prosecuting authority to determine whether a prosecution is called for, on what charge and to consider which witnesses to call on which issues. It would be absurd to expect a witness to say exactly in his statement what he will eventually say in court. There will have to be indications other than a mere lack of detail in the witness' statement to conclude that what the witness said in court was unsatisfactory or untruthful. There is no law that compels a witness what to say and what not to say in his statement. The witness tells it as he sees it. He is not expected to relate in his statement what he saw in the minutest detail. Should a witness through a lapse of memory or any other valid reason omit some detail which later could become important, he should not as a matter of course be branded as being untruthful. Moreover, the mere fact that a witness deviates in a material respect from what he said in his statement does not necessarily render all his evidence defective. The court will in the final analysis consider the evidence as a whole in order to determine in what respects the witness' evidence may be accepted and in what respects it should be rejected. Counsel who act on behalf of accused persons, are wont to pounce on any differences, no matter how insignificant, which may arise between an extra curial statement of a witness and the witness' testimony in court'<sup>14</sup>

[44] This position has been echoed in a long line of the other decisions.<sup>15</sup>

[45] Constable Nketshe was criticised for not mentioning in his statement that before he proceeded to arrest the plaintiff, he never mentioned in his statement that he consulted with his colleagues in relation to the case. He also never mentioned that he accessed the computer database of the SAPS where the details about the case were registered. Further, he never mentioned that he phoned the complainant not only to get directions to her homestead but also to obtain the details of the case. Mr Vapi for the plaintiff urged the court to consider these omissions in constable Nketshe's arrest statement as militating against him since unlike lay

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<sup>14</sup> Ibid.

<sup>15</sup> *S v Govender & Others* 2006 (1) SACR 322 (E) at 326C; In *S v Mahlangu & Another* (GSJ) unreported case no CC70/20210 of 22 May 2012 Horn J restated the principles relating to written statements by witnesses. The learned Judge held:

'In order to discredit a witness who made a previously inconsistent statement it must be shown that the deviation was material...'

In *S v Mkohle* 1990 (1) SACR 95 (A) the following was stated:

'Contradictions *per se* do not lead to the rejection of witnesses' evidence. ...[T]hey may simply be indicative of an error. ...[N]ot every error made by a witness affects his credibility; in each case the trier of fact has to make an evaluation; taking into account such matters as the nature of the contradiction, their number and importance, and their bearing on other parts of witness' evidence.'

witnesses from whom statements are obtained by the police, he wrote the statement himself and should have included all the critical details such as the details which he omitted. It is indeed so that constable Nketshe was the author of his statement and no one else. However, sight must not be lost of the fact that when he prepared the arrest statement, he would not have been contemplating that a civil suit would thereafter ensue. He therefore did not prepare his arrest statement in contemplation of a civil suit. That notwithstanding during his evidence in chief constable Nketshe never mentioned that before proceeding to arrest the plaintiff he phoned the complainant with a view firstly to establish the whereabouts of the locality and secondly to interview the complainant for the purpose of establishing what exactly had happened. Further, he never mentioned that he accessed the computer database of the police where the details of the case were captured. He also never mentioned the fact that before he went to arrest the plaintiff, he first verified the information concerning the case with his colleagues. This emerged for the first time during his cross-examination by Mr Vapi. As if that was not worse this version was never put to the plaintiff during cross-examination. I therefore reject it as a fabrication not because constable Nketshe had omitted to mention it in his arrest statement.

[46] Mr Ngandlela for the defendants urged me to consider the fact that the plaintiff in his warning statement never mentioned the fact that he was away from his residence from Thursday 28 May 2015 until he returned on 31 May 2015. In his warning statement he only mentioned having been away from home on 29 May 2015. He further urged the court to consider the fact that while the plaintiff says that at about 07:00 in the morning on the 29 May 2015 he went back to Nqgwala locality to switch off the lights from his residence and to tend his livestock.

Sibusisiwe Mphethukana his girlfriend on the other hand contends that he only left at 12:00 midday on the 29 May 2015 and came back at about 12h30.

[47] The plaintiff explained what was described as a discrepancy between what is contained in his statement and his evidence in court. He stated that when he gave his warning statement, he answered to the questions which were posed to him by constable Sikhunyana. In addition, he explained that as part of the reasons of having to go back to Nqgwala locality from Fortgale was to release his sheep. It would have been unusual for sheep to be released at 12:00 midday. If Sibusisiwe had said in her statement that he only left at 12:00 midday that must have been an error on her part. For the same reasons as I have enumerated above, I accept the plaintiff's explanation. Further insofar as there might be a contradiction between his evidence and what is set out in the statement of Sibusisiwe, Sibusisiwe was not called as a witness in court and all that is contained in her statement remains hearsay evidence which has not been tested.

