

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

**CASE NO.: 643/2016**

Date of hearing: 09 October 2020

Date supplementary heads filed: 16 October 2020

Date circulated to the parties : 12 August 2021

In the matter between:

**MABHASO NONTSELE**

Plaintiff

**And**

**MINISTER OF POLICE**

First Defendant

**NATIONAL DIRECTOR OF PUBLIC  
PROSECUTIONS**

Second Defendant

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**JUDGMENT**

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**MAJIKI J:**

INTRODUCTION:

[1] The plaintiff sued the two defendants in their nominal capacities for wrongful arrest and detention as well as malicious prosecution.

## PLEADINGS

[2] It is necessary to transcribe the allegations made by the plaintiff in his particulars of claim.

‘9. The plaintiff was held in detention from the 8<sup>th</sup> of December 2013 until the 19<sup>th</sup> of May 2015, namely a period of 550 days.

10. In effecting the said wrongful and unlawful arrest and detention of the plaintiff, the aforesaid arresting officer:

10.1 invoked the power to arrest for a purpose not contemplated by the legislature; and

10.2 invoked the power of arrest, to frighten and harass the plaintiff, by punishing him through arrest and detention, and

10.3 invoked the power to arrest for an ulterior purpose, and

10.4 arrested the plaintiff without ever considering any explanation or statement from the plaintiff, setting out his innocence in connection with the alleged crimes and in particular that there was no evidence against the plaintiff: and

10.5 acted without taking into consideration the facts conveyed to them by the plaintiff at the time of his arrest and

10.6 acted without critically analysing any information at their disposal, before arresting the plaintiff and

10.7 acted without considering alternative and less dramatic means of securing the attendance of the plaintiff at court and

10.8 acted without considering whether the detention of the plaintiff was necessary at all and, in particular without considering:

10.8.1 whether the plaintiff was a flight risk and

10.8.2 whether the plaintiff would interfere with witnesses and

10.8.3 whether the plaintiff would hamper investigation and

10.8.4 whether the plaintiff was of fixed abode and could be easily traced.

10.9 acted in a way which ignored the plaintiff's constitutional rights as enshrined in the Bill of Rights and the Constitution, and contrary to the presumption of innocence of the plaintiff and

10.10 acted without exercising a discretion to arrest in a fair and balanced manner and

2.11 failed to exercise their discretion properly in that the plaintiff should never have been arrested at all, had the arresting officer taken due account of all the above circumstances and

2.12 acted in arresting and detaining the plaintiff in circumstances where there was no urgency to so arrest him and where investigations were still underway.

11 The police officials who acted as investigating officers in the charge levelled against the plaintiff, and the State Prosecutors in Lady Frere Magistrate's Court, whose full and further particulars are unknown to the plaintiff, owed the plaintiff a duty of care:

11.1 to assess the strength of the State's case against the plaintiff and to determine whether there existed a *prima facie* case against the plaintiff and

11.2 to ensure that the charges and proceedings against the plaintiff were dealt with by them in accordance with law and in accordance with the dictates of justice and

11.3 to ensure that the plaintiff not be detained in custody, or that his detention in custody not be extended, where no *prima facie* case existed against the plaintiff and

11.4 not to seek the imposition of bail if no *prima facie* case against the plaintiff had been recorded and

- 11.5 to place before the court during the process of all court appearances and remands, and whilst determining the issue of bail in respect of the plaintiff, all relevant information including information as to the strength and weaknesses of the State's case against the plaintiff, and information in the plaintiff's favour relating to the complete lack of evidence, alternatively, insufficient evidence against the plaintiff which would be highly relevant to the granting of bail and the continued prosecution of the plaintiff.
- 12 On the 3<sup>rd</sup> of February 2014, and at the Lady Frere Magistrate's Court, the members of the South African Police Services, whose names are presently unknown to the plaintiff, together with the prosecutor, Ms S Maarman, who dealt with the case on that day, opposed the granting of bail to the plaintiff, and did so maliciously in concert, well knowing that no *prima facie* case existed against the plaintiff at that time or at all.
- 13 The wrongful arrest and detention and malicious prosecution of the plaintiff took place in Lady Frere, within the area of jurisdiction of the above Honourable Court.

#### CLAIM 2: MALICIOUS PROSECUTION

- 14 During December 2013, the said members of the South African Police Services set the law in motion against the plaintiff by laying a false charge of rape against the plaintiff, when they:
- 14.1 had no reasonable or probable cause for doing so and
- 14.2 were actuated by malice and
- 14.3 had no evidence whatsoever that the plaintiff had been involved in such a crime.
- 15.1 On the 19<sup>th</sup> of May 2015, the charge of rape against the plaintiff was withdrawn, he having been spent 550 days in unlawful detention.

15.2 The charge of rape was again re-instated against the plaintiff on the 15<sup>th</sup> of July 2015, when the matter proceeded to the Regional Court in Lady Frere, on which occasion the plaintiff was found not guilty and discharged in terms of section 174 of the Criminal Procedure Act.

16. As a result of the plaintiff's malicious prosecution aforesaid, he suffered general damages in respect of contumelia in the sum of R200 000.00, by virtue of the fact that:

- (i) the plaintiff was paraded before Court in view of the public on all occasions when his matter came to court and was remanded and
- (ii) the plaintiff was presented as a common criminal on each such occasion.'

