Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**NO**
Interest to other Judges:	**YES**
Circulate to Magistrates:	**YES**

Case No: 583/2021

In the matter between:

TEBOHO RATHEBE **Plaintiff**

and

THE MINISTER OF POLICE **First Defendant**

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS **Second Defendant**

JUDGMENT

CORAM: NAIDOO J

HEARD ON: 28 February 2023, 1-3 March 2023, 27-28 November 2023 and 1 December 2023

DELIVERED ON: 1 MARCH 2024

INTRODUCTION

[1] The plaintiff's claims in this matter are for the recovery of non-patrimonial damages, and are founded in the *actio iniuriarum*. He claimed damages against the defendants in two claims, the first being against the first defendant, the Minister of Police (the Minister) for damages he suffered as a result of his being wrongfully and unlawfully arrested and detained in connection with a criminal charge of Rape, and the second claim is against the second defendant, the National Director of Public Prosecutions (NDPP), for damages arising from what he alleges to be malicious prosecution in respect of such charge.

Adv C Zietsman represented the plaintiff, and Adv PG Chaka represented the defendants.

THE PLEADINGS

[2] The plaintiff claims damages, in Claim 1, in an amount of Four Hundred Thousand Rand (R400 000.00), together with interest and costs, for unlawful arrest and detention and in Claim 2, in an amount of Two Hundred Thousand Rand (R200 000.00) together with interest and costs, for malicious proceedings, although it was clear during the trial that he was referring to malicious prosecution as part of such proceedings. He alleges that on 14 April 2019, and at his home in Qwa Qwa, he was wrongfully and unlawfully arrested by members of the South African Police Service (SAPS) from the Makwane Police Station, without a warrant of arrest. The alleged charge in respect of which he was arrested was one of

Rape. He was detained at the Makwane police station until 16 April 2019.

[3] On 16 April 2019, the plaintiff appeared in the Makwane Magistrate's Court, where bail was ostensibly opposed by the police, so the matter was remanded to 2 May 2019 for a formal bail application. He was thereafter detained at the Harrismith Correctional Facility from 16 April 2019 until 15 May 2019. When he appeared on 2 May 2019, the matter could not be heard due to "time constraints" and was remanded to 15 May 2019. On the latter date he was released on R500.00 bail and made three more appearances in the Makwane Magistrate's Court until 29 July 2019, when the NDPP declined to prosecute him and the charge against him was withdrawn. At all material times, the members of SAPS and prosecutors were acting in the course and scope of their employment with the first and second defendants respectively.

[4] The plaintiff alleges that his arrest was unlawful for a number of reasons, which in essence, are that:

4.1 the members of SAPS did not take into account his rights in terms of section 12 of the Constitution, Act 106 of 1996 (the Constitution), and without good cause, arbitrarily deprived him of his freedom.

4.2 the said SAPS members had no grounds to interfere with his constitutional rights, as he posed no danger to himself or the community, he would not have evaded his court hearing, there was no urgency to justify his arrest by SAPS, they did not take into

account that he had a known and fixed address, they breached the public law duty not to violate the plaintiff's right to freedom and/or SAPS breached the plaintiff's private law right not to be unlawfully arrested and detained.

[5] The plaintiff pleaded additionally and/or alternatively that his arrest was unlawful as the members of SAPS had no *prima facie* case and/or reasonable grounds to arrest him. In the further alternative, he alleged that the members of SAPS did not exercise their discretion or did not exercise their discretion properly and *bona fide*, as there was no obligation on them to arrest him, they did not investigate the matter properly, did not follow up on the plaintiff's explanation and there were no grounds to suspect that he had committed an offence.

[6] Further alternative grounds pleaded by the plaintiff were that members of SAPS who arrested him did not comply with the prescripts of their Standing Orders (General) 341 (G). More specifically their goal was not to investigate the matter further and/or prevent the plaintiff from committing any further offences, protect the plaintiff and/or put an end to committing an offence.

