

In the KwaZulu-Natal High Court, Durban
Republic of South Africa

Case No : 7882/2003

In the matter between :

Siphiwe Rodgers Sithole

Plaintiff

and

The Minister of Safety and Security

First Defendant

Alex Mahlasela Chiliza

Second Defendant

M D Mngadi

Third Defendant

Mr Thabethe

Fourth Defendant

Mr Cele

Fifth Defendant

The Minister of Justice and Constitutional Development

Sixth Defendant

Judgment

Lopes J

[1] The plaintiff in this action, Siphiwe Rodgers Sithole, was a police officer employed by the South African Police Services. He has sued the defendants in various combinations and for various amounts on the basis of the following claims :

- (a) his wrongful arrest on the 8th January 2002 by the second, third, fourth and fifth defendants;
- (b) an assault upon him committed by the third defendant Warrant Officer Mngadi, also committed on the 8th January 2002;
- (c) the malicious prosecution of the plaintiff on a charge of housebreaking and/or theft on or about the 20th May 2004 instigated and/or conducted by employees of the sixth defendant, the Minister of Justice and Constitutional Development, without any reasonable or probable cause;
- (d) a claim for damages arising from the fact that the plaintiff suffered from post-traumatic stress disorder as a result of the circumstances arising in the claims for wrongful arrest, assault and malicious prosecution.

[2] I granted an order in terms of Rule 33(4) separating the issues of liability and quantum. This judgment accordingly deals only with the question of the liability of the defendants on the claims for wrongful arrest, assault and malicious prosecution.

[3] It is useful to set out the history of the matter which emerges from the evidence of the plaintiff's first witness.

- (a) Siyabonga Moloi (also known as Siyabonga Zulu, but to whom I shall refer as 'Mr Moloi') was unemployed and visiting the Workshop Shopping Centre in December of 2001. He approached two police officers one who was in uniform and the other one who was not. He asked them if they could assist him in finding work. One of them introduced himself as 'Sithole' and said that

he could assist. He told Mr Moloi to meet him the next day at the second gate at C R Swart Square Police Station in Durban;

- (b) Mr Moloi duly arrived at C R Swart Square the next day and met 'Sithole' who asked him to assist in loading some goods into a vehicle. Next door to C R Swart Square Police Station is a block of flats which is used as housing for police officials ('the police barracks'). 'Sithole' took Mr Moloi to flat number 203 in the police barracks and opened the door to that flat with keys. At that time there were a lot of other police officers walking up and down. Goods were pointed out to Mr Moloi which he then loaded into a motor vehicle indicated by 'Sithole';
- (c) when he had done so, he told 'Sithole' that he was leaving to go to QwaQwa and 'Sithole' offered to take him to the taxi rank. He was paid R200 for the services which he had performed. At the behest of 'Sithole', Mr Moloi took with him to QwaQwa, a bag which 'Sithole' said he would uplift from Moloi in QwaQwa in a few days time. To this end they exchanged telephone numbers. Moloi returned to QwaQwa with the bag;
- (d) on the day after New Year's Day Mr Moloi was telephoned by 'Sithole' who said that he was on his way. However 'Sithole' did not arrive. At about 7 o'clock in the evening a number of police officers arrived where Mr Moloi was staying in QwaQwa. They included the second defendant, Warrant Officer Chiliza;
- (e) the police officers accused Mr Moloi of having stolen goods from flat number 203 and arrested him. In doing so they also assaulted him. He showed them the bag he had been given by 'Sithole' which apparently contained items such as court stamps, police stamps and extracts from police documents;

