



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

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

Case No: 248/2020

In the matter between:

MAKOELE ENOCH MIYA

Plaintiff

and

THE MINISTER OF POLICE

First Defendant

**NATIONAL DIRECTOR OF PUBLIC
PROSECUTIONS**

Second Defendant

JUDGMENT

CORAM: NAIDOO J

HEARD ON: 15,16 and 18 March 2022. Heads of Argument filed 4
May 2022

DELIVERED ON: 13 SEPTEMBER 2022

INTRODUCTION

[1] The plaintiff's claims in this matter are founded in the *actio iniuriarum*, which is action for the recovery of non-patrimonial damages. The plaintiff sued the defendants for damages he suffered as a result of his being wrongfully and unlawfully arrested and detained in connection with a criminal charge of Rape. His claim included damages arising from what he alleges to be malicious prosecution in respect of such charge. After the defendants closed their case, the plaintiff applied for an amendment to his Particulars of Claim as follows:

The amount of R250 000.00 reflected in paragraph 11 to be amended to read R450 000.00; the amount of R250 000.00 in prayer 1, on page 10, be amended to read R450 000.00; the amount of R150 000.00 in paragraph 15, be amended to read R250 000.00. The defendants had no objections to the amendments and the Particulars of Claim were amended accordingly. Adv C Zietsman represented the plaintiff, and Adv PS Mphuloane represented the defendants.

THE PLEADINGS

[2] The plaintiff claims damages, in Claim 1, for unlawful arrest and detention and in Claim 2, for malicious proceedings, although it was clear during the trial that he was referring to malicious prosecution as part of such proceedings. After the amendment referred to earlier, the plaintiff claims an amount of R450 000.00- in respect of claim 1, and R250 000.00 in respect of claim 2. He alleges that on 13 March 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 Namahadi Police Station in Phuthaditjhaba, without a warrant of arrest. The alleged charge in respect of which he was arrested was one of rape. He was detained at the Namahadi police station.

[3] The following day, on 14 March 2019. He appeared in the Phuthaditjhaba Magistrate's Court, where bail was ostensibly opposed by the police, so the matter was remanded to 20 March 2019 for a formal bail application. He was thereafter detained at the Harrismith Correctional Facility from 14 March 2019 until 20 March 2019. On the latter date he was released on R500.00 bail and made seven more appearances in the Phuthaditjhaba Magistrate's Court until 19 September 2019, when 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 1006 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 and he was in a position to explain that he did not commit rape.

- [5] The plaintiff pleaded additionally and/or alternatively that his arrest was unlawful as the members of SAPS had no *prima facie* reasonable grounds to arrest him. In the further alternative, he alleged that the members of SAPS did not exercise their discretion properly or at all, as there was no obligation on them to arrest him, they did not investigate the matter properly and there were no grounds to suspect that he had committed a crime.
- [6] 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. When he appeared in court on 14 March 2019, bail was denied at the instance of the employees of the first and second defendant, 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 he was found not guilty and discharged in terms of section 174 of the Criminal Procedure Act 51 of 1977 (the CPA). 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.
- [7] It is common cause that this matter has its genesis in the arrest and detention of the plaintiff in 2013 on a charge of rape. He was detained for four days after that arrest and thereafter released at court, without appearing before a magistrate. The defendants

admit the arrest, detention and prosecution in March 2019, but deny that it was without probable cause, and allege that the arrest was in terms of a warrant of arrest. The defendants also relied on section 40(1)(b) of the CPA as a defence. I will deal further with this later. They denied the claim of malicious proceedings.

EVIDENCE FOR THE PLAINTIFF

- [8] The plaintiff testified and called his brother, Tumelo (Tumelo) Miya as a witness. The latter confirmed his version that members of SAPS came looking for the plaintiff at the home where they both resided, assaulted and arrested them both. Tumelo, like the plaintiff also testified that no warrant was produced prior to arresting the plaintiff. The plaintiff and his brother were taken to different police stations. The plaintiff said that although the police had a file in their possession, they did not show him the contents but simply informed him that they were looking for him as he had been on the run since 2013, and that there was also another person that they were looking for. He was detained firstly at Namahadi police cells and then transferred to Harrismith Correctional Facility after his first appearance in court. He remained in custody for seven days before bail was fixed in the amount of R500.00.
- [9] The plaintiff alleges that he was detained in deplorable circumstances at the Namahadi 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 better. His evidence is that when he appeared in court on 20 March 2019, no evidence was led. The magistrate simply informed him that he was not guilty or “something like that”. He was told that the case is being dismissed. It was suggested to him that the charge was withdrawn, which he agreed with.

