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**IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE DIVISION, GQEBERHA]**

Case No: 2063/2019

In the matter between:

PHINDILE PAYI

PLAINTIFF

and

THE MINISTER OF POLICE

1ST DEFENDANT

THE NATIONAL DIRECTOR OF PUBLIC

2ND DEFENDANT

PROSECUTIONS

JUDGMENT

Pakati J

Introduction

[1] The plaintiff instituted an action for damages against the Minister of Police and the National Prosecuting Authority, the first and second defendants, claiming an amount of R300 000-00 for the alleged unlawful arrest and detention on 13 August 2018, payment in the sum of R2,5million for further detention from 15 August 2018 until 12 September 2018, and an amount of R500 000-00 for malicious prosecution.

[2] The members of the South African Police Services (“the SAPS”) arrested the plaintiff without a warrant on 13 August 2018, for allegedly committing the offences of kidnapping and rape. He was detained at Motherwell Police Station. The members of the first defendant and the second defendant were acting in the course and scope of their employment.

[3] In his particulars of claim, the plaintiff alleged that on 15 August 2018, the matter was postponed until 24 August 2018, for formal bail application at the instance of both the first and second defendants. They opposed his release from custody. He was then transferred to St Albans Prison, where he was further detained. On 24 August 2018, his bail application was again postponed to 28 August 2018 at the instance of the public prosecutor, acting in concert with the investigating officer. On 28 August 2018, the plaintiff was in attendance and the plaintiff’s bail application was again remanded to 12 September 2018, at the specific request and instance of the public prosecutor acting in concert with the investigating officer. On 12 September 2018, despite there being no change to his personal circumstances, the public prosecutor and the investigating officer were no longer opposed to the plaintiff’s release on bail.

[4] In the amended plea filed on 24 March 2020, the first defendant pleaded to the plaintiff's amended particulars of claim dated 13 February 2020, as follows:

(a) The first defendant admits that the plaintiff was lawfully arrested without a warrant after he was pointed out by the complainant for being involved in criminal activity. The arrest and detention were justified by the provisions of s 40 (1) (b) of the Criminal Procedure Act, 51 of 1977 ("the CPA").

(b) The plaintiff was lawfully arrested and detained for having committed kidnapping, an offence referred to in schedule 1 of the CPA.

(c) The complainant pointed out the crime scene as the plaintiff's residence.

(d) She also pointed out Mr Thobela Beyi ("Beyi") as the person who allegedly kidnapped and raped her at the plaintiff's residence.

(e) The first defendant denies that the plaintiff's arrest was wrongful, unlawful, and unjustified.

(f) The arresting officer, Sergeant Siyabulela Mnyango ("Sgt Mnyango"), was a peace officer as defined in the Act. He had a reasonable suspicion that the plaintiff had committed a Schedule 1 offence of kidnapping.

(g) The first defendant denies that the plaintiff was unlawfully held at Motherwell Police Station.

(h) Regarding claim 2, the second defendant admits that the plaintiff and his co-accused appeared in court for the first time on 15 August 2018. Their rights were explained to them, and they elected to apply for legal aid. The matter was then postponed for legal aid and a formal bail application to 24 August 2018. They were remanded in custody. On 24 August 2018, they appeared in court

and the matter was postponed to 04 September 2018, for legal aid and a formal bail application. Even on this day, they remained in custody. On 04 September 2018, the case was postponed to 07 September 2018, for a formal bail application. On 07 September 2018, it was remanded to 12 September 2018 for a formal bail application.

(i) On 12 September 2018, the bail proceedings in terms of schedule 6 of the CPA, proceeded against the plaintiff and his co-accused. They had the *onus* to satisfy the court that exceptional circumstances existed which in the interest of justice permitted their release. However, on 12 September 2018, the second defendant was no longer opposed to the plaintiff's release on bail.

(j) The first and second defendant deny that they set the law in motion against the plaintiff thereby acting with malice.

[5] It is common cause that on 13 August 2018, the plaintiff was arrested by the police and detained at Motherwell Police Station until 15 August 2018, when he appeared in court for the first time. It is also common cause that the plaintiff remained in custody until he was released on 12 September 2018, when the case against him was struck off the roll due to lack of evidence.

[6] Before the trial started, the parties had agreed that there would be no separation of merits and *quantum*. Regarding the lawfulness of the arrest and detention, the first defendant bore the *onus* to prove the grounds of justification.¹ That

¹ *Minister of Law and Order v Hurley* 1986 (3) SA 569 (A) 589E-F.

is so because the justification for the detention following an arrest until a detainee's first appearance in court continues to rest on the police.² The first and second defendants also have an *onus* of proving the lawfulness of the plaintiff's continued detention from 15 August 2018 to 12 September 2018. The general principle is that the *onus* rests on the detaining officer to justify the detention because detention is *prima facie* unlawful.³ The plaintiff bears the *onus* only when he alleges that the arresting officer failed to exercise his/her discretion rationally. In respect of malicious prosecution, the plaintiff bears the *onus*. However, the parties agreed that, for their convenience, the plaintiff would commence leading evidence in respect of the claims.

[7] To prove his case against the defendants, the plaintiff testified and called no witnesses to testify on his behalf. The defendants called the arresting officer, Sgt Mnyango, Constable Nomangesi Andries ("Cst Andries"), Captain Ayanda Sabane and the prosecutor, Mr Themba Mavakala, to testify on their behalf.

The evidence of the plaintiff

[8] The plaintiff testified that on 12 August 2018, the day before his alleged unlawful arrest, he was in the company of Beyi, and one Mr Junior, travelling in Beyi's motor vehicle. The plaintiff occupied the back seat. They proceeded to a tavern in Motherwell. At the tavern, they consumed alcohol. After a while, when the plaintiff

² See *Minister of Police and v Another v Du Plessis* [2013] ZASCA 119; 2014 (1) SACR 217 (SCA) at para 17.

³ See *JE Mahlangu and Another v Minister of Police* [2021] ZACC10 at para [32] where it was held that once it has been established that the constitutional right not to be deprived of one's physical liberty has been interfered with, the deprivation is *prima facie* unlawful, and the infringer bears the *onus* to prove that the interference was justified.

realised that he had too much to drink, he went to the vehicle and fell asleep. He was awakened by a noise caused by his companions when they approached the vehicle in the company of about five unknown ladies and a male person. The complainant was amongst the ladies. The plaintiff saw the complainant for the first time. The complainant sat on the lap of Beyi, who occupied the front passenger seat. After everyone had boarded the vehicle, the plaintiff heard the occupants of the motor vehicle talking about going to the beach. Indeed, they took the direction going towards the beach. When the vehicle stopped at the beach, the male person ran out of the vehicle saying that '*he was not getting along with the beach*' and disappeared in the bushes. The ladies also alighted and gave chase but could not catch up with him. They returned to the location without him.

