



IN THE HIGH COURT OF SOUTH

AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURGG

CASE No: 4755/2017

In the matter between:

THEMBELANI NGCOBO

FIRST PLAINTIFF

BHEKUYISE SHANGE

SECOND PLAINTIFF

and

THE MINISTER OF POLICE

DEFENDANT

ORDER

1. The defendant is found liable for the damages to the two plaintiffs for the unlawful arrest and detention up to the date of the first appearance at court.

2. The defendant and the National Director of Public Prosecutions are each found equally liable for damages for the unlawful detention and prosecution of the plaintiffs for the period from the date of the first appearance in court to the date of their conviction by the trial court. The defendant is found liable to compensate the plaintiff 50% of the proved damages.

3. The defendant, the National Director of Public Prosecutions and the trial court are found equally liable for damages for unlawful detention of the plaintiffs from the date of conviction to the date of the release after the appeal against conviction and sentence was upheld. The defendant is found liable to compensate the plaintiffs 33.33% of the proved damages.

4. The determination of quantum of damage is postponed *sine die*.

5. The defendant is ordered to pay costs of the action including costs of senior counsel where so employed.

JUDGMENT

Delivered on:

Mngadi J:

[1] The two plaintiffs in the action for the arrest, detention, prosecution, conviction and serving sentence of imprisonment claim damages from the defendant. The first plaintiff claims R3 million for loss of earnings and R10 million general damages. The Second plaintiff claims R10 million general damages.

[2] The first plaintiff is Thembelani Ngcobo an adult male born on 3 April 1989. The second plaintiff is Bhekuyise Shange an adult male born on 10 January 1991. The defendant is the Minister of Police, the National Minister of State responsible for the South African Police Services.

[3] The plaintiffs, as a cause of action, state that on 19 December 2010 they were without reasonable and probable cause nor belief in their guilt wrongfully, maliciously arrested and detained by members of the South African Police Services for murder and rape. Consequent to their arrest and detention the police opposed the release of the plaintiffs on bail and release on bail was refused. The plaintiffs claim that as result of contrived confession evidence by the police they were prosecuted convicted and

sentenced. The plaintiffs, *inter alia*, claim that the police owed a duty of care to them to convey to the prosecutor and the judicial officers involved in the case that the plaintiffs' confession was induced by assault on their part. They failed to do, which resulted in the plaintiffs remaining in custody from the date of arrest until 10 October 2013 when their conviction and sentence on appeal was set aside and they were released.

[4] Further, the plaintiff stated that the members of the police wrongfully and maliciously set the law in motion by laying a charge of murder and rape against the plaintiffs when they had no reasonable cause for doing so nor did they have any reasonable belief in the guilt of the plaintiff. The result of laying the charge was that the state prosecuted the plaintiffs on the charge of murder and rape; the court acquitted the plaintiffs on the rape charge and convicted them on the murder charge. It resulted in the plaintiffs sentenced to life imprisonment.

[5] The issues at the commencement of the trial were in terms of Rule 33(4) separated. The issue of liability to be tried separately and issue of quantum postponed for later determination. Initially, in the plea, defendant raised special pleas one of prescription and another non-compliance with the provisions of s3 of the Institution of Legal Proceedings Against Certain Organs of State Act No. 40 of 2002. Parties agreed at the commencement of the trial that the special pleas have fallen away. The parties agreed that the criminal trial record is handed in as evidence. The evidence adduced in the criminal trial is correctly recorded and that evidence be taken as evidence adduced before this court. In addition, the parties agreed that the police docket and the contents thereof be handed in and it be admitted as evidence. The record of the criminal trial

indicated that the criminal trial wherein the plaintiffs were accused 1 and accused 3 respectively commenced on 20 August 2012 before Potgieter AJ (sitting with an assessor) The accused were Thembelani Brian Sgodo Ngcobo (Accused 1), Sphamandla Mkhize (Accused 2) and Bhekumuzi Christopher Shange (Accused 3). The indictment indicated that accused 1 and accused 3 were aged 19 years, and accused 2 was 20 years old. The state indicted the accused on three (3) crimes, namely; Assault with intent to do Grievous Bodily Harm (count 1 against accused 1 only); a charge of Rape in contravention of s3 of the Sexual Offences and Related Matters Amendment Act 30 of 2007 read with the provisions of s51 and schedule 2 of the Criminal Law amendment act 105 of 1997 (Count 2), and a charge of Murder read with the provisions of s51 and Schedule 2 of the Criminal law Amendment Act 105 of 1997(Count 3).

[6] The summary of substantial facts provided by the state as it opening address alleged that on Friday 17 September 2010, Bawinile Khethiwe Mthalande (Khethiwe) together with some friends went to Mortel Store where they had some drinks. Khethiwe had an altercation with one of accused 1's friends. She was ordered to leave the store. On her way home, accused 1 followed her. He attacked her and stabbed her on the shoulder and thumb, and he left her. Later, the same night, accused 1 returned to Mortel store and met accused 2 and 3. They decided to go and look for Khethiwe at her home to stab her.

[7] It further alleged as follows. The deceased who was Khethiwe's sister was at her home. The accused gained entry to her room and held her. The accused stabbed and took her by force to show them where Khethiwe was. On the road, the accused took turns raping the deceased. They then stabbed the deceased and slit her from her vagina to the chest causing her entrails to spill out. She died at the scene from stab wounds on the lungs and heart.

[8] Each accused during the trial had his own counsel representing him. The state, at the commencement of the trial withdrew all charges against accused 2. The remaining accused both pleaded not guilty to all the charges. In respect of count 1, the first plaintiff stated that he acted in self-defence when he caused injuries to Khethiwe. Both the plaintiffs denied all the allegations against them in respect of the rape and Murder charges.

[9] The Prosecution in its opening address stated that the state as a first witness will call Khethiwe. Khethiwe will testify that she is the sister of the deceased. During the evening of 17 December 2010, she was at a Local shop with certain friends. Where she encountered a group of men, which included accused 1. There was an argument emanating from the proposition of one of her female friends by one of the males. There was drinking and dancing going on at the shop. She left the shop for home when she was followed by accused 1, who stabbed her. She later encountered accused 1 at her home; she knew accused 1 prior to the incident. During the later part of that night, she and her family decided that the deceased was missing from their home.

[10] The prosecution, as part of its opening address indicated that it intended to prove in a trial- within-a trial the admissibility of warning statements made by the two accused to commissioned police officers.

[11] The state then lead evidence of Khethiwe. She testified that the deceased was her sister and she lived with her in the same homestead. She testified as summarised by the prosecutor in the opening address. She said Remember a boyfriend of her other sibling proposed love to one of her companion. She confronted him. Then one of her companions said they must leave. They arrived at about 8pm and it was then at about 12 midnight. They went out. She left her companions standing on the road and she told them that they would catch up with her. She then felt something stabbing her. It was the first plaintiff stabbing her. She struggled with him over the knife. He stabbed her on the right hand upper arm. The knife cut her on her thumb. They struggled over the knife, the first plaintiff left her, and he proceeded downwards towards the Sikhakhane residence.

[12] Khethiwe testified that she called one of her companions Fasi. She told her that she had been stabbed. They went to Themba Ndlovu's home; Themba was one of the people in her company. She phoned her mother to come and fetch her. She met her mother on her way home. Her mother was with the first plaintiff. They arrived at home. Her grandmother went to the deceased to fetch a candle to use for a source of light. In the meantime, she used her cell phone torch to light. She identified the first plaintiff and

she asked him what he wanted there because he stabbed her. The first plaintiff said how did he stab her because he was helping. She said earlier when she met her mother who was with first plaintiff, she thought first plaintiff was her brother, and it was dark.

[13] Khethiwe under cross-examination stated that she was intoxicated and she said she not know how much liquor she had consumed. She said she and the plaintiff were related by surname. She had known him for two months. She had no problem with him. She said she did not know whether it was safe to walk alone at night, and she left her three companions and walked alone because it was already late at night. She said the injury on her thumb was not bleeding. The injury was a scratch. She said she did not know why the doctor did not note injury in the medical examination report (J88). She walked with her mother and the person she said it was first plaintiff to her home for about 5 minutes. When she told her mother that first plaintiff was the person who stabbed her, her mother did not respond. When she met her mother and the first plaintiff, they were talking to each other.

[14] Khethiwe denied what was put to her to be the first plaintiffs' version, that during the evening she pushed one Muzi and the first plaintiff asked her why she pushed Muzi, and she replied by referring to the first plaintiff as a thug(Skhotheni) and this caused an altercation between them and they had to be separated. She denied that later the first plaintiff went out to answer a phone, and whilst he was answering the phone she and other people confronted him and repeated that he was a thug. She denied that she

struck him with a beer bottle on his head and the bottle broke, that they struggled over the broken bottle and she was injured during the struggle. She denied that Muzi and Siphesihle came outside and she left with her companions. It was put to her that it was the last time, the first plaintiff saw her that night, he was not in the company of her mother, he was never at her home. She said what also caused her not to initially identify the accused, was because he had taken off the jacket he was earlier wearing and he wrapped it around his waist.

[15] The state then requested that a trial-within-a trial be held concerning the admissibility of the statements made by both plaintiffs. It stated that the statements are confessions they were made to commissioned police officers, made by the first and second plaintiffs freely and voluntarily, without having unduly influenced thereto and whilst both they were in their sound and sober senses.

[16] The first witness was Mandlenkosi Alfred Mlangeni. He testified that he was a Colonel in the South African Police Service stationed at Plessislaer with a service of thirty- two (32) years. On 18 December 2010 on a Saturday, he was the officer on standby duty. He had to be called out to attend for each and every serious crime committed in his patrol area. The areas are Plessislaer and Taylor's Holt Police Station areas .On 18 December 2010 he attended the scene in this case. He arrived at the scene and he observed and he preserved some evidence, marked whatever he could mark and pointed out to the photographer. He interviewed police officers he found at the scene and other identified witnesses. He interviewed and took a statement from

Khethiwe. He generally oversees the proceedings on the scene on the day in question. The next day he was called after he was told that some people had been caught and they were suspected to be involved in the commission of the crime. He was requested to take down warning statements from those persons. Warrant Officer Mthembu requested him. He was requested to interview all the suspects and obtain their warning statements. He did question all three suspects and he obtained statements from the three of them. He took a statement from second plaintiff (Bhekuyise Shange) who also was arrested on 20 December 2010 after he was off the investigation.

