

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

CASE NO. 284 and 285/2012

Not Reportable

In the matter between:

YONELA DIPLOMA SINGATHA

1st Plaintiff

LWANDISO NKEBENKEBE SKOM

2nd Plaintiff

and

THE MINISTER OF POLICE

1st Defendant

THE NATIONAL DIRECTOR OF PUBLIC

PROSECUTIONS

2nd Defendant

JUDGMENT

D VAN ZYL ADJP:

[1] Mr Yonela Diploma Singatha (the first plaintiff) and Mr Lwandiso Nkebenkebe Skom (the second plaintiff) individually issued summons

claiming damages from the Minister of Police (**the first defendant**) and the National Director of Public Prosecutions (**the second defendant**) for wrongful arrest and detention, assault and malicious prosecution. As both the plaintiffs' claims arose from their arrest and criminal prosecution for the death and the alleged rape of a certain P. A. (**the deceased**), their claims were subsequently consolidated. Pursuant to the raising of a special plea of prescription by the defendants, the plaintiffs' claims arising from the alleged assault, their arrest on 11 June 2009, and their subsequent detention until 28 June 2009, were dismissed.¹ The plaintiffs' claims were accordingly limited to unlawful detention, in the case of the first plaintiff from 29 June 2009 to 05 October 2011, and in the case of the second plaintiff from 29 June 2009 to 05 December 2011, and malicious prosecution.

- [2] The deceased was last seen at a tavern on 6 June 2009. Five days later her body was discovered near the Buffalo River by a scholar on his way to Zwelitsha. After the discovery was reported the two plaintiffs and a person by the name of Philani Nquma were arrested in 11 June. The first plaintiff testified that he was told by his mother that the police came to his house looking for him. He went to the police station to make enquiries. When no one could assist him, he left. The sister of the second plaintiff arrived

¹ Judgment by Roberson J delivered on 27 May 2014.

thereafter at his workplace and told him that the police had also been to her house saying they were looking for him and the second plaintiff. The two plaintiffs, accompanied by the second plaintiff's sister and his mother proceeded to the Zwelitsha police station. There the two plaintiffs were placed in the holding cells by three policemen. They were not advised of the reason for their detention. The following day detectives arrived who took them out of the cells. According to the plaintiffs they were assaulted. The first plaintiff was taken to his home where a search was conducted. Nothing was found. The second plaintiff testified that he was shown items of clothing that were taken from his room which he identified as his own. There were, what looked like blood spots on the clothing. He explained its presence to the police by saying that he was asked by a shebeen owner to assist in the slaughtering of a pig.

- [3] The investigating officer, Warrant Officer Marwanqa, (**Marwanqa**) testified that he was tasked with the investigation of the deceased's death on 12 June when the police docket was handed to him by a senior police official. There was only one statement in the docket.² This statement seems to have simply contained a report about the death of the deceased, the so-called "first

² Statement A1. This number, and those to follow are in accordance with the numbering allocated thereto in the police docket, and not the page numbers as they appear in exhibit "A".

information of crime” statement. At that time the two plaintiffs and the said Philani Nquma had already been arrested in connection with the death of the deceased. It is not clear under what circumstances Philani Nquma was arrested. According to the investigation diary in the police docket,³ Marwanqa on the same day obtained and placed the following documents in the police docket: A2 to A4 were notices intended to show that the plaintiffs’ rights were explained to them when they were detained on 11 June 2009; A5 is a statement from the person who discovered the deceased’s body; A6 and A7 are witness statements Marwanqa obtained from a certain Nomnikelo Sithekence and Nombulumko Bam.

- [4] The investigation diary then shows that the following day Marwanqa obtained a statement from another witness, one Sisanda Bakubaku. He questioned the three suspects and the second plaintiff admitted the allegations. He recorded in the investigation diary that the second plaintiff said that the axe used to cut the throat of the deceased was thrown in the Buffalo River. The next entry in the diary shows that after further investigations, the third suspect, namely Philani Nquma was released and his statement⁴ was placed in the police docket. Marwanqa then proceeded to

³ Exhibit “A” page 3 to 4.

⁴ A10.

charge the two plaintiffs and filed a statement ⁵ to that effect in the police docket. According to this statement he released the one suspect, **“and (the) other two suspects were charged due to Lwandiso’s version.”** A16, to which no reference was made, and no reliance was placed on in evidence, is a statement by a Captain Sigcu. He is the police officer who took the second plaintiff to make a pointing out on 12 June 2009.

- [5] What followed after the investigating officer charged the plaintiffs with murder and rape is not in issue, and appears from the record of the proceedings in the Magistrates’ Court where the plaintiffs first appeared, and thereafter in the High Court where they were eventually prosecuted.⁶ The plaintiffs’ first appearance was in the Zwelitsha Magistrate’s Court on Monday 15 June when the matter was postponed to 17 June. The Court ordered the plaintiffs to remain in custody while arrangements were to be made for them to obtain legal representation and for the hearing of a bail application. On 17 June the plaintiffs were represented by a Mr Muvango. The matter was postponed to 15 July for a formal bail application.

⁵ A15.

⁶ Exhibits “A”, “B” and “C” respectively

[6] On 15 July the plaintiffs were represented by a Ms Fudumele who advised the Magistrate that the plaintiffs were abandoning their bail application. The matter was adjourned to 28 August **“for DPP’s decision.”** On that day the matter was postponed to 4 September **“for formal bail application.”** On 4 September a Mr Gomba represented the plaintiffs and he formally applied for the plaintiffs to be released on bail. The prosecutor advised the Court that the State was opposing the application. The plaintiffs testified in support of their application to be released on bail. The State did not call any witnesses, and proceeded to close its case. The Court refused the application, finding that there were no exceptional circumstances justifying their release on bail.

[7] The matter was thereafter postponed on several occasions pending a decision by the second defendant. That decision was taken on 27 May 2010 and was communicated to the Magistrate the following day. The decision was that the plaintiffs were to be prosecuted **“at a summary trial at the Eastern Cape High Court at Bhisho on counts of murder and rape in contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007.”**

[8] The matter was eventually postponed for trial in the High Court. The trial commenced on 13 September 2011. On 5 October 2011, during the course of the trial, the first plaintiff was released on bail. The trial was finalized on 5 December 2011 when the plaintiffs were discharged at the end of the State's case. The trial Court found that there was insufficient evidence upon which a Court may convict the plaintiffs as envisaged in section 178 of the Criminal Procedure Act.⁷

[9] To succeed in an action based on unlawful detention a plaintiff must show that the defendant, or someone acting as his agent or employee, deprived him of his liberty. As an interference with the personal liberty of any person is *prima facie* unlawful, the *onus* is on a defendant to establish why, in the particular circumstances, the interference is legally justified. This continues to be the position after the arrest of a person.⁸ The requirements for a successful claim for malicious prosecution are in turn that a plaintiff must allege and prove that the defendant:

- (a) set the law in motion (instigated or instituted the proceedings);
- (b) acted without reasonable and probable cause;

⁷ Act 51 of 1977.