- [10] I should perhaps mention that about six months after his release in 2013, the plaintiff visited the Investigating Officer (I/O), Warrant Officer (W/O) Molefe as he needed written confirmation that the matter against him was not proceeding. Molefe advised him that the charge was withdrawn, and provided him with a letter to this effect. The plaintiff required this letter for purposes of an appeal relating to his work as a security officer. He thereafter worked in the security industry, seemingly as a security guard from 2013 to 2014. He then relocated to KwaZulu Natal, where he worked until 2016, and left there after he was shot. After his arrest in 2019, he had no contact with Molefe, the I/O. The plaintiff closed his case after Tumelo testified.

EVIDENCE FOR THE DEFENDANT

- [11] The defendants called three witnesses, The I/O, Molefe, and two prosecutors, Goodman Langelihle Makhanya (Makhanya) and Lefa Victor Rathaba (Rathaba), who were involved in the prosecution of the plaintiff. On the third day of trial and while Molefe was under cross-examination, the first defendant conceded the merits in respect of Claim 1. It seems that an offer of settlement was made

but not accepted, so the matter proceeded. The court was therefore, required to adjudicate only the issue of quantum in respect of Claim 1. The plaintiff's case in respect of Claim 1 hinged on the absence of a lawful and properly issued warrant of arrest, hence rendering his arrest unlawful. In view of the first defendant's concession in respect of Claim 1, it is unnecessary for me to deal in any detail with the merits or evidence surrounding the warrant of arrest. I will deal with such evidence, if necessary, later in this judgment.

- [12] It is perhaps useful to deal with the facts of the matter leading to the arrest of the plaintiff in 2013 in order to properly contextualise the evidence given in respect of the present matter. In the 2013 matter, the two female complainants in that matter who were scholars, were walking in the street at approximately 21h45, when they were accosted by unknown males. The one complainant, Mavis Qothelo (Qothelo), said there were three men but the other complainant, Puleng Mbele (Mbele), said there were four. Both of them ran away but the assailants caught up with them. Mbele said two of them approached her and robbed her of her mobile telephone, while the other two chased her friend, Mavis, and took her towards a graveyard. She ran away and sought help from the police. Qothelo said that the two who chased her robbed her of her mobile telephone and then pulled her to a graveyard, where they both raped her at knifepoint. Thereafter they took her schoolbag and its contents and left. She went to a nearby house for help and ultimately met the police on the street. The suspects were not found at that time.

- [13] The two complainants subsequently made further statements to Molefe who was the I/O. Mbele said that she pointed out suspect number one to the police, while Qothelo said that she told her father who raped her, and he knew accused number 2 very well. Her father pointed out accused 2 to the police. When regard is had to the docket in that matter, the plaintiff in this matter is accused 1 and accused 2 is someone called Monaheng Lucky Mofokeng. There is no discernible date on Qothelo's statement, and an extremely poorly written date on Mbele's statement. Molefe in cross-examination said that the date appeared to be 14 January 2014. He said Qothelo's statement was taken on a different day to the one on which Mbele's statement was taken. Therefore, the police would have known at least since 14 January 2014 that Mbele, who was not the person who was raped, identified the plaintiff as her assailant. The plaintiff was not charged with robbery, but with rape. Molefe testified that he was not aware that Mbele was not raped and that the plaintiff was not charged with robbery.
- [14] Makhanya is currently a Senior Public Prosecutor. During 2019, he was a Regional Court Control Prosecutor stationed at Phuthaditjhaba, and one of his functions was to screen dockets to establish that a crime has been committed, that a perpetrator has been identified and whether a defence has been furnished. In this matter there was more than one perpetrator and DNA evidence was required. Despite a number of requests for such evidence, it was not forthcoming. He saw no prospects of success in this matter and decided on, 11 June 2019, to stop the prosecution by issuing a *nolle prosequi*. He testified that this was his only his