[7] With regard to claim 2, the plaintiff alleged that the members of SAPS wrongfully and maliciously set the law in motion by arresting, charging and prosecuting him on the alleged charge of Rape. The second defendant wrongfully and maliciously proceeded with the prosecution from 14 April 2019 to 29 July 2019. When he appeared in court on 16 April 2019, bail was denied at the instance of the employees of the first and second defendants,

resulting in his further detention at the Harrismith Correctional Facility. The employees of the first and second defendants, acting in the course and scope of their employment with the first and second defendants, continued to prosecute the plaintiff until the charge against him was withdrawn on 29 July 2019. The arrest and prosecution of the plaintiff were actuated by malice and/or *animo iniuriandi* and/or negligence, as the employees of the first and second defendants had no reasonable and/or probable cause for doing so, nor did they have any belief in the truth of the information.

[8] The defendants admit the arrest and detention in April 2019, but deny that the arrest and detention were unlawful, as the arresting officer was a peace officer as described in section 40(1)(b) of the Criminal Procedure Act 51 of 1977 (the CPA) who had a reasonable suspicion that the plaintiff had committed an offence in terms of Schedule 1 of the CPA. The defendants admit that the arrest was effected without a warrant of arrest. They also assert that *animus injuriandi* and malice were absent in the arrest and prosecution of the plaintiff. The defendants pleaded that, based on the available facts, there was a *prima facie* case against the plaintiff, and that, as a result, there was reasonable cause to arrest the plaintiff. The second defendant alleged that members of the Prosecuting Authority who dealt with the plaintiff's case acted, at all material times, impartially, in good faith and in furtherance of their statutory powers, duties and functions. The second defendant pleaded further that as new evidence came to light, which exonerated the plaintiff, the prosecutor declined to prosecute the appellant. He was not discharged in terms of section 174 of the CPA, as he alleged.

EVIDENCE FOR THE PLAINTIFF

[9] The plaintiff testified and called one witness. His evidence is that on 14 April 2019, a number of police vehicles arrived at his home. A female police officer approached him, while the rest of the police officials remained in their vehicles. The police officer, who was accompanied by the plaintiff's former girlfriend, MA[…], informed him that he was being arrested for rape. He said that he had not seen MA[…] for a long time so he could not have raped her. He was then informed that it was MA[…]'s daughter who was the complainant. He was thereafter placed under arrest, transported to the police station and lodged in the police cells.

[10] The plaintiff alleged that he was detained in deplorable circumstances at the Makwane police cells. The cell was filthy, the toilet was non-functional, there were no beds. He was given a "sponge" (which I take to mean a sponge mattress) and a dirty blanket which had a bad smell, as well as lice. He was not given any water, although he was given something to eat. The Harrismith Correctional Facility was slightly better, as they slept on beads which had a sponge mattress, but gangsterism was a problem in prison. He was forced to join a gang while in prison to ensure his own safety.

[11] The plaintiff's girlfriend, MM testified that she was with the plaintiff and left him shortly before the police arrived. After his arrest she received a call from him between 8h00 and 9h00, informing her of his arrest and what the charge was. Her

evidence is that on 30 March 2019, when the plaintiff is alleged to have raped the complainant, she was with the plaintiff at his home, when the complainant arrived in the company of another child called Momo. The complainant was sent by the plaintiff's sister to fetch a bucket of water. The complainant said she was hungry and the witness gave her a burger which they had in the house. Both children then left. It was therefore impossible for the plaintiff to have raped the complainant as she was present with him on that day. After the plaintiff's release on bail, she and the plaintiff were at a shopping centre when the complainant approached and asked the plaintiff for R10.00 to buy food, as she was hungry. He gave her the money.

[12] The further evidence of this witness is that the prosecutor dealing with the matter obtained her telephone number and sent numerous messages to her attempting to proposition her to have an intimate relationship with him. He allegedly said she should leave the plaintiff as he was in jail and he was not her type. She resisted such proposition by the prosecutor. She told the plaintiff about the prosecutor's conduct but did not report this to the police or anyone else, as nobody enquired about it. She conceded that it was important information and someone might have been able to help the plaintiff if she had reported it. The plaintiff closed his case after this witness testified.