⁸ See *Minister of Police and Another v Du Plessis* (666/2012) [2013] ZASCA 119 (20 September 2013) at para [17].

- (c) acted with “*malice*” (or *animo injuriandi*);
- (d) that the prosecution failed.⁹

[10] At the trial the issues for decision were limited by the parties in a pre-trial minute to the following:

- “4.1 the lawfulness or otherwise of the plaintiffs’ detention from 29 June 2009 to date of release on 5 December 2011 in the case of the second plaintiff and 05 October in the case of the first plaintiff;**
- 4.2 whether the second defendant had reasonable and probable cause for –**
 - 4.2.1 arraigning the plaintiffs on charges of murder and rape; and**
 - 4.2.2 pursuing the prosecution of the plaintiffs; and**
- 4.3 depending on the outcome of the case on the issues set out in paragraphs 1 and 4.2 above, the quantum of damages to which the plaintiffs are entitled.”¹⁰**

[11] The parties were *ad idem* that the issue raised in the paragraph 4.1 limited the enquiry to that of the legality of the plaintiffs’ continued detention after

⁹ *Minister of Justice and Constitutional Development v Moleko* [2008] 3 All SA 47 (SCA) at para [8] and *Rudolph v Minister of Safety and Security* 2007 (5) SA 94 (SCA) at para [16].

¹⁰ Paragraph 4 of the minute of a pre-trial conference held on 2 June 2014.

their initial arrest and their appearance in the Magistrate's Court. A further aspect that requires comment is that the reference to the second defendant in paragraph 4.2 of the minute is clearly incorrect. The reason is that the plaintiffs' claim for malicious prosecution lies against the first defendant only. Their claims against the second defendant were limited to wrongful detention.¹¹ The parties acknowledged this to be the position in their further submissions to the Court in response to a query directed to them subsequent to the conclusion of the trial. They also confirmed that the only remaining issue for determination in respect of the malicious prosecution claim was whether the investigating officer had reasonable and probable cause for laying charges of murder and rape against the plaintiffs. The limitation of the issues in respect of the claims for unlawful detention and malicious prosecution placed issues such as the lawfulness of the plaintiffs' arrest and question whether, by charging the plaintiffs with murder and rape after their arrest, the investigating officer can be said to have "instigated" the proceedings,¹² outside this Court's mandate, and consequently unnecessary to decide.¹³

¹¹ Paragraphs 11, 12, 13 and (b) and (c) of the relief claimed in the plaintiffs' amended particulars of claim.

¹² See generally in this regard *Prinsloo and another v Newman* 1995 (1) SA 481 (A) at 492C – F and 495A and *Minister for Justice and Constitutional Development v Moleko supra* at paras [9] to [11].

¹³ *Fischer v Ramahlele* 2014 (4) SA 614 (SCA) at para [13].

[12] The plaintiffs' pleaded case in respect of their unlawful detention claim was in main that their arrest was unlawful, and consequently so too their subsequent detention. To this the defendants pleaded that the plaintiffs were arrested without a warrant by a peace officer who entertained a reasonable suspicion that the plaintiffs had committed the offences of murder and rape.¹⁴ It was pleaded that the plaintiffs were thereafter brought before a Court, and that their continued detention was consequently by virtue of a court order and not by reason of the arrest. This defence is clearly based on the decision in *Isaacs v Minister van Wet en Onder*¹⁵ where it was held that the unlawful detention of the plaintiff in that matter ceased when the Magistrate issued a detention order in terms of section 50 (1) of the Criminal Procedure Act.

[13] The plaintiffs wisely anticipated that the defendants would place the lawfulness of their detention in issue on that basis, and they accordingly in the alternative also based their claim on the existence and breach of a **“duty of care”** on the part of the first and second defendants' officials. This is

¹⁴ The relevant section is 40(1)(b) which provides that a police officer may arrest a person without a warrant whom he reasonably suspects of having committed an offence referred to in Schedule 1 of the Act, other than the offence of escaping from lawful custody.

¹⁵ 1996 (1) SACR 314 (A) at 321I to 322C.

based on decisions such as *Woji v Minister of Police*¹⁶, *Minister of Police v du Plessis*¹⁷, and *Minister of Safety and Security v Tyokwana*¹⁸ where it was found that the existence of a detention order does not preclude a determination of the legality of the manner in which the Court exercised its discretion in granting that order, and that conduct, including an omission, which constitutes a breach of a public law duty may render an arrested person's detention after his appearance in court unlawful for purposes of a delictual claim for damages. The plaintiffs formulated the duty as follows in their particulars of claim:

“11. The Police Officials who acted as investigating officers in the charges leveled against the plaintiff, and the state prosecutors in both Zwelitsha Magistrate’s Court and the Bhisho High 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 according to the dictates of justice; and

¹⁶ (92/2012) [2014] ZASCA 108 (20 August 2014) at paras [27] and [28].

¹⁷ (666/2012) [2013] ZASCA 119 (20 September 2013).

¹⁸ (827/13) [2014] ZASCA 128 (23 September 2014) at para 38. See *Minister of Safety and Security v Sekhoto* 2011 (5) SA 376 (SCA) at paras [42] to [44] and footnote 5 in the *Woji* case.

- 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 remands and whilst determining the issue of bail in respect of the plaintiff, all relevant 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."

[14] With regard to the second issue for determination, reasonable and probable cause as a requirement for a successful claim for malicious prosecution has two constituent elements, the one subjective and the other objective. The defendant must not only "subjectively have had an honest belief in the guilt of the plaintiff, but his belief must have been objectively reasonable, as would have been exercised by a person using ordinary care and prudence."¹⁹ The word

¹⁹ *Prinsloo and Another v Newman* 1975 (1) SA 481 (A) at 495H. Also W A Joubert (ed) **The Law of South Africa (LAWSA)** volume 15 at para 449. See too *Minister for Justice and Constitutional Development v Moleko supra* at para [20].