[3] The special plea of non-joinder of the complainant and the minister of justice and correctional services, persisted with by the first defendant at the commencement of trial, was dismissed on the basis that they did not have direct and substantial interest which would prejudice them if they were not joined.

[4] In his plea the first defendant averred that the plaintiff was initially removed by the arresting officer from his home to the police station because the members of the community were angry and wanted to harm him. He could not be questioned in the presence of such people. After he was questioned, he was arrested, and a charge of gang rape of K[...] S[...] (K[...]) was laid against the plaintiff and two others.

[5] The first defendant averred that "the eye witness and the complainant was highly intoxicated." Therefore, she could not give valid consent to sexual intercourse. The complainant was also reported to be mentally challenged.

The plaintiff was arrested in order to have access to his clothes and search for evidence, without him knowing, he was suspected of being part of the people who committed rape.

[6] Further, the first defendant pleaded “The case opened against the plaintiff was not less a serious offence like shoplifting where means of security the attendance of the accused person may be less dramatic, here we are talking about very serious offence ... all these factors justify the action that was taken ...”

[7] The second defendant denied that the state prosecutors acted maliciously in prosecuting the plaintiff. It said the plaintiff’s warning statement, other state witnesses’ statements and the medical record, known as J.88 were considered by the prosecutor. Consequent thereto, two state witnesses were interviewed, thereafter a *prima facie* case to prosecute the plaintiff was established. Further the opposition of bail by the state prosecutors was in line with the law. The onus was on the plaintiff to demonstrate that he was a candidate to be released on bail.

## EVIDENCE

[8] In the plaintiff’s case, only the plaintiff testified. The plaintiff testified that at the time of his arrest he did odd jobs assisting builders. He left school after he failed standard eight. He was arrested on 8 December 2013 in the afternoon by sergeant Njotini at his home, in the presence of his mother. Other two police officers arrived at the time he was about to be taken away.

[9] Sergeant Njotini advised her that she was arresting him for the rape of K[...]. He told her that he knew nothing about the rape of K[...]. Sergeant Njotini told him that he would explain that at the police station. According to

him, he only knew K[...] from the locality. He found one Konono in a van driven by sergeant Njotini with K[...] and her sister at the back of the van, with no canopy. He was arrested together with Konono and one Kwanda. They were all taken to the police station by the other two police.

[10] He said on 6 December 2013 he attended a pre-circumcision event of local boys from the afternoon until the following day. Kwanda and Konono were also present. Although he had been drinking he remained conscious of what was happening around him, throughout. There were many people but he did not see K[...]. He never spoke to her or had sexual intercourse with her.

[11] He was next visited by sergeant Njotini after a day or two. She minuted a statement from him, he was speaking IsiXhosa and he was not aware of what she wrote. His understanding of english language is generally poor, the statement was not read back to him. He signed it because he was not aware that he could refuse to sign, or that he could choose to remain silent, it was his first time to have a brush with the law. He was also informed of the charges, then. A saliva swab was taken from him in about eight days of his detention.

[12] On the 4 February 2015 he applied for bail and it was refused. The prosecutor did address court but that was not interpreted to IsiXhosa. He continued to go to court until he was released on 19 May 2015. However, on 20 May 2015 sergeant Njotini took him to the police station and to court again. He was warned to appear again on 15 July 2015.

[13] On 15 July 2015 his trial was proceeded with, the witnesses testified, K[...] stated that she knew nothing about the crime. He was then discharged.

[14] He said the arrest hurt him. He lost weight and has never regained it. He was detained in a communal cell, its toilet had no door. He and his inmates had to block the view of the toilet with a sponge mattress. Sometimes there would be no water to flush the toilet. They slept on the sponge mattresses on the floor, with no pillows. In Lady Frere the winter season is always very cold and windy. They sat on a cement bench. His view did not extend beyond the cell, the windows were high. Other inmates were smoking, he is a non-smoker. He contracted tuberculosis. They would go without meals and would be told that they had been forgotten. Breakfast was served between 09h00 and 10h00 which made things difficult for those who took medication, like him. The inmates would fight with each other over food.

[15] His lover also broke up with him saying he was a rapist. He also felt bad because the members of the community viewed him as a rapist. His mother's health also deteriorated. She used to attend court. When he appeared in court on 2 October 2014 he realised that he was unable to lift up his right leg. He was taken to Glen grey hospital, his leg became worse he felt sharp needle like pains and he could not put it down.

[16] In cross examination he said, he did not know what information was in possession of sergeant Njotini when she came to arrest him, he did not see any of the statements in her possession. He was also not aware that on the day of his arrest there were people who were angry, asking why the suspects were not arrested and saying if they were not removed, they would deal with them. He also did not know that such was one of the investigating officer's reasons for opposing his release on bail, together with the fact that, there was information that he threatened state witnesses. He said at his home he was only with his mother, no one threatened to interfere with her in her duties. There were also no crowds when the police fetched Kwando.

[17] He disputed that he told sergeant Njotini that he had consensual sexual intercourse and a love relationship with K[...]. He said he had denied that he had sexual intercourse with K[...]. He had denied so even to Nophendule Sogiba, a member of K[...]'s family. Nophendule assaulted him and chased him away. He left his shirt in the room he had been with the boys. He did tell sergeant Njotini about that, that may be the reason why it was contained in the warning statement. He said he took off his shirt because he was feeling hot. He said he knew nothing about the state K[...] was reportedly in, the next morning, that of having torn jeans and wetness. He admitted that the two police officers who took them to the police station, gave them documents. That was after the police officers had explained what was contained in the documents, however, he did not understand the explanation. They took the documents with to the detention cell, the inmates used them for smoking. He never admitted that he committed the offence to the said officers. The notice of rights in terms of the Constitution is recorded to have been signed by the plaintiff at 16h50 on 08 December 2013.