[9] The plaintiff noticed that the complainant and Beyi were involved in a love relationship because they were kissing the whole time during the trip. Before the vehicle reached the plaintiff's home, some of the ladies had alighted. The plaintiff remained with the driver of the vehicle and his girlfriend, the complainant and Beyi. When the plaintiff arrived at his home, Beyi asked for a place to sleep with the complainant, to which the plaintiff agreed. The plaintiff, Beyi and the complainant alighted and proceeded to his house. Inside the house, the plaintiff showed Beyi and the complainant the bedroom that they were going to occupy for the night. In the meantime, he remained in the lounge, playing music, drinking some wine, and doing his laundry.

[10] In the early hours of the morning, the complainant appeared and sat with the plaintiff in the lounge. She told him that she wanted to leave. Considering that the area was unsafe, and it was still in the early hours of the morning around 03h00, the plaintiff discouraged her from leaving and asked her to wait a little while. He told her that there were no taxis at that time. He promised that he would accompany her to get to a taxi called Jikeleza a little later. She asked for some food from the plaintiff, who offered her same. As she was busy eating, she asked for some water. The plaintiff went to the kitchen to fetch water. In the meantime, the complainant got out of the house and ran away. The plaintiff realised that she ran out with his money and two cell phones that were inside the bedroom where she and Beyi slept. He then gave chase.

[11] The complainant ran into a house in the neighbourhood where the plaintiff found her, crying. He informed the owner of the house that the complainant ran away with his money and two cell phones. The neighbours advised him to come later to resolve the issue. He returned home to continue with his laundry and found Beyi still asleep. At approximately 06h00 or 07h00 in the morning, Beyi woke up and left for his house. At around 08h00 in the morning, as he was about to hang his laundry, two police officers, Sgt Mnyango and Cst Andries, arrived in the company of the complainant. They asked the complainant: "*Is this the person?*" She replied in the negative. They then asked him the whereabouts of Beyi and he told them that he stayed in the location but did not know where he was. They told him that they would keep him until they found Beyi. He then directed them to where Beyi lived. When they ultimately found him, the plaintiff and Beyi were arrested for rape and kidnapping. They were kept in custody from that morning of 13 August 2018, until 15 August 2018, when they appeared in court for the first time. Their case was postponed about four times before

it was struck off the roll against the plaintiff on 12 September 2018, due to lack of evidence.

[12] The plaintiff also testified about the bad condition of the police cells as well as those of St Albans Prison where he was detained.

The evidence of Sergeant Mnyango

[13] On 13 August 2018, Sgt Mnyango was on duty with Cst Andries at Kamvelihle Police Station when Ms Ndileka Kolisi reported that the complainant informed her that she had been raped. Cst Andries attended to her. Sgt Mnyango, Cst Andries and Ms Kolisi proceeded to Ms Kolisi's house where the complainant was. On their arrival, the complainant informed them that she was taken by the plaintiff and Beyi. Beyi raped her while the plaintiff was present in the house. Sgt Mnyango contends that he entertained a reasonable suspicion that the plaintiff had committed an offence referred to in schedule 1 and arrested him. He was pointed out by the complainant as the person who refused her to get out of the vehicle as well as his house.

[14] During cross-examination, Sgt Mnyango conceded that the complainant told him that it was not the plaintiff who raped her. He confirmed that he did not enquire further as to what the plaintiff exactly did to her. He also confirmed that the pointing out statement did not state categorically what offence the plaintiff had committed. When the complainant told him that the plaintiff refused to open the door to the house, he concluded that the plaintiff kidnapped her. When he was asked whether his

suspicion was reasonable, he conceded that the suspicion did not rest on reasonable grounds. He concluded that the arrest was unreasonable under the circumstances.

The evidence of Constable Andries

[15] Cst Andries' evidence did not take the defendant's case any further. She distanced herself from the arrest of the plaintiff because she asserted that there was no evidence linking the plaintiff to the commission of the offences. She did not complete the pointing-out statement, Sgt Mnyango did. She stated that they took the plaintiff, Beyi and the complainant to the police station because they had not received sufficient information pertaining to the role of the plaintiff.

The evidence of Captain Ayanda Sabane

[16] Captain Ayanda Sabane was the investigating officer of the case. On 13 August 2018, he took down the statement of the complainant, Ms N[...] M[...], and interviewed the plaintiff on 14 August 2018. During the interview, Captain Sabane informed the plaintiff that he was a suspect in a rape and kidnapping case. He confirmed that he already had the benefit of reading the complainant's statement when he interviewed the plaintiff. He disagreed that there was no evidence implicating the plaintiff. He said: *"His presence at the time the complainant was pulled to the room, I take it as if he [the plaintiff] was part of it."* However, during cross-examination, he confirmed what he said during bail proceedings that there were no elements of rape and kidnapping against the plaintiff. He added that he did not know why the plaintiff was arrested. He also confirmed that he contradicted himself when he said that the plaintiff gave a condom

to the complainant because the complainant was the one who requested a condom from the plaintiff. He proffered no explanation for this contradiction.

The evidence of Temba Mavakala

[17] Mr Mavakala, an employee of the second defendant, and acting senior public prosecutor at the time, testified that after reading the statement of the complainant on 15 August 2018, his duty was to determine whether there was a *prima facie* case against the plaintiff and Beyi, which he did. He concluded that there was a *prima facie* case against both. He then charged them for rape, a schedule 6 offence and kidnapping. He also consulted with Captain Sabane and they decided to oppose bail. The matter was postponed for the plaintiff and Beyi to apply for legal aid. Mr Mavakala insisted that the plaintiff acted with a common purpose with Beyi in the commission of the offences. In his opinion, when the plaintiff said he feared Beyi, that was a sign of refusing the complainant to leave. However, he conceded that in the complainant's statement, there is no detail indicating the role played by the plaintiff in the commission of the offences.

Common cause facts

[18] It is common cause that the plaintiff was arrested and detained by Sgt Mnyango, in the company of Cst Andries, on 13 August 2018. It is further common cause that because of his arrest, the plaintiff was detained at Motherwell Police Station until he appeared in court for the first time, on 15 August 2018. The matter was remanded a few times before it was struck off the roll, on 12 September 2018, due to a lack of evidence implicating the plaintiff in the commission of the offences.