“**guilt**”, as was stated by Lord Denning in *Glinski v McIver*²⁰, is apt to be misleading. It is not necessary that the defendant must believe in the probability of a conviction. It is rather the existence of a belief that there exists sufficient grounds for bringing the accused to trial **“Whereas in truth he has only to be satisfied that there is a proper case to lay before the court, or in the words of Lord Mansfield, that there is a probable cause “to bring the [accused] to a fair and impartial trial”, see *Johnstone v Sutton* (16). After all, he cannot judge whether the witnesses are telling the truth. He cannot know what defences the accused may set up. Guilt or innocence is for the tribunal and not for him.”**²¹

- [15] An honest belief in the charge alone is no justification for a prosecution if there is nothing to find it on. **“The defendant may think he has probable cause, but that is not sufficient. He must have probable cause in fact.”**²² This is the second constituent element of reasonable and probable cause, and the issue for determination which crystalised on the evidence in the present matter. The plaintiffs’ case is that on the evidence there existed no grounds upon which the investigating officer could have based any honest belief that there existed a proper case to place before a Court. It is a question of fact, the burden which is on the plaintiffs. The mere fact that they were acquitted is not sufficient. The question is whether there existed sufficient facts known

²⁰ [1962] 1 All ER 697 HL.

²¹ At 710. See also 714 to 715

²² *Ibid.*

to the defendant at the time from which it could be concluded that there was reasonable and probable cause.²³ The facts may consist of the information available to the defendant, like the contents of witness statements, and the facts to be inferred from that information. In *Prinsloo v Newman*²⁴ it was added that the test for reasonable and probable cause also extends to another aspect, namely, whether the facts (“**known or suspected**”) constitute an offence in law, and in applying that test, each case must be considered on its merits.²⁵

- [16] The decision of the parties to limit the issues for determination to the legality of the plaintiffs’ continued detention, and whether reasonable grounds existed for charging the plaintiffs with rape and murder, meant that the focus of the evidence and the questioning at the trial was on the sufficiency of the evidence, and the strength of that evidence at the time when they were first charged, and subsequently when they appeared in Court and applied to be released on bail. It is convenient to first examine the evidence in the context of the claim for malicious prosecution. Both plaintiffs testified that there existed no evidence to charge them. The second plaintiff’s evidence was to the effect that he had no knowledge of what he was accused of, and that he

²³ *Osche v King William’s Town Municipality* 1990 (2) SA 855 (E) at 858.

²⁴ *Supra*.

²⁵ At 498H.

did not admit to anyone of having been involved in the death of the deceased. The defendants called two witnesses to deal with the issues raised in this context, namely the investigating officer Marwanqa, and the prosecutor who opposed the plaintiff's application to be released on bail.²⁶

[17] Marwanqa gave the following reasons for charging the plaintiffs with murder and rape in response to being asked on what information he had based that decision: The second plaintiff arrived at the police station saying it was him and his friend Diploma who was involved in “**raping and murdering**” the deceased; the second plaintiff was prepared to make a pointing out, bloodied clothing was found in the shack occupied by the second plaintiff; and the plaintiffs were implicated by the witnesses in their witness statements.

[18] In one of the witness statements made by Marwanqa and introduced into evidence, he stated that he investigated the explanation which the second plaintiff advanced for the presence of blood on his clothing, and established that the second plaintiff was never asked to assist with the slaughtering of a

²⁶ The remaining two witnesses, namely Tokota and Coltman, testified in relation to their decision to arraign the two plaintiffs in the High Court on charges of murder and rape. Their evidence is irrelevant in light of the narrowing down of the issues, and Counsel subsequently acknowledged this to be so.

pig as he had claimed. Marwanqa further testified that exhibit “E”, wherein the results of the second plaintiff’s pointing out were recorded, including the statements made by him thereat, formed part of the police docket at the time he decided to charge the plaintiffs. It was evident from Marwanqa’s evidence that this document and its contents was predominantly the motivation for that decision.

- [19] The difficulty with Marwanqa’s evidence that he also based his decision on the second plaintiff arriving at the police station implicating himself and the first plaintiff is twofold: The first is that it is not apparent from Marwanqa’s statement of the events of 11 June that the second plaintiff made a inculpatory statement to him.²⁷ The second plaintiff denied having done so. Marwanqa in that statement simply said that he found the two plaintiffs at the Community Service Centre, that they informed him that they had heard the police were looking for them, and that they decided to surrender themselves. That is consistent with the two plaintiffs’ evidence that they were told that the police came to their homes looking for them, and they as a result went and presented themselves at the Zwelitsha police station. The statement further records that Marwanqa detained the two plaintiffs “for

²⁷ Exhibit “A” page 21.

further investigation after receiving information that they had committed the said offence.” The source of that information is not stated.

[20] It was only the next day when Marwanqa in a further statement dealing with the events of 12 June said that the second plaintiff admitted that he committed the offence, that a pointing out was made by him, and that he said that he threw the axe in the river.²⁸ According to this statement, Marwanqa then released the third suspect and decided to charge the plaintiffs **“due to Lwandinso’s version.”** Lwandinso is the second plaintiff’s first name. The second difficulty with Marwanqa’s evidence in this regard is the important fact that he acknowledged that he was aware that the second plaintiff’s acknowledgement that it was him who committed the offence constituted a confession, and that it was inadmissible as evidence against the second plaintiff unless recorded in writing. According to him the second plaintiff declined to agree that it be reduced to writing, and that the Criminal Procedure Act excludes the use of a confession against a co-accused.²⁹

²⁸ Exhibit “A” page 22 to 23.

²⁹ Section 219 reads: **“No confession made by any person shall be admissible as evidence against another person.”**

[21] Marwanqa's evidence in Court with regard to the contents of what he was told by the second plaintiff is, anything but satisfactory. It is not clear what was exactly said to him on each occasion. As in his written statements, his evidence consisted of vague statements such as that the second plaintiff told him that he was involved **"in raping and murdering the girl, it was him and his friend Diploma; he heard it from the second plaintiff at the time he was in the cell, and then he told us how all this happened."** And then in cross-examination: That the second plaintiff said he **"is bringing himself because he is the doer of this"**; that **"it was him who did this thing"**; and that he **"said to the police he is the one who raped and murdered that girl."**

[22] With regard to the involvement of the first plaintiff, Marwanqa's evidence was that whenever the second plaintiff spoke about the death of the deceased, he would mention **"the name of Diploma and his girlfriend."** Diploma is the first plaintiff's second name. The problem with Marwanqa's evidence in this regard is that in the two witness statements made by him regarding the events of 11 and 12 June, there is no mention made about the possible involvement of the first plaintiff.³⁰ All what the second plaintiff is reported to have said to Marwanqa is that he **"admitted that he committed the offence."**

³⁰ See paras [16] and [17] above.