EVIDENCE FOR THE DEFENDANT

[13] The defendants called three witnesses, the arresting officer,

Sergeant Matieho Grace Tshabalala (Sgt Tshabalala), the investigating officer, Warrant Officer Rathlapi Daniel Maloka (I/O or Maloka) and the prosecutor, Rabasuthu Qhojeni (Qhojeni), who was involved in the prosecution of the plaintiff. Sgt Tshabalala testified that she is attached to the Cluster Operational Command Centre and Tracing Team. Their cluster includes all the police stations in Phuthaditjhaba. On the morning of 14 April 2019, she and her team proceeded to the Makwane police station and while they were there, they received a call from Warrant Officer Maloka, who handles child and rapes cases, requesting their assistance with a recently opened docket, where the suspect was known.

[14] She and her team (12 in all) met Maloka, and he handed her the docket, with the instruction to arrest the suspect, being the plaintiff. She contacted the complainant's mother, MB, and arranged to meet near the latter's place of residence. She interviewed the mother and then the complainant. Sgt Tshabalala enquired why it took so long to open a case. MB advised that the schools were closed and the complainant was visiting the plaintiff's parental home. The complainant was also interviewed and she narrated to Sgt Tshabalala how the rape occurred on 30 March 2019. Thereafter she requested MB to show her where the plaintiff lived. They took MB with them and she took them to the plaintiff's house.

[15] They were met by the plaintiff at his house. Sgt Tshabalala explained that they were there to arrest him in connection with a charge of rape. After she read him his rights, they transported him to the Makwane police station where he was booked in and locked in a cell. They then called Maloka and advised him that the

suspect was arrested and placed in the police cells, and that the docket he gave them is at the police station.

[16] Warrant Officer Maloka, the investigating officer in this matter testified that he received a call from the Makwane police station about a rape matter. He went there and found the complainant and her mother. He interviewed the complainant in the presence of her mother, and wanted to establish if what was written in the statements was what would be repeated verbally. The complainant told him that she had visited the sister of the plaintiff, whose name is MC, and the latter sent her to the plaintiff's house to fetch a bucket of water. When the complainant arrived at the plaintiff's house, he was alone. He took her to the bedroom and raped her. She returned to his sister's house and informed her what had happened. MC promised to call the police. The complainant heard her make a call but did not hear what MC said. The police never arrived until that day (13 April 2019), when her mother realised that something was wrong with her, and took her to the police station.

[17] Maloka thereafter took the complainant to the hospital to be examined, but was unable to get assistance, as it was the weekend, and the incident of rape did not happen on that day. He was asked to return on Monday. He took her back to the hospital on 15 April 2019, where she was examined and the medico-legal report (J88) was completed by the nurse on duty He testified further that on the day before that, being 14 April 2019, he received the particulars of the plaintiff and requested the Tracing Unit to assist him. He met them along the way, at a village called

Qholaqhwe, where he briefed them as to what had to be done, told them that the suspect is a known person and handed the docket to them. Later that day, the Tracing Unit called him to say that the suspect was arrested and thereafter handed the docket back to him.

[18] He obtained a statement from the complainant's mother on 15 April 2019. The plaintiff was charged on 16 April 2024 and made his first appearance in court on the same day. The state and Maloka were opposed to bail, as further investigation into the complainant's safety was required. Maloka wanted to ascertain whether or not the complainant was living in the same house as the plaintiff, or whether there was any contact between them. After his investigations revealed that the complainant was living with her mother and not the plaintiff, Maloka was no longer opposed to bail. The matter was postponed at this point for Maloka to be cross-examined. When the matter resumed a few months later, the court was informed that the plaintiff had in the interim passed away. The executor of his estate was substituted as the plaintiff in the matter after the relevant amendment to the summons was made.

[19] It emerged from the cross examination of Maloka that when he received the docket on 13 April 2019, only the complainant's statement was filed therein. When he handed the docket to Sgt Tshabalala on 14 April 2019, with the request to arrest the plaintiff, it was still only the complainant's statement in the docket. He obtained the statement of the complainant's mother, MB, on 15 April 2019. Based on the information in the docket, he decided

to arrest the plaintiff on 14 April 2019. I will deal further with this aspect later.