[18] He said he never made a phone call from K[...]'s phone which was reportedly stolen, he also never took the said phone to K[...]'s mother. He said when Sindiswa met him, half naked in his upper body, on the passage, he was from the room with the boys. He denied that he was leaving the room where K[...] was, allegedly being raped by other two persons. He said he could not deny that there were items found in the room where the rape took place, including a shirt.

[19] At the end of the state case, Ms Nhantsi, counsel for the second respondent applied for absolution from the instance of the second respondent. She said no *prima facie* case had been made against the second respondent.

The plaintiff had not alleged and proved the elements of a claim for malicious prosecution. The application was successfully opposed. The court was of the view that were averments in the particulars of claim and evidence had been led upon which the court might find for the plaintiff in respect of the claims against the second defendant.

[20] Two (2) witnesses testified on behalf of the first defendant. Captain Silwana testified in relation to the bail proceedings. He said he was told in the morning of the day that he went to court that, he had to stand in for the investigating officer, who was away when the bail application was heard. He was not involved in the matter. He said sergeant Njotini told him that she was opposing bail because the applicants were not safe in their community, people wanted to kill them; that an eyewitness had been threatened with assault by the applicants and finally, that the complainant was very drunk during the commission of the offence. Sergeant Njotini asked him to present those in court, as her reasons for opposing the bail application, on her behalf. He had no personal information about those.

[21] He said he never read the docket, it was brought to court during the bail hearing. If there had been a suggestion of a place where the plaintiff and his co-accused could have been safe, he would not have opposed their release. He also did not know which accused had threatened to assault a state witness. He conceded that he was obliged to inform the prosecutor about a weakness in the state case.

[22] Sergeant Njotini's testimony related to the arrest and reasons for opposing the release of the plaintiff on bail. She said she had fourteen (14) years experience. On 8 December 2013, she was handed with a docket in the matter. It contained the complainant's statement, the J88 with the doctor's

conclusions, that the injuries of the victim were consistent with sexual offence. She proceeded to the village to follow up on the matter. Next to the gate of K[...]’s home there were men armed with bush knives and sticks, looking furious. They surrounded the van she was driving and started to hit it. She explained that she was there to meet K[...] in relation with a criminal matter.

[23] The people asked where the police had been, they said if the police were unable to do their work, the people would do it for the police. The police van she had called for, as back up, arrived. Both vans left to look for the suspects. There were community members where they found Konono as well. They wrestled with the police over Konono, but did not succeed. They proceeded to the plaintiff’s home. They found community members standing outside his home. She shouted the plaintiff’s name, she told him to rush, and that she would like to hear from him, at the police station. They rushed to the third suspect’s home, they got there ahead of the community members who were causing commotion.

[24] They got to the police station, she left the suspects as she wanted to meet the witnesses first. K[...] confirmed what was in her statement, that she had been drunk at a relative’s home. She was woken up by Sindiswa. Sindiswa showed her that her trousers’ zip was torn. There was a male sleeping next to her. Sindiswa told her that she was raped by three (3) men, including one who lied next to her, Konono. The other one was Mjozana and another was unknown. She also realised that she had fluids in her underwear. She knew nothing about what could have happened to her. Her cellphone was missing. Her mother told her that she received a phone call from Mjozana, using K[...]’s phone. Sergeant Njotini said she did not remember how K[...]’s cellphone was recovered.

[25] Sindiswa confirmed what was contained in her statement as well. She said she saw the plaintiff on his way out of the room where Konono was raping K[...]. The plaintiff was naked in his upper body. Sergeant Njotini said Sindiswa's statement was of substance in relation to the charge of rape. She went back to the police station. She met the three (3) suspects, individually. She told them of the allegations against them. The plaintiff said K[...] had consented to sexual intercourse with him. They drank together and he kept her cellphone. Sergeant Njotini told him that K[...] was too drunk to consent and that they were related. The plaintiff said he was also drunk. She told him that he was under arrest. She said she critically analysed the information that was in front of her and formulated a reasonable suspicion that he had committed the offence. He was advised of his constitutional rights.

[26] She said she charged the plaintiff on 9 December 2013 after she had advised the plaintiff of his legal right relating to the minuting of a warning statement, the plaintiff elected to make one. The warning statement appears to have been signed at 19h40 on 9 December 2013. She said she detained the plaintiff because his life was in danger. Further, he was charged of a schedule 6 offence. She gave instructions that the plaintiff's bail be opposed on the basis stated by the previous witness. She was of the opinion that he would interfere with the state witnesses, if he were to go back to his locality. She also considered him to be a flight risk because of the seriousness of the case against him.

[27] She said she had no duty to interrogate the strength of the case, that was the court's duty. Also, she had no duty to disclose the strength and weakness of the state case. She disclosed all the information she had and handed the docket to the prosecutor. She sent the DNA samples for testing. Even though

the results were available on the system on 14 March 2014, she did not access them electronically and was also not advised of their outcome, despite her constant follow up, until they were dispatched to her in hard copy.