[48] I have already found that this was a case where constable Nketshe had to first investigate the exculpatory explanation which was proffered by the plaintiff and his girlfriend before effecting the arrest and that his failure to do so was a dereliction of duty, I now have to consider the other two ancillary reasons which constable Nketshe advanced as the reasons for him to arrest the plaintiff. Constable Nketshe testified that he arrested the plaintiff because they thought that if they did not arrest him, the plaintiff would have killed the complainant and he would have fled. It is common cause or the very least not in dispute that the plaintiff learnt about the imminence of his arrest from his aunt when he returned home on Sunday. If there was any likelihood that the plaintiff would kill the complainant there is no reason why he would not have



killed her on Sunday when he returned at Nqgwala locality. Further, there is no reason why the plaintiff would have elected to sleep over at home when he well knew that the police were looking for him the previous day if there was any likelihood of him fleeing. Moreover, what are the probabilities that the plaintiff would have returned to this locality just after he had committed this offence of rape against the complainant especially when he was already alerted that the police were looking for him. In my view it is highly improbable that he would have returned. What constable Nketshe therefore advanced as further reasons to arrest the plaintiff were contrived.

[49] In the circumstances I find that before effecting the arrest constable Nketshe did not entertain a suspicion and he also conceded as much during cross-examination by Mr Vapi. Accordingly, I find that the plaintiff's arrest was unlawful. In view of the fact that I found that the plaintiff's arrest was unlawful his subsequent detention was also equally unlawful.

[50] From the evidence from constable Nketshe it is clear that he never exercised any discretion whether to arrest the plaintiff. As soon as he got called over the radio that there was a complaint at Nqgwala locality by a complainant who complained about having seen her rape assailant he was fixated on having the plaintiff arrested. In any event in view of the absence of all the jurisdictional facts in this case it is unnecessary for me to consider the question of whether constable Nketshe exercised any discretion.

#### Malicious prosecution

[51] I now turn to consider the second claim of malicious prosecution. It is trite that in order to succeed with a claim for malicious prosecution, a claimant must allege and prove:

55.1 That the defendant set the law in motion (instigated or instituted the proceedings);

55.2 That the defendant acted without reasonable and probable cause;

55.3 That the defendant acted with malice or (*animo iniuriandi*); and

55.4 That the prosecution has failed.<sup>16</sup>

[52] The plaintiff's evidence in relation to this claim was very brief. He confirmed that the prosecution ended on the 24 June 2016. He further asserted that the second defendant had no probable cause for prosecuting him for two reasons. The first reason he argued was that the police did not listen to him at the time he told them that he was not at Nqgwala locality at the time the alleged offence was perpetrated upon the complainant. He further asserted that when his girlfriend Sibusisiwe asserted in confirmation of what he said that he was not present on the day of the alleged incident of rape the police also did not listen to her. In the circumstances he was not supposed to have been prosecuted. The police did not investigate this matter and they also did not go to the tavern in which he was consuming alcohol on the 29 May 2015. secondly, he asserted that the DNA result excluded him as the donor of the DNA. As a result, thereof the chances of him having been successfully prosecuted were minimum. There was no evidence which was tendered on behalf of the second defendant in relation to this claim.

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<sup>16</sup> *Minister for Justice and Constitutional Development & others v Moleko* 2009 (2) SACR 585 (SCA); *Patel v National Director of Public Prosecutions & others* 2018 (2) SACR 420 (KZD).

[53] It was common cause between the parties that the first and fourth requirements were established in this case which therefore meant that I had to determine whether the plaintiff proved his case in relation to the other two requirements.

[54] In *Moleko*<sup>17</sup> the SCA explained reasonable and probable cause as thus:

‘Reasonable and probable cause, in the context of a claim for malicious prosecution means an honest belief founded on reasonable grounds that the institution of proceedings is justified. The concept therefore involves both a subjective and an objective element—  
Not only must the defendant have subjectively had an honest belief in the guilt of the plaintiff, but his belief and conduct must have been objectively reasonable, as would have been exercised by a person using ordinary care and prudence.’