[17] Colonel Mlangeni testified that on 19 December 2010 on Sunday he met first plaintiff in his private office at Plessislaer Police Station. In the office, it was only him and the first plaintiff. Prior to taking down the warning statement, he used a prescribed pro forma with guidelines questions to be asked and to fill up and that is what he did. The first plaintiff introduced himself to him. He asked his name and address. He identified himself to the first plaintiff completing the pro forma and he warned him of his rights. All the questions that he asked and the answers he gave, he recorded them down. He identified the pro forma he used and it was marked as exhibit 'E'. He communicated with first plaintiff and in the course interpreted from English to Zulu. Question 8 which he filled out after he had made a statement it asked: 'were you in any way threatened, assaulted or influenced to make the statement' and the first plaintiff's response was 'no, it was my own free choice'. He said he was satisfied that first plaintiff made the statement freely and voluntarily and in his sound and sober senses. He read the statement back to the first plaintiff. The Prosecutor asked Colonel Mlangeni that although it was not part of the document handed in as an exhibit, did he establish if the first plaintiff had any injuries, he said he did, he had some injuries and the first plaintiff told him how he sustained the injuries.

[18] Mlangeni under cross-examination testified that he had been a lieutenant colonel for five (5) years. He during that period took many confessions, may be 100 or 50. The scene of crime was about 35 minutes from Plessislaer Police Station. He had been investigating cases for thirty (30) years. When on 18 December 2010 he left the scene of crime he had a suspect in mind in the assault and a person suggested as a suspect on the charge of murder. He observed the injuries on the deceased body when he attended the scene. The injuries were multiple stab wounds and a deep cut from vagina through the stomach to the chest; it was a very horrific scene. As depicted on the photo in the photo album. He could see that the body had been dragged and there were blood drops where the body was lying, there were blood spots for a long distance leading to a house, which indicated to him that the person was taken from the house to the spot where she was found murdered. W/O Mthembu was also at the scene on the day he attended the scene. On 19 Dec 2010 W/O Mthembu phoned him. He stated that suspects apprehended by the community are sensitive cases and the community may harm the suspects. He said the community apprehended the first plaintiff and the two and assaulted them. He said three suspects he had to interview were first plaintiff, Mkhize and Ntshela. He said W/O Mthembu informed him that the community had caught some suspects and they were detained at the Plessislaer Police Station, he was requested to attend to interview them and obtain warning statement because it was sensitive matter. He was not aware at the time that admissions were going to be made. The suspects were brought to him to be questioned. He interviewed the suspects one by one. He completed the warning statements from first plaintiff at 16h20. He did not record the injuries on first plaintiff because the first plaintiff was from a doctor. He was not involved deep in the investigation, his duty was to take the warning statement and ascertain that against the people who were arrested there was a prima facie case against them, otherwise they had to release them. It is possible that he ordered the first plaintiff be taken to the doctor DNA samples to be taken. He knew W/O Mthembu as a detective based at Taylors' Halt Police Station.

[19] Mlangeni confirmed OB entry Plessislaer Police Station serial no 1835 at 09:30 indicates that W/O Mthembu booked out first plaintiff Siphokuhle Mkhize and Sihle Ntshela. Entry 1857 records that suspects back at 5pm. He said he did not note the movements of the suspects during the course of the day. He admitted that he also obtained warning statements from Siphokuhle Mkhize and from Siphesihle Innocent Ntshela, he did not know in which order he obtained statements from them, but he obtained statements one after the other. He confirmed that he completed Ntshela's statement consisting of two and a half pages at 17h30, and the one from Mkhize consisting of four pages at 17h40. It was put to him that the short intervals indicate that the suspects were not properly warned of their constitutional rights.

[20] Colonel Mlangeni denied that he told the accused that he must use the opportunity to study in prison and that since he was pleading guilty there would be no problems in court. He denied that the first plaintiff told him that he knew nothing about the commission of the crimes, and there he signed a document the Lieutenant Colonel had not written in his presence, and that he never went through the pro forma with him. He confirmed that he was aware that the community assaulted the first plaintiff and he saw open fresh wounds in him. He said the first plaintiff did not tell him that police officers assaulted him. When it was put to Mlangeni that a commissioned officer recording a confession has to be independent from the matter to ensure accuracy and reliability of what is recorded, the court intervened suggesting that was not law. The Colonel stated that although he was involved in the investigation, he would not deny a person an opportunity to tell him whatever he wanted to tell him. He said although he had knowledge of the case, he was not prohibited from taking a warning statement from the first plaintiff. He said his primary concern was to safeguard the interest of justice if wrong people were arrested, he should have done something about, but if he is happy

that the right people were arrested, he can also say okay carry on guys and charge them. He said he commenced taking statement intending statement to take a warning statement, not intending to take a confession. When asked why he would be requested to take a warning statement, he said he did not know what the accused would say. Asked why when what the first plaintiff started telling him took the form of a confession, he did not stop and refer the first plaintiff to a commissioned officer to take a confession, he said if a person wants to tell a story, it is not for him to stop him, it is for the court to decide. He said at times it helps the accused, the prosecutor to take a guilty plea, if the accused is pleading guilty he must be afforded that opportunity for the court to know what the accused has to say. He said it was not his duty to second-guess whatever he tells him, as long as it is not under duress. Mlangeni when asked that the community assaulted the first plaintiff suspecting him of the murder, why he did not ensure that first plaintiff was not confessing in fear of the community, he said he did not know why the community assaulted first plaintiff, the community did well by not killing him. Mlangeni said he explained to the first plaintiff that he was a commissioned officer.

[21] The next witness in the trial-within-trial was Jack Velaphi Mncwabe. He testified that he was a captain at the SAPS stationed at Taylor's Halt at the time. He had 24 years' experience in the police force. He was the head of the detectives at Taylor's Halt Police Station. He was not on duty on 18 December 2010. He commenced duties on 20 December 2010. He obtained a warning statement from the second plaintiff on 21 December 2010. W/O Mthembu under his command requested him to take a statement from the second plaintiff. He completed taking a warning statement at 19:33.

W/O Mthembu had requested him to do that at 4pm, at that time they detained their suspects at Plessislaer. Entry 2097 indicates the booking out of Shange on the OB by him at 18:40. Entry 2012 shows the time 19:55 when he booked back Shange into the cells. He took Shange to an office at Plessislaer to interview him. He interviewed him in IsiZulu. He went through the document Exh "G".

[22] He stated that he first introduced himself as Captain Mncwabe from Taylor's Halt. He informed him of the charges, he was facing and where and when the offences took place. Shange elected to make a statement, he recorded the statement, and he read it back to him. The last page indicated that he asked Shange whether he was attacked or threatened and he said No. His understanding was that the second plaintiff made the statement to him freely and voluntarily. He was satisfied that second plaintiff understood all his rights as set out in para 3.1 to 3.7 of the document. The second plaintiff did not report any assault on him. He said he had not had anything to do with investigation up to that stage. He said the docket of his subordinates pass through his hand and it is so that the docket in this matter he would have had course to peruse during the course of the investigation.

[23] Mncwabe in cross-examination testified that he read to the second plaintiff the document in Zulu. He testified that he obtained the details of the crimes committed from W/O Mthembu. The document is in the first person but he satisfied himself that the second plaintiff understood and agreed. He said he explained to the second plaintiff the contents of paragraphs that he had a right to remain silent, not to say anything or to

make any confession nor admission. He said he did explain the difference between an admission and a confession, he said he informed the second plaintiff that he had a right to get a legal representative should he foresee that there might be an injustice or unfairness to him in this matter. It was 19h30 but he explained that a legal representative could be arranged for him. The version of the second plaintiff was put to him and he denied it. The version of the second plaintiff put is the following. He was held at Taylor's Halt and there severely beaten by police officers and thereafter brought to Plessislaer and brought to his office, that in this office Mncwabe was busy writing, after completing writing on the document, he ordered him to place his signature on the document. He denied that he told second plaintiff that if he did not sign he knew what was in there for him.

[24] Mncwabe stated he last saw W/O Mthembu on 20th and they were still busy with investigation. The following day he saw Mthembu again at the police station and Mthembu gave him feedback that they eventually arrested the second plaintiff, Mthembu also told him about a certain knife allegedly thrown in the toilet. He said Mthembu requested him to take a statement from the second plaintiff only after they have established as to what happened to the knife. He stated that later on at about 16h00 Mthembu came back to him and informed him that he could not find the knife but he should proceed to take the statement from the second plaintiff. He confirmed he heard of the arrest by the community, the finding of a mutilated body of the deceased, the arrest of the other suspects, he admitted that he was pressure on the police to solve the crime and bring to book the people who committed the crime. Mncwabe testified that after he finished taking the statement from the second plaintiff he took his fingerprints. Mncwabe said the second plaintiff could not tell him at what time the incident took place. He used a pro forma in the first person of the person who is making a statement, not a form used by the person taking a statement.

[25] The third witness by the state in the trial-within-a trial is Sthembiso Allen Mthembu (Mthembu). Mthembu testified that he was detective warrant officer stationed at Taylor's Halt Police station. He testified as follows. On 18 December 2010 at about 9 AM, he attended the scene. He found first plaintiff at the scene apprehended by members of the community. The community members were violent and threatening to kill the first plaintiff. He intervened, but the first plaintiff had already been injured and bleeding from his head. Mlangeni had left the scene with Khethiwe. He later placed first plaintiff in the police van and secretly told Constable Z.R Dlamini to drive away. He did not explain anything to the first plaintiff since there was no time and he was protecting him from the members of the community.