[23] Marwanqa's reliance on those statements in the police docket which he obtained from possible witnesses was confined to his contention that they showed that the deceased was last seen with the plaintiffs, in particular the second plaintiff. However, in none of the statements which were in the docket at the time he decided to charge the plaintiffs, (or any time thereafter) are the plaintiffs mentioned either by name, or identified as having been present at the shebeen where the deceased was last seen on 6 June in Zwelitsha. Marwanqa was eventually reluctantly constrained to concede in cross-examination that these statements did not in any way connect the two plaintiffs with the deceased.

[24] That leaves the evidence of the pointing out. It consisted of Captain Sigcu's recording of what transpired, and what was said to him by the second plaintiff at the time.³¹ Captain Sigcu appears to also have made a separate witness statement regarding the pointing out.³² No reference was made to this statement in evidence by Marwanqa as a document on which he placed any reliance as constituting grounds for charging the two plaintiffs. The reason for this in all probability lies in the fact that in this statement Sigcu also attributes other admissions to the second plaintiff which did not form

³¹ Exhibit "E".

³² Exhibit "A" page 16 to 20.

part of Exhibit “E”. This appears to be in conflict with his evidence in the plaintiffs’ criminal trial that he *verbatim* recorded what the second plaintiff had told him at the time of the pointing out. It is accordingly not necessary to make any further reference to Captain Sigcu’s witness statement, and no reliance was placed thereon in the present proceedings.

[25] Those portions of exhibit “E” which are relevant to the question whether it provided grounds for the investigating officer’s decision to charge the two plaintiffs with murder and rape, read as follows:

“14:55 After walking for about five hundred (500) metres towards the Buffalo river bank, suspect said we should stop. He alleged that they were there – it was himself, Yonela and his girlfriend. He said “Sasilapha. Yayindim no Yonela nalaa cherry yakhe.”

14:58 Suspect points a spot where he alleges that Yonela and his girlfriend had sex. Photo is taken. Suspect further says he does not know the spot where they killed the deceased and left her dead.

15:02 Suspect alleges that on their way back home, somewhere they stopped and he threw away a small axe which they used to kill the deceased with. He says he will try and figure out the spot.

15:06 Suspect points a spot about (30) thirty paces from the alleged spot for rape. He says he thinks it is where he threw the small axe.”

[26] What is apparent from the contents of what the second plaintiff is reported to have told Captain Sigcu, is that it does not implicate either of the plaintiffs in the alleged rape of the deceased. If it is accepted that “Yonela”, which is the first plaintiff’s first name, must be taken as being a reference to him, and that the girlfriend³³ of Yonela is the deceased, it provides no evidence of unconsensual sexual intercourse by the first plaintiff, or an admission that the second plaintiff was a party thereto. It also cannot justify the inference, as was suggested by one of the defence witness, that the two plaintiffs acted in concert. Marwanqa could not on the evidence in Exhibit “E” have entertained a belief that was objectively reasonable that a charge of rape was warranted.

[27] With regard to the murder charge, the statement of the second plaintiff as recorded by Captain Sigcu, constitutes an admission that “they” killed the deceased. Read in the context of the fact that the pointing out was made after the arrest of the plaintiffs in connection with the death of the deceased; that, according to Marwanqa, he questioned the plaintiffs, which questioning could only have related to the death of the deceased; that the

³³ It is in my view not unreasonable to accept that to have been the position. The statements are not to be read in isolation and in the first paragraph the second plaintiff is reported to have said that it were the three of them who were at the river.

second plaintiff indicated that he was prepared to made a pointing out; and that it was himself and Yonela who were present at the river, the reference to “**they**” and “**the deceased**” in the statement is reasonably capable of being taken as a reference to the first and second plaintiffs, and to the deceased, whose death was being investigated at the time. The statement that “**they killed the deceased**” does not constitute a confession as was suggested in argument. It is not an unequivocal admission of all the elements of the crime of murder, as in the case of an admission that the deceased was “**murdered**” ³⁴. The second plaintiff’s admission that “**they killed the deceased**”, coupled with the fact that bloodstained clothing, which he admitted belonged to him, was found at his house, in my view constituted reasonable and probable cause for charging him with murder at the time.

[28] It was submitted that the second plaintiff’s admission, which also implicated the first plaintiff in the death of the deceased, could not constitute reasonable and probable cause for also charging the first plaintiff with murder. The reasoning was that this constituted inadmissible hearsay evidence, and that the Courts are reluctant to allow such evidence to be admitted where it plays a decisive or significant role in the decision whether to convict an accused person. A distinction must be drawn between

³⁴ E Du Toit *et al* Commentary on the Criminal Procedure Act at 24 – 52.

evidence which is *per se* inadmissible, that is, it can never be admissible in evidence against an accused person in a criminal trial, and evidence such as hearsay evidence, which although inadmissible, may be admitted into evidence where it is in the interests of justice to do so,³⁵ or where it can be brought within some other exception to the hearsay rule. Examples of the first category of evidence is a confession which does not comply with the provisions of section 217 of the Criminal Procedure Act, or which implicates a co-accused as envisaged in section 219 of that Act. This evidence cannot provide the basis for an honest belief that there is cause to charge the plaintiff. In the second category of evidence it is the function of the Court to decide whether that evidence should be admitted into evidence. Whilst it must certainly play a part in assessing the strength of the State's case in bail proceedings, I do not believe that it is expected of the person who is said to have instigated the prosecution to anticipate whether or not such evidence would be ruled admissible at the trial. As stated earlier, a distinction must be drawn between facts necessary to establish the guilt of a plaintiff and those required to establish **“an honest belief formed on reasonable**

³⁵ In terms of section 3 (1) (c) of the Law of Evidence Amendment Act 45 of 1988 hearsay evidence will be admissible if the Court, having regard to the factors set out in paragraph (c), is **“of the opinion that such evidence should be admitted in the interests of justice.”** *S v Ndlovu* 2002 (2) SACR 325 (SCA) shows that the provisions of section 3 may, in appropriate cases be used to render admissible the admission of a co-accused. Cases such as *Balkwell & Another v S* [2007] 3 All SA 465 (SCA) and *S v Libazi & Another* 2010 (2) SACR (SCA) however seem to suggest the opposite.

grounds that the institution of proceedings is justified.”³⁶ Like the guilt of the accused, the admissibility of evidence is a function of the trial Court. I however do not find it necessary to decide this aspect in the present matter. The reason is simply that I am satisfied that the investigating officer did not have reasonable and probable cause at that time to also charge the two plaintiffs with the rape of the deceased.