[20] Rabasuthu Qhonjeng (Qhojeng or "the prosecutor") was the District Court prosecutor who dealt with the docket relevant to this matter since the plaintiff's first appearance in court on 16 April 2019, until the charge against him was withdrawn on 29 July 2019. His evidence was that bail was initially opposed on 16 April 2019 as the I/O advised him that the complainant was the plaintiff's daughter and the I/O had concerns for her safety. The matter was remanded to 2 May 2019 for a bail application. On that day, the I/O advised the prosecutor that he was no longer opposed to bail, as the complainant was no longer close to the plaintiff and had moved to a village. However, due to "time constraints", the matter could not be heard on 2 May 2019 and was remanded to 15 May 2019. On the latter mentioned date, bail was fixed in the amount of R500.00.

[21] The matter was then remanded for further investigation twice more, to 5 June 2019 and 4 July 2019. On the latter date Maloka obtained the statement of MC and when the prosecutor received the file, he requested a remand to 29 July 2019, for a decision by the Regional Court prosecutor. On that date, the Regional Court prosecutor issued a *nolle prosequi* directive, instructing the District Court prosecutor to withdraw the charge against the plaintiff, which was accordingly done on 29 July 2019.

[22] The addresses of the plaintiff and the complainant were canvassed

with Qhojeng in cross examination and he said the information he obtained from Maloka was that those addresses were very close, being one street away from each other. He did not question this or investigate it for himself because he accepted what Maloka had said. He also said that he did not believe MC's statement, as she did not corroborate the complainant's statement and he believed that she was protecting the plaintiff. He appeared to be displeased with the decision of the Regional Court prosecutor not to continue with the prosecution, stating that if it were up to him, he would have continued with the prosecution of the plaintiff. The defendants closed their case after this witness testified.

[23] A matter I should mention is the complaint by the plaintiff that the first defendant failed to call other members of the Tracing Unit to testify about the arrest of the plaintiff. The only purpose that would have served is to either corroborate or contradict Sgt Tshabalala's evidence regarding the time frames she testified about, as that was in contention when she testified. The events relating to the actual arrest of the plaintiff are not seriously in dispute. He was not mishandled, assaulted or otherwise mistreated by the arresting officers. Nothing material turns on the finer details of who accompanied him into and out of the house, who was allowed into the house, and such like. I do not believe that the failure to call such witnesses requires a negative inference to be drawn against the first defendant.

ISSUES

[24] The issues to be determined by this court are:

24.1 whether the plaintiff has succeeded in proving the merits of his claim, in respect of Count 2;

24.2 whether the first defendant discharged the onus on him to show that the arrest of the plaintiff was lawful;

24.3 whether the plaintiff established a causal link between the actions of the defendants/their employees and the patrimonial loss he alleges he suffered.

24.4 the quantum in respect of Claim 1 and Claim 2

THE LAW and EVALUATION

[25] As indicated earlier, the first defendant, admitted that the plaintiff was arrested without a warrant of arrest, but denied that the arrest was unlawful. It is well established in our law that where the arrest of the plaintiff is admitted, the deprivation of his liberty is *prima facie* unlawful and the defendant bears the onus to prove that the arrest and hence the deprivation of the plaintiff's liberty was justified and lawful. However, in his closing arguments and in his Heads of Argument, Mr Chaka, on behalf of the first defendant, conceded that in the face of the evidence before court, he could not argue that the police officials, for whose conduct the first respondent is responsible and/or liable, entertained a reasonable suspicion that the plaintiff had committed an offence in terms of Schedule 1 of the CPA. This concession relates to Claim 1, and Mr Chaka requested the court to make an appropriate finding as to the lawfulness of the arrest.

[26] I examine now the conduct of Maloka upon whose instructions the

plaintiff was arrested by Sgt Tshabalala and the Tracing Unit. He received the docket on 13 April 2019, and interviewed the plaintiff on the same day. Her statement was the only statement in the docket at the time. Her address was given as No […] Q[…] Village, near M[…] shop. The plaintiff's address was recorded, in his warning statement, as […] Lusaka, Thabong. Maseponki's address is reflected on her statement as […] Lusaka, Thabong. The complainant's statement indicated that she was raped on 30 March 2019, some two weeks prior to 13 April 2019. It is apparent from a reading of the complainant's statement, that she did not mention that the plaintiff was her father. In fact, she indicated that she called him "Kopano's father". Yet Maloka testified that the complainant had informed him that she went to her father Teboho, to fetch water. He testified that he read her statement and noticed that she mentioned several people, including MC, to whom she reported the alleged rape.