[26] Mthembu testified that at about 11 pm he saw the first plaintiff again at Taylor's Halts police station. The OB entry 1756 he made recorded that he detained first plaintiff at 10h40, detained with Siphelele Mkhize for murder under CAS 116/12/2010 and it refers to SAP 14A Q4736741 and 4736740 as their constitutional rights. It recorded Thembelani Ngcobo got injuries on head when the community assaulted him. He said Constable R.Z Dlamini explained the constitutional rights. He testified that he also explained to the first plaintiff his constitutional rights and the reason for the arrest at Taylor's Halt police station but they were not booked in at Taylor's Halt. He said he explained the accused constitutional rights and he told him that he was arresting him for the murder charge. He said he first introduced himself as the police officer, told him that he was putting him under arrest on a charge of murder, inform him of a of the rights of legal representation, that he had a right to consult with his own legal practitioner, if he did not have one, he can be afforded one by the state. He said he also explained to him that whatever he says or tells him would be used as evidence against him in court. He also informed him of his rights to a bail application. He then told him that he would be taken to Plessislaer Police station for the reason that he was injured and he needed medical attention.

[27] Mthembu testified that on 19 December 2010 at 9:20 per OB 1835 he booked out first plaintiff, Siphelele Mkhize and Sihle Ntshela. He booked them to take to the Doctor for their blood samples to be taken. He took them to Doctor Soni at St Annes Hospital. He took them to the doctor. He returned from the doctor and booked them back into the cells. He testified that on the morning of 19 December 2010, he told Mlangeni that he had these suspects and he would like him to obtain a statement from them. He did not arrange the time with Mlangeni. He intended to tell him when the suspects were brought back to St Annes Hospital. He did not inform him, but it was his weekend to be on standby duties. He arrived with the suspects as per entry 18h57 at 16h55 that reads "suspects back and charged by W/O Mthembu Thembelani Ngcobo-Taylor's Halt CAS 116/12/2010. By charging him, it refers to his fingerprints being taken. He stated that he did not assault the first plaintiff and nobody assaulted first plaintiff in his presence. It was the last time he interacted with first plaintiff on that day.

[28] Mthembu testified that he arrested the second plaintiff. He arrested the second plaintiff where he stayed. He explained his constitutional rights when he arrested him. He arrested the second plaintiff on 20 December 2010. He introduced himself and that he was investigating the murder. He informed him of his rights of legal representation and that he had a right to have his own legal representative of his own choice. If he did not have one, he could make an application in court to be afforded a state attorney. He told him that he must bear in mind that whatever he is discussing with him might be used against him as evidence in court and he informed him of his right to a bail application. That took place at Taylor's Halt police station and he did not know at what time, but in the morning between quarter pass seven to eight. He also took him to Doctor Soni to his Surgery. It was between ten and eleven. The doctor attended to him at 14h00. He then took the second plaintiff back to Plessislaer and detained him.

[29] Mthembu testified that after he detained the second plaintiff he went to Captain Mncwabe under whose command he was. He requested the docket. He informed him that there was one more person he had arrested, and he wanted to add him in the docket. It was entry 1981 with time 18h00 stating that the suspect is detained by

Detective constable Madlala of SAPS Taylor's Halt. Bhekumuzi Shange CAS 116/12/2010 murder. His rights were explained and understood, and then SAP14 A Q4736777 is the constitutional rights warning. He testified that on 21 December 2010 Captain Mncwabe obtained a warning statement from the second plaintiff. He arranged for Captain Mncwabe to obtain the warning statement. He arranged commissioned officers to take warning statement because the offences were serious and in such cases, they are not allowed to take such statements from the suspects. The second plaintiff wanted to say something, and it is where he had to tell him no, stop, you can convey that to the right person. He testified that he did not assault the second plaintiff and no police officer assaulted him in his presence.

[30] Mr Mthembu in cross-examination testified that he had an experience of 22 years' service, thirteen (13) years of which as a detective. Mthembu testified after the first plaintiff was removed from the scene, he wanted him taken to Plessislaer Police station because at Taylor's Halt they did not have cells in which to keep a suspect overnight and he also wanted him to be seen by a Doctor. He said there were about 15 members of the community armed with bricks and sjamboks. Persons were shouting that the first plaintiff be released to them for them to kill him. He said the first plaintiff could not be taken straight to the doctor because the procedure for arrested persons is first go to a police station to make a note or letter to say the person is under arrest so if he is taken to the doctor or hospital, he would be guarded by the police. It is to fill occurrence book and write out SAP 70. He agreed with an OB entry of Plessislaer that first plaintiff was detained at 10h40; and taken to Edendale hospital at 10h45 as per entry 1757. He said he would not deny that the notice of constitutional of first plaintiff by Constable Dlamini was done at 9h30 at Plessislaer. Mthembu testified that he was not an investigating officer but he was part of the investigation team and Col Mlangeni was in charge of the team. He proceeded to Taylors Halt and he opened a police docket. He said he saw the first plaintiff bleeding at the scene with an open wound, he instructed Dlamini to quickly take him to the police station because they had to take him down to Plessislaer and to hospital. His intervention with the first plaintiff on 18 December 2010 at Plessislaer was purely to inform him of his rights and he played no

further part on the day. He only inform the first plaintiff that he was going to take him to hospital. The first plaintiff was then detained in the cells. He found the first plaintiff in the charge office; he was bleeding, wearing shorts and having no shirt. He booked the first plaintiff into the cells at 10h40 as per the OB entry.

[31] Mthembu admitted that there was no evidence linking first plaintiff to the incident up to the date of trial. He said first plaintiff was detained so that he would be investigated as to how true are the allegations that the community were saying against him. Mthembu admitted that at that stage he had no statement by Khethiwe filed in the docket. He admitted that when he detained the first plaintiff he had no leads that he was involved in the murder. He said he has no comment to why the right to remain silent was not explained to first plaintiff at Taylor's Halts police station. Mthembu said although he was with first plaintiff at Taylor's Halt and he told him all what he wanted to tell him, there is nothing stopping him to going to Plessislaer and repeat to first plaintiff what he had told him at Taylor's Halt. Mthembu said that he did not investigate first plaintiff at Plessislaer Police station, he investigated him at Taylors Halt when he arrived. Mthembu when asked whether at the stage he asked Col. Mlangeni to take a statement from first plaintiff, had first plaintiff told him anything necessitating the taking of a statement by the commissioned officer, he said first plaintiff did not tell him what he wanted to say excerpt to indicate that he wanted to say something. He confirmed that Col Mlangeni did not know that first plaintiff was going to incriminate himself.

[32] Mthembu testified that he got impression that second plaintiff wanted to make a statement, and he handed the book over to Capt Mncwabe. He arrested second plaintiff on 20 December 2010 at 8h00 at his home. He took him to Taylor's Halt. He first asked second plaintiff what did he knew about the incident. The interaction took about an hour. He then at about 15h00 took him to Doctor Soni. Between 10ó clock and 15h 00, he was with second plaintiff in his office at Taylors Halt trying to contact other colleagues to assist to remove what second plaintiff said he had. He did not book him into the register the second plaintiff. He agreed with OB entry 2097 indicating that

he was detained at 18h00 and his notice of rights is timed at 18:40, although the second appellant made a detailed statement to him he still saw it necessary to hand over or confirm Mncwabe that the second plaintiff wished to make a statement that he must proceed to take a statement. He confirmed that he did not advise the second plaintiff of his right to remain silent. He said he did not do so because he was still to refer plaintiffs to Col Mlangeni and Capt. Mncwabe where the said rights would be explained thoroughly and properly to them. Mthembu asked why he only warned second plaintiff of his constitutional rights after he had questioned and obtained information from him, he said he would not have placed second plaintiff under arrest before he could give him the reason why he should do so. He said he did not book in second plaintiff at Taylor's Holt because he was still asking him questions about the offences, he would not have reached a stage to book him in before he would at least get what he was looking for. He denied that he and Madlala who arrived in the home of the second plaintiff with other police officers assaulted him.

[33] Zamokwakhe Raymond Dlamini testified as follows. He was a constable stationed at Taylor's Halt Police station with eight (8) years' experience. On 18 December 2010 at 5:30 he attended the scene at Mafakatini. He was the first police officer to arrive at the scene. He and Cost Nene proceeded to the home of the first plaintiff but they did not find him. Sibongiseni Mbhele phoned him and told him that community members had apprehended the first plaintiff. He then proceeded to the scene and he saw the first plaintiff with blood on his head. The members of the community some were carrying sticks and sjamboks. The first plaintiff was taken to the van. He then as instructed by W/O Mthembu drove away with first plaintiff. He book the first plaintiff to Taylor's Halt. W/O Mthembu arrived and read to the first plaintiff his constitutional rights. He then took first plaintiff to Plessislarer. W/O Mthembu followed them in another vehicle. He at Plessislaer read to the first plaintiff his constitutional right from SAP 14 (a) and it was at 09:30. As per the entry 1757 at 10:45 he booked out the first plaintiff and he booked him to Edendale Hospital. He returned and booked into the cells the first plaintiff at 15:50 as per entry 1771. He stated under cross-examination that after W/O Mthembu read to the first plaintiff his right, he was then placed in a police

vehicle and he took him to Plessislaer. He did not absence W/O Mthembu at Taylor's Holt investigating the first plaintiff. He said W/O Mthembu read to first plaintiff the constitutional rights from the e-pocket book he had no c_ that W/O Mthembu stated that he explained the constitutional rights from memory Dlamini testified that the SAP 70 form was complete at Plessislaer SAPS after he had completed the SAP 14A notice of rights. He agreed that as result of assaults, the first plaintiff at the scene could not stand and he had to sit on the ground. He insisted, contrary to Mthembu's evidence that Nene and Madlala were not there at Plessislaer Police Station.

[34] Victor Mduduzi Nene testified as follows. He was a constable stationed at Taylor's Holt SAPS. He worked nightshift on 17 December 2010. On the morning 18 December 2010, he attended the scene of crime at Mafakatini. His evidence relating to the presence of the body and the community at the scene and the first plaintiff brought to the scene agrees with the evidence of the other police officers. He denied that he went to Plessislaer Police station stating that from the scene he went home. He denied that he assaulted the first plaintiff at any stage. Thomas Madlala testified as follows. He stated that on 19 December 2010 he booked out the first plaintiff to doctor Soni. He denied that he was at Plessislaer Police station on 18 December 2010. He denied that on 2018 December 2010 he and Nene assaulted the first plaintiff in the presence of W/O Mthembu. He returned with first plaintiff from doctor Soni and he with W/O Mthembu booked back into cells the first plaintiff.