[28] After the bail was denied she never considered that it was necessary to pursue the reconsideration of bail. She was also not approached in that regard. After 2015 she did not re-arrest the plaintiff. She was also not present in court, after the plaintiff got ill.

[29] In cross examination she confirmed that she gave the instructions contained in the plea, that the plaintiff was arrested because the community was angry at the suspects and would harm them, if they were not arrested. The reason of keeping all of them in detention, was in order to protect them. She said it was not her instructions that she needed the suspects' clothes for purposes of DNA testing.

[30] She confirmed that, in her statement, she said the victim's statement did not make a strong case. Further, it said her decision to arrest was made after the statement of Sindiswa, the eyewitness was obtained. She conceded that her own statement did not say that Sindiswa said she saw the plaintiff having sexual intercourse with or that she saw Konono raping K[...]and putting his penis in his trousers, as she had testified. She also conceded that Sindiswa was not an eyewitness in the case against the plaintiff. She said in the light of the fact that Sindiswa stated that, nothing occurred in her mind when she saw the plaintiff half naked, sergeant Njotini may have omitted to record her line of thoughts in her statement. She in fact thought that, after Sindiswa saw Konono raping K[...], Sindiswa must have subsequently concluded that the plaintiff also raped K[...]. She conceded that she omitted to record Sindiswa's words, 'I did not ask Mabhaso why he was like that, (naked on top) *as I was not*

*expecting anything* (brackets mine). Nonetheless, sergeant Njotini said she was able to place the plaintiff on the scene.

[31] She said she regarded herself as having had sufficient evidence against the plaintiff, regardless of the fact that it was two (2) other people that were seen having sexual intercourse with K[...] and not the plaintiff. She said the consent alleged by the plaintiff would be disproved because the victim was drunk. The doctor's report also confirmed injuries consistent with sexual assault. The reading of the J88 reveals that ureteral orifice was noted to be red ++ and swollen and that erosion, increased friability and discharge were present. The cervix and the posterior fourchette were also red, among others. She said she was also going to obtain samples for DNA testing.

[32] Sergeant Njotini confirmed that she asked the plaintiff about being seen half naked, he said he was hot. She said that was a lie, there were not many people there. She also conceded that she did not enquire of where exactly Sindiswa met the plaintiff. During criminal trial Sindiswa had said that he was on the verandah stretching. She said she was told by Sindiswa that she crossed paths with the plaintiff at the verandah. She did not specify that because she had seen the verandah, it was closeby.

[33] She said she would not wait for DNA results before effecting arrest because those take long to be available. Further in a gang rape DNA did not usually point at more than one (1) person, if it came back positive, anyway. When she was taken through the warning statement, it became clear that she did not communicate or complete the *pro-forma* form correctly. Most importantly, the plaintiff had said he did not understand the allegation against him. She said she thought he meant that he denied the allegation. He had also elected to have an attorney provided for him, however the statement was

minuted without one being provided to him. Sergeant Njotini said the election was made with regard to court attendance. It was also pointed out to her that she did not mark any of the elections of rights made by the plaintiff. Further, the statement was exculpatory, in nature, in that it raised a defence of consent. She disputed that for that reason, she was supposed to investigate further, according to her, the victim was drunk and could not consent.

[34] With regard to opposing bail she said she had no duty to find an alternate address for the plaintiff. It was the duty of his lawyers to forward such. She said she was not told that the plaintiff had forwarded an alternate address of his grandmother in Bronkospruit, otherwise she would have verified it and would not have opposed his bail application. She had not seen the record of the bail proceedings. She said she informed the prosecutor that the victim was very drunk, she did not know that the magistrate was not made aware of that, early on, by the prosecutor. She also advised the prosecutor of the DNA results on the same day of receiving the results. During cross examination she said she was reminded by the note in her diary of the date on which she attended to the prosecutor, it was on 7 August 2014. She specifically repeated that she had no duty to disclose to the prosecutor or court the weakness of the state case. She said she never charged the plaintiff about the theft of the cellphone because it had already been returned.

[35] She said she would not warn a suspect in a rape case. The plaintiff could run to any place within the country, even if he had no international passport, she took into account that he was staying with the victim in the same area, he could intimidate the witnesses and disturb the investigations. Captain Silwana was the one who brought the information that witnesses were threatened and she was of the view that investigation would be interfered with. According to her the bail conditions would not address such.

[36] Two witnesses testified on behalf of the second defendant, Miss Maarman who enrolled the matter and attended to bail proceedings. Mr Buso testified about main trial and how the prosecution failed. Both of them denied that the plaintiff's prosecution was malicious. Ms Maarman and Mr Buso had nine (9) and twenty two (22) years experience as prosecutors, respectively. Mr Buso was attached to the Lady Frere sub cluster at the time the matter was before court. Currently he is in the office of the deputy director of prosecutions, Mthatha.

[37] Ms Maarman specifically stated that the plaintiff was neither arrested and detained by the members of second defendant nor did he make such allegations against the second defendant. He was brought to court within the prescribed forty eight (48) hours, on 10 December 2013. She said she is the one who received the plaintiff's docket and had it enrolled. She said she considered the statements in the docket and concluded that there was evidence of all the elements of rape, that is, unlawful and intentional sexual penetration, without consent.