involvement with the docket in the matter. He indicated under cross-examination that he did not consult with the previous prosecutor or the I/O before he took the decision to *nolle* the docket. One of the main reasons for that decision was the lack of *prima facie* evidence against the plaintiff, being DNA evidence linking him to the rape charge. He also conceded that the state's case against the plaintiff did not improve from the date he was first arrested in 2013 to the date of his second arrest in March 2019.

[15] Rathaba has been a District Court prosecutor since 2009 and currently working in the Sising Magistrate's Court which falls under the jurisdiction of the Phuthaditjhaba Magistrate's Court. He was the prosecutor who dealt with the plaintiff's matter in court on 20 March 2019, and was unable to remember if he dealt with the matter on the plaintiff's first appearance, when the matter would have been screened by the Control Prosecutor and enrolled for court. However, having been referred to the docket and charge sheet, he noted that he was the prosecutor on the first appearance, and said that he would not dispute that he dealt with the matter on that day. Given the nature of the charge, namely rape, the common practice is not to set bail on the first appearance but to remand it for seven days for further investigation and for a formal bail application, which was done in this matter.

[16] Rathaba did not contact the I/O but wrote a note in the investigation diary of the docket requesting him to be present for the formal bail application. He testified that the I/O filed a statement saying he does not oppose bail, hence there was no need to meet with him. He also could not comment on whether the

DNA sample was taken from the plaintiff, despite numerous requests in the investigation diary to do so. He confirmed that DNA results were important in order to prosecute a rape matter, but that it sometimes took long to receive these results, with the result that the matter would be struck from the court roll. The defendants closed their case after this witness testified.

ISSUES

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

- 17.1 whether the plaintiff has succeeded in proving the merits of his claim, in respect of Count 2;
- 17.2 whether the plaintiff established a causal link between the actions of the defendant/his employees and the patrimonial loss he alleges he suffered.
- 17.3 the quantum in respect of Claim 1 and Claim 2

THE LAW and EVALUATION

[18] As indicated earlier, the first defendant conceded liability in respect of Claim 1, making it unnecessary to embark upon the legal position in respect of unlawful arrest. I will deal with the law relating to a claim of malicious prosecution. Both counsel correctly referred to the requirements for a successful claim in respect of malicious prosecution, as cited by the learned authors in *Amler's Precedent of Pleadings, 8th Edition, p247*, from the *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)

[19] It was expected of the defendants to call the two complainants in the matter in respect of which the plaintiff was charged with rape, to shed light on how the plaintiff came to be pointed out and to whom such pointing out was made, as well as Constable Tshabalala, who arrested the plaintiff. No explanation was forthcoming as to why they did not do so. In his Heads of Argument, Mr Mphuloane indicated that the arresting officer was dismissed from his employment with the first defendant and his whereabouts are unknown. No mention was made of the two complainants. It is well settled in our law that failure to call available witnesses can lead to the negative inference being drawn, depending on the circumstances of the case, that calling such witnesses may have uncovered facts which are unfavourable to his case or may have damaged his case.

[20] This case is a good example of poor and ineffectual police investigation and a failure by the relevant prosecutor/s to read the docket properly and apply his/her mind to the evidence in the docket. Molefe, the I/O, in spite of being a police officer for many years, specialising in sexual offence cases, displayed a worrying

lack of understanding, or ignorance, of the evidence gathered and particularly whether there were grounds to arrest the plaintiff in the first place. The initial statements of Mbele and Qothelo do not identify of their assailants. Almost a year later Molefe obtained statements from them identifying their assailants, without any details of how they were able to make such identification, to whom Mbele had pointed out the plaintiff or how the father of Qothelo pointed out accused 2 to the police. There was absolutely no follow up investigation done as a result of the two later statements. Molefe conceded that he was not aware that Mbele was not raped