[55] Quoting from the case of *Relyant Trading (Pty) Ltd v Shongwe and another*<sup>18</sup> with approval the SCA stated as thus:

‘The requirement for malicious arrest and prosecution that the arrest and prosecution be instituted ‘in the absence of reasonable and probable cause’ was explained in *Beckenstrater v Rottcher and Theunissen* as follows:

‘When it is alleged that a defendant had no reasonable cause for prosecuting, I understand this to mean that he did not have such information as would lead a reasonable man to conclude that the plaintiff had probably been guilty of the offence charged; if, despite his having such information, the defendant is shown not to have believed in the plaintiff’s guilt, a subjective element comes into play and disproves the existence, for the defendant, of reasonable and probable cause.’

‘It follows that a defendant will not be liable if he or she held a genuine belief founded on reasonable grounds in the plaintiff’s guilt. Where reasonable and probable cause for an arrest or prosecution exists the conduct of the defendant instigating it is not wrongful. The requirement of reasonable and probable cause is a sensible one: ‘For it is of importance to the community that persons who have reasonable and probable cause for a prosecution should not be deterred from setting the criminal law in motion against those whom they believe to have committed offences, even if in so doing they are actuated by indirect and improper motives.’

[56] In respect of the requirement that the defendant must have acted with ‘malice’ or *animus iniurandi* the SCA in *Moleko*<sup>19</sup> further said:

<sup>17</sup> Ibid at para [20].

<sup>18</sup> [2007] 1 All SA 375 (SCA) para [14].

<sup>19</sup> *Moleko* (note 16 above) paras [61- 3].

‘In the *Relyant* case, this court stated the following in regard to the third requirement:

‘Although the expression malice is used, it means, in the context of the *actio iniuriarum, animus iniuriandi*. In *Moaki v Reckitt & Colman (Africa) Ltd and another*, Wessels JA said:

‘Where relief is claimed by this *actio* the plaintiff must allege and prove that the defendant intended to injure (either *dolus directus* or *indirectus*). Save to the extent that it might afford evidence of the defendant’s true intention or might possibly be taken into account in fixing the quantum of damages, the motive of the defendant is not of any legal relevance.’

In so doing, the court decided the issue which it had left open in *Lederman v Moharal Investments (Pty) Ltd* and again in *Prinsloo and another v Newman*, namely that *animus injuriandi*, and not malice, must be proved before the defendant can be held liable for malicious prosecution as *injuria*.

*Animus injuriandi* includes not only the intention to injure, but also consciousness of wrongfulness:

‘In this regard *animus injuriandi* (intention) means that the defendant directed his will to prosecuting the plaintiff (and thus infringing his personality), in the awareness that reasonable grounds for the prosecution were (possibly) absent, in other words, that his conduct was (possibly) wrongful (consciousness of wrongfulness). It follows from this that the defendant will go free where reasonable grounds for the prosecution were lacking, but the defendant honestly believed that the plaintiff was guilty. In such a case the second element of *dolus*, namely of consciousness of wrongfulness, and therefore *animus injuriandi*, will be lacking. His mistake therefore excludes the existence of *animus injuriandi*.’

[57] Turning now to the issue of whether the defendants would be liable to the plaintiff for malicious prosecution there were no witnesses who were called by the second defendant to controvert the plaintiff’s case. This issue must therefore be determined on the basis of the plaintiff’s evidence taken together with the pleadings and other documents which served before the court namely the complainant’s statement, the plaintiff’s warning statement and the DNA results which appear at page 28 of the index to notices.

[58] The allegations which are set out in paragraph 11 of the plaintiff’s particulars of claim do not have any foundation on the facts. Constable Nketshe did not lay the charges against the plaintiff. The complainant laid the charges against the plaintiff. On 30 May 2015 at 09:00 am the complainant made a statement which was to the effect that on Friday 29 May 2015 at about

20:10 she was from a Somalian shop to buy maize. On her way home he saw two South African males coming in front of her. While they were next to her the plaintiff exclaimed and said is this you. What constable Nketshe and his companion Sandile Kobo did is to follow up on the complaint which the complainant made that she saw the person who had allegedly raped her.