Issues

[19] The issues for determination are whether: (i) the plaintiff was lawfully arrested and detained in terms of s 40(1) (b) of the CPA; (ii) the defendants were liable for the plaintiff's continued detention from 15 August 2018 to 12 September 2018 when the matter was struck off the roll, and (iii) the second defendant, acting in concert with the first defendant, maliciously prosecuted the plaintiff.

The lawfulness of the arrest

[20] S 40(1) (b) of the CPA provides that a peace officer may without a warrant arrest any person whom he reasonably suspects of having committed an offence referred to in schedule 1, other than the offence of escaping from lawful custody. The arrest would be lawful if the arresting officer successfully establishes the jurisdictional factors, and he/she may invoke the power conferred by s 40(1) (b) to arrest the suspect unless the plaintiff demonstrates that the discretion to arrest him/her was exercised unlawfully.⁴ The jurisdictional requirements for a lawful arrest under s 40(1) (b) defence are that:

⁴ In *Minister of Safety and Security v Sekhoto and Another* 2011 (1) SACR 315 (SCA), Harms DP quoted with approval the dictum in *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) at 818H-J and 819A-B where Van Heerden JA held: "If the jurisdictional requirements are satisfied, the peace officer may invoke the power conferred by the subsection, i.e., he may arrest the suspect. In other words, he then has a discretion as to whether or not to exercise that power (cf *Holgate-Mahomed v Duke* [1984] 1 All ER 1054 (HL) at 1057). No doubt his discretion must be properly exercised. But the grounds on which the exercise of such a discretion can be questioned are narrowly circumscribed. Whether every improper application of a discretion conferred by the subsection will render an arrest unlawful, need not be considered because it does not arise in this case. All that need be said for the purposes of the point under consideration is that an exercise of the discretion in question will be clearly unlawful if the arrestor knowingly invokes the power to arrest for a purpose not contemplated by the Legislator. But in such a

- 20.1 the arrestor must be a peace officer.
- 20.2 the arrestor must entertain a suspicion.
- 20.3 the suspicion must be that the suspect committed a schedule 1 offence; and
- 20.4 the suspicion must rest on reasonable grounds.

[21] If the arresting officer succeeds in establishing these jurisdictional factors, the arrest would be lawful, unless the plaintiff establishes that the discretion to arrest him/her was exercised in an unlawful manner.⁵ If one or more of the jurisdictional factors is/are not met, the arrest would be unlawful. The relevant enquiry is whether the suspicion was reasonable thereby successfully establishing the jurisdictional factors.⁶

[22] In the instant case, it is undisputed that Sgt Mnyango is a peace officer; that kidnapping is a schedule 1 offence; and that he entertained a suspicion that the appellant had committed an offence of kidnapping. In dispute is whether his suspicion rested on reasonable grounds, which must be considered against the applicable principles and the relevant factual matrix.

case, as is generally the rule where the exercise of a discretion is questioned, the *onus* to establish the improper object of the arrestor will rest on the arrestee (cf *Divisional Commissioner of SA Police, Witwatersrand Area, and Others v SA Associated Newspapers Ltd and Another* 1966 (2) SA 503 (A) at 512; *Groenewald v Minister van Justisie* 1973 (3) SA 877 (A) at 884)."

⁵ *Sekhoto supra* paras 30 and 38.

⁶ See *Nkosinathi Justice Banda v Minister of Police N.O.* [2020] ZAECHGHC 55 para 40).

Whether the suspicion was based on reasonable grounds

[23] In *Mabona and Another v Minister of Law and Order and Others*,⁷ Jones J held:

“The test of whether a suspicion is reasonably entertained within the meaning of s 40(1) (b) is objective (*S v Nel and Another* 1980 (4) SA 28 E at 33E-H). Would a reasonable man in the second defendant’s position and possessed of the same information have considered that there were good and sufficient grounds for suspecting that the plaintiff was guilty of conspiracy to commit robbery or possession of stolen property knowing it to have been stolen? It seems to me that in evaluating his information a reasonable man would bear in mind that the section authorises drastic police action. It authorises an arrest on the strength of a suspicion and without the need to swear out a warrant, i.e. something which otherwise would be an invasion of private rights and personal liberty. *The reasonable man will therefore analyse and assess the quality of the information at his disposal critically, and he will not accept it lightly or without checking it where it can be checked. It is only after an examination of this kind that he will allow himself to entertain a suspicion which will justify an arrest. This is not to say that the information at his disposal must be of sufficiently high quality and cogency to engender in him a conviction that the suspect is in fact guilty. The section requires suspicion but not certainty. However, the suspicion must be based upon solid grounds. Otherwise, it will be flighty or arbitrary, and not a reasonable suspicion.*” (Own emphasis)

[24] It is undisputed that the plaintiff was not the driver of the vehicle and from the statement of the complainant, nowhere does she say that the vehicle was driven on the instructions of the plaintiff. She stated that when she and her companions tried to escape, it was the driver of the vehicle who pulled her by her hair and assaulted her on the back with an empty bottle forcing her to go to the vehicle. Even when the drivers exchanged, it was still not the plaintiff who drove the vehicle but one Bulelani. This is according to the statement of the complainant. The first time she mentioned the plaintiff

⁷ *Mabona and Another v Minister of Law and Order and Others* 1988 (2) SA 654 (SE) at 658E-H; see also *Shaaban Bin Hussein and Others v Chang Fook Kam and Another* (1969) 3 All ER 1627 (PC) the court held: “Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking; “I suspect but I cannot prove.” *Suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is the end.*” (Own emphasis)

she said: *“I left with the owner of the house with the first driver male. He instructed me to enter the house, inside I seated on the couch at lounge (sic), he said I must go to the bedroom. The African male who was the first driver he instructed me to take off all my clothes. I asked to the other male (sic) who was the owner of the house for a condom, he gave us.”*

[25] In the above quotation, there is nothing that suggests that the plaintiff had anything to do with forcing the complainant to alight from the vehicle to go to his house. Similarly, there is no indication that he refused to let her go from his house, at any stage. In her statement, she stated that when she asked the plaintiff to open the door for him, he said that he was afraid of Beyi because he is a gangster and stays in the location, which is denied by the plaintiff. After she ran out of the plaintiff's house and noticed that the plaintiff was chasing her, she said: *“I saw the owner of the house asking for help from the community members of Kamvelihle area.”* S also did not mention that the door was locked and could not go out or that the plaintiff kidnapped her, as Sgt Mnyango wants the court to believe. Instead, Sgt Mnyango testified that he arrested the plaintiff *‘based on what the complainant informed me. She said that the plaintiff refused her to leave or let her go and also of what happened in the car. To me, that amounted to kidnapping because he took away her rights.’* Surprisingly, this does not appear in Sgt Mnyango's statement which he himself wrote. In paragraph 2 of his statement, the following is recorded: *“On Monday 2018-08-13 at about 07:15 I went to house 2[...] M[...] Street, Ikamvelihle where the complainant, Ms N[...] M[...], pointed out suspect Phindile Payi to me. I arrested him, explained his rights as per SAPS 14/26/08/2018. He was free from injuries.”* When he got to the plaintiff's house he said: *“Upon entering the house, the complainant said: ‘Here is Phindile, the one I was*

running from in the morning.’ I informed the plaintiff that we were arresting him for kidnapping.” On both occasions, there were no details regarding what the plaintiff did to the complainant. There is also no indication that he informed the plaintiff of his rights when he arrested him. In his own version, he did not give the plaintiff an opportunity to explain and tell him his side of the story before effecting the arrest.