[27] His further testimony was that he did not attempt to interview any of the persons mentioned in the complainant's statement. There was no J88 in the docket at that stage, but he decided on 13 April 2019, to have the plaintiff arrested, on very bare evidence and without making any attempt to at least obtain a statement from MC, which on hindsight, decided the fate of the prosecution. He testified that he made many unsuccessful attempts to find MC to obtain the statement, and concluded that she was evading him. Tellingly, the investigation diary in the docket bears no recordal of any attempt by this witness to find MC.

[28] He also testified that when he did obtain her statement, he did not believe her as he was of the view that she was protecting her brother, the plaintiff. He based this conclusion on his impression that she was evading him, which impression he could not substantiate, other than to say that he left messages for her with the neighbours. In attempting to justify his actions, he continued to refer to the plaintiff as the complainant's father, even though he knew at least by the time he took the statement of MA, that she was the plaintiff's ex-girlfriend and that the complainant was not his child. Maloka further admitted that he had decided, on the basis of the complainant's statement that the plaintiff was guilty and had to be arrested. This is one of the reasons he opposed bail. The other reason was to protect the child, as they lived in the same area.

[29] A diligent and objective police officer would have immediately realised that great caution needed to be exercised when he was faced with the evidence of a child in a matter as serious as this, and that he would have had to gather more evidence to have, at least, a *prima facie* case against the plaintiff. The safety of the complainant was never an issue, and Maloka would have known this if he applied his mind diligently to the content of the complainant's statement. The plaintiff and his sister MC lived close to each other, while the complainant and her mother lived far from the plaintiff's home. This was clear from the addresses furnished in the complainant's statement and that of the plaintiff. He clearly did not even canvass this aspect with the complainant or her mother to satisfy himself of the complainant's safety. Yet this was the main reason for opposing the fixing of bail for the plaintiff. The reality is that the address of the complainant did not change at all, and she did not relocate from Lusaka in Thabong to Q[…]. Maloka failed to conduct any investigations in this matter between 16 April 2019

(the date of the plaintiff's first appearance in court) and 4 July 2019, when he obtained MC's statement, resulting in the unnecessary and unlawful detention of the plaintiff for a longer period.

[30] It seems that Maloka's view also tainted and influenced the minds of the prosecutor, Qhojeng, as well as the arresting officer, Sgt Tshabala. Qhojeng, remarkably also believed the plaintiff to be guilty and did not believe MC's statement, despite never having consulted with her or any other witness, and in spite of the J88 not alluding to sexual assault or rape. He was prepared to continue with the prosecution because he did not believe MC. Sgt Tshabala, appears to have gone way beyond the instructions of Maloka to find and arrest the plaintiff. She was required to fetch MA to point out the plaintiff's residence, but ended up interviewing both the complainant and MA to satisfy herself as to what happened, which was not part of her duties. She said that tracing and arresting people are her core functions, and not investigation. She too indicated that she did not believe the plaintiff and referred to the complainant as "the abused".

[31] The defence witnesses, in my view failed to impress the court as diligent, objective and reasonable officers performing their duties in accordance with the standard required by law. This is particularly so in Maloka's case where his conduct falls far short of the requirements of section 40(1)(b) of the CPA, the relevant

provisions of which stipulate that

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

(a) ….

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

The evidence is very clear that Maloka did not have sufficient evidence upon which to arrest the plaintiff, and hence could not have entertained a reasonable suspicion that the plaintiff committed an offence. His suspicions were far from reasonable and were clearly unreasonable, emotional and lacking in objectivity. This is no doubt the basis upon which Mr Chaka made the concession that he did I respect of Claim 1.

[32] I find accordingly that the arrest of the plaintiff was unlawful and so was his detention from 14 April 2019 to 15 May 2019. In view of Maloka's conduct, which I have described in the preceding paragraphs of this judgment, there was no justification for the detention of the plaintiff up to the date that he was admitted to bail. If Maloka had obtained MC's statement before arresting the plaintiff, as he ought to have done, it is clear that the arrest and detention, and the subsequent prosecution of the plaintiff would not have taken place. His failure to perform his duties properly resulted in the unjustifiable and unlawful deprivation of the plaintiff's liberty. The plaintiff's claim in respect of Claim 1 must, therefore, succeed.