[59] Due to the absence of the investigation diary and the fact that there were no witnesses who testified on behalf of the second defendant it is unknown who was the prosecutor who formulated the charges and enrolled the matter in court. In *Moleko* it was held that in an action premised on malicious prosecution with regard to the liability of the police, the question is whether they did anything more than one would expect from a police officer in the circumstances, namely to give a fair and honest statement of the relevant facts to the prosecutor, leaving it to the latter to decide whether to prosecute or not. What constable Nketshe did after arresting the plaintiff was to depose to an affidavit in which he set out what he did which was to arrest the plaintiff. He testified that after lodging the plaintiff into the police cells at Bityi he had no further role to play in the case. As much as constable Nketshe has been criticised for the omissions in his statement and the court having rejected his version in relation to such omissions to the extent that they were not to put to the plaintiff it would be fair in the circumstances to conclude that in his statement he gave a fair and honest statement of the relevant facts to the prosecutor and left everything to the prosecutor to decide whether to prosecute or not. Consequently, I find that constable Nketshe after he lodged the plaintiff in the holding cells, he had no further role to pay in this case. Any assertion that he set the law in motion against the plaintiff is unsustainable and must therefore fail.

[60] At the time the prosecutor charged the plaintiff and enrolled the matter he or she must have considered what was contained in the docket which in variably must have included the statement deposed to by the complainant Matozana Bhonxa which was deposed to on the 30 May 2015 at 09:00 and the warning statement of the plaintiff which was signed on 01 June 2015 which documents if one considers the dates at which such statements were signed were before the plaintiff's first appearance in court on 03 June 2015.

[61] In the statement the complainant clearly identifies the plaintiff as one of the two persons who grabbed her and fell her to the ground. She further identifies the plaintiff to have undressed her and undressed himself of his underwear and his pants and thereafter inserted his penis into her vagina and started to move up and down having sex with her until he ejaculated. If one considers what is contained in the statement of the complainant Matozana Bhonxa can it fairly be said that the prosecution did not have such information as would lead a reasonable man to conclude that the plaintiff had probably been guilty of the offence charged. I opine not. The plaintiff has himself during his testimony admitted that the complainant knew each other very well. He grew up in front of the complainant. They were neighbours whose respective residences lay at a distance of 100 meters apart from each other. In the circumstances it is my view that it cannot be said the prosecution did not have such information as would lead reasonable man to conclude that the plaintiff had probably been guilty of the offence charged. Based on the facts I have summarised above it cannot be said that the prosecution directed its will to prosecuting the plaintiff in the awareness that reasonable grounds for the prosecution were possibly absent.

[62] Constable Nketshe was severely criticised during cross-examination for his failure to investigate the plaintiff's *alibi*. He was further criticised for not following up on the accuracy of the information from the plaintiff's girlfriend. The issue of the investigation of the *alibi* is one which fell within the remit of the investigating officer and not within the remit of constable Nketshe. What constable Nketshe was required to have done and ought to have done is to make enquiries in relation to the information which both the plaintiff and his girlfriend volunteered instead of simply ignoring it as if it was irrelevant to enable him to found a reasonable suspicion that the plaintiff had committed an offence referred to in Schedule 1 of the CPA. The statement of Sibusisiwe Mphethukana was deposed on 06 June 2015 way after the matter had already been enrolled. As much as it must have formed part of the docket when the matter remained on the roll it was not relevant when the decision to charge the plaintiff and to enrol the case was taken. However, since this statement must have formed part of the docket Sibusisiwe's confirmation of the plaintiff's *alibi* must have also formed part of a whole host of investigations which must have been underway which presumably included the investigation of who possibly must have been plaintiff's companion and the DNA swabs which were sent for DNA examination. In view of the fact that the parties did not have the investigation diary in the docket as well as the charge sheet it was difficult to determine when exactly the DNA results were obtained by the prosecution. However, the letter enclosing the DNA results and directed to the commander of the Family Violence and Child Protection and Sexual Offences Unit in Mthatha is dated 28 January 2016. Clearly in between 28 January 2016 and 24 June 2016 the DNA results must have come to the hands of the prosecution. When the DNA results were on hand on the date which is unknown to either of the parties, on 24 June 2016 the charges against the plaintiff were withdrawn. In the circumstances I find that the plaintiff has failed to prove that the defendants

acted with malice (*animo injuriandi*) and without a reasonable and a probable cause. In the premises, the plaintiff's claim for malicious prosecution against both defendants must fail.

#### General legal principals regarding the assessment of damages

[63] I now turn to deal with the general legal principles regarding the assessment of damages. A proper approach to assessment of damages in matters such as the present have been held to include an evaluation of the personal circumstances of the plaintiff, the circumstances around the arrest, as well as the nature and duration of the detention.<sup>20</sup>

[64] The determination of an appropriate amount of damages is largely a matter of discretion and it is impossible to determine an award of damages for this kind of *injuria* with any kind of mathematical accuracy. Although it is always helpful to have regard to awards made in previous comparable cases as a guide, such an approach if slavishly followed can prove to be treacherous. The correct approach is to have regard to all the facts of the case and to determine the quantum of damages on such facts.<sup>21</sup>

[65] 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 - 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. The courts

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<sup>20</sup>*Ngcobo v Minister of Police* 1978 (4) SA 930 (D) at 935B - F.