[26] Sgt Mnyango testified that when Ms Kolisi arrived at the charge office, she was attended to by Cst Andries, and he was not close to them when Ms Kolisi made the report. He did not hear what it was all about. Strangely, he is the one who effected the arrest. At the time, the complainant’s statement had not even been taken down except what he said the complainant informed him which is neither contained in her statement nor his. Clearly, Sgt Mnyango had no information to analyse or assess at the time of the arrest. He simply accepted what he said he was told without checking where it could be checked. It is therefore surprising that without an examination of this kind, he allowed himself to entertain a suspicion which would justify the arrest of the plaintiff. He also did not say that he investigated the information, as a starting point, to obtain *prima facie* proof that an offence of kidnapping had been committed.

[27] When Sgt Mnyango was asked if he enquired from the complainant what she meant when she said the plaintiff did not allow her to alight from the vehicle, he said he did not. He confirmed that it was not the plaintiff who held the complainant by the hair. He conceded that if he had asked for the details from the complainant, that would have helped in formulating a reasonable suspicion. He would also have established that the door was unlocked. He admitted that the complainant did not mention in her

statement that she was prevented from leaving the house. He admitted further that when he arrested the plaintiff the only information at his disposal, was what he was told by the complainant that she was raped in the house and no further detail, especially regarding the alleged kidnapping. He confirmed that when he arrested the plaintiff, he insisted that he had done nothing wrong. Instead of considering what he was telling him, he told him that he would explain whatever he wanted to say in court.

[28] During cross-examination, it was put to Cst Andries that when she wrote the name of the suspect as Thobela Beyi, in the investigation diary (annexure “A”) at page 96, it was because there was no information implicating the plaintiff. She said: *“I only had one suspect there, it was Thobela. However, the arresting officer [Sgt Mnyango] decided to include the plaintiff. He said he was going to arrest the plaintiff for kidnapping and Thobela, for kidnapping and rape. I asked him the reason why he was arresting the plaintiff because I only mentioned Thobela. Then Sgt Mnyango said to me the plaintiff was also involved in all this thing. That is when I informed him that he will make the arrest and not me because I only saw Thobela as the suspect in this case of kidnapping and rape.”* She confirmed the evidence of Sgt Mnyango that nowhere was it written in the complainant’s statement that the plaintiff prevented the plaintiff from leaving the house.

[29] Adv Cetywayo submitted that Sgt Mnyango did not set out the basis for the suspicion, on reasonable grounds, that the plaintiff took part in the kidnapping and rape of the complainant. Adv Dala argued that the plaintiff failed to plead any facts upon which the attack on Sgt Mnyango’s discretion to arrest him was based.

[30] It is trite that an arrest or detention is *prima facie* wrongful. The evidence shows that Sgt Mnyango's belief that the plaintiff had committed a schedule 1 offence did not rest on reasonable grounds, as shown above. When he arrested the plaintiff, a docket had not been opened and the complainant's statement had not been obtained. I therefore conclude that the first defendant failed to discharge the *onus* to justify the arrest. I say so because the arrest was not carried out to secure the plaintiff's attendance to court for prosecution to commence, but he was arrested because he was pointed out by the complainant.

Detention

[31] Detention is, in and by itself, unlawful. The *onus* rests on the detaining officer to justify it.⁸ The Constitutional Court remarked that the question whether the applicant's detention was consistent with the principle of legality and his right to freedom and security of the person in s 12 of the Constitution, is a constitutional matter. S 12(1) of the Constitution guarantees that everyone has the right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause.

[32] The plaintiff alleges that after he was arrested, he was taken to Motherwell Police Station where he was detained. He alleges further that there were no reasonable and/or objective grounds justifying his detention. He contends that his

⁸ *Zealand v Minister of Justice and Constitutional Development and Another* 2008 (2) SACR 1 (CC) (2008) (4) SA 458; 2008 (6) BCLR 601) para 24.

detention was wrongful and without reasonable and probable cause in that Sgt Mnyango, as well as other police officers at Motherwell Police Station failed to apply their minds in respect of his detention and the circumstances relating thereto. He contends further that Sgt Mnyango acted unreasonably in that there was no evidence linking him to the commission of any offence.

[33] In *Mvu v Minister of Safety and Security and Another*⁹ Willis J cited with approval *Hofmeyr v Minister of Justice and Another*¹⁰ and remarked:

“[10] In *Hofmeyr v Minister of Justice and Another* King J, as he then was, held that even where an arrest is lawful, a police officer must apply his mind to the arrestee's detention and the circumstances relating thereto, and that the failure by a police officer properly to do so is unlawful. The minister's appeal was unanimously dismissed by what was then known as the Appellate Division of the Supreme Court. It seems to me that, if a police officer must apply his or her mind to the circumstances relating to a person's detention, this includes applying his or her mind to the question of whether detention is necessary at all. This, it seems to me, and in my very respectful opinion, enables one to get a better grip on an issue which has been debated in the law reports in recent cases such as *Minister of Correctional Services v Tobani*; *Ralekwa v Minister of Safety and Security*; *Louw v Minister of Safety and Security and Others*; *Charles v Minister of Safety and Security*; *Olivier v Minister of Safety and Security*; and *Van Rensburg v City of Johannesburg*. On the question of unlawful detention per se, as a concept to be considered separately from the question of arrest, it is, in my respectful view, instructive to read the *Tobani* case in which Jones and Leach JJ, together with Govender AJ, upheld, in an appeal to the full court, the judgment of Froneman J. I also agree with the general approach of Horwitz AJ in the *Van Rensburg* case even though, in that case, the facts are distinguishable from the present one at least inasmuch as a warrant for arrest had been issued.”