- [21] The initial statements were in the docket since February 2013. Mbele's second statement was obtained, seemingly, on 14 January 2014, and Qothelo's statement presumably around the same time but, according to Molefe, on a different day. Molefe did not even take the trouble to ensure that these statements were properly commissioned. A similar situation applies to his own statement made in respect of his non-opposition to bail, which is not dated or commissioned. When asked whether this statement applied to the plaintiff's 2013 or 2019 appearance in court, he could not say, a further example of shoddy police work on the part of an ostensibly experienced police officer. In spite of clear evidence that the plaintiff was not identified by Qothelo as one of her rapists but by Mbele as one of the assailants who robbed her of her mobile telephone, Molefe pushed forward with a charge of rape against the plaintiff. His obtaining a warrant of arrest in October 2014, which was executed by Constable Tshabalala in 2019, is a further indication that the employees of the first defendant set the law in motion against the plaintiff, without

grounds for doing so. In addition, he conceded that the warrant, which bore the names of both accused, had been altered by deleting the name of accused 2, after the magistrate had authorised the warrant of arrest, such deletion having been done without the authority of the magistrate.

[22] When the defective and unlawful warrant of arrest which, formed part of the docket, was exposed in cross-examination, Molefe conceded that his altering the warrant of arrest by deleting the name of accused 2, was “a huge mistake” for which he was at fault. He also conceded that the plaintiff was arrested on a defective warrant of arrest, and that his address appears at the top of the warrant, an address he knew since 2013, raising the question why it was necessary to have a warrant of arrest authorised. There appears to have been no attempt to secure his attendance at court by one of the other less drastic means allowed in law, for example a notice to appear in court or a summons. This is no doubt the reason that the first defendant capitulated on the third day of trial, while Molefe was being cross-examined, and conceded liability in respect of Claim 1. I am satisfied that the plaintiff has shown that there was no probable cause for the employees of the first defendant to have arrested him for a second time in March 2019.

[23] I turn now to deal with the conduct of the employees of the second defendant. Rathaba was the prosecutor dealing with the docket on the plaintiff’s first appearance on 14 March 2019. He noted that that the plaintiff was charged with rape, and as is the practice, he remanded the matter for seven days to 20 March 2019, for further

investigation and for a formal bail application. He requested the I/O to be present in court for the bail application. The I/O ostensibly filed a statement indicating that he was not opposed to bail, so that when the plaintiff appeared in court on 20 March 2019, bail was set and he was released. It was clear that Rathaba did not consider the contents of the docket fully, as he testified that his involvement started only on 14 March 2019. He baldly declared that the remand from 14 March 2022 to 20 March 2022 was to gather more evidence, and DNA evidence was part of the further investigation. When it was put to him that even after the plaintiff was arrested in 2019, no DNA samples were collected from him. His response that it happens that a matter is struck from the roll, pending receipt of DNA results.

- [24] It was clear that he either missed the point completely, that no DNA sample was taken from the plaintiff, and therefore no results would be forthcoming, or he realised the predicament he was in and simply gave a very generalised answer. I am inclined to agree with the proposition put to Rathaba that he had no idea of what the contents of the docket were, because he did not read the docket. Therefore there was no probable or reasonable cause for the continued detention of the plaintiff from 14 March to 20 March 2019. Even if one were to accept that in a busy District Court, the prosecutor dealing with first appearances has little time to study an entire docket, given the large number of dockets he/she has to read, and he/she therefore accepts that if the matter has been enrolled, the Control Prosecutor would have read the docket and made the informed decision to continue to prosecute the plaintiff, it begs the question whether the Control Prosecutor did in fact read the docket

[25] Rathaba's evidence is that the docket would be sent to him after it had been screened by the Control Prosecutor, who is expected to read the entire docket and decide whether to enrol the matter or not. The history of the various remands, together with the numerous entries in the investigation diary requesting DNA samples to be collected, ought to have triggered a careful reading of the docket, and particularly the statements made by the two complainants. If the docket had been read, it would have been clear to the Control Prosecutor that no DNA samples were collected, and instructions would have been given for such to be done, in view of the arrest of the plaintiff, seemingly for this purpose. This was not done.