<sup>21</sup>*Protea Assurance Co Ltd v Lamb* 1971 (1) SA 530 (A) at 535B - 536A; *Minister of Safety & Security v Seymour* 2006 (6) SA 320 (SCA) paras [17-18]; *Rudolph & Others v Minister of Safety & Security & Another* 2009 (5) SA 94 (SCA) paras [26 - 9].



are cautioned to be astute to ensure that the awards they make for such infractions reflect the importance of the right to personal liberty.<sup>22</sup>

#### Plaintiff's personal circumstances

[66] The plaintiff testified he was 45 years of age having been born on 08 August 1978. This means that at the time of his arrest the plaintiff was 37 years of age. He had a standard 9 level of education. He was separated from his wife. However, he has two children with her who are 21 and 09 years respectively. At the time of his arrest, he was operating a spaza shop and made on average approximately R5000 per month. After his arrest his spaza shop collapsed and had to close. However, the plaintiff managed to resuscitate the spaza shop after the charges were withdrawn against him. While he was in detention, the plaintiff lost 08 sheep which even after he was released on bail on 18 June 2015, he was unable to look for since his bail conditions prevented him from going to Nqgwala locality. The plaintiff testified that he was detained both at Bityi police holding cells, the holding cells in the magistrate's courthouse and Mthatha Correctional Centre in conditions which were deplorable, totally and completely filthy and unhygienic. He further testified that upon being detained at Mthatha Correctional Centre on 03 June 2015 he could not sleep as one of the inmates there flirted with, and courted, him making advances of a sexual nature. This resulted in him the next morning making a request to be changed from that cell to another cell. He testified that he was the congregant of the Anglican Church and held a position of a church warden which position he was removed from after he was arrested in respect of the charges and was only re-instated to that position after the charges were withdrawn.

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<sup>22</sup> *Minister of Safety & Security v Tyulu* 2009 (5) SA 85 (SCA) para [26].

Comparative cases

[67] Mr Vapi the plaintiff's counsel and Mr Ngadlela referred me to the cases I set below.

In *Minister of Safety and Security & Others v Van der Walt & another*<sup>23</sup> the plaintiffs who were each detained for six days were each awarded R 120 000.00 in 2015 which would translate to R205 000.00 in 2022.

[68] In *Bhengu v Minister of Safety and Security*<sup>24</sup> the plaintiff was detained for seven days and was awarded R130 000.00 in 2010 which would translate to R234 000.00 in 2022.

[69] In *Rahim & Others v Minister of Home Affairs*<sup>25</sup> the ninth appellant who had been detained for 35 days in prison was awarded damages in the sum of R25 000.00 for unlawful arrest and detention which translates to R36 233.81 in 2022. The court awarded this amount due to the paucity of information which was placed before it.

[70] In coming to what I consider to be an appropriate award of damages to compensate the plaintiff for the deprivation of his personal liberty and freedom and the attendant mental anguish and distress I have considered the cases which were referred to by counsel and to the cases as set out hereunder.

[71] In *Oriyomi v Minister of Police*<sup>26</sup> the Plaintiff was a young administration clerk at a Church. She was unlawfully arrested and detained for a period of three days. She was kept in a filthy police cell with a non-functioning toilet situated at the corner of the cell affording no

<sup>23</sup> 2015 (2) SACR 1 (SCA).

<sup>24</sup> (KZD) unreported case no 3858/2003 of 19 July 2010.

<sup>25</sup> 2015 (4) SA 433 (SCA).

<sup>26</sup> (GP) unreported case no 14132/13 of 06 April 2020.

privacy. She was made to sleep on the floor with no blankets. She was awarded damages in the sum of R120 000.00.

[72] In *Ngwenya v Minister of Police*<sup>27</sup> a 48-year-old plaintiff who was self-employed as a bath tub manufacturer who was unlawfully arrested for four (04) days was awarded damages in the sum of R45 000.00 which translates to R51 000.00 in 2022.

[73] In *Seymour*<sup>28</sup> the Supreme Court of Appeal reduced an award in the amount of R500 000.00 and substituted it with one of R90 000.00 for the detention of a 63-year-old plaintiff who was farmer which was for a period of five days.