⁹ *Mvu v Minister of Safety and Security and Another* 2009 (2) SACR 291 (GSJ) para 10.

¹⁰ *Hofmeyr v Minister of Justice and Another* 1992 (3) SA 108 (C).

[34] *Adv Cetywayo* submitted that the plaintiff was detained because of an unlawful arrest. Sgt Mnyango effected the arrest despite the entry in the investigation diary that the suspect was Beyi. *Adv Cetywayo* submitted further that the wrongful act of Sgt Mnyango and Cst Andries, of arresting the plaintiff resulted in his further detention after his first appearance.

[35] Regarding the condition of the holding cell in Motherwell Police Station and in St Albans Prison in which the plaintiff was detained, *Adv Dala* submitted that the issue of the conditions of the cells was not pleaded by the plaintiff in his particulars of claim. For this assertion, he relied on *Jacobs v Minister of Safety and Security* (CA 327/2012) [2013] ZAECHGHC 95¹¹ where the Court as per Eksteen J held:

“[29] The function which pleadings fulfil in litigation was discussed in *Imprefed (Pty) Ltd v National Transport Commission* 1993 (3) SA 94 (A). Kumleben JA and Nienaber JA, in their joint judgment, at 107C-E state:

At the outset it need hardly be stressed that: ‘The whole purpose of pleadings is to bring clearly to the notice of the Court and the parties to an action the issues upon which reliance is to be placed...’”

[36] In reply, *Adv Cetywayo* submitted that the conditions of the cells were part of what the plaintiff had to go through because of the unlawful arrest.

¹¹ *Jacobs v Minister of Safety and Security* (CA 327/2012) [2013] ZAECHGHC 95 para [29].

[37] In his particulars of claim, the plaintiff did not mention the condition of the cells in which he was detained. He mentioned it during his testimony. In *South British Insurance Co Ltd v Unicorn Shipping Lines (Pty) Ltd*¹² Holmes JA (Wessels JA, Trollip JA, Corbett JA, and Galgut AJA, concurring) stated:

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

[38] After the plaintiff testified about the condition of the cells in which he was kept, the defence cross-examined him about it. *Adv Dala* put it to him that the defendants would deny whatever he said regarding the condition of the cells. In any event, the plaintiff testified about his experience in custody, which cannot be divorced from the fact that he was in custody. That he was arrested and detained is uncontroverted, as alluded to earlier. Moreover, the defendants will not be prejudiced as both parties fully canvassed it.

[39] Sgt Mnyango and Cst Andries knew that there was no evidence linking the plaintiff to the commission of the offences when Sgt Mnyango arrested and detained him. Nevertheless, Sgt Mnyango proceeded and arrested and detained him. This is unacceptable as it undermines the constitutional right to freedom and security of a person including the right not to be deprived of freedom arbitrarily or without just cause.

¹² *South British Insurance Co Ltd v Unicorn Shipping Lines (Pty) Ltd* 1976 (1) SA 708 at 714G.

Further detention from 15 August 2018 to 12 September 2018

[40] It is common cause that after his arrest, the plaintiff appeared in court on 15 August 2018, for the first time. He alleged that the investigating officer as well as the prosecutor were in possession of the docket and yet they opposed his release from custody which resulted in the matter being remanded in custody to 24 August 2018, for a formal bail application. On 24 August 2018, the matter was again remanded at the request and instance of the prosecutor acting in concert with the investigating officer and he was transferred to St Albans Prison where he was further detained until 28 August 2018. It was further postponed to 12 September 2018 for a formal bail application at the instance and request of the prosecutor acting in concert with the investigating officer. On 12 September 2018, without there being a change in his personal circumstances, the prosecutor and the investigating officer were no longer opposed to his release on bail. On this day, it was struck off the roll against him due to lack of evidence, as stated.

[41] *Adv Cetywayo* submitted that the wrongful arrest of the plaintiff by Sgt Mnyango and Cst Andries, the prosecutor, acting together with W/O Sabane to oppose his release on bail, led to his further detention which caused harm to the plaintiff.

[42] In response to the above, the defendants stated in paragraph 15 of the plea:

“15. AD PARAGRAPH 14

15.1 The plaintiff and his co-accused, Beyi, who appeared in court on the 15th of August 2018 were explained their rights to bail and elected to apply for the assistance of legal aid and the matter was postponed to 24 August 2018 for a formal bail application.”

[43] In reply, *Adv Dala* argued that the authority to further detain a suspect is within the discretion of the court. For this assertion, he relied on Sekhoto¹³ where the court held that while it is clearly established that the power to arrest may be exercised only for the purpose of bringing the suspect to justice, the arrest is only one step in that process. Once an arrest has been effected, the peace officer must bring the arrestee before a court as soon as reasonably possible and at least within 48 hours (depending on court hours). Once that has been done, the authority to detain that is inherent in the power to arrest has been exhausted. The authority to detain the suspect further is then within the discretion of the court.

[44] Theron J in *Bryan James De Klerk v the Minister of Police*,¹⁴ remarked:

“[81] Constable Ndala subjectively foresaw the precise consequence of her unlawful arrest of the applicant. She knew that the applicant’s further detention after his court appearance would ensue. She reconciled herself to that consequence. What happened in the reception court was not, to Constable Ndala’s knowledge, an unexpected, unconnected and extraneous causative factor – it was the consequence foreseen by her, and one which she reconciled herself to. In determining causation, we are entitled to take into account the circumstances known to Constable Ndala. These circumstances imply that it would be reasonable, fair, and just to hold the respondent liable for the harm suffered by the applicant that was factually caused by his wrongful arrest. For these reasons, and in the circumstances

¹³ *Sekhoto supra* at para 42.

¹⁴ *Bryan James De Klerk v the Minister of Police* [2019] ZACC 32 para 81.

of this matter, the court appearance and the remand order issued by the Magistrate do not amount to a fresh causative event breaking the causal chain.”

[45] The learned Judge concluded:¹⁵

“[86] The crucial fact in this matter is that Constable Ndala subjectively foresaw the harm arising from the mechanical remand of the applicant after his first court appearance. She knew that the applicant’s further detention after his court appearance would be the consequence of her unlawful arrest of him. She reconciled herself with this knowledge in proceeding to arrest him. In addition, she knew that her mere note inside the docket recommending bail would amount to nothing at this first appearance. That the judicial process *should* have had a different tenor and outcome seems to me to be beside the point. The point is that Constable Ndala knew it would not.”