[29] Marwanqa was a poor witness. His evidence was vague, and it was characterised by a refusal to commit himself and an exaggerated attempt to justify his own actions. There is no doubt that he knew that the second plaintiff’s alleged acknowledgment to him that he committed the offence constituted a confession and was inadmissible. He further knew that in none of the witness statements the plaintiffs were implicated. He was after all the investigating officer who took those statements down. Further, if he had read what Captain Sigcu recorded was said to him by the second plaintiff at the pointing out, it must have been clear to him that there was no evidence at that time implicating either of the two plaintiffs in the rape of the deceased, and that the evidence implicating the first plaintiff in a murder charge was tenuous. I am satisfied that the plaintiffs have proved that on

³⁶ *Minister for Justice and Constitutional Development v Moleko supra* at para [20]. This is consistent with the position in the English Law from which the requirement of reasonable and probable cause was adopted. See J Neethling, J M Potgieter and P J Visser **Law of Personality** at page 177 and *Hicks v Faulkner* (1881) 8 QBD 167 (All ER 1881 – 1885 reprint, 187 at 192.)

the facts no reasonable and probable cause existed for charging them with rape, and that Marwanqa must at the very least have foreseen the possibility that he “. . .was acting wrongfully, but nevertheless continued to act, reckless as to the consequences of his or her conduct.”³⁷

[30] That leaves the claim for unlawful detention and the issue of the legality of the plaintiffs continued detention post their arrest, and the question whether the investigating officer and the prosecutor acted in breach of a duty as alleged in the pleadings. Marwanqa’s evidence was to the effect that on those occasions from 15 June 2009 when the plaintiffs first appeared in the Magistrate’s Court, he simply took the police docket to court and did not in any way discuss the case with the prosecutor. As he put it **“I just went there to give him the docket, I did not, I was not there to discuss the case.”** On 14 June 2009 Marwanqa completed, what is referred to as a **“bail information form”**, in respect of the two plaintiffs.³⁸ On a reading of this form its purpose is clearly to assist the prosecutor in making a decision with regard to the continued detention of an arrested person upon his appearance in court. From the information supplied by Marwanqa in the two forms it is evident that he was of the view that the plaintiffs posed no flight risk, and that there

³⁷ *Minister of Justice and Constitutional Development v Moleko supra* at para [64].

³⁸ Exhibit “A” page 5 to 8.

was nothing to show that they would interfere either with any of the witnesses or the investigation of the matter. One of the questions in the form is whether bail should be opposed. Marwanqa left this blank. His explanation in evidence was that it was the duty of the prosecutor to decide what to do.

- [31] Marwanqa denied that he opposed the plaintiffs' application for bail on 15 September 2009. He testified that he did not consult with the prosecutor, and that he was not called to testify. That the prosecutor did not call him as a witness is borne out by the record of the bail proceedings. However, his evidence that he did not indicate to the prosecutor that he was opposed to bail, is in conflict with the pleadings.³⁹ What is evident from Marwanqa's evidence is that all he did was to complete the bail information forms, and to take the police docket to Court. He clearly did not see it as his duty to bring any information in the police docket regarding the nature of the evidence against the plaintiffs to the attention of either the prosecutor or the Court.

³⁹ In reply to a request for particulars for trial, Marwanqa was identified as the police official who is said to have opposed bail.

[32] With regard to the plaintiffs' bail application, the prosecutor, Mr Ntulwana, testified that he was placed in possession of the police docket, that he consulted with the investigating officer, and that he opposed the application. He based his decision to oppose bail on the nature of the offences with which the plaintiff were charged with, and the fact that the second plaintiff made inculpatory statements at the time of the making of a pointing out. Further, it was his decision not to present any evidence, the reason being that he was of the view that the plaintiffs' evidence was insufficient to discharge the burden of showing the existence of exceptional circumstances as envisaged in section 60(11)(a) of the Criminal Procedure Act.⁴⁰ It is evident from the record at the bail proceedings in the Magistrate's Court that the plaintiffs bail application was dealt with in terms of that section.⁴¹

[33] What is clear from Ntulwana's evidence is that he only had regard to the contents of the pointing out, namely Exhibit "E", and what he was told by Marwanqa in his consultation with him which does not appear to have gone beyond Exhibit "E". In Ntulwana's own words, he did not concern himself

⁴⁰ Section 60(11)(a) reads: **"Notwithstanding any provision of this Act, where an accused is charged with an offence referred to – (a) in Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional circumstances exist which in the interests of justice permit his or her release".**

⁴¹ Exhibit "C".

with the other statements which were in the police docket at the time. The difficulty with this evidence is that Marwanqa was emphatic that he did not have a consultation with the prosecutor at the bail hearing. If accepted as true, then Ntulwana could not have based his decision to oppose bail on what he was told by Marwanqa. If he did consult with Marwanqa, it would most certainly have been to seek his views with regard to whether or not to oppose the application for bail. Considering the fact that Marwanqa was an unimpressive witness, it is more probable than not that Ntulwana did consult with him, and that Marwanqa, who held the view at the time that there were grounds to charge the plaintiffs, told him that he must oppose the application.

- [34] As in the case of Marwanqa, Ntulwana's views with regard to the existence evidence implicating the plaintiffs, and the strength of the evidence against the plaintiffs at the time, was confined to the contents of Exhibit "E". His evidence did not inspire much confidence that he made any real attempt to apply his mind to the question whether there was evidence available to support the charges. He clearly made no effort to read the rest of the statements on the police docket or attempt to give context to what was contained in exhibit "E". If he had read the statements in the docket, it

would have been clear to him that there was no evidence to also charge the plaintiffs with rape. While acknowledging that the strength of the State's case is a relevant consideration, Ntulwana's evidence was further to the effect that he had no duty to inform the Court with regard to the nature of the evidence in support of the charges leveled against an accused person at a bail hearing. What emerged from his evidence is that he held this view by reason of the fact that the burden of proof in bail applications, where 60(11)(a) of the Criminal Procedure Act are applicable, rests on the accused person, and there was consequently no duty on him to inform the Court of the either the nature of the evidence implicating the plaintiffs, or of the strength or weakness of such evidence.