[26] As indicated, Makhanya's evidence is that he was involved for a short while on 11 June 2019, read the docket and saw no prospects of a successful prosecution and endorsed the docket with the *nolle prosequi* decision. When he was confronted with the fact that the plaintiff was allegedly pointed out by the robbery complainant (Mbele) and not the rape complainant (Qothelo), Makhanya attempted to justify the persistence with the prosecution on a charge of rape by asserting that the complainants were attacked by a group of four men and that even though they split up and chased the two complainants, they were acting with common purpose and therefore, the plaintiff could be charged with rape. He was unable to answer satisfactorily when it was pointed out that the charge sheet makes no mention of common purpose, but, in fact, pointedly alleges that the plaintiff raped the complainant, Qothelo. The distinct impression gained from his evidence is that

he saw that there were no DNA results and, based on that, he concluded that there was no prospect of a successful prosecution.

[27] It appears that it was completely lost on Makhanya that a DNA reference sample was never taken from the plaintiff, and therefore, there could never be a DNA result. It seems to have dawned on him during cross-examination that the complainant in the robbery matter identified or pointed out the plaintiff as one of her assailants, and not the complainant in the rape charge. 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. In *S v Lubaxa* 2001 (2) SACR 703 (SCA); (2001 (4) SA 125, the court said the following at para 19:

'...Clearly a person ought not to be prosecuted in the absence of a minimum of evidence upon which he might be convicted, merely in the expectation that at some stage he might incriminate himself. That is recognised by the common-law principle that there should be reasonable and probable cause to believe that the accused is guilty of an offence before a prosecution is initiated and the constitutional protection afforded to dignity and personal freedom (s 10 and s 12) seems to reinforce it. It ought to follow that if a prosecution is not to be commenced without that minimum of evidence, so too should it cease when the evidence finally falls below that threshold...'

The test for reasonable and probable cause set out in *Beckenstrater v Rottcher and Theunissen* 1955(1) SA 129 (A) about sixty eight 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”.

[28] The plaintiff bears the onus to prove these requirements and an evidential burden rests upon the defendant to rebut the inference regarding its state of mind, in order to escape liability. 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. It is not in dispute in this matter that the employees of the first defendant instituted proceedings against the plaintiff by charging him and bringing him before the court. From what I have set out above, it is clear that his arrest was based upon a defective and unlawful warrant of arrest, and on evidence that falls far short of the threshold referred to in *Lubaxa* above.

[29] The prosecution in this matter was based upon the same deficient evidence and incorrect facts as the arrest, and despite being under a duty to ensure that the interests of justice and the rights of people are protected, the prosecuting authority in this matter failed to exercise its discretion properly to ensure that the plaintiff's Constitutionally protected rights were not violated. I am satisfied that there was no reasonable and probable cause to arrest and prosecute the plaintiff in this matter, and that in persisting with the prosecution in this matter, the conduct of the prosecution was wrongful. I am, consequently, of the view that the plaintiff has satisfied the requirements to succeed in his claim for malicious prosecution.

- [30] There is one further matter that requires mention. After the parties closed their respective cases, the court postponed the matter to 11 May 2022 for closing arguments. Mr Zietsman suggested that the parties prepare written Heads of Argument to assist the court. The matter was discussed and the court indicated that if it found the written Heads sufficient, there would be no need for oral arguments, and the court would advise the parties accordingly upon receipt of the Heads. They agreed that both Heads of Argument would be filed by 25 April 2022, and the court recorded that accordingly, but did not make an order to this effect. The plaintiff's Heads were filed a week later, on 4 May 2022. The defendants appear to be labouring under the misapprehension that the court set time frames for the parties to file Heads of Argument and ordered accordingly.
- [31] There was a discussion in court and the parties agreed amongst themselves on the timeframes for the filing of such Heads. The defendants took up the surprisingly strong position, in their Heads of Argument, that they were prejudiced by the "plaintiff's blatant failure" to comply with the court's order, and as such the plaintiff's conduct should be "condemned/not condoned at all costs". The court was implored to disregard the plaintiff's Heads of Argument. The plaintiff, for his part, offered no explanation to the court for the late filing of his Heads. He was not obliged to as there was no court order to this effect. He indicated in his supplementary Heads of Argument that he will furnish an explanation if required to do so. The defendants did not mention the issue of the late filing of the Heads of Argument, nor did they pursue their request that the plaintiff's Heads be disregarded. I will take it, therefore, that they had abandoned this request.