[74] In *Mofokeng & Another v Minister of Police*<sup>29</sup>, the court granted the plaintiff an award of R90 000.00 for unlawful arrest and detention for two (2) days.

[75] In *Tladi v Minister of Safety & Security*<sup>30</sup>, a deputy school principal who was unlawfully arrested and detained for one night was awarded R25 000.00 in damages.

[76] In *Minister for Safety & Security v Scott and Another*<sup>31</sup> an award of R 75 000.00 was granted to the plaintiff who was businessman who spent one night in the police cells following his unlawful arrest was reduced to R 30 000 on appeal which translates to R46 000.00 in 2022.

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<sup>27</sup> (NWM) unreported case no 924/2016 of 7 February 2019.

<sup>28</sup> *Seymour* (note 21 above) para [19].

<sup>29</sup> (GJ) unreported case no 2014/A3084 of 17 February 2015.

<sup>30</sup> (GSJ) unreported case no 11/5112 of 24 January 2013.

<sup>31</sup> 2014 (6) SA 1 (SCA).

[77] In *Mothoa v Minister of Police*<sup>32</sup> the plaintiff was awarded damages in the sum of R150 000.00 for a detention which was for a period of twenty-two (22) hours under appalling conditions at the Johannesburg Central Police Station.

[78] In *Fubesi v The Minister of Safety and Security*<sup>33</sup> the plaintiff was awarded damages in the sum of R80 000.00 in 2010 for arrest without warrant and a detention which lasted for three days and about 18 hours.

[79] Mr Vapi submitted that it would be fair and reasonable if the plaintiff was compensated in the sum of R494 000.00 calculated at R26 000.00 per day from 31 May 2015 to 18 June 2015. Mr Ngadlala on the other hand urged me that in view of the limited evidence which the plaintiff presented a sum of R45 000.00 would constitute a fair and just compensation for unlawful arrest and detention. I disagree with Mr Ngadlala that there was limited information before me. I have specifically set out the relevant information under the personal circumstances of the plaintiff. Consequently, I also disagree with him that R45 000.00 would constitute a fair and just compensation to the plaintiff.

[80] I consider the fact that the plaintiff was not taken to court as soon as possible and within a period of 48 hours after his arrest and instead was taken to court for his first appearance after the expiry of 48 hours to be an aggravating fact in this case. I must mention that a charge of rape even if a person is ultimately acquitted of such a charge or such charge is withdrawn causes a lot

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<sup>32</sup> (GSJ) unreported case no 5056/11 of 08 March 2013.

<sup>33</sup> (ECG) unreported case no 680/2009 of 30 September 2010.

of reputational damage. This is especially so when a person operates a business enterprise and has a position of responsibility in society such as in church. In the exercise of my discretion in respect of what I consider to be an appropriate award I have cautioned myself that in comparing awards each case must be decided on its own facts.

[81] In my view regard being had to the peculiar facts of the case an award in the sum of R456 000.00 would constitute a just, fair, and reasonable compensation to the plaintiff in the circumstances. This amount is calculated at R24 000.00 per day from 31 May 2015 to 18 June 2015.

#### Costs

[82] The general rule is that the costs should follow the event. Although the claim for malicious prosecution against both defendants is unsuccessful both defendants were represented in this case by the same counsel and attorney. The evidence which was led in respect of the claim for malicious prosecution was relevant to the claim for unlawful arrest and detention against the first defendant with more than 90% of the time during the hearing spent in relation to the unlawful arrest and detention claim. In the circumstance the plaintiff was substantially successful in his claim and the most equitable order as a result is that the plaintiff is entitled to 90% of his costs in respect of these proceedings.

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

1. The arrest and detention of the plaintiff was wrongful and unlawful;

2. Judgment is granted in favour of the plaintiff for the payment of a sum of R456 000.00 as and for damages in respect of his unlawful arrest and detention from 31 May 2015 to 18 June 2015;
3. The first defendant is ordered to pay interest on the sum of R456 000.00 at the prescribed rate of interest calculated from the date of judgment to the date of final payment thereof;
4. The plaintiff's claim for malicious prosecution against both defendants is dismissed; and
5. The first defendant is ordered to pay 90% of the plaintiff's costs of suit.

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M. M. CHITHI

ACTING JUDGE OF THE HIGH COURT

**APPEARANCES**

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Heard on : 17 - 19 October 2022

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