[46] At paragraph [88] the learned Judge continued:

“[88] On the facts of this case, the Magistrate concerned should not be exclusively liable for the subsequent detention, given the original delict by the arresting officer and her subjective foresight of the subsequent detention and the harm associated therewith.”

[47] The liability of the police for the detention post-court appearance of the arrestee should be determined on an application of the principles of legal causation, having regard to the applicable tests and policy considerations. This may include a consideration of whether the post-appearance detention was lawful. These public

¹⁵ At para 86.

policy considerations will serve as a measure of control to ensure that liability is not extended too far. The conduct of the police after an unlawful arrest, especially if the police acted unlawfully after the unlawful arrest of the plaintiff, is to be evaluated and considered in determining legal causation. Moreover, each case must be determined on its own facts. That is because there is no general rule that can be applied dogmatically to determine liability.¹⁶ The determination of legal causation is based on the consideration of the various factors which *inter alia*, include direct consequences, reasonable foreseeability, and the presence of a *novus actus interveniens*.¹⁷

[48] In the present case, the arrest of the plaintiff was unlawful as it did not consider the principle that deprivation of liberty through an arrest and detention is *prima facie* unlawful. Sgt Mnyango must have known that pursuant to the unlawful arrest, the plaintiff would routinely be remanded in custody after his first appearance. In addition, Captain Sabane, who was privy to the complainant's statement which clearly stated that the suspect was Beyi, recommended that bail be opposed until the 12th of September 2018. In his evidence during bail proceedings on 12 September 2018, Captain Sabane stated:

"Your Worship, with regard to accused 2 [the plaintiff] hence I am saying I don't, I am not against him being granted bail because when I read the statement of the complainant, I don't see him being involved in the actual incident of rape and kidnapping. Maybe because he chased her out of the house and on the road the sister, the witness; maybe that is why he was arrested because 'A1' statement, in the

¹⁶ See *De Klerk supra* at para 63.

¹⁷ See *De Klerk* above at para 65.

complainant's statement, there is nothing that implicates him in the rape and the kidnapping because from the tavern, they don't say he did anything to the bushes and back to the place where they slept."

[49] Mr Mavakala, who acted as a senior public prosecutor on the first day the plaintiff appeared in court, testified that he did not receive further information which would have strengthened the case against the plaintiff between 15 August 2018 and 12 September 2018. When he was asked from which facts he drew his conclusion, he was at pains to explain that. Instead, he conceded that no facts were detailing what the plaintiff did to support his conclusion. He also could not direct the court to the portions of the complainant's statement detailing the plaintiff's role in the commission of the offences. When he addressed the court on 12 September 2018, when the plaintiff appeared in court for the formal bail application, he said: "*Your Worship, however in respect of accused 2 [the plaintiff], Your Worship, accused 2 does not have pending cases or previous convictions and also the case against him in terms of the merits of the case, it is not so very clear.*" This, to me, shows that he did not honestly believe that the plaintiff was guilty of the offences charged. An example of this is shown when he continued: "*Your Worship, the schedule in respect of accused 1 but that changed a lot with accused 2. Accused 2, Your Worship, I argued with my investigating officer to my superiors trying to explain to them that nothing for this person to be answered but they insist so he is still on the dock now because, not because of me or the investigating officer (sic).*"

[50] The above shows that Sgt Mnyango, Cst Andries, Captain Sabane and Mr Mavakala subjectively foresaw the harm when the case was remanded after the

plaintiff's first court appearance. They reconciled themselves with that knowledge. Mr Mavakala could not proffer a reason why the plaintiff was not released on 15 August 2018, when he appeared in court for the first time.

[51] In this case, to impose liability on the defendants for the entire period of detention (30 days) in the circumstances of this matter, would not exceed the bounds of reasonableness, fairness, and justice.¹⁸ In the circumstances, I conclude that this matter meets the criteria set out by the Constitutional Court in *De Klerk supra*, to hold the defendants liable for the period of 30 days for which the plaintiff was further detained.

Malicious prosecution

[52] It consists in the wrongful and intentional assault on the dignity of a person comprehending also his or her good name and privacy.¹⁹ To succeed with a malicious prosecution claim, the plaintiff must allege and prove that; (i) the defendants set the law in motion (instituted or instigated the proceedings); (ii) the defendant acted without reasonable and probable cause; (iii) the defendant acted with malice (or *animo inuriarum*); and (iv) that the prosecution failed. In this instance, the plaintiff bears the *onus* of proof to establish each, as alluded.²⁰ The plaintiff's case was struck off the roll due to lack of evidence linking him to the commission of the offences of kidnapping and rape, as stated.

¹⁸ *De Klerk supra* at para 87.

¹⁹ *Heyns v Venter* 2004 (3) SA 200 (T) 208B.

²⁰ *Minister of Safety and Security v Lincoln* (682/19) [2020] 3 All SA 341 (SCA); 2020 (2) SACR 262 (SCA) (5 June 2020).

The respondents set the law in motion (instituted or instigated the proceedings)

[53] In *Lederman v Moharal Investments (Pty) Ltd*²¹ Jansen JA (Ogilvie Thompson JA, Rumpff JA, Botha JA, Jansen JA and Muller AJA) held:

“Inherent in the concept 'set the law in motion', 'instigate or institute the proceedings', is the causing of a certain result, i.e. a prosecution, which involves the vexed question of causality. This is especially a problem where, as in most instances, the necessary formal steps to set the law in motion have been taken by the police and it is sought to hold someone else responsible for the prosecution.”

[54] Jansen JA in *Lederman supra* quoted with approval from the judgment of Price J in *Madnitsky v Rosenberg* 1949 (1) PH J5 and said:

“[W]hen an informer makes a statement to the police which is wilfully false in a material particular [sic], but for which false information no prosecution would have been undertaken, such an informer “instigates” a prosecution.”

[55] In *Waterhouse v Shields*²² Gardiner J remarked:

“The first matter the plaintiff has to prove is that the defendant was actively instrumental in the prosecution of the charge. This is a matter more difficult to prove in South Africa, where prosecutions are nearly always conducted by the Crown, than it is in England, where many cases are left to the private prosecutor. Where a person merely gives a fair statement of the facts to the police and leaves it to the

²¹ *Lederman v Moharal Investments (Pty) Ltd* 1969 (1) SA 190 (A) at 197A.

²² *Waterhouse v Shields* 1924 CPD 155 at 160.

latter to take such steps thereon as they deem fit and does nothing more to identify himself with the prosecution, he is not responsible, in an action for malicious prosecution, to a person whom the person may charge. But if he goes further, and actively assists and identifies himself with the prosecution, he may be liable. "The test," said Bristowe J in *Baker v Christiane* 1920 WLD 14, "is whether the defendant did more than tell the detective the facts and leave him to act on his own judgment".