[33] I turn now to deal with Claim 2. The law relating to a claim of malicious prosecution is well settled. The requirements for a successful claim in respect malicious prosecution, are succinctly

set out by the learned authors in *Amler's Precedent of Pleadings, 8th Edition, p247*, where they cite the case of *Moleko* case below:

"To succeed with a claim for prosecution, a claimant must allege and prove that:

(a) the defendants set the law in motion – they instigated or instituted the proceedings;

(b) the defendants acted without reasonable or probable cause;

(c) the defendants acted with malice (or *animo iniuriandi*); and

(d) the prosecution has failed."

These were the guidelines provided by the court in *Minister of Justice and Constitutional Development & Others v Moleko 2009(2) SACR 585 (SCA)*, which was applied in the matters of *Minister of Safety and Security v Lincoln 2020 (2) SACR 262 (SCA)* and by the Full Court in *Minister of Police and Another v Hoogendoorn 2022 (2) SACR 36 (GP)*

[34] It is a trite principle of our law that a person ought not to be prosecuted where the minimum evidence upon which he can be convicted is absent. I have set out how the conduct of the police officials and particularly Maloka, which resulted in them setting the law in motion against the plaintiff, without grounds for doing so. Put differently, they acted without reasonable or probable cause. With regard to malicious prosecution, the test for reasonable and probable cause set out in *Beckenstrater v Rottcher and Theunissen 1955(1) SA 129 (A)* about sixty nine years ago still holds relevance today. The court said at p136 A-B

"When it is alleged that a defendant had no reasonable cause for prosecuting, I understand this to mean that he did not have such information as would lead a reasonable man to conclude that the plaintiff had probably been guilty of the offence charged; if, despite his having such information, the defendant is

shown not to have believed in the plaintiff's guilt, a subjective element comes into play and disproves the existence, for the defendant, of reasonable and probable cause".

[35] The manner in which Qhojeng dealt with the docket is relevant to assessing whether the Prosecuting Authority acted with malice or *animus iniuriandi.* I have set out the various remands in this matter before the charge was withdrawn on 29 July 2019. On each occasion, it seems that Qhonjeni was guided by what Maloka said in respect of further investigation, without, for instance, himself giving instructions to guide the investigation. He clearly bought into Maloka's view that the plaintiff was guilty and in spite of evidence that did not corroborate the complainant's version, he indicated that if it were up to him, he would have continued with the prosecution. This is very relevant, as it was clearly (and fortunately for the plaintiff) not up to him.

[36] In spite of his mindset and belief that the plaintiff was guilty, there is nothing on record to show that he deliberately and maliciously delayed the matter or acted contrary to the requirements of his position as prosecutor to prejudice the plaintiff. His mistake was to rely on untrue and incorrect information from Maloka, which he did not know at the time was incorrect. The plaintiff was indeed legally represented throughout the proceedings, so Qhojeng's evidence that the matter was remanded for more than the required seven-day period at a time, due to the plaintiff's legal representative being unavailable, is not unreasonable or indicative of malice. In any event, the presiding officer has the final say in remanding a matter, which he does by the exercise of his discretion. There is no

evidence to suggest that Qhojeng played any part in improperly influencing the exercise of that discretion by the presiding officer. It is common cause that Maloka only obtained and filed the statement of MC on 4 July 2019. Upon receipt of that statement, Qhojeng, in spite of his not believing the content thereof, sought a remand in order to refer the matter for decision by the Regional Court Control Prosecutor.

[37] The decision by the Regional Court Control Prosecutor to have the charge withdrawn was taken on 29 July 2019, and the charge was withdrawn against the plaintiff that same day. The prosecution in that respect, therefore, failed. As I indicated earlier, the plaintiff bears the onus to prove the elements required for malicious prosecution to be established. With regard to Claim 2, the conduct of the employees of the second defendant is relevant. I have set out Qhojeng's handling of this matter and, in my view, although he appears not to have actively and objectively applied his mind to the evidence in the docket, and relied on Maloka's advice, his subjective view did not play a part in prolonging the matter. In accordance with the directives relevant to his post, the District Court refers the matter to the Regional Court for a decision as to whether the prosecution of the plaintiff would continue. This was done, as I have indicated, without any undue delay.