[38] She repeated what was contained in Sindiswa's statement, in particular that the plaintiff's warning statement contained an admission which placed him on the scene of crime. Further, K[...] said she was very drunk, she cried and her pants were torn. Such was not consistent with consensual sexual intercourse. It was also unlikely that K[...] was the plaintiff's lover, had she been, he would have not allowed others to have sexual intercourse with her, as well. The J88 corroborated one of the allegations in the docket, it noted injuries consistent with rape. She was then of the view that there was a *prima facie* case against the plaintiff. Mr Buso as well said, in the circumstances of this case, he would have also enrolled the matter.

[39] She said an admission, even if eventually inadmissible at trial, is capable of being taken into account for purposes of enrolment. The bail application, was opposed. The plaintiff and his co-accused put up affidavits which did not profer their versions. They bore the onus to prove exceptional circumstances justifying their release on bail. She could not recall what the state disclosed on the merits of the case. The investigating officer was not available. She also did not have the police docket. However, she told the court that if it was satisfied that it was in the interests of justice to admit them to bail, they may be released. Mr Buso agreed with her that it would have been difficult for Ms Maarman to explain the state case, without a docket.

[40] She did not agree that K[...]’s statement did not implicate the plaintiff. She also said Sindiswa had fluids in her underwear. She said, in circumstances where the applicants in a bail application were legally represented and had not said the case against them was weak, or disclosed the basis of their denial of the charges, she did not consider herself as having a duty to go into the merits of the case and disclose weakness in the state case, unless the court enquired into that. She also said she did not disclose that the complainant did not know what had happened, because she was going to rely on circumstantial evidence. She did not regard it as necessary at that stage to tell the court even about the said fact, that she was going to rely on circumstantial evidence. Mr Buso conceded that weaknesses in the state case, like, the reliance on circumstantial and hearsay evidence and not having a positive DNA results, had to be disclosed, promptly, at the earliest opportunity in the case.

[41] She said later, on 6 February 2014 the police docket came, she considered it as to whether there were grounds to oppose bail. She placed the

nature of the evidence that would be led during trial, which in her view was a strong *prima facie* case. Ultimately, she left it to court to make the decision about whether to grant bail or not. The court also had to decide on the threats on the plaintiff and the victim. Despite having considered that conditions could be attached to their release on bail, the life threats had an impact on the weight that was supposed to be taken into account in determining whether their release was in the interest of justice.

[42] She said plaintiff did not testify, in order to state that he would have been safe at an alternate address. She did not think of asking his legal representative about that. She said despite the fact that the plaintiff had a fixed address, she considered him to be a flight risk because of the strength of the evidence against him.

[43] She disputed that by charging the plaintiff she kept the law in motion against the plaintiff, after the police had initially set the law in motion. She denied that the prosecutors were negligent in the application of the law. She said she ascribed the fluids on the victim and the tear in her trousers on the plaintiff because he had admitted sexual intercourse.

[44] She said during trial, if admissible, she could use an exculpatory statement. She would support it with other evidence that proved the case, against the plaintiff, in spite of the exculpatory part of consent in the statement. Consent would have been countered by the victim's drunkenness. That the plaintiff said in his warning statement, he did not understand the charge, she thought he was denying the charge and that would be capable of being challenged during trial. That was not a serious flaw for purposes of the determination of bail. The fact that he had requested a state attorney and still

had a statement minuted without one, did not call for her to ignore what he had deposed to, about the facts of the case.

[45] Mr Buso testified that the docket was brought by him, after he had intervened and engaged the seniors of sergeant Njotini. He found Ms Maarman in court, he could not disturb her because she was in trouble with the court about the unavailability of the investigating officer. The matter was allocated to the regional court sometime in 2014. Eventually, in June 2015 he enrolled the matter for trial. At that stage there was strong circumstantial evidence of gang rape against the plaintiff. His analysis of available evidence was similar with that of Ms Maarman. Further, he said he consulted with state witnesses and his view of a strong case was fortified. More information came out from the witnesses, for example, Sindiswa said as she was entering the room where the rapes allegedly took place, the plaintiff was coming out of the said room. She had seen his two co-accused, actually in the act. The investigating officer also confirmed that information.

[46] He said things changed during trial, unexpectedly. Sindiswa contradicted herself, she omitted testifying about things she had said in consultation, she seemed lost and uninterested. The DNA result was negative. The warning statement could not be admitted. It was made before a constable and the rights had not been clearly explained. However, if the preliminary formalities had been done correctly, it would still pass the test of having been made freely and voluntarily. All along he had been confident about his case against the plaintiff. Even in his address to court at the end of the state case he said, if the court would be questioning why the matter was enrolled in the first place, the answer would have been that he was in an unfortunate situation in that the information he had, was not tendered in court, by the same witness he obtained it from.

[47] According to Mr Buso the DNA result came to his attention after the trial had already started, in June 2015. This is despite the fact that according to sergeant Njotini she had furnished the results to the prosecutor on 7 August 2015. He said he had no personal vendetta against the plaintiff. He submitted there was no gross negligence in the prosecution of the plaintiff. He said gang rape is a schedule 6 offence which attracts long term imprisonment. It is a serious offence. The plaintiff had to wait in jail, for him to be released, he had to show exceptional circumstances justifying his release.

[48] The issues for determination in relation to arrest and detention against the first defendant are whether Sergeant Njotini had a reasonable suspicion to have the plaintiff arrested. Further, whether the plaintiff's continued detention was justified. With regard to the second defendant, whether the prosecutors were negligent in the plaintiff's prosecution during the hearing of the bail application and or in further prosecution of the plaintiff and therefore liable for his damages.