[56] Notwithstanding the bare denial in the pleadings that on 13 August 2018, the members of the SAPS and those of the NPA instigated the prosecution against the plaintiff, the plaintiff insisted that the defendants did so on charges of kidnapping and rape.

57] Regarding the liability of the first defendant, the relevant question is whether the police did anything more than one would expect from a police official in the circumstances, namely, to give a fair and honest statement of the relevant facts to the prosecutor, leaving it to him to decide whether to prosecute or not.

[58] Based on the facts of the instant case, it cannot be said that the members of the first defendant were actively instrumental in the prosecution of the charges against the plaintiff. It also cannot be said that they directed their will in prosecuting the plaintiff thereby infringing his personality although they were aware that there was no evidence linking the plaintiff to the alleged offences.

[59] The same cannot be said about the prosecutor who must pay attention to the contents of the docket and act with objectivity and protect the public.²³ The prosecutor was initially adamant that after reading the docket which contained the statement of the complainant, there was a *prima facie* case against the plaintiff. During the bail hearing he said: “Accused 2 [the plaintiff], *Your Worship, I argued with my investigating officer to my superiors (sic) trying to explain to them that nothing for this person to be answered but they insist so he is still on the dock now because not because of me or the investigating officer [indistinct]*”. In paragraph 65.1 of the defendants’ heads of argument, the following can be gleaned:

“65.1 It was the evidence of Mr Mavakala that due to the case not being strong enough against the plaintiff, he did not oppose the granting of bail against the plaintiff. However, due to the fact that the plaintiff was being charged with a schedule 6 offence, the plaintiff bore the *onus* of proving that there were exceptional circumstances indicating that it would be in the interest of justice for him to be released on bail.”²⁴

[60] The above is different from what Mr Mavakala testified to. He said:

“I read the docket. My duty was to determine whether there was a *prima facie* case or not against the accused persons. After considering and reading the docket I determined the charges first and determined that there was a *prima facie* case against both accused. When the docket arrived, it was

²³ *Minister of Police and Another v Du Plessis* 2014 (1) SACR 217 (SCA).

²⁴ Section 60(11) (a) of the Criminal Procedure Act 51 of 1977 provides that the court shall order that the accused be detained in custody until he/she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that the interests of justice permit his/her release.

written kidnapping and rape. When I made my decision after reading the docket, I charged both for kidnapping and rape.”

[61] As far as the second defendant is concerned, in terms of s 179(2) of the Constitution, the prosecuting authority has the power to institute criminal proceedings on behalf of the state and to carry out any necessary functions incidental to instituting criminal proceedings. *In Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)*²⁵ Ackermann et Goldstone JJ held:

“72...However, prosecutors have always owed a duty to carry out their public functions independently and in the interests of the public. Although the consideration of bail is pre-eminently a matter for the presiding judicial officer, the information available to the judicial officer can but come from the prosecutor. He or she has a duty to place before the court any information relevant to the exercise of the discretion with regard to the grant or refusal of bail and, if granted, any appropriate conditions attaching thereto.”

[62] In this case, the prosecutor did not act independently. Although during the trial he insisted that there was a *prima facie* case against the plaintiff, that is not what he conveyed to the magistrate during the bail hearing. His opinion had changed in that he said there was no *prima facie* case against the plaintiff but listened to his seniors who told him to proceed with the case even though there was no evidence linking the plaintiff to the commission of the crimes.

²⁵ *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* 2002 (1) SACR 79 (CC) at para 72.

[63] In my view, the second defendant instigated the prosecution against the plaintiff because the prosecutor knew that there was no evidence linking the plaintiff to the commission of the offence and yet he was actively instrumental in continuing with charging the plaintiff.

Absence of reasonable and probable cause

[64] Reasonable and probable cause, in the context of malicious prosecution, means an honest belief founded on reasonable grounds that the institution of proceedings is justified. The concept therefore involves both a subjective and an objective element.²⁶ In *Beckenstrater v Rotter and Theunissen*²⁷ Schreiner JA laid down the test for reasonable and probable cause and said:

“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.”

[65] It cannot be said that either subjectively or objectively the prosecutor had an honest belief founded on reasonable grounds that the institution of proceedings was justified. He is the one who argued with his seniors that the plaintiff had no case to

²⁶ *Minister of Justice and Constitutional Development and Others v Moleko* 2009 (2) SACR 585 (SCA) para 20.

²⁷ *Beckenstrater v Rotter and Theunissen* 1955 (1) SA 136 (A) 136A-B.

answer, as alluded. In the circumstances, the plaintiff succeeded in discharging the *onus* of proving the absence of reasonable and probable cause.

[66] This leads me to the next issue, *animus iniuriandi*.

Animus iniuriandi

[67] To succeed in this claim, the plaintiff must allege that the defendant intended to injure him (either *dolus directus* or *indirectus*). *Animus iniuriarum* includes not only the intention to injure but also the consciousness of wrongfulness. Van Heerden JA in *Minister of Justice and Constitutional Development and Others v Moleko*²⁸ remarked:

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

²⁸ *Minister of Justice and Constitutional Development and Others v Moleko* [2008] 3 All SA 47 (SCA)²⁸ at 63.

[68] In *Patel v National Director of Public Prosecution and Others*²⁹ Ledwaba DJP held:

“[27] A prosecutor should assess whether there is sufficient and admissible evidence to provide a reasonable prospect of a successful prosecution, otherwise the prosecution should not commence. According to the DPP’s Prosecution Policy Code of Conduct, Guidelines and Directing under the heading: When the role of the prosecutor is described, it is stated that:

“Prosecutors must at all times act in the interest of the community...

[Members of the Prosecution Authority] must act impartially and ...in good faith...” Emphasis added.

[69] *In casu*, the prosecutor did not believe that the plaintiff was guilty, hence he argued with his seniors and was not opposed to the plaintiff’s release on 12 September 2018 when the matter was struck off the roll. The prosecutor also did not carry out his public functions independently and in the interests of the plaintiff, as stated. He did not act in accordance with the requirements of the constitution and did not have regard for the rights of the plaintiff. Such rights include his rights to bail and not to be detained arbitrarily and without just cause.³⁰

[70] The conduct of the prosecutor was a deliberate intentional act in that he directed his will to prosecute the plaintiff thus infringing his personality, as mentioned above. In other words, his conduct was wrongful, and he was conscious that his action

²⁹ *Patel v National Director of Public Prosecution and Others (Unreported Judgment: (4347/15) [2018] ZAKZDHC 17; 2018 (2) SACR 420 (KZD) (13 June 2018) at 31 para 27); see also Minister of Police and Another v Du Plessis 2014 (1) SACR 217 (SCA) at para 34 where the court held that a prosecutor had to pay attention to the contents of his docket. He has to act with objectivity and protect the public interest.*

³⁰ See *January v Minister of Safety and Security 2012 (1) SACR (ECP) para 32.*

was wrongful. He foresaw the possibility that he was acting wrongfully, but continued to act, recklessly as to the consequences of his conduct. He was fully aware of the fact that by doing so, the plaintiff would in all probability be injured and his dignity negatively affected. I am satisfied that the plaintiff proved *animus iniuriandi* on the part of the second defendant.