[35] Doctor Soni testified that on 19 December 2010 at about 12h 52, he examined the first plaintiff and he completed the prescribed medical examination form (J88). He found the following injuries, a 5cm laceration on the left parietal area that had been sutured, a 2.5 cm laceration on right parietal area on left hand and forearm; 5cm sutured wound on the left thumb; 3cm sutured wound central aspect of the left palm, index and middle fingers, The back of ears and left part of the head had dried blood. The doctor stated and recorded what he was told by first plaintiff 'allegedly assaulted by many people from community, assaulted with a gun, sticks and kicked. Attended and

sutured at Edendale Hospital. The doctor testified that the first plaintiff was not wearing any shoes nor anything on top and he was wearing shorts.

[36] The first plaintiff testified as follows. He in the evening of 17 December 2010 was at Mortel Store. He was drinking with his friends, the second plaintiff and Siphesihle Mkhize, Sihle, Ntshela and others. He knew Khethiwe by sight. He saw her in the store but he did not see her arriving. One female in the company of Khethiwe approached him and his friends and they asked to share liquor with them. He told her that he would not share liquor with her because they had all contributed in buying the liquor. That passed. Whilst they were dancing with the females, Khethiwe called them thugs (Skhothenis) she said after she had pushed away the second plaintiff. She also advanced to him and pushed him. She asked him who was he to dance with her female companions. His friends came and they took him away. He went with his friends and they continued drinking on their table. Siphesihle drew his attention to his phone, which was ringing. He went out to answer the phone away from the noise. He went about 20 meters away. He then saw a group of males and females coming from the store towards him and Khethiwe (who was light in complexion) was in the group). Khethiwe approached and confronted him. He asked the person he was on the call with to hold. Khethiwe asked him whether he was still denying that he was a Skhotheni. He asked what she really wanted from him. She struck him with a beer bottle on the head. The bottle broke. They struggled over a piece of the broken bottle. It cut him on the left thumb. He assumed during that struggle Khethiwe was cut on her shoulder area. (Court recorded two scars on the back portion of the thumb, three to five millimeters long). Muzi Shange, his younger brother Sphe and Siphokuhle Ngcobo came from the direction of the shop running. He was now in possession of the broken bottle. Khethiwe apologized to him. He chased her away. He went back to continue drinking. He received a message from the owner of the store, he was working for, telling him to go and sleep to prepare to do orders the next morning. Before he could leave, Siphelale Ngcobo, his younger brother requested him to give him R50.00 because he wanted to continue drinking.

[37] The first plaintiff testified that he then left; Sipehelele and his friends went with him. Those who accompanied him were Sipehelele, Siphesihle and the second plaintiff. He arrived at his home, which was about three minutes away, he took the R50.00 and he gave it to Siphesihle. Sipehelele and the other companions remained there for short while and they left and he went to sleep. He and Sipehelele occupied the room he slept in.

[38] The first plaintiff testified that he woke up in the morning. A small group of members of the community arrived and accused him of killing the deceased and they started to assault him. He ran away. They were about seven or eight in number. They were carrying sticks and one Madonsela of the community forum was carrying a firearm. He heard a siren from a police van and he ran towards where it was coming from. Another group of community members apprehended him before he could reach a police van. They caught him because that group approached from the direction he ran to. He was further assaulted, but with sticks whilst on the ground and stamped on. In his home, he was assaulted with sticks and he blocked the blows by his arms and hands. He asked to be taken to the scene. One boy stabbed him on his left hand. He was also hit on the head. He sustained wounds on the back of his head. He was bleeding from the wounds. He was taken to the scene where there was the body of the deceased. He found that there were police at the scene. It was said he must see what he has done. He requested to see the dead person because he did not know her. He removed the covering. He was being assaulted and told to eat the body. He fell onto the body. The police intervened.

[39] The first plaintiff testified that hearing people saying he must be beaten to death, he asked Ntshela, a police officer to ask if there is a person who saw him killing the deceased to come forward. Ntshela took a police loud speaker and asked that anyone who saw the first plaintiff killing the deceased must come forward. No one came forward. Ntshela said to Khethiwe why was she now not coming forward because she said it is the first plaintiff and his companions who killed the deceased. Khethiwe said she did not say it is them who killed the deceased but she said she suspected them, he

was then taken into a police van. He said his knees were weak, W/O Mthembu and Ntshela assisted him to the police van. (The Ntshela he pointed out in court it turned out his name is Zamokwakhe Raymond Dlamini).

[40] The first plaintiff testified that he was taken to Taylor's Halt police station. He was given forms he signed and he was told those were his rights. He was informed of the charges, of the right to a legal practitioner and the right to remain silent. He was then transported to Plessislaer Police station. W/O Mthembu did come to him whilst he was at Taylor's Holt Police Station. Mthembu hurled insults to him. Again, at Plessislaer Police Station, his constitutional rights were read to him and he was put in the cells. He signed the document notice of rights; he understood the rights explained to him. In the morning, Victor Nene woke him up. He was with Madlala. Nene beat him with a fist before taking him out of the cell. Madlala beat him with an open hand. They took him to a room wherein was W/O Mthembu. Mthembu was sitting on a chair with a table in front of him. He had papers before him on which he was writing. He said Mthembu told him that he was not there to fight with him but it will be a problem if he makes a fool of him. Nene and Madlala stood behind him. His hands were handcuffed on the back. Mthembu read to him what he said it was a statement of his co accused stating that they went to a room, took out a female they assaulted, raped and killed her. He told Mthembu that he did not know anything about that. Nene and Madlala when he denied hit him. Nene hit him on the head with a butt of a firearm on the left hand side in the middle of his head on the left and right hand sides. Nene was not directly behind him but he was on his right and he could see when he assaulted him. To stop the police from assaulting him, he agreed with whatever they read to him. He told Nene that in fact Nene knew that he did not even know where the deceased stayed. Nene said he was fooling them around.

[41] The first plaintiff testified that he was then taken to Edendale Hospital. The wounds were stitched at the hospital on the rib area, left thumb and the pointing finger. He was given some painkillers. He was taken back to Plessislaer Police Station and

placed back into the cells. The following day Mthembu and Madlala booked him out and he was taken to doctor Soni. He was with Siphokuhle Mkhize and Siphesihle Ntshela. Mthembu told him to study whilst in prison, and not to make a fool of them by denying everything when in court. When doctor Soni examined him both Madlala and Mthembu were present. He told the doctor, as he was busy examining him, that there are the police officers who assaulted him and they assaulted him with a firearm. After the examination, they went back to Plessislaer Police Station where they found Col. Mlangeni in the charge office. W/O Mthembu took him Col Mllangeni. Mthembu gave Mlangeni some papers after he talked him to Mlangeni. Col. Mlangeni took him to his office. He told him that now that he had admitted to the offences, if he goes to prison he must behave so that he would not stay for too long, and he must study. He told Mlangeni that he was assaulted and he did not know anything about the offences. Mlangeni said he was not there to listen to his stories. He brought him there to sign, he was in a hurry to go to Boston. He then signed the papers as mentioned by Mlangeni. He was taken back and placed in the cells. He did not get an opportunity to read the document. He signed before Mlangeni and it was not explained to him.

[42] The first plaintiff denied that after leaving the shop, he went to Khethiwe's home and he was with Khethiwe's mother. He said he did not know Khethiwe's mother and he did not know the whereabouts of Khethiwe's home. The first plaintiff testified that whilst on 18 December 2010, he was at the scene; Siphokuhle Mkhize was fetched from his home and brought to the scene. They were both placed in the police van. He did not know how Siphesihle Ntshela was arrested, he saw him at the police station. He

denied there it is Nene who protected him from the community. He said Nene was the first person to assault him. Nene also told Ntshela to release first plaintiff to the community to assault him again. It is Ntshela and Zuma who took him to Hospital. It is only Ntshela who was nice to him, the other police officers believed he was responsible for the offences. He denied that he raped the deceased; he said he did not even know her. He denied that he was at any stage in possession of a knife.

[43] The first plaintiff under cross-examination testified that he worked at Mortel Store doing counter duties by selling items to customers and he also placed orders and received goods from suppliers. He knew constable Dlamini as Ntshela as he usually visited the store. The store also served as a nightclub during weekends. On 17 December, 2010 he had been in town to make orders. He came back at about 17h00; he went home and returned at about 19h00 to the store, he knew Remember and he was at the store that evening. He did not see Remember proposing love to Nokuhle. After his first altercation with Khethiwe, it was about 3 or 4 hours when the second altercation took place. She hit him once with a beer bottle with beer and he grabbed her. He sustained a small open wound above the right eye on the hairline. (The court noted 1.2 cm scar above eyebrow plus /minus 5 to 8 millimetres round indentation wound). He did not receive at any stiches in the wound. When Khethiwe hit her, she was with five or six companions. He said he held the right hand of Khethiwe with a broken bottle and bend it towards her, which may have caused injury on the right upper arm. Khethiwe screamed and said 'you have just injured me'. and she apologised to him and he chased her away telling her to leave. He said one of those who drank with

them was a Mr Khumalo from Mafakatini in a homestead with taxis. He said when he went to his home, his brother Sipehelele, Siphokuhle Mkhize and second plaintiff accompanied him, they left the room after he had gone to bed. When he woke up in the morning, he saw his brother Sipehelele.

[44] The first plaintiff testified that when he fled pursued by members of the community he was wearing a white T-shirt, a J exchange jacket scotch in colour and navy 3-quarter pants and the slops or sandals on his feet. He gave the jacket, the t-shirt and 3 quarter pants to the police on Sunday and they brought him other clothing's, a pair of long pants and a shirt. He confirmed that his constitutional rights were explained to him at Taylor's Halt Police station on the morning of his arrest, which he did not remember who did so.