[49] In argument Mr Cole, counsel for the plaintiff, submitted that sergeant Njotini, in the first place, was confused, she imputed the allegations of Konono being seen raping the victim as being relevant to the plaintiff. Sindiswa's statement did not implicate the plaintiff, so was that of the victim.

## UNLAWFUL ARREST AND DETENTION

[50] It is common cause that Sindiswa was not an eyewitness to and did not directly implicate the plaintiff with rape. However, according to the arresting officer, circumstantial evidence linked him to the commission of the crime. Sergeant Njotini said she verified what was contained in the statements. She

said, initially she had a weak case. Sindiswa's interview was satisfactory with regard to the allegations against the plaintiff. When asked by the court, she said she formulated the reasonable suspicion that the plaintiff committed the offence, after she interviewed Sindiswa. Sergeant Njotini said she concluded that, despite the fact that Sindiswa did not suspect anything before she entered the room, subsequent to witnessing the rape by Konono, Sindiswa must have associated the plaintiff's being half naked and coming out of the room with the rape. Sindiswa placed him on the scene.

[51] The removal of the plaintiff for his own safety is disputed. That would account for entire period from when he was taken away until the time sergeant Njotini said she effected the arrest. According to the plaintiff he was told that he was being arrested of the rape of K[...], which he denied. He was told he would explain at the police station. The plaintiff said his statement was minuted the following day. Sergeant Njotini said she interviewed the plaintiff but charged him the following day, because it was already late. It is not in dispute that the plaintiff was questioned before a decision to arrest was made. What is disputed is the actual moment, whether it was before he got to the police station or it was at the police station together with outcome of that questioning.

[52] Arrest is *prima facie* unlawful. It infringes rights to personal liberty. In **Duncan v Minister of Law and Order** 1986 (2) SA 805 at 818 H-I the Court said that once the peace officer has on reasonable grounds entertained a suspicion that the arrestee committed an offence, she may properly exercise a discretion whether to arrest or not. The test for the reasonable suspicion is objective.

[53] Even though the plaintiff denied in oral evidence that there were many people when he was arrested, in his particulars of claim he had pleaded that it was in full view of the members of the public. Further, he could not deny that there were many people at K[...]’s homestead. According to sergeant Njotini she had to call for a backup because the people were angry. The probabilities in this regard favour sergeant Njotini, in that, initially, she took the plaintiff in order to protect him and interview him, away from the said people.

[54] The statement of K[...] naming the plaintiff’s nickname or the fact that Sindiswa implicated the plaintiff, was confirmed by Sindiswa in a subsequent interview. Sindiswa’s further statement which stated that, she met the plaintiff half naked, on the way out of the room she was about to enter where she witnessed the rape, was what sergeant Njotini exercised her discretion to arrest the plaintiff on. The suspected offence was gang rape, she said they do not issue warning for such offences, the suspects would be released by court.

[55] The plaintiff’s being half naked had to be contrasted with the explanation that he was feeling hot. Constable Njotini said there were not many people in the room he had been. Unfortunately, it was not established whether the shirt the plaintiff left in the said homestead was the one that was retrieved from the room where the victim was raped. However, circumstantially, it cannot be said it was unreasonable to associate his being half naked with what was happening in the room he was suspected of having been seen coming from. He was also named in K[...]’s statement. In the criminal trial, during the evidence of K [...], he was referred to with his nickname. In this court when the issue of the nickname was clarified, no objection was recorded. In addition to what was in the statements, sergeant Njotini said her suspicions and that the case was no longer weak were

fortified after the interview with Sindiswa. Further, despite the fact that the manner in which the plea was drafted is not a model one, however, from the averment repeated paragraph 6 above, it does appear that the plaintiff was arrested to secure his attendance in court. I am therefore satisfied that after formulating the reasonable suspicion that he had committed the offence, sergeant Njotini exercised her discretion to arrest him to secure his attendance in court on a charge of a serious offence. She said she could not warn him to attend because of the nature of the offence. Indeed, it does appear that the said decision would not have been within the power of a junior police officer. Sergeant Njotini had to take the plaintiff to court for it to make a determination whether the plaintiff should be detained or released.

[56] In my view the onus resting on the defendant for the arrest of the plaintiff has been discharged. I am of the view that, the arrest at that stage was not unlawful, it met the requirements of section 40(1)(b) of the Criminal Procedure Act 51 of 1977.

[57] In the particulars of claim it is averred that no *prima facie* case existed against the plaintiff. The plaintiff did not testify regarding the enrolment of the matter. In that regard it is apposite to quote what was said in **S v Lubaxa** 2001 (4) SA 1251 SCA. The Court dealt with the exercise of discretion in section 174 of Criminal Procedure Act applications. At paragraph 19 the Court stated:

“Clearly a person ought not to be prosecuted in the absence of a minimum evidence upon which he may be convicted. That is recognised by the common-law principle that there should be a ‘reasonable and probable’ cause to believe that the accused is guilty of an offence before prosecution is initiated.”

[58] In my view, both Mr Buso and Ms Maarman's evidence about whether there was a *prima facie* case against the plaintiff, at least, upon the enrolment of the matter cannot be faulted. It has been transcribed at length above. At this stage, the warning statement was also part of the record. The warning statement refers to 6 December at 02h00. I accept that 6 December was the date when the event started, 02h00 refer to early hours of the 7<sup>th</sup> December. It is consistent with the time the plaintiff said he was at the ceremony. The preliminaries that the plaintiff was not properly taken through with, would have been relevant to the issue of admissibility of the statement at trial. Ms Maarman explained that she thought that when the plaintiff said he did not understand the charges, he meant that he was denying the charge. What he said in the statement mattered for enrolment purposes.