Quantum

[71] In assessing the *quantum* of damages, Bosielo AJA, as he then was, in *Minister of Safety and Security v Tyulu*³¹ held:

“[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. The correct approach is to have regard to all the facts of the particular case and to determine the quantum of damages on such facts (*Minister of Safety and Security v Seymour* 2006 (6) SA 320 (SCA) at 325 para 17; *Rudolph and Others v Minister of Safety and Security and Another*. 2009 (5) SA 94 (SCA) ([2009] ZASCA 39) paras 26 - 29)”.

³¹ *Minister of Safety and Security v Tyulu* 2009 (5) SA 85 (SCA) para 26.

[72] It is undisputed that the plaintiff was arrested on 13 August 2018, and appeared in court for the first time on 15 August 2018 and detained for two days. He was detained for a further 30 days before he was released on 12 September 2018. The plaintiff is relatively young. He was arrested in full view of his neighbours. Cst Andries testified that when the plaintiff was removed from the police station, about 50 members of the community were watching. The plaintiff testified that after his arrest, the mother of his two children now refers to him as a rapist. He is unable to maintain a love relationship as he is referred to as a rapist. In the community, he is no longer seen in the same light as he was before his arrest.

[73] Concerning deprivation of liberty, Erasmus J in *Ntshingana v Minister of Safety and Security and Another*³² referred to the general principles that the amount of damages to be awarded when determining the *quantum* of damages in matters which concern unlawful deprivation of liberty, is in the discretion of the court, amounts to an estimate, is calculated *ex aequo et bono* and is based on the extent and nature of the violation of the personality. The plaintiff further testified regarding the unhygienic condition in the cells wherein he was incarcerated.

[74] As far as *quantum* is concerned, I have considered the relevant facts, as well as the age of the appellant, his personal and social circumstances, the circumstances of the arrest, the nature and duration, the fact that when he was arrested there was no evidence linking him to the commission of any crime, yet he remained in custody for 30 days. I have also made a comparison of the previous awards in similar cases like

³² *Ntshingana v Minister of Safety and Security and Another* [2021] JOL 50340 (CC).

this one, which serves as a useful guide. However, each case must be treated according to its own merits. I am of the view that a fair and appropriate award of damages for the appellant's unlawful arrest and initial detention is an amount of R100 000-00 (one hundred thousand rand). For further detention from 15 August to 12 September 2018 (30 days) a fair and appropriate award is an amount of R800 000-00 (eight hundred thousand rand). Having regard to the circumstances of this case and having considered the previous awards in cases of this nature, R300 000-00 (three hundred thousand rand only) is fair and reasonable for damages suffered by the plaintiff in claim 3 for malicious prosecution.

Costs

[75] *Adv Cetywayo* submitted that costs should follow the result. He submitted further that due to the complexity of the matter and the amount of *quantum* involved, it was necessary to employ two counsel. He further submitted that the defendants should be ordered to pay costs on a scale between attorney and client to show displeasure in the conduct of the police for the concessions they made that the arrest of the plaintiff was not justifiable. For this assertion, he relied on *Gerrit Smit v The Road Accident Fund*³³ where Eksteen J remarked:

"Generally, I think that the computation and proof of a claim for loss of earning capacity does usually involve complex issues of fact and law. Where the claim is large, then it is usually a reasonable and prudent precaution for a plaintiff to engage the services of two counsel."

³³ *Gerrit Smit v The Road Accident Fund* [2014] ZAECPEHC para 16.

[76] *Adv Dala* submitted that the issues of this matter were relatively uncomplicated, and that the plaintiff's claim should be dismissed. He submitted further that this matter was not a complex one deserving of two counsel. He referred to the *SCA in Minister of Police v Gqamane [2023] ZASCA 61* where costs of two counsel were disallowed on the basis that the matter was not sufficiently complex to justify such an award. He submitted further that costs should only be costs of one counsel.

[77] The case referred to by *Adv Cetywayo* above, dealt with computation of loss of earning capacity and is distinguishable from the instant case. I am of the view that this matter was not complicated enough to justify the employment of two counsel even though the *quantum* of damages sought is a substantial amount of money. In my view, there is no justification for costs on a scale as between attorney and client. Costs on a scale as between party and party are proper, in the circumstances.

[78] In the circumstances, I issue the following order:

Claim1

- 1. The first defendant is ordered to pay the plaintiff, Mr Phindile Payi, a sum of R100 000-00 (one hundred thousand rand only), for unlawful arrest and detention of two days, from 13 August 2018 to 15 August 2018.**

2. Interest *a tempora morae* at the prescribed legal rate from the date of judgment.

Claim 2

3. The defendants are ordered to pay an amount of R800 000-00 (eight hundred thousand rand only) for further detention of 30 days from 15 August 2018 to 12 September 2018, jointly and severally the one paying the other to be absolved.
4. Interest *a tempora morae* at the prescribed legal rate from the date of judgment.

Claim 3

5. The second defendant is ordered to pay an amount of R300 000-00 (three hundred thousand rand only) for malicious prosecution.
 6. Interest *a tempora morae* at the prescribed legal rate from the date of judgment.
 7. The defendants are ordered to pay costs of the action jointly and severally the one paying the other to be absolved.
-

BM PAKATI

JUDGE OF THE HIGH COURT, EASTERN CAPE DIVISION, GQEBERHA

APPEARANCE:

COUNSEL FOR PLAINTIFF: ADV CETYWAYO WITH ADV MASHIYI

INSTRUCTED BY: NTANZI ATTORNEYS INC

COUNSEL FOR DEFENDANT: ADV DALA

INSTRUCTED BY: STATE ATTORNEY, GQEBERHA

DATE HEARD: 22, 23, 24, 25, 26, 29, 30, 31 MAY 2023,

01 JUNE 2023, 13 JULY 2023

JUDGMENT DELIVERED: 22 FEBRUARY 2024