[45] He testified that Nene and Madlala assaulted him by slapping him when they took him to Mthembu. He said Mthembu told him that he had been told the truth by Siphokuhle Mkhize. He read to him what he said it was said by Mkhize. He read it in sections and asked him whether it was so, if he said it was not so, he was assaulted. He would be assaulted until he agreed with what Mthembu was saying it happened. They were telling him he did the crime of the murder and rape with Siphokuhle. He said because of the assaults, he ended up saying he attempted to rape the deceased but he could not get on erection.

[46] The prosecutor cross-examined the first plaintiff about what W/O Mthembu said in his statement, but it is not necessary to refer to it because no statement by W/O Mthembu was proved,

[47] The first plaintiff called his brother Sphelele Ngcobo as a defence witness. Sphelele testified that he was eighteen (18) years old with Grade 10 level of education. On 17 December 2010, he was at Mortel store. He was drinking liquor with Mthobisi Madlala and Bhekani Zuma. First plaintiff was at the store drinking. He saw first plaintiff quarrelling with Khethiwe about 4 metres away. He went to them and he stopped them. He told first plaintiff to leave Khethiwe and not to talk to her anymore. He heard Khethiwe calling the first plaintiff a thug. After he separated them, the first plaintiff went and he sat down and he continued drinking. Later whilst he was outside standing in the verandah, he saw a group of Khethiwe and others. In the veranda he was with Mlungi Shange and Siphokuhle Mkhize. The crowd went to where the first plaintiff was. He and his companions also proceeded to where the first plaintiff was. He arrived and he saw the first plaintiff injuring his left hand. They took him back to the store when he arrived the first plaintiff was holding a bottle that Khethiwe had been carrying in the shop. He testified that the shop owner called and told first plaintiff to go to sleep because tomorrow morning he was going to have to wake up and go to order some stuff for the shop. They then accompanied the first plaintiff to his home about 300 metres away. In the room, the first plaintiff gave him R50.00. They put him to bed, as he was very drunk. They locked the door and they went away. They went back to Mortel Store and they continued drinking. He testified that after he finished drinking he

went back to the room he shared with first plaintiff. He found first plaintiff sleeping. He said when he said we, he is referring to Siphokuhle Mkhize and the Bhekani Zuma and the second plaintiff. When they left, the tavern after finishing drinking each one went to their respective homes. The second plaintiff lived about 200 metres away from the store. They were all at that time pretty drunk.

[48] Sphelele under cross- examination testified that when he arrived at the tavern he found the first plaintiff with Siphokuhle and the second plaintiff. He arrived at about 9 or 10pm. He did not see how the quarrel between first plaintiff and Khethiwe started. He heard Khethiwe calling first plaintiff 'Skhotheni' when he arrived to them. He and his companions were out to the verandah to smoke. The first plaintiff had gone out to answer a call. He went to first plaintiff and the group of people because there was noise people swearing. He accompanied first plaintiff because he was drunk and had been involved in the quarrel and he was injured on his hand. These two companions came along too. He testified that the R50.00 he took he intended to use it for transport to Pietermaritzburg the next day. He would go with his mother to buy tekkies. They did go to town the next day at seven in the morning. The first plaintiff left to go to the store to buy stock. The first plaintiff got up first and he left whilst he was still sleeping. He asked the first plaintiff for the R50.00 at the store. At the time first plaintiff went to answer the call, he would not walk properly. He said he did not see the second plaintiff carrying a knife that evening. He is not able to say whether Mondli, Thanda, Ntshela and a Mr Khumalo were there because he did not know the other people. He confirmed

that he asked for R50.00 for first plaintiff because he wanted to continue drinking. Since he had already spent the monies, his mother gave to him for transport.

[49] The second plaintiff testified as follows. He went to Mortel store on 17 December 2010 after he was done with his household chores. Sinhle Ntshela arrived and they drank together. Thereafter the first plaintiff arrived. They were drinking and dancing. Khethiwe who was drunk, came to him. She was with a crowd which converge where first plaintiff was. In the crowd was Khethiwe and she continued with her talks of 'Skhotheni's as she did inside the tavern. The first plaintiff's brother said they must get back to the store and continue drinking. A person selling on the store called first plaintiff after that they took first plaintiff to his home and put him to bed. It was he, Sphelele Ngcobo and Siphokuhle Mkhize. They chatted with first plaintiff for a while and he fell asleep. Sipelele closed the door and they went back to the tavern. The first plaintiff and the other people were drunk.

[50] He saw the first plaintiff giving money to Sipelele before they left. They did not stay for a long time at the tavern because it was already late. They put their money together and bought liquor. They left the tavern on their separate ways. He testified that on Saturday morning his mother woke him up four o'clock to go to the ploughing the fields. They worked at the field and they finished about mid-day.

[51] He testified that on 20 December 2010 Mthembu and Madlala who were with other police officers arrested him. He was at home. They asked whether he was Muzi

and he said yes. They started hitting him. They accused him of killing a girl. He told them that he did not know anything about that. They entered the house. They took his T-shirt. They handcuffed him on the back. They put him on their vehicle. They said he would tell the truth. Madlala hit him on his private part. They took him to Taylors' Holt Police station. They put him in a place crowded with people working at the police station. He was then taken to Northdale Hospital and thereafter to Doctor Soni. Dr Soni asked him to undress and examined him: thereafter he was taken to Plessislaer police station. Mncwabe on Tuesday came to him. He took him out of the cells to where a statement was taken down from him. Mncwabe read to him his rights. He said he must sign on the documents. The document with rights was read to him in English and it was explained to him in Zulu. He was also asked to sign exhibit N but it was not explained to him what it was. He said he knew nothing about what was contained in the exhibit N. He said when Mthembu came to arrest him, he said it is alleged that he put the knife in the toilet; he said he was told by his friends. It is Mncwabe who asked him to sign the documents not constable Madlala. His level of education is grade 11. Police from his room took a t-shirt and his track pants. Mncwabe said to him, if he did not sign the documents, the same thing that happened at his home would happen. He understood that he would be assaulted again.

[52] He testified that in the store Khethiwe came and pushed him. Before that females in Khethiwe's company asked to share drinks in their drinks, and the first plaintiff told them that is not possible because they all contributed in buying the liquor. He said Khethiwe also pushed first plaintiff and she said to her friends who were

dancing with first plaintiff, why were they dancing with “Skhotheni”. After that, he saw Sipehelele telling first plaintiff to leave Khethiwe, and they went to the back and continued drinking.

[53] He said whilst standing in the veranda with Sipehelele and Siphokuhle smoking, a crowd gathered around first plaintiff. He went to see what was happening. Khethiwe was talking, first plaintiff was injured. First plaintiff told them that he got injured whilst fighting with Khethiwe. Khethiwe apologised to the first plaintiff. They went back to the tavern and they continued drinking.

[54] The second plaintiff under cross-examination, he said Siphokuhle Mkhize also came and drank with them; others were on the other side. He is not sure but it is possible that at some stage Mondli drank with them, just like Thanda Ntshela as well as a Mr Khumalo. He thinks Khethiwe pushed him because he was dancing with her friends. He, Siphokuhle Mkhize and Sipehelele went home with first plaintiff. They assisted first plaintiff who was drunk to get home. He thought Sipehelele would use the money to buy liquor but he did not know whether it was used.

[55] The second plaintiff stated when he was arrested in the morning at his home; both Madlala and Mthembu assaulted him. Mthembu hit him on his face with open hands. They put him in the house and Madlala assaulted him also by slapping him on the face. In the motor vehicle whilst handcuffed at the back, Madlala squeezed his private part saying he would tell the truth, Madlala was left at Taylor’s Halt Police

Station but later he found him at Plessisslaer Polcie station. No rights were explained to him at Taylor's Holt. He said Dr Soni spoke to him in English and Mthembu interpreted for him. He did not tell the doctor that police assaulted him. He finished to Dr Soni and he was first taken to his home and thereafter to Plessislaer Police Station. They went to his home to fetch items of clothing he referred to earlier.

[56] The second plaintiff testified that when they arrived at Plassislaer Police station Madlala booked him into the cells. The following day on 21 December 2021 Mncwabe book him from the cells and book him to the room where statements are taken. They sat on a table and Mncwabe explained his rights to him. He said Mncwabe did not ask him any questions and he did not tell him how he and his co-accused committed the crimes Mncwabe said if he did not do as required what the other police did to him would happen again. He then signed as requested, Exhibit N, which is a document that already had been filled. Mncwabe then told him that what he had signed was a statement wherein he was admitting that he committed the crimes. He learnt when he consulted with counsel of the contents alleged to be his statement. He was asked why the police officers would in his statement accuse for committing the crimes, he said police officers know how trials are conducted.

[57] The second plaintiff, contrary to what was put to witnesses by his counsel, said no police officers at Taylor's Halt beat him. He said Mthembu and Madlala did not take him from the cells to Mncwabe's office. He said at his home from Doctor Soni he was

threatened with violence whilst being booked in at Plessislaer police kept threatening him, at the time he was arrested he was highly intoxicated.

[58] After the defence closed its case, the criminal trial court called two witnesses, namely Siphokuhle MKhize and Ntombi Crethina Mthalande. In my view, it is not advisable for a court to call as a court witness a person regarded by the state as an accomplice, and a person who is not called by the party she or he is close to and would be expected to support the case of that party.

[59] Mkhize testified, after he was warned in terms of s204 of the Criminal Procedure Act 51 of 1977, as follows. On the evening of 17 December 2010 he was at Mortel store with both plaintiffs. He after considerable period left with his brother Lango to his residence. The next day in the morning community members took him to the scene. He was thereafter placed in a police van.

[60] Mkhize under cross-examination testified that he knew Khethiwe by sight. He did not witness any altercation between her and the first plaintiff. He knew Sipelele and he saw him on 17 December 2010 at Mortel Store. He did not at any stage accompany first plaintiff with Sipelele and second plaintiff to their home. He left the Mortel Store at 23h00.