- [35] In support of what the duties of Marwanqa were after their arrest, and at their appearance in Magistrate's Court when they applied to be released on bail, the plaintiffs placed reliance on the judgment in *Woji v Minister of Police*⁴² where the Court considered the role of an investigating officer in bail proceedings. It was found that in the context of the provisions of section 12(1)(a) of the Constitution a police officer may, on the facts and in the circumstances of a particular case, have a duty to the Court when it is called upon to exercise its discretion to order the continued detention of the

⁴² *Supra*.

accused. In terms of section 12(1)(a) the entrenched right to freedom includes the right not to be deprived thereof arbitrarily or without just cause.⁴³ Like any other right in the Bill of Rights, it binds the State and its organs who have a duty not to perform any act that infringes these rights.⁴⁴ Where the conduct of the State, as represented by the persons who perform functions on its behalf, is in conflict with its constitutional duty to protect the rights in the Bill of Rights, it may constitute a public law breach of duty that can be transposed into a private law breach leading to an award for damages.⁴⁵ The police officer in *Woji* was held to have had a public law duty not to violate the appellant's right to freedom by either not opposing his application for bail, or by placing all relevant and available facts before the Magistrate⁴⁶

[36] With regard to the role of the prosecutor, the plaintiffs placed reliance on the decision in *Minister of Police and Another v Du Plessis*⁴⁷ where it was held that a prosecutor may not act arbitrarily. He must act with objectivity and in the public interest. This means that **“A prosecutor’s function is not**

⁴³ It reads: **“Everyone has the right to freedom and security of the person, which includes the right – (a) not to be deprived of freedom arbitrarily or without just cause.”**

⁴⁴ *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) at para [44] and *Woji v Minister of Police supra* at para [27] and [28].

⁴⁵ *Woji v Minister of Police supra* at paras [27] and [28]. Also *Minister of Safety and Security v Carmichele* 2004 (3) SA 305 (SCA) at para [37].

⁴⁶ At para [28].

⁴⁷ *supra*.

merely to have the matter placed on the roll to then simply be postponed for further investigation. A prosecutor must pay attention to the contents of his docket. As set out above, a prosecutor must act with objectivity and must protect the public interest. In the present case that was not done.”⁴⁸ A prosecutor occupies a special position in relation to the Court, and his paramount duty is to assist the Court in ascertaining the truth. In doing so he plays a vital role in “ensuring due process and the role of law as well as respect for the rights of all the parties involved in the criminal justice system.”⁴⁹

[37] The defendants’ submission in argument was that the duties of the police and the prosecutor, in relation to the exercise of the Court’s discretion to order the continued detention of an arrested person, must in the present matter be considered in the context of the application of the provisions of section 60(11)(a). Where that section finds application, the submission was that there is no question of an inquisitorial procedure, and the only issue is whether the accused has discharged the burden of proof placed on him by that section. There is no *onus* on the State to disprove the existence of exceptional circumstances. Rather it is for the accused to prove his future acquittal on a balance of probability.⁵⁰ These submissions are in line with

⁴⁸ At para [28].

⁴⁹ At paras [28] and [29].

⁵⁰ *S v Botha en ‘n Ander* 2002 (1) SACR 222 (SCA) at para [21] and *S v Mathebula* 2010 (1) SACR 55 (SCA) at para [12].

cases such as *S v Viljoen*⁵¹ and *S v Mathebula and Another*⁵² where it was held that the *onus* which section 60(11) places on an accused person means that unless he has set up a *prima facie* case for his release, there is no duty on the prosecution to rebut his evidence.

[38] The defendants further submitted that the police play no role in the manner in which bail proceedings are being conducted. It is for the State, represented by the prosecuting authority, to decide whether or not to call the investigating officer as a witness. All an investigating officer is required to do, is to place the docket before the prosecutor, and to leave it to him to decide on the further conduct of the case against the accused. It was submitted that the *Woji* case is distinguishable on the facts. In that case the detention order was made as a result of incorrect information given by the police to the Court at the bail hearing. Accordingly, so it was submitted, in the absence of Marwanqa having made a misrepresentation, or having withheld facts from the prosecutor, it was argued that the first defendant could not incur any liability.

⁵¹ 2002 (2) SACR 550 (SCA) at 561f – g.

⁵² *Supra* at para [12].

[39] Insofar as the possible liability of the second defendant is concerned, the defendants argument was to the effect the prosecution had a *prima facie* case against both plaintiffs, the plaintiffs did not adduce any evidence in the bail proceedings regarding the weakness of the State's case against them, thereby relieving the prosecution to disprove the existence of exceptional circumstances, and accordingly, that the plaintiffs failed to discharge the burden of proof of showing the existence of exceptional circumstances.

[40] The position of the two the plaintiffs were different and the issue raised must be determined in that context. As concluded earlier, there existed no reasonable and probable cause to charge the plaintiffs with rape. Insofar as the murder charge is concerned, the only evidence implicating the first plaintiff consisted of hearsay evidence, which could potentially be ruled admissible in terms of section 3(1)(c) of the Evidence Amendment Act. The evidence against the first plaintiff was clearly very weak and Marwanqa eventually correctly admitted as much in cross examination. Besides the hearsay evidence implicating him in the death of the deceased, none of the other witness statements in my way connected him with the deceased.

[41] The rights or duties of the police and the prosecutor which may arise from the position of the burden of proof in bail proceedings, must not be equated with their public law duties which may arise from the Constitution, and given content by the prosecutor's special relationship with the Court and the role which he fulfills in criminal proceedings.⁵³ Once an accused person is brought before a Court, the authority to detain him, which arises from the power to arrest a suspect, is exhausted.⁵⁴ His further detention is then within the discretion of the Court.⁵⁵ That discretion is subject to wide ranging statutory directions. Section 60(11)(a) provides that the Court must order that an accused person be detained in custody pending his trial, unless the accused satisfies the Court that exceptional circumstances exists which in the interests of justice permits his release. While section 60(11)(a) may shift the burden of proof to the accused, the issue remains essentially the same as in any other proceedings where a Court is called upon to decide the question of the release of an accused on bail, namely a judicial determination whether his release from detention is in the interests of justice. Because an order made in terms of section 60(11)(a) affects the freedom of the person concerned, it brings into play his entrenched right in section 12(1)(a) of the Constitution not to be deprived of his freedom arbitrarily or without just cause. That means, as in the case of *Woji v*

⁵³ See *Minister of Police and Another v du Plessis supra* at paras [28] to [30].

⁵⁴ At para [28].

⁵⁵ *Minister of Safety and Security v Sekhoto* 2011 (5) SA 367 (SCA) at para [42].

Minister of Police, that the police and the prosecutor may be found to have a public law duty to assist the Court in giving effect to, and protecting the entrenched right of the accused in section 12(1)(a).