[59] Further, immediately following the first appearance no evidence was tendered about further appearances until the hearing of the bail application. The issue is of existence of *prima facie* case has been linked to the opposition of the plaintiff's application for bail. This relates to both defendants, regarding the information placed before court by the first and second defendants, during the hearing of the bail application.

## EXTENDED DETENTION

[60] With regard to the bail proceedings on 3 February 2014, the landscape changed, in my view. The pleaded case of negligence also appears from paragraph 11 of the particulars of claim, contrary to the submissions by Miss Nhantsi. Regarding evidence on the said negligence, the plaintiff said the prosecutor's address would not be interpreted to IsiXhosa. However, Ms Maarman testified at length about what presentations she made when she opposed the bail application. Those became common cause.

[61] In **Carmichelle v Minister of Safety and Security** 2001 (4) SA 938 (CC). At paragraph 72 D-E therein it was stated:

‘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 bail proceedings, it is true that the plaintiff bore the onus to prove exceptional circumstances justifying his release on bail. However, the magistrate was not advised that the state was to rely on circumstantial evidence; that the complainant had no version, the reference to the plaintiff was based on hearsay evidence, that the DNA result was still outstanding and that the plaintiff’s statement was exculpatory and had compliance problems.

[63] Ms Maarman relied on the unavailability of the police docket for her inability to place what was contained therein. That had little to do with the plaintiff. Sergeant Njotini, even in her absence, had to ensure that she had a contingency plan in place, regarding the taking of the docket to the prosecutor and any other issue the prosecutor would have wanted to confer with the police about. Indeed, it transpired that the conference was necessary, when the police said they were ignorant about the issue of existence of alternate address. Mr Buso eventually managed to get it, Ms Maarman could have also done what Mr Buso did.

[64] The court in **Carmichelle**, supra, at paragraph 73 implores us to take the challenges the prosecutors face, especially in the lower courts. However, in circumstances where Ms Maarman had said, in circumstances where the plaintiff was represented, she would only disclose the weakness of the case, if the court enquired about such, it is difficult to imagine that she would have done more, in an effort to bring relevant information to the attention of the court. She also said it was a schedule 6 offence, the plaintiff had to discharge the onus regarding exceptional circumstances and then the magistrate would make the determination. She had no regard of the fact that the determination would be made by the magistrate, after she or he had been armed with all relevant information.

[65] At paragraph 74 in **Carmichelle**, supra, the court said that there seems to be no reason, in principle, why a prosecutor who has reliable information should not be held liable for the consequences of negligent failure to bring such information to the attention of the court. After the police docket had been brought to Ms Maarman, her testimony was that she disclosed information about the *prima facie* case against the plaintiff only, and not the weaknesses in the case. Another difficulty relates to what the basis of the information about threats by the plaintiff to the state witnesses was. Captain Silwana, who sergeant Njotini said she obtained it from testified that, he did not have knowledge about the said threats. The plaintiff's being a flight risk was based on the seriousness of the offence. For that reason, the magistrate had to be informed of the weaknesses in the case. Conditions could have also been imposed to address concerns about fleeing.

[66] Further, his detention to protect the plaintiff had been addressed by the option of realising him to his grandmother's address, a fact that both captain Silwana and sergeant Njotini said they did not know about. Sergeant Njotini

said she would have verified it and would not have opposed the bail application. Captain Silwana said so as well. That information was with the prosecutor's knowledge, contained in the plaintiff's affidavit, she ought to have informed the police about it.

[67] Further, she had to disclose to the magistrate all weaknesses about reliance on circumstantial hearsay evidence so that the magistrate properly exercise the discretion relating to the granting of bail. The plaintiff, amongst others had stated that he was going to plead not guilty to the charge, even though he did not elaborate.

[68] In **Minister of Justice and Constitutional Development v X** (196/13) [2014] ZASCA 129 (23 September 2014) at paragraph 18, 21, 29 and 36 the court laid the basis for and concluded that information that was not disclosed to the magistrate had a bearing in the decision of whether or not to release the appellant on bail. The court found that conduct to have been wrongful and negligent.

[69] The further detention of the plaintiff continued until 19 May 2015. The DNA results were available on 14 March 2014. Ms Njotina said she received the results on 7 August 2014. She said she informed the prosecutor on the same date. Again according to **Carmichelle's** case, *supra*, when that information was not passed through, the Court could not exercise its discretion with regard to further detention or granting of bail, at any stage after the initial refusal of the application. The plaintiff had no way of having knowledge about that information.

[70] In my view, in the circumstances of the present case, a reasonable magistrate armed with all that relevant information would most probably not

have remanded the plaintiff in custody on 6 February 2014 and even more so, after the DNA results came forth. With regard to causation, the harm suffered by the plaintiff as a result of his detention would not have occurred but for that conduct of the police and the prosecutors. Their conduct was the direct cause of his continued detention.