[61] Mthalande testified as follows. She testified that she was the mother of the deceased. On 17 Dec 2010 after the soapie Generations, the deceased left her retiring

to sleep in her room. Khethiwe soon thereafter phoned asking her to come and meet her on her way home. She told her that she was at Dombi's residence. She asked Khethiwe's brother to accompany her but he refused. She phoned Khetive and told her to sleep at Dombi's residence. After a while there was a knock on the door. She asked who it was. The person knocking said he was Sgodo Ngcobo residing at the close proximity to Mortel Store. She asked him what he wanted, he said he wanted to render assistance to her. He also said Khethiwe is here, she has been slapped and she is in the company of her two friends from Mphophomeni Township. She then walked out of the house. Sgodo exclaimed saying was she also present referring to her as aunt. She told him it was insignificant who she was, he must show her Khethiwe. She and Sgodo walked off the yard. They walked two paces from the gate, the grandmother was standing at the gate. She asked Sgodo if he was carrying a knife. He denied carrying a knife. He asked her what caused her to think he was carrying a knife. She told him evil spirits possessed her and she would detect if he was carrying a knife. She told him that the knife he was armed with he had used to kill a person and that God will enlighten her as to who is the person he killed with a knife.

[62] She testified that it was her first time to see that person. She whilst in the company of Sgodo she saw Khethiwe approaching. She asked Sgodo who is the person approaching because he said Khethiwe had been stabbed. Khethiwe walked past. Khethiwe shouted at her grandmother to alert her that she had been stabbed. She turned around and walked away.

[63] Sgodo said these vagrants from Mafakathini should not ridicule him; he just wanted to keep an eye on her so that these vagrants could not fool them around. He and Sgodo walked into the house wherein was Khethiwe and grandmother. The grandmother said light up the house so that I can establish how extensive are the stab wounds on Khethiwe but she said the house should not be lighted up. She said so because she was scared. The house was eventually illuminated by cellphone light after she instructed them to do so to see how Khethiwe was injured. Sgodo also showed his cellphone light. Khethiwe then said "mother I thought you are in the company of my brother but instead you are in the company of the person who stabbed me." Then a verbal argument ensued between Khethiwe and Sgodo and the grandmother ran out of the house. She reprimanded them.

[64] She testified that the grandmother went out of the house with the sole intention to call the deceased. She returned and said Lindani was not there. Sgodo ran away. She looked out for Sgodo but the grandmother reprimanded not to pursue Sgodo. She returned to the house. She sent her son Sbo to go and look for Lindani in the toilet. He came back and reported that Lindani was not in the toilet. They remained seated until they get some help the next morning. The body of Lindani was recovered on that next morning.

[65] She testified that the two men who accompanied Khethiwe, she did not know them. She asked who were they, one said he was Nhlanhla Bhengu and the other one was a Ngcobo. They did not enter the premises but they walked past. She said she knew first plaintiff. She saw him on that day when he came and he knocked at the door. He introduced himself as Sgodo. She said she has never discussed with Khethiwe how she got stabbed. She worked far from home. She visited maybe once a month; sometimes she did not find her at that time. She noticed that Khethiwe was injured at the back of her left shoulder, she did not stop as she walked past because she was busy establishing the identities of her companions. Two cellphones were used to light the house, one by Khethiwe and the other one by Sgodo. The deceased's room was about 12 meters from the room in which they were. When told that the first plaintiff was

never in the home and never spoke to her, she said he was at home because he was wearing black shorts and his jacket tied around his waist.

[66] The state as its last witness lead evidence of Dhanraj Money who performed a post mortem examination of the deceased. He stated that his chief post mortem findings where there was history of stabs and rape. The findings being multiple clean cut wounds on the body of the deceased, and that the weapons penetrated the left and right lungs and the heart. The injuries on the body were a linear clean cut wounds as follows: 1) two wounds close together outside the external genitalia measuring 2cm x1.5 cm. 2) Three wounds on the outside of the right external genitalia measuring 1.5 cm x2cm and 3.5 cm long. 3) A clean cut wound in the mid line of the chest to the abdomen from the level of the fourth costal cartilage to symphysis pubis measuring 45cm long and the small intestines exposed through the wound. 4) Three wounds in the left epigastrium measuring 2cm long each. 5) Fifteen cut wounds in the region of the left chest cavity between the clavicle and the fourth costal cartilage each measuring 2.5 cm, 1.5cm and 1cm in the left mid clavicular line at the costal margin where the ribs end and 2.5 cm wound. 6) Two wounds across the interior neck at the level of the thyroid cartilage measuring 12cm and 10cm each. 7) In the interior neck between the chin and the surface of the chest and the clavicle between sternomastoid muscles there were six wounds each measuring 7 cm x 5cm x2 cm. 8) In the left cheek there were seven wounds ranging from 2.5 cm to 1.5 cm each. 9) In the right cheek to the nose were six wounds measuring 3cm to 1cm each. 10) In the right upper parietal a wound measuring 5cm long across. 11) Behind the left mastoid bone two wounds measuring 4 cm and 3.5 cm. 12) across the palm of the 2nd /3rd/4th fingers three wounds each measuring 1.5 cm. 13) Three wounds close together around thoracic 8 vertebra measuring 1.5 cm and 2cm each over thoracic one vertebra, in the left buttocks three wounds measuring 3cm/ 2cm/ 3.5 cm. 14) In the right buttocks two wound measuring 2.5 cm x 3cm. Both lungs and the heart were punctured. The entire abdomen cavity and the pelvic cavity was soiled with dagga particles as if when the abdomen was opened by the long lengthy wound, the dagga particles was scattered into the abdomen. There were no injuries to the internal or external genitalia, which

meant there was no medical evidence to confirm forceful sexual penetration. In total, there were forty-nine wounds.

[67] The trial court in ruling the 'confessions' admissible it found that the state discharged the onus on it beyond reasonable doubt that the plaintiffs made the confessions freely and voluntarily in their sound and sober senses without having been unduly influenced thereto.

[68] Zamokwakhe Raymond Dlamini in an affidavit stated that on 18 December 2010 he received a complaint of murder at Mafakatini Location. He proceeded to the scene. He found two suspects that were unknown to him who were already apprehended by the community, their names are Thembelani Ngcobo and Siphosihle Mkhize. Thembelani was assaulted with injuries on the head and body. He introduced himself that he was a police officer and he showed them his appointment certificate, then he told them that they are under arrest for the suspicious murder case. He informed them of their constitutional rights and he then arrested them and detained them at Plessiaslaer SAPS.

[69] The investigation Diary of Taylors Holt SAPS CAS 116/12/2010 has an entry dated 18 December 2010 time 06:00 stating "*Deceased*: Sali Mthalani near MaMbilini Butchery.

Suspect: Unknown at this stage: *Witness*: No witness at this stage. *Scene of crime*: Mafakatini Location below Mambilini Butchery: *Date and time*: 2010-12-18-at 05:00
Statement of arrest of Cst Dlamini: Filled as per A3: *Statement of the informant* obtained and filled as per A2: *SAPS 70 of Thembelani Ngcobo* filled as per B2: Further entries show on 19 Dec 2010 a warning statement was obtained from Thembelani Ngcobo ,from Siphosihle Mkhize, and a statement obtained from Siphosihle Ntshela. On 20 December 2010 it is recorded that seized exhibits be sent for DNA analyses purposes. Further entries show that Sihle Ntshela was arrested on 18 December 2010 at 20:20 and his statement obtained as A8 and released on 20 Dec 2010 at 07:00. On

27 may 2011 the DPP advised that he was unable to make a decision in this matter pending DNA results and requested forensic science lab to expedite results.

[70] In the docket it indicates that Mthembu on the day the body was found found a black shoe near the deceased, another shoe not far from the body, a grey pair of jeans with bloodstains. Also found was a t-shirt blue in color written (SSV Markranstadiot and in red www soccer Leispzig torn off and t-shirt had bloodstains. He also noticed blood drops leading to the home of the deceased about 100 meters away, and at the entrance to the deceased's home he found a pair of bluish sandals. He also found bloodstains inside the room as well as on the mattress and on the mirror.

[71] Mthembu in his statement of arrest of second plaintiff on 20 Dec 2010 at 07:15 stated that as follows; the second plaintiff came out to him. He introduced himself to second plaintiff. He asked the second plaintiff for a weapon that was used to kill the deceased. He said the first plaintiff directed him to the second plaintiff and told him that a murder weapon was with him. The second plaintiff then admitted that he took the murder weapon an okapi knife after the commission of the offence. He pointed the toilet where he had thrown the knife. He went and looked at the toilet, which was half-full and he did not see anything. He went to the room of the second plaintiff. The second plaintiff gave him a blue T-shirt full of bloodstains. The second plaintiff admitted that he stabbed and raped the deceased. He then placed first plaintiff under arrest and he explained to him his constitutional rights.

[72] The defendant in the amended plea admitted that:

1. The plaintiffs were arrested at or near Mafakatini in Pietermaritzburg under case number Taylor's Halt CAS 116/12/2010.
- 2 The plaintiffs were initially detained at Taylor's Halt Police Station and subsequently at Plessislaer Police Station and Pietermaritzburg Correctional Centre.
- 3 The bail application was opposed and it was subsequently refused by the Pietermaritzburg magistrate court.

[73] The defendant in amplification of its plea pleaded the following. 1. The first plaintiff was arrested on 28 December 2010 and the second plaintiff was arrested on 20 December 2010. 2. The plaintiff's arrest and detention was unlawful in accordance with the following provisions of section 40(1)(b) of the Criminal Procedure Act 51 of 1977 (the CPA). 3. The members of the South African Police Service who arrested the plaintiffs were peace officers as defined in the CPA. 4. There was a reasonable suspicion that the plaintiff's had committed the offences of murder alternatively, the offences of murder and rape envisaged in schedule 1 of the CPA. 5. The court convicted the plaintiffs on October 2013 and sentenced them on 10 October 2013. 6. The defendant and its employees acted at all reasonable times material hereto in the arrest and the detention of the plaintiffs with reasonable and probable cause. The evidence pointed to their complicity in an assault, rape and murder of the deceased, and an assault of the deceased's sister Bavumile Khethiwe Mthalande. The evidence arose out of information supplied to the police by members of the community at Mafakatini location that the first and second plaintiff participated in the rape and murder of the deceased and in respect of first plaintiff in the assault of the deceased's sister. It also arose by virtue of statements made in the form of affidavits, the first plaintiff made to Lieutenant Col Mlangeni on 19 December 2010 and by the second plaintiff to Capt J.V Mncwabe on 21 December 2010, and by the implication of the second plaintiff in the commission of the crimes against the deceased by the first plaintiff. The defendant pleaded that there was no maliciousness in the prosecution of the plaintiffs and it denied that the prosecution was with *animus injuriandi*. In addition, defendant pleaded that persons committing crimes, as demonstrated by the evidence implicating the plaintiffs and failure by first plaintiff to challenge on appeal his conviction for assault, should not be allowed to profit out of the commission of crimes by being paid damages.