- [42] What the nature of that duty may be, must be determined on the facts of the present matter in the context of section 60(11)(a) of the Criminal Procedure Act. A jurisdictional prerequisite for the operation of this section is that the accused is charged with a Schedule 6 offence.⁵⁶ The power of a Court to proceed in terms of section 60(11)(a), and consequently the legality of its decision in terms thereof, is subject to the existence of a charge and the underlying decision to charge the accused. In *S v Botha en 'n Ander*⁵⁷ it was held that the formulation of the charge in the charge sheet, supplemented by a written confirmation as envisaged in section 60(11A)⁵⁸ when necessary, is decisive to the existence of the jurisdictional fact. That it may on this authority not be necessary to place evidence before the Court hearing the bail application justifying the decision to charge the accused with a Schedule 6 offence, does not in my view relieve both the police and the prosecutor from disclosing to the Court the fact that there exists no

⁵⁶ Du Toit *et al op cit* at 9-66A.

⁵⁷ *Supra* at para [16]

⁵⁸ This section facilitates the existence of the charge as a jurisdictional fact by authorizing the prosecution authority to issue a written confirmation that it “**intends to charge the accused with an offence referred to in Schedule 5 or 6.**”

evidence to substantiate the charges, or for that matter, that the only evidence implicating the accused is very weak and entirely dependent upon the admission of hearsay evidence emanating from a co-accused.⁵⁹

[43] To hold otherwise would mean that charges could be formulated without the existence of any evidence, simply to cast the *onus* in bail proceedings on the accused. Underlying the existence of the charge in section 60(11)(a) is the availability of evidence implicating the accused and the decision to charge him with an offence.⁶⁰ A failure by the prosecutor to inform the Court of the absence of evidence implicating the accused in the charge would leave the Court with the impression that such evidence does exist. To allow the Court to proceed to exercise its function in section 60(11)(a) from that premise, is in my view tantamount to misleading the Court. It is in conflict with the role of a prosecutor in criminal proceedings.⁶¹ Whether or not there are sufficient grounds for a charge as envisaged in section 60(11)(a) is a matter which would fall within the knowledge of the police and the prosecution. It is a decision which cannot be made arbitrarily and without a proper consideration of the evidence. The absence of evidence is

⁵⁹ The strength or weakness is relevant in bail proceedings to the existence of exceptional circumstances, or determining where the interests of justice lie for the purposes of section 60(11)(a) and (b). See *S v Kock* 2003 (2) SACR 5 (SCA) at para [15]. Also *Woji v Minister of Police supra* at para [3].

⁶⁰ *Minister of Police and another v du Plessis supra* at para [28].

⁶¹ See *State v Jija and others* 1991 (2) SA 52 (E) at 671 to 67B, quoted with approval in *Minister of Justice and another v du Plessis supra* at para [28].

a matter which is accordingly relevant to such proceedings, and would place a duty on the prosecutor to bring that to the Court's attention, particularly, as in the present matter, when the police docket is in the possession of the prosecutor.

[44] On the facts of the present matter I am satisfied that Ntulwana failed in his duty to the Court. He did not have regard, or properly applied his mind to what was contained in the police docket and in Exhibit "E". If he had done so he would have realised that there was no evidence to substantiate a charge of rape and that the evidence implicating the first plaintiff in murder was very weak. As a consequence of this failure the Magistrate proceeded in terms of section 60(11)(a) of the Criminal Procedure Act and determined the continued detention of the plaintiffs in terms thereof. I may add that in the present matter it is doubtful that the necessary jurisdictional fact for the application of section 60(11)(a) ever existed at all. Schedule 6 deals with crimes which were committed in very specific circumstances, such as rape where the victim was raped more than once, or murder that was planned or premeditated. In this matter there was no formal charge sheet drawn up informing the plaintiffs of the dates and places of the alleged crimes, the

name of the deceased, and particulars of the actions which the State were attributing to them.

[45] That the bail proceedings were conducted by the prosecutor did not relieve Marwanqa of his duty in relation to those proceedings. He failed in his duty to the Court by not bringing to the attention of Ntulwana that there was no evidence, other than what was contained in exhibit “E”, to implicate the plaintiffs in the commission of the crimes. In *Carmichele v Minister of Safety and Security and another*,⁶² it was held that the police has a clear duty to bring to the attention of the prosecutor any factors known to them relevant to the exercise by the magistrate of his discretion to admit a detainee to bail. On Marwanqa’s version he did nothing more than to simply hand the docket over to the prosecutor. This he did in the face of the absence of any evidence implicating the first plaintiff in the rape and the death of the deceased, other than the hearsay evidence of the second plaintiff. If it is accepted that Ntulwana did consult with him, then he clearly failed to direct Ntulwana’s attention to what was contained in the police docket, or rather the lack thereof.

⁶² *Supra* at para [63]. See also *Minister of Safety and Security v Tyokwana supra* at para [40].

[46] In so far as the second plaintiff is concerned, although there was no evidence to support a charge of rape, his statement at the time of the pointing out implicated him in the death of the deceased. Coupled with the discovery of bloodstained clothing at his home, and what appeared to be a false explanation, it provided reasonable and probable cause for charging him with murder at that point in time. The next question is whether, accepting that the investigating officer and the prosecutor may have failed in their respective duties in relation to the charge of rape, what the Magistrate on the probabilities would have done.⁶³ Murder is a crime as envisaged in Schedule 5. Considering the evidence placed before him, the seriousness of the crime of murder, its prevalence and the nature and gravity of the possible punishment, I am not convinced that it can be said the Magistrate, more probably than not, would have found that the interests of justice permits the release of the second plaintiff on bail.⁶⁴ By contrast, considering the weakness in the State's case against the first plaintiff, the tenuous nature of the evidence implicating him in the deceased's death, and the fact that he did not present a flight risk, I am satisfied that the Magistrate would in all probability have released him on bail. That rendered the continued detention of the first plaintiff unlawful.

⁶³ See *Woji v The Minister of Police supra* at para [32].

⁶⁴ Section 60(11)(b) provides that on an accused charged with a Schedule 5 offence must satisfy the Court in bail proceedings that the interest of justice permits his or her release.

[47] That leaves the determination of the amounts to be awarded to the plaintiffs as damages. Unlawful detention and malicious prosecution are forms of *iniuria* and the amount of compensation is calculated according to what is fair and just in the circumstances of the particular case.⁶⁵ This inevitably means that the amount is determined by the broadest general considerations in the exercise of a wide discretion, and the figure arrived at must necessarily be uncertain, dependant upon the view of the Court of what is fair in all the circumstances. Generally, in detention cases factors such as the duration of detention; the presence or absence of an improper motive; the status or standing of the plaintiff, and in the case of malicious prosecution; the seriousness of the crime for which the plaintiff is prosecuted; the severity of the penalties in the case of a conviction; the period which the charge hung over the head of the plaintiff; and the fact that the charge had not been withdrawn until the plaintiff was acquitted at the end of the State case, play a role in determining the amount to be awarded for compensation.