[38] While courts may be reluctant to limit or interfere with the legitimate exercise of prosecutorial authority, the discretion of

prosecuting authority to prosecute is not immune from the intervention of the court where such a discretion is improperly exercised. In view of what I have set out in this regard, the interference of this court in the discretion to prosecute or the exercise of prosecutorial authority in this matter is not warranted. In my view, the plaintiff has not proved the essential element of malice on the part of the prosecuting authority, and Claim 2 must, accordingly fail.

QUANTUM

[39] The award of damages in cases such as this, lies in the discretion of the court, which discretion must be exercised reasonably and fairly, especially as such damages cannot be calculated in accordance with any formula or with mathematical precision. While it may be useful to consider awards made in previous comparable cases, the circumstances and merits of each case must be considered when an award for damages is made. Our courts have repeatedly pronounced upon the determination of appropriate awards of damages. In *Minister of Safety and Security v Seymour 2006(6) SA 320 (SCA)*, the court held at paras 17 and 20*:*

"The assessment of awards of general damages with reference to awards made in previous cases is fraught with difficulty. The facts of a particular case need to be looked at as a whole and few cases are directly comparable. They are a useful guide to what other courts have considered to be appropriate but they have no higher value than that".

and

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

The awards I have referred to reflect no discernible pattern other than that our courts are not extravagant in compensating the loss. It needs also to be kept in mind when making such awards that there are many legitimate calls upon the public purse to ensure that other rights that are no less important also receive protection."

[40] Our courts have emphasised that the interests of both parties must be fairly balanced and the award for damages must always be commensurate with the harm suffered. The Supreme Court of Appeal (SCA) had this to say in *Minister of Safety and Security v Tyulu 2009(5) SA 85 (SCA) at para 26:*

" In the assessment of damages for unlawful arrest and detention, it is important to bear in mind that the primary purpose is not to enrich the aggrieved party but to offer him or her some much-needed solatium for his or her injured feelings. It is therefore crucial that serious attempts be made to ensure that the damages awarded are commensurate with the injury inflicted. However, our courts should be astute to ensure that the awards they make for such infractions reflect the importance of the right to personal liberty and the seriousness with which any arbitrary deprivation of personal liberty is viewed in our law. I readily concede that it is impossible to determine an award of damages for this kind of *injuria* with any kind of mathematical accuracy. Although it is always helpful to have regard to awards made in previous cases to serve as a guide, such an approach if slavishly followed can prove to be treacherous."

[41] The parties led no specific evidence in respect of the quantum of damages. The plaintiff, in the course of delivering his oral evidence in court, placed his personal circumstances on record and the consequences he suffered as a result of being incarcerated in this matter. He was 41 years old at the time of testifying at the trial in this matter in February 2023 and would have been approximately thirty seven (37) years old at the time of his arrest in 2019. No

details were given of his educational qualifications. He was married and had two children, aged 11 years and 1 year respectively. He was self-employed as a motor mechanic but lost all his customers when he was in prison. He tried his hand at scholar transport but that only worked for a month, after which parents did not allow their children to travel with him. He was unemployed since then but no details are given of the reason for this or what attempts he made to secure employment. No details were provided as to what exactly his income was at the time of his arrest.

[42] With regard to his detention, he spent two nights at the Makwane police station in conditions that I have described earlier, before being moved to the Harrismith Correctional Facility after his first appearance in court, where he was detained for approximately a month before being released on bail. It is alleged that he thereafter made three appearances in court over a period of two months before the prosecution decided not to proceed with the prosecution and withdrew the charge against him. I have set out the deplorable conditions that he had to endure at the Makwane police station., and the rigours of life in prison. He described how the gangs in prison arm themselves with weapons made from cutlery and other items they could access. There was a constant threat of being stabbed or killed. He also had to endure the consumption of drugs by inmates, which added to his stress and trauma.

[43] With regard to the withdrawal of the charge against him, he testified that he felt heartsore, because he wanted the matter to go to trial so that the truth will be known and he would not be

regarded as a bad person by the community. Before his arrest, people were friendly to him, but upon his return from custody, they had changed. If he had a disagreement with anyone, they would say he is a rapist, hence he wanted his name to be cleared. Other adverse consequences of his being in prison for a month is that one of his friends used his vehicle and damaged it. His nephew who was taking care of his house appropriated his clothes and was wearing those clothes when he returned home from prison. I pause to mention that the plaintiff was very emotional and cried when talking about the complainant, whom he regarded as his daughter. He broke down again when describing the effects of his incarceration on his life.