[74] The defendant admitted that the application for the release on bail of the plaintiffs it opposed. It opposed it on a proper legal basis, which included concerns for the safety of each of the plaintiffs at the Mafakatini community intended killing them for the said rape and murder, once bail was denied continued detention was at the specific instance of the Ministry of Justice, not defendant. Further, post-refusal of bail, the continuation

of the prosecution of the plaintiff was at the specific instance of the National Director of Public Prosecution and /or the Ministry of Justice, and not the defendant.

[75] In my view, the evidence establishes that at the time Mthembu arrested second plaintiff on 20 December 2010 no member of the community had made a statement implicating the second plaintiff to any crimes. Mthembu told the second plaintiff that he wanted him to produce a murder weapon because the first plaintiff said the murder weapon was taken by him after the commission of the crime. Mthembu knew or ought to have known that a confession is only admissible against the confessor. He could not use the confession of the first plaintiff as evidence on which to arrest the second plaintiff.

[76] Further, in my view, the evidence shows that the first plaintiff was not arrested for the assault on Khethiwe. Dlamini arrested the first plaintiff for the murder and rape. Dlamini when he arrested the first plaintiff did not have any evidence or information that the first plaintiff had committed the murder and /or rape of the deceased. The assault related to a separate incident not shown by evidence to be linked to the murder and rape charges. What really befell the plaintiffs was because of being accused for committing the murder and the rape. The arrest, detention, prosecution, conviction and sentence of the plaintiffs whether justified or not must be decided in relation to the evidence against them on the murder and rape charges. The defendant in the plea stated that 'pursuant to the assault of Khethiwe the plaintiffs, first plaintiff in particular, wanted to exact revenge upon her after assaulting her, by following her to her homestead, in consequence of which, eventually, her sister(the deceased Lindeni Angel Mthalane) was raped and murdered'. This averment is preposterous and not based on any evidence; it flies in the face of the evidence on record. Khethiwe, although she was very vague in her evidence, she never said that the first plaintiff stopped assaulting her when he still wanted to assault her further. She never said that the first plaintiff had any reason to assault her. If the first plaintiff was content to assault Khethiwe, what reason could cause him to gruesomely kill the deceased who had nothing to do about what happened between Khethiwe and the first plaintiff. The evidence relating to the first

plaintiff leaving Mortel Store, proceeding to his home, and sleeping was corroborated and it was not shown by the state, as it amounted to an alibi, to be false.

[77] It is trite that the police officer effecting an arrest bears an onus to prove that his action is justified in law. He must entertain a suspicion that the plaintiff committed a schedule 1 offence. The suspicion must be based on reasonable grounds (s40 (1)(b) of the CPA);. See *Minister of Law and Order vs Hurley and Another* 1986 (3) SA 568 A at 589 E-F; *Duncan v Minister of Law and Order* 1986(2) SA 805 (A) at 818 G-K; *MR v Minister of Safety and Security* 2016 (2) SACR 540 (CC) para 46, *Minister of Safety and Security v Sekhoto* 2011 (5) SA 367 (A).

[78] The defendant admits that subsequent to the arrest of the plaintiffs and their detention it charged them. The arrest and the charging of the plaintiffs set the law in motion against them. In the case of malicious prosecution based on *actio injuriarum*, in order to succeed in a claim for malicious prosecution a plaintiff must establish that the defendant:- (a) set the law in motion (instigated or instituted the proceedings); (b) acted without reasonable and probable cause, and (c) acted with malice (*animo injuriandi*); and (d) the prosecution failed. (*Minister of Justice and Constitutional Development & Others vs Moleko* [2008] 3 All SA 47 (SCA); *Woji vs Minister of Police* [2014] ZASCA 108; 2015 (1) SACR 409 (A) at 419f-g.

[79] The defendant admits that it opposed the release of the plaintiffs on bail and that resulted in the further detention of the plaintiffs. The charge of assault is irrelevant because if first plaintiff was facing only a charge of assault the application for bail would not have been opposed, in particular, for the reason mentioned in the plea. If the defendant did not have what it regarded as evidence against the plaintiffs, it would not have opposed bail. The probability is that it would have released the plaintiffs without charging them. The defendant was not entitled to oppose the release on bail of a suspect against whom there was no evidence because the community was threatening to kill him.

[80] The only question relating to malicious prosecution is whether the defendant acted without reasonable and probable cause and whether it also acted with *malice /or animo injuriandi*). The plaintiffs, in addition, seek to hold defendant liable based on the failure of the police to inform the prosecutors and judicial officers of the irregularity in the confessions of the plaintiffs. In my view, this cannot be an independent separate cause of liability in the particular circumstances of the case. The negligence of the police is obtaining confessions from the plaintiffs in an irregular manner and in persisting presenting the confessions as evidence against the plaintiffs. It is correct as pleaded by the defendant that the Appeal Court found that the 'confessions' ought to have been found inadmissible as having been not freely and voluntarily made because of the supervening threat of assault and actual assault which each plaintiff suffered at the hands of the community which resulted . However, that does not mean that the 'confessions' were not inadmissible on some other ground. In fact, despite the finding of the Appeal Court, the defendant could before this court show that in every respect the 'confessions' were obtained properly and stood admissible as evidence against the plaintiffs.

[81] The defendant obtained 'confessions' from the plaintiffs in the guise of warning statements. Both Mlangeni and Mncwabe coincidentally did not use the prescribed pro forma for taking confessions. They knew that there was a prescribed pro forma for taking confessions. Such pro forma is a product of team expertise and guidance from courts. It is followed to ensure that safeguards for taking confessions are complied with to ensure that suspect's constitutional rights are not infringed and that the process accords with the accused's right to a fair trial. Each question in the proforma serves a particular purpose. The pro forma serves as a contemporaneous record of what took place during the taking of the confession. The failure to use the prescribed pro forma is courting disaster.

[82] Mlangeni and Mncwabe testified that they did not use the prescribed pro forma because they were taking warning statements. If both Mlangeni and Mncwabe were not forewarned that suspects could make confessions to them, it follows that the suspects

either before or by Mlangeni and Mncwabe were not warned of their rights relating to confessing. The pro forma requires, inter alia, that the commissioned officer assure the suspects that he is an independent impartial person not involved in the investigation of the case. Since both Mlangeni and Mncwabe were part of the investigating team of the charges against plaintiffs and they could not have given the required assurance. The pro forma requires that the suspect be specifically warned about his rights relating to the taking of the confession, for example, a right not to confess, a right not to incriminate yourself etc and he be given an opportunity to exercise those rights, which is not required in case of a suspect from whom a warning statement is taken. The constitutional rights of the suspect must be explained in the context of what is happening, for example, the suspect might not need a legal representative for a warning statement but need one for a confession.

[83] It resulted in confessions taken by unqualified officers in the in the guise of warning statements. It resulted in the prescribed *pro forma* for taking confessions not being used and all the safeguards followed in the taking of the confessions not being followed. The required independent impartial intervention in the process by a justice of the peace was missing. It resulted in a fatally defective process. In the results, the statements obtained by both Captain Mncwabe and Lieutenant Col Mlangeni were not worth anything. If the officers confused the process why the suspects would not be confused. The confused process infringed the right of the plaintiffs to as fair trial. It resulted in using underhand methods to secure the conviction of the plaintiffs. The trial court overlooked the fact that taking of confessions is a completely different process from the taking of warning statements. S217 of the Criminal Procedure Act 51 of 1977 regulates the admissibility of confessions not warning statements. It is irregular for a police officer to start taken a warning statement from a suspect and in the middle of the process to change and take a confession. It is not necessary to make a finding on whether the plaintiffs made the statements, and if so, whether the statements were made freely, voluntarily and without any undue influence and in compliance with the constitutional rights of the plaintiffs. The confused process followed make it unnecessary. The plaintiffs labelled the 'confessions' as contrived evidence against

them and evidence extracted from them by assaults and threats. See *S v Malinga* 2015(2) SACR 202(SCA) .

[84] The said statements were obtained in overzealousness to find something against the plaintiffs so that they would be charged and be taken to court. It threw the investigation off track. The insistence that there be at least a DNA investigation was ignored. Initially and correctly so, the National Director of Public Prosecutions insisted that there be DNA investigation results before a decision be taken but apparently, an overzealousness prosecutor proceeded with the prosecution of the plaintiffs without the result of the DNA examination. It resulted in the unwary court overlooking the fatal shortcomings in the process and it relied on the warning statements to convict the plaintiffs. The alleged presence of first plaintiff at the home of Khethiwe is baffling so is the brutal killing of the deceased by the appellants for no reason and they did not even know her. The police despite having no evidence of the motive of the killing of the deceased, failed subject items found in the scene to thorough investigation to assist them in identifying the perpetrator(s).