⁶⁵ *Ex aequo et bono*. See J M Potgieter, L Steynberg and T B Floyd **Law of Damages** 3rd ed at page 545 and 550.

[48] The list of factors is not exhaustive.⁶⁶ In considering the amount to be awarded in an unlawful detention case, Jones J in *Olgar v Minister of Safety and Security*⁶⁷ stated it broadly as follows:

“In modern South Africa a just award for damages for wrongful arrest and detention should express the importance of the constitutional right to individual freedom, and it should properly take into account the facts of the case, the personal circumstances of the victim and the nature, extent and degree of the affront to his dignity and his sense of personal worth. These considerations should be tempered with restraint and a proper regard to the value of money, to avoid the notion of an extravagant distribution of wealth from what Holmes J called the ‘horn of plenty’, at the expense of the defendant.”

Another factor to be considered in this enquiry is awards that have been made in previous cases. Although relevant, the Court in *Minister of Safety and Security v Seymour*⁶⁸ cautioned that each case must of necessity be decided on its own facts, and that there is no discernible pattern, other than that the Courts were not extravagant in compensating the loss. It further emphasised that it must be kept in mind **“when making such awards that there**

⁶⁶ See J M Potgieter *at al op cit* at page 545 to 550 for other factors which may be relevant to determining the amount of damages and the authorities referred to.

⁶⁷ Unreported judgment in case number ECD 608/2007 delivered on 18 December 2008.

⁶⁸ 2006 (6) SA 320 (SCA) at para [20]. Also *Woji v Minister of Police supra* at para [28].

are many legitimate calls upon the public purse to ensure that other rights that are no less important also receive protection.”⁶⁹

[49] The plaintiffs testified that they are 25 and 29 years old respectively. The first plaintiff attended school until standard eight. The second plaintiff passed matric. Both are unmarried. They are employed, the first plaintiff as a panel beater and the second plaintiff at a factory. As stated, the first plaintiff remained in detention from the time of his arrest on 11 June 2009 until his release on bail on 5 October 2011 while he was on trial in the High Court. Three months later, on 5 December 2011, both plaintiffs were acquitted on all the charges at the end of the State case. Throughout this time they continued to face the serious charge of rape and the penalties it carries despite the absence of evidence. The first plaintiff was detained in overcrowded conditions. He was kept in a cell with between 40 to 50 other inmates sharing one toilet facility. He was allowed to have visitors. His girlfriend came to visit him and his relationship with her continued during his incarceration.

⁶⁹ At para [20].

[50] There is no evidence of specific incidents where the first plaintiff may have been subjected to inhumane or degrading treatment, or that he was subjected to treatment of sufficient concern warranting medical attention during and after his release. He did not suffer degradation beyond that what was inherent in being detained in an overcrowded cell, with the humiliation, discomfort and stress with which that is expected to be accompanied.

[51] With regard to the plaintiffs' prosecution, their damages would consist primarily in the impairment of their good name, physical liberty and feelings of dignity (*contumelia*).⁷⁰ Relevant to the quantum of their loss is the fact that the plaintiffs were charged with rape, a serious crime that carried with it the prospect of a long term of imprisonment; they were kept in custody on this charge and continued to face the charge until their acquittal two years later; and the investigating officer displayed a reckless disregard for what was contained in the police docket. It must however be added that there is no reason to find that he acted with an ulterior motive, and none has been suggested.

⁷⁰ J M Potgieter, L S Steynberg and T B Floyd *op cit* at page 549 to 550.

[52] Both plaintiffs' claims also included damages for *contumelia*. As the essence of this loss consists of the impairment of a plaintiff's subjective feelings of dignity or self-respect, it was required that they had to prove that they actually (subjectively) felt insulted by their detention and prosecution.⁷¹ Neither of the plaintiffs testified that they felt humiliated or insulted. They accordingly failed to prove any loss under this head of damages.

[53] Considering all the circumstances and the comparable cases the parties referred to, an appropriate award for the first plaintiff's detention is R400,000.00, and for the first and second plaintiffs' prosecution, the sum of R50,000.00 each. As the plaintiffs were substantially successful in their claims, there is no reason for the defendants not to be liable for the costs of the actions. A matter that requires special mention is the wasted costs incurred by the postponement of the matter on 14 January 2014. After the initial postponement of the matter in June 2014, it was set down for hearing on 14 and 15 January 2015 in order to enable the defendants to present, and conclude the evidence of witnesses who were earlier unavailable. The matter however had to be postponed early, once again at the instance of the

⁷¹ *Delange v Costa* 1989 (2) SA 857 (A) at 862A – B; *Bennet v Minister of Police and Another* 1980 (3) SA 24 (C) at 37 D – E and *Brandon v Minister of Law and Order and Another* 1997 (3) SA 68 (C) at 79B – C. Also J Neethling, J M Potgieter and J C Knobel *op cit* at page 346 and J M Potgieter, L S Steynberg and T B Floyd *op cit* at page 122.

defendants because of the unavailability of a witness. I am in agreement with plaintiffs' Counsel that the wasted costs incurred by this, which were reserved, must also be borne by the defendants.

[54] The last aspect that requires comment relates to the interest to be awarded on the judgment. The order that interest must run from 14 days after the date of judgment, as opposed to the date of demand, is in accordance with the relief sought by the plaintiffs in their amended particulars of claim.

[54] In the result the following order is made:

- 1. Save for the second plaintiff's claim for unlawful detention which is dismissed, the plaintiffs' claims are upheld.**
- 2. Judgment is granted in favour of:**
 - (a) the first plaintiff for payment of the sum of R400,000.00 as against the first and second defendants jointly and severally, the one paying the other to be absolved;**

- (b) the first plaintiff for payment of the sum of R50,000.00 as against the first defendant;**
- (c) the second plaintiff for payment of the sum of R50,000.00 as against the first defendant;**

2. The defendants pay:

- (a) interest on the aforementioned amounts at the rate of 9 percent per annum from 14 days after the date of judgment to the date of payment.**
- (b) the first and second plaintiffs' costs of suit, together with interest thereon at the legal rate of 9 percent per annum from 14 days after taxation to the date of payment.**

D VAN ZYL

ACTING DEPUTY JUDGE PRESIDENT - BHISHO

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Date Heard:

02 February 2015

Judgment Delivered:

26 March 2015