[32] 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) 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.”

[33] 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.”

[34] The parties led no evidence in respect of the quantum of damages but addressed the issue in their respective Heads of Argument. The court was left to gather the sketchy information about the plaintiff that was mentioned in his evidence. He was 31 years old at the time of testifying at the trial in this matter in May 2022, and would have been twenty eight (28) years old at the time of his arrest in 2019. No details were given of his educational qualifications. He was employed as a security officer but currently appears to be working as a vendor. No details were provided as to what exactly he sells, what his income was at the time of his arrest or what his current income is.

[35] From his evidence, it is apparent that he worked as a security guard until 2016, when he was shot. No details are given as to what he did between 2016 and 2019, or when he started his business as a vendor. With regard to his detention, he spent one night at the Namahadi 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 seven (7) days before being released on bail. It is alleged that he thereafter made seven appearances in court over a period of six (6) months before the prosecution decided not to proceed with the prosecution. Although it was pleaded in the summons that he was discharged in terms of section 174 of the CPA on 19 September 2019, no such evidence was led and it was common cause that a *nolle prosequi* was issued by the second defendant on 11 June 2019. The plaintiff testified that he was advised that the case against him was dismissed or withdrawn, but neither party explained why the plaintiff was required to appear in court until 19 September 2019.

[36] I mention that a perusal of a copy of the charge sheet and record of proceedings in the Magistrate's Court, it is apparent that on 20 March 2019 and after bail was set, the matter was remanded to 16 April 2019 for further investigation. On 16 April 2019, the matter was remanded to 6 June 2019, again for further investigation. On 6 June 2019, the plaintiff did not appear in court. A warrant of arrest was authorised and his bail was provisionally forfeited to the state. The matter was remanded to 27 June 2019 for final cancellation of bail, on which date the plaintiff was still absent from court and his bail was finally forfeited to the state. Then strangely, a further appearance sheet, dated 9 June 2019, was filed after that of the 27 June 2019, indicating that the plaintiff appeared in court of his own accord, and explained that he was in custody in another matter on 6 June 2019.

[37] The warrant of arrest appears to have been cancelled and an indemnity letter furnished to the plaintiff, presumably to furnish to any police officer who attempted to arrest in terms of the warrant of arrest. The matter was then remanded to 19 September for the

docket to be requested. On 19 September 2019, the charge against the plaintiff was withdrawn. Rathaba was the prosecutor on 9 June 2019, when the warrant of arrest, was cancelled as well as on 19 September 2019 when the charge against the plaintiff was withdrawn. These aspects were never raised by the plaintiff, and the court is in the dark as to why the plaintiff was made to appear in court for almost 3 months after the decision not to prosecute him. It appears to be another example of ineptitude on the part of the employees of the first and second defendants.

[38] The plaintiff referred only to 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. It was submitted on behalf of the plaintiff in this matter that an amount of Between R350 000.00 and R400 000.00 would be a fair and just award for unlawful arrest and detention and an amount of between R175 000.00 and R200 000.00 a fair amount for malicious prosecution.

[39] 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, which was preceded by an assault upon him. It followed 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. The evidence of the plaintiff and his brother with regard to his arrest was not disputed, nor was his evidence regarding the effect of his arrest and detention upon him. It can therefore, be accepted that the conduct and actions of the employees of the first and second defendants caused the plaintiff to suffer damages as a result of the *contumelia* and emotional stress, to which he was subjected.