[85] The warning statements constituted the only evidence against the plaintiffs. It caused them to be detained from the time they were charged by the police, caused them not to be released on bail and caused them to be tried, convicted and sentenced. In the notice of factual and legal causation, there is no doubt that the unlawful arrest of the plaintiffs, the unlawful obtaining of confessions in the guise of warning statements and the presentation of the confessions as evidence resulted in the detention and imprisonment until they were released when their appeal against conviction and sentence was upheld. In *Minister of Police v Skosana* 1977 (1) SA 31 (A) at 34F-G, Corbett JA (as he then was) expressed himself as follows regarding the question of causation: 'Causation in the law of delict gives rise to two rather distinct problems. The first is a factual one and relates to the question as to whether the negligent act or omission in question caused or materially contributed to (see *Silva's Fishing Corporation (Pty) v Maweza* 1957 (2) SA 256 (A) at 264; *Kakamas Bestuursraad v Louw* 1960 (2) SA 202(A) at 222) the harm giving rise

to the claim. If it did not, then no legal liability can arise and *cadit quaestio*. If it did, then the second problem becomes relevant, viz whether the negligent act or omission is linked to the harm sufficiently closely or directly for legal liability to ensue or whether, as it is said, the harm is too remote. This is basically a juridical problem in which considerations of legal policy may play part.’ The police intended the ‘confessions’ obtained from the plaintiffs to be used as evidence against them. The ‘confessions’ were used as evidence against the plaintiff used for their conviction and sentence.

[86] The police particularly in a constitutional democracy have a responsibility to ensure that in carrying out their duties to combat crime persons are not arbitrary deprived of their freedom or without just cause. In *Thandanani v Minister of Law and Order* 1991 (1) SA 702 (E) it was held “sight must not be lost of the fact that the liberty of the individual is one of the fundamental rights for a person in a free society which should be jealously guarded at all times and there is a duty on over courts to preserve this right against infringement’. In *Mahlangu and Another v Minister of Police* (CCT88/20) [2021] ZACC 10; 2021(7) BCLR 698 (CC); 2021 (2) SACR 595 CC para (32) the court held ‘ it follows that in a claim based on interference with the constitutional right not to be deprived of one’s physical liberty, all that the has to establish is that an inference has occurred. Once this has been established, the deprivation is *prima facie* unlawful and the defendant bears the onus to prove that there was a justification for the interference.

[87] The warning statements constituted conscripted evidence, which was the only evidence against the plaintiffs. Both Lieutenant Col Mlangeni and Capt. Mncwabe were senior experienced officers well aware of the procedure to be followed in taking a confession from the suspects but deliberately flouted the prescribed procedure to serve their own interest. They knew and intended the devastating consequences caused to the plaintiffs. It is immaterial that they believed the plaintiffs to be guilty of the crimes. They acted in law without reasonable and probable cause and with *animo injuriandi*.

[88] The plaintiffs sought to establish against the police officers an intention to injure them as well as acting without reasonable and probable cause. The evidence proves, in my view, on the preponderance of probabilities that the police acted without

reasonable and probable cause. There is no evidence that the police knew that the plaintiffs had not committed the crimes. In any case, the plaintiffs do not sue defendant as the actual wrongdoer but as the employer of the actual wrongdoer. The police owed the plaintiffs a duty of care to ensure that the police investigation against them was conducted in a proper manner with the required care and skill, which they failed to do

[89] The National Prosecuting Authority is the country's prosecuting authority. It has a duty to apply its mind properly before it makes a decision to prosecute. It is part of its primary function to ensure that in the investigation and the collection of evidence the police followed proper procedures. Such a task is more acute where the only evidence against the accused is conscripted evidence. It is incomprehensible that at decision to prosecute the plaintiffs was made based on confessions in the guise of warning statements taken by police officers involved in the investigation of the same crimes against the plaintiffs. The prosecutors acted recklessly to the prejudice of the plaintiffs. It acted without reasonable and probable cause. The prosecution knew the consequences for it to prosecute the plaintiffs without reasonable and probable cause. It therefore acted recklessly and with *animo injuriandi*.

[90] The trial court is expected to carry out its judicial duties with reasonable skill and care. In the case wherein conscripted evidence constitutes the only evidence against the accused, it is trite that the court must approach such evidence with extreme caution. The trial court relied on confessions in the guise of warning statements taken by police officers involved in the investigation. It was a gross dereliction of its duties on its part. The use of any evidence created by the participation of the accused where otherwise such evidence would not have existed is strictly regulated. See *Magwaza v S* (20169/2014) [2015] ZASCA 36; [2015] 2 All SA 280 (SCA). In *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E-F Holmes JA said: For the purposes of liability culpa arises if-(a) a diligens paterfamilias in the position of the defendant (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and (ii) would take reasonable steps to guard against such occurrence; and (b) the defendant failed to take such steps'. In *Mukheiber v Raath and Another* 1999 (3) SA 1065 (SCA) at

1077E-F the court held: 'The test for *culpa* can, in the light of the development of our law since *Kruger v Coetzee* 1966 (2) SA 428 (A), be stated as follows (see Boberg *The Law of Delict* at 390): For the purposes of liability *culpa* arises if- (a) a reasonable person in the position of the defendant –(i) would have foreseen harm of the general kind that actually occurred; (ii) would have foreseen the general kind of causal sequence by which that harm occurred; (iii) would have taken steps to guard against it, and (b) the defendant failed to take those steps.' In *Sea Harvest Corporation (Pty) Ltd & another v Duman Dock Cold Storage (Pty) Ltd & another* 2000 (1) SA 827 (SCA) para 21, it was held that the true criterion for determining negligence is whether in the particular circumstances the conduct complained of falls short of the standard of a reasonable person. In *S v Kramer & Another* 1987 (1) SA 887 (WLD) at 894 F- H the court noted by citing Boberg *The Law of Delict* (1984) vol 1 at 346, that: 'The standard required is not the highest level of competence; it is a degree of skill that is reasonable having regard to 'the general level of skill and diligence possessed and at the time by the members of the branch of the profession to which the precautions belongs'.

[91] As between the plaintiffs and the defendant. It is common cause that both the National Prosecuting Authority and trial court as stated above were negligent in the carrying out of their tasks and their negligence contributed to the further detention of the plaintiffs. Section 1 of the Apportionment of Damages Act 34 of 1956, provides: ' (1) (a) where any person suffers damages which is caused partly by his own fault and partly by the fault of any other person, a claim in respect of that damage shall not be defeated by reason of the fault of the claimant but the damages recoverable in respect thereof shall be reduced by the court to such an extent as the court may deem just and equitable having regard to the degree in which the claimant was at fault in relation to the damage. Section 2 of the Act provides:' 2.1 where it is alleged that two or more persons are jointly or severally liable in delict to a third person (hereinafter refers to as the plaintiff) for the same damage, such persons (hereinafter referred to as joint wrong doers) may be sued in the same action. Section 2 applies to joint wrongdoers, persons who are jointly and severally liable in delict for the same damage to the plaintiff. The section buttresses a right of contribution between joint wrongdoers who are jointly and severally liable in delict for the same delict. If the court is satisfied that all joint wrongdoers are before it, it may apportion the damage amongst them

based on their relative degrees of fault and may give judgment against every wrongdoer for his part of the damages.

[92] The defendant pleaded that the decision to prosecute the plaintiffs rested with the National Prosecuting Authority. In addition, the defendant pleaded that the plaintiff served a sentence of imprisonment, which was imposed by the trial court. In so pleading, the defendant claimed that if anything was wrong in the prosecution and the conviction of the plaintiffs the fault does not lie with it. However, the reality is that the prosecution and the trial and conviction of the plaintiff was based on the conscripted evidence procured by the police. It resulted as far as the damage suffered by the plaintiffs in the prosecution and the trial court being joint wrongdoers due to their relative degrees of fault. In *South British Insurance Co.Ltd v Smit* 1962 (3) SA 826 (A) at 835 H it was clarified that the court has to measure the conduct of all the parties whose fault caused the damage and determine, having regard to the circumstances of the case, the respective degrees of negligence of all the parties as reflected by their acts and omissions which combined brought the damage in issue. In *AA Mutual Insurance Association Ltd vs Nomeka* 1976(3) SA 45 (A) at 55D it was determined that as long as the plaintiff's fault is put on issue, an apportionment need not be specifically pleaded or claimed since the Act is part of the law and the court has to give judgment in accordance with the law. In my view, the same principle obtains where between the plaintiff and the defendant it is common cause or it is irrefutable that contributory negligence of others contributed in causing the damage.

[93] Judicial officers enjoy immunity from liability for damage in the carrying out of their duties except where the judicial officer acted with malice. There is no evidence of malice on the part of the trial court. The immunity has the effect that the plaintiffs are unable to recover any damages from the trial court but that does not mean that the portion of the damages that the party enjoying immunity would have been liable for is to be borne by the other wrongdoers. The other wrongdoers are entitled to claim that the damages for which they held liable be for be in accordance to its respective degree of

contributory negligence, which can only be determined by taking into account consideration the degree of contributory negligence of the party enjoying immunity.

[94] The police initiated the fault but both the National Director of Public Prosecutions and the trial court operate at a level of skill and care higher than that of the police. The police are solely liable for the unlawful arrest and for the period of detention from arrest to the first appearance in court. The police and the National Director of Public Prosecution are equally at fault for the prosecution and detention of the plaintiffs from the date of their first appearance up to the date of conviction. From the date of the conviction of the plaintiffs to the date of their release when the appeal was upheld the police, the Director of National Prosecution and the trial court are equally liable.

[95] In the result, it is ordered as follows:

1. The defendant is found liable for the damages to the two plaintiffs for the unlawful arrest and detention up to the date of the first appearance at court.
2. The defendant and the National Director of Public Prosecutions are each found equally liable for damages for the unlawful detention and prosecution of the plaintiffs for the period from the date of the first appearance in court to the date of their conviction by the trial court. The defendant is found liable to compensate the plaintiff 50% of the proved damages.
3. The defendant, the National Director of Public Prosecutions and the trial court are found equally liable for damages for unlawful detention of the plaintiffs from the date of conviction to the date of the release after the appeal against conviction and sentence was upheld. The defendant is found liable to compensate the plaintiffs 33.33% of the proved damages.
4. The determination of quantum of damage is postponed *sine die*.

5. The defendant is ordered to pay costs of the action including costs of senior counsel where so employed.

Mngadi, J

APPEARANCES

Case Number : 4755/2017P

For the Plaintiff : G. Madonsela SC

Instructed by : H.M. Mathonsi Attorneys
PIETERMARITZBURG

For the Defendant : R. Padayachee SC

Instructed by : State Attorney (KwaZulu-Natal)
DURBAN

Heard on : May 2021/August 2022 and 11-15 September 2023

Judgment delivered on : 20 October 2023