[44] The plaintiff referred to a number of cases on the aspect of quantum of damages awarded by our courts, one of which was the matter of *De Klerk v Minister of Police 201892) SACR 28 (SCA) and 202(1) SACR 1 (CC),* where the Constitutional Court (CC) agreed with the dissenting judgment of the SCA in which the court found that the police could be held liable for the entire period of the claimant's detention, including the period of detention after his first appearance in court. The CC agreed that an amount of R300 000.00 for approximately 7 days' detention was appropriate.

[45] I was also referred to the matter of *Mkwati v Minister of Police 2018 JDR 0021 (ECM)*, where the plaintiff was detained for 32 days and was awarded damages in the amount of R560 000.00.

Although, it was submitted on behalf of the plaintiff in this matter that damages in an amount between R550 000.00 and R650 000.00 should be awarded in respect of unlawful arrest and

detention, Mr Zietsman conceded that an amount of R400 000.00, was claimed in the summons, and it was not expected of the court to make an award in a higher amount . I take into account that the plaintiff is now deceased and that any award made in his favour will, in reality, not provide *solatium* to him, but will represent a claim in favour of his estate. No evidence was placed before this court with regard to any claims against the plaintiff's estate, and this court must guard against making an award that will amount to largesse or an award that will no longer serve the purpose it was intended to serve. Mr Zietsman made submissions in respect of the quantum for malicious prosecution, but it is not necessary to deal with that in view of my finding that Claim 2 must fail.

[46] There was also no evidence placed before this court of any serious physical or medical sequelae to the plaintiff as a result of his arrest and detention. It can be accepted that he was traumatised by his arrest, and subsequent incarceration at Makwane police station and at the Harrismith Correctional Facility. It follows that his freedom was severely curtailed. It appears that he was not unscathed by the conditions and circumstances under which he was detained, and which I detailed earlier. He suffered emotional distress, was humiliated and degraded. It can therefore, be accepted that the conduct and actions of the employees of the first defendant caused the plaintiff to suffer damages as a result of the *contumelia* and emotional stress, to which he was subjected.

[47] It was submitted on behalf of the first defendant that in the event of the court finding that the arrest of the plaintiff was unlawful, it should be held liable for damages only for the period 14 April to 16 April 2019. In view of my finding that the first respondent should be

held liable for the entire period of the plaintiff's incarceration, up to the time he was released on bail, the proposals by the first respondent in respect of quantum are inappropriate and will be disregarded. In *Seymour*, referred to above, an award of R90 000.000 was made for five days' detention; in S*eria v Minister of Safety and Security 2005(5) SA 130 (C),* R50 000.00 was awarded in respect of an architect who was detained overnight.

[48] On a conspectus of all the evidence, and after considering all the circumstances of this matter, which I have detailed, I am of the view that the plaintiff is entitled to be compensated for the damages he suffered in respect of Claim 1 in the amount listed in the order that follows hereafter. With regard to costs, the plaintiff requested the court to order that costs of travel and accommodation in respect of the plaintiff's legal representatives be paid. These are matters to be raised with the Taxing Master and proved to be reasonable and necessary. The Taxing Master has the discretion to allow such costs. An order by this court in those terms would unnecessarily fetter the discretion of the Taxing Master.

[49] In the circumstances, I make the following order:

49.1 The first defendant is directed to pay to the plaintiff, the amount of Three Hundred Thousand Rand (R300 000) in respect of the plaintiff's claim for unlawful arrest and detention (Claim 1);

49.2 Interest is to be paid on the said amount from date of summons to date of payment;

49.3 The first defendant is directed to pay the plaintiff's costs on a party and party scale, such costs to include all costs previously reserved.

49.4 The plaintiff's claim in respect of malicious prosecution (Claim 2) is dismissed, with no order as to costs in respect thereof.

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S. NAIDOO, J

On behalf of Plaintiff: Adv. C Zietsman

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