[40] It was submitted on behalf of the defendants that an appropriate amount of damages in respect of unlawful arrest and detention would be R60 000.00. In respect of malicious prosecution, it was argued that the claim relevant thereto should be dismissed with costs, but if the court finds that the plaintiff had succeeded in proving his claim then an amount of R90 000.00 would be a fair award. The first defendant referred to the matter of *Mvu v Minister of Safety and Security and Another* 2009(6) SA 86 (GSJ), as support for his contention that R60 000.00 is a fair award. I note that the actual amount of the award in *Mvu* was R30 000. Mr Mphuloane on behalf of the defendants also referred to several other matters. In *Tyulu* referred to above, an award of R50 000.00 was made in respect of a magistrate who was detained for a few hours. In *Seymour*, also referred to above, an award of R90 000.000 was made for five days' detention; in *Seria 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

[41] The defendants also referred to two matters emanating from this Division and which were heard together by my brother Molitsoane J on 23 October 2021 and in which judgment was delivered on 17 January 2022. These are the matters of *Motlogeloa Eric Choane v Minister of Police + 1*, Case number 2606/2018 and *Thabo Monaheng v Minister of Police + 1* Case number 1823/2019. Both plaintiffs sued for damages in respect of unlawful arrest and detention as well as malicious prosecution. The court awarded damages in respect of Choane, in the amount of R80 000.00 (against the Minister of Police) for his arrest and three days' unlawful detention before his first appearance and R350 000.00 (against the National Director of Public Prosecutions - NDPP) for approximately ten months' detention after his first appearance. He was awarded R50 000 for malicious prosecution (against the NDPP). Monaheng was awarded R80 000.00 (against the Minister) for three days' unlawful arrest and detention before his first appearance in court and R220 000 (against the NDPP) for detention after his first appearance. He was awarded R50 000.00 (against the NDPP) for malicious prosecution.

[42] The plaintiff in this matter pleaded that he suffered general and special damages in respect of *contumelia*, emotional stress and trauma, loss of amenities of life and legal fees. No evidence in respect of the latter two heads of damages was led. The plaintiff said that he was assaulted at the time of his arrest and he was "swollen" as a result. No medical evidence was tendered nor was it canvassed with him whether he sought medical assistance for his alleged injuries. With regard to emotional damages, he testified that he is afraid to approach women for fear that he will be charged

with rape. He also testified to not feeling good about this experience that he endured and that he felt “disheartened”. It appears that he was legally represented during his appearances in court after his release on bail.

[43] It was argued on behalf of the first defendant that he was not liable for claim 2 (malicious prosecution) and cannot be held jointly and severally liable. When regard is had to the Particulars of Claim, the plaintiff did in fact plead that the employees of the first and second defendant set the law in motion against him without reasonable and probable cause. I have set out the reasons that I made such a finding.

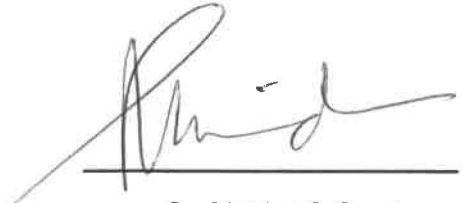
[44] On a conspectus of all the evidence, and after considering all the circumstances of this matter, which I have detailed, I am of the view that the plaintiff is entitled to be compensated for the damages he suffered in respect of Claim 1 and Claim 2 in the amounts listed in the order that follows hereafter. With regard to costs, the plaintiff requested that the court 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 to that effect would unnecessarily fetter the discretion of the Taxing Master.

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

The first and second defendants are jointly and severally liable to

pay to the plaintiff, the following amounts, the one paying, the other to be absolved:

- 45.1 Two Hundred and Fifty Thousand Rand (R250 000) in respect of the plaintiff's claim for unlawful arrest and detention;
- 45.2 One Hundred and Fifty Thousand Rand (R150 000.00) in respect of the plaintiff's claim for malicious prosecution;
- 45.3 The defendants are directed to pay the plaintiff's costs on a party and party scale, such costs to include the costs of 19 August 2021.



S. NAIDOO, J

On behalf of Plaintiff: Adv. C Zietsman
Instructed by: Loubser Van Wyk Inc
c/o Jacobs Fourie Inc
158 Zastron Street
Westdene
Bloemfontein
(Ref:P Venter/Lou7/0021)

On behalf of Defendant: Adv PS Mphuloane
Instructed by: Ms RD Canham
Office of the State Attorney
11th Floor Fedsure Building
49 Charlotte Maxeke Street
Bloemfontein
(Ref:b66/202000154/P14M)