## MALICIOUS PROSECUTION

[71] In order for the plaintiff to succeed in a claim for malicious prosecution he had to allege and prove that the defendants set the law in motion against him; the proceedings were without reasonable cause; with malice and the proceedings were terminated. In **G [...] C [...] and another v Minister of Safety and Security and another** (case no 205/2019) [2021] ZASCA012 delivered on 3 February 2021 at paragraph 24, the court in the majority judgment addressed averments relating the prosecutor's allegedly wrongful conduct in the opposition of a bail application. Its finding there, in my view, indicates that even with regard to that complaint, the cause of action is malicious prosecution.

[72] The plaintiff's particulars of claim made the relevant allegations for malicious prosecution against the first defendant only. In order to make a case for malicious prosecution the plaintiff is required to allege and prove the elements of delict against the second defendant.

[73] Section 20 of National Prosecuting Authority Act provides:

- ‘(1) The power, as contemplated in section 179 (2) and all relevant sections of the Constitution, to –
- (a) institute and conduct criminal proceedings on behalf of the State;
  - (b) carry out any necessary functions incidental to instituting and conducting such criminal proceedings; and
  - (c) discontinue criminal proceedings, vests in the prosecuting authority and shall, for all purposed, be exercised on behalf of the Republic.’

[74] The role of the police in initiating the criminal proceedings cannot be faulted in the light of what has already been analysed with regard to existence of a *prima facie* case. That role ended and the rest of the prosecution was pursued by the prosecutors, after they were handed with all the information relating to the matter. The fact that the prosecutors decided that they had a strong case until midway the trial was not dependant on what they were told by the police. Mr Buso said he interviewed his main witness, Sindiswa. It may well be that he failed to scrutinise the compliance issues with regard to warning statement, and was erroneously not furnished with DNA results. However, he said he was confident of his witness until the witness showed signs of loss of interest in the witness box. I am therefore not of the view that, during the period the police officers were actively involved in the proceedings, there was probable cause for the plaintiff’s initial prosecution.

[75] I am also of the view that the claim of malicious prosecution was not instituted against the second defendant, whose officers were responsible for the prosecution of the plaintiff. It is therefore not necessary to interrogate the conduct of the prosecutors any further.

## RESULT

[76] In the circumstances, the plaintiff succeeds in his claim for unlawful detention from the date of the refusal of bail to the date of his release. In respect of the said period the first defendant is held liable for the police officer's failure to discharge their legal duty to verify and place all relevant information before court for the proper exercise of the courts discretion whether to grant or refuse bail.

## QUANTUM

[77] The quantum that was persisted with, during the hearing relates to arrest, detention and malicious prosecution. The quantum that requires determination therefore is in respect of successful claim of detention from 6 February 2014 to 19 May 2015. The plaintiff claimed R2 million rand for the period from 7 December 2013. During argument a sum of R4 million rand was suggested for the entire period of detention. The actual period for which the defendants have been held liable for should discount some sixty one (61) days, preceding the finalisation of the bail application.

[78] In **Rahim v The Minister of Home Affairs** 2015 (4) SA 433 (SCA) at paragraph 27 the court stated:

‘The deprivation of liberty is indeed a serious matter. In cases of non-patrimonial loss where damages are claimed the extent of damages cannot be assessed with mathematical precision. In such cases the exercise of a reasonable discretion by the court and broad general considerations play a decisive role in the process of quantification. In cases involving deprivation of liberty the amount of satisfaction is calculated by the Court *ex aequo et bono*. *Inter alia* the following factors are relevant

- (i) circumstances under which the deprivation of liberty took place;
- (ii) the conduct of the defendants; and
- (iii) the nature and duration of the deprivation.’

[79] In **Minister of Safety v Tyulu** 2009 (5) SA 85 (SCA) paragraph 26 the Court said:

‘In the assessment of damages for unlawful arrest and detention, it is important to bear in mind that the purpose is not 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 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 ...’

[80] The plaintiff was kept in police cells throughout his detention, those are designed for short transitional stay. It was very cold in winter. He sat on a cement bench and slept on cement floor. Food was scarce, inmates fought over it. It was particularly difficult for him as the problem in his leg caused his movement to be slow. Even when he received his ration it was not timeous, and posed challenges in as far as it concerned the taking of his medication. He shared a communal cell with smokers, whilst he was a non-smoker. He had no outside view. He was hurt, because upon his release, members of the community called him a rapist. He also lost his lover. I also consider that he had to contend with being unwell during his incarceration.

[81] I have had regard to previous awards, in particular **Msongelwa v Minister of Police** 2020 (2) SACR 664 (ECM) the plaintiff spent 158 days in custody, he was also shot at during his arrest. He was awarded a sum of R5 million. In **Zealand v Minister of Justice and Constitutional Development** 2009 JOL 23423 (SE), the plaintiff spent extended detention of four (4) years ten (10) months after the success of the appeal. On 29 October 2008 the award therein was R2 million. In the circumstances of this case, I regard the sum of (One million six hundred thousand) R1 600.000.00 as an appropriate award for the relevant damages in this matter.

In the result

1. The first defendant is hereby ordered to pay the plaintiff damages in the sum of (One million six hundred thousand) R1 600.000.00 in respect of the period of extended detention from 6 February 2013 to 19 May 2014.
2. The first defendant is hereby ordered to pay interest on the said amount at the prescribed rate from the date of judgment to the date of payment.
3. The first defendant is hereby ordered to pay costs of suit relevant to the claim of unlawful detention.
4. The first defendant is hereby ordered to pay interest at the prescribed rate from fourteen (14) days from the date of taxation to the date of payment.

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**B MAJIKI**

**JUDGE OF THE HIGH COURT**

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