- (f) Mr Moloi was asked by Chiliza to name the person who had given him the bag, and he said that he had introduced himself as 'Sithole';
- (g) Mr Moloi was then taken to the QwaQwa Police Station and thereafter to C R Swart Square Police Station. At C R Swart Square Police Station he was asked to make a statement which he did. He signed a sworn statement before Warrant Officer Mngadi, the third defendant who had been appointed as the investigating officer in the theft case;
- (h) Mr Moloi appeared in court on two occasions, the first time on his own, and on the second occasion he was joined in the dock by the plaintiff. Mr Moloi maintained that the plaintiff was not the policeman who had introduced himself to him at the Workshop as 'Sithole' and told that to the police officers who administered the court, and he tried to tell that to the prosecutor, who would not speak to him. Eventually the charges against Mr Moloi were withdrawn and he was released from prison;
- (i) in 2004 the charges were reinstated and Mr Moloi again appeared with the plaintiff. This time he was persuaded to testify as a witness against the plaintiff in terms of s 204 of the Criminal Procedure Act, 1977. However, when he came to testify he experienced an anxiety attack and was unable to utter more than a sentence or two in evidence. The trial was then abandoned;
- (j) Mr Moloi was later called as a witness in a disciplinary enquiry held at C R Swart Square Police Station against the plaintiff. Prior to the re-institution of the charges, Mr Moloi was visited in prison by a Captain Sookdhoo who was conducting disciplinary proceedings against the plaintiff in relation to the theft. He told Captain Sookdhoo that Warrant Officer Chiliza had told him to mention the names Siphiwe Rodgers Sithole in relation to the person who had

instructed him to offload the goods from the flat next to C R Swart Square Police Station. This was contained in an affidavit dated the 29th February 2003 (the date is obviously incorrect). Mr Moloi told the disciplinary committee that the plaintiff was not the 'Sithole' he had met at the Workshop.

[4] It was common cause between the parties that :

- (a) flat 203 from which the goods were taken at the police barracks was occupied by the second defendant, Warrant Officer Chiliza;
- (b) a person named Mokoenaryana Dankie Mokoena ('Mr Mokoena') saw some of the items which had been contained in the bag taken to QwaQwa by Mr Moloi, and believing them to be stolen, had contacted a person who was identified on a video cassette in the bag, and asked for details of the person depicted in the wedding ceremony contained on the video cassette;
- (c) it transpired that the wedding depicted was that of Warrant Officer Chiliza and his bride, and when he came to know of these facts, Warrant Officer Chiliza together with other police officers drove up to QwaQwa and arrested Mr Moloi. At the time the police authorities would not allow the investigating officer, Warrant Officer Mngadi to go up to QwaQwa, and Warrant Officer Chiliza did so at his own expense.

[5] In this judgment I shall refer to the various police officials by the ranks which they held when they testified.

[6] The plaintiff's case consisted of four witnesses, Mr Moloi, Warrant Officer Haynes, Captain Sookdhoo and the plaintiff himself.

[7] Warrant Officer Henry Eli Haynes testified that he had worked with both the plaintiff and Warrant Officer Chiliza. He had been working at the grille at the Durban Magistrates' Court on the 10th January 2002 when the plaintiff appeared at court. On that day he saw Warrant Officer Chiliza calling the names of the prisoners that were to be returned to Westville Prison. This was at approximately lunchtime. Warrant Officer Chiliza also called out the name of the plaintiff. Having given the evidence that Warrant Officer Chiliza called out the name of the plaintiff, Warrant Officer Haynes then said that he was inside his office when the names were called, and that was done outside his office, and he was unable to comment on the way in which the name of the plaintiff was called out.

[8] In his evidence he clearly sought to distance himself from being able to testify as to the manner in which Warrant Officer Chiliza had called out the name of the plaintiff. This had formed part of the plaintiff's case because it was suggested that the name of the plaintiff had been called out as 'Siphiwe Rodgers Sithole, a policeman' in a very loud voice although the plaintiff was standing directly in front of Warrant Officer Chiliza. The clear suggestion was that this was done in order that other prisoners would become alerted to the fact that the plaintiff was a policeman, with rather obvious consequences if the plaintiff was thereafter to be conveyed to Westville Prison in the prison van together with other prisoners. Warrant Officer

Haynes was even unable to remember whether the plaintiff was returned to Westville Prison after the lunch adjournment or whether he went back to court.

[9] Captain Sookdhoo testified that he knew the plaintiff and was the disciplinary officer in an internal disciplinary investigation against the plaintiff. He testified that he commissioned a statement made by Mr Moloi, and in that statement Mr Moloi said that he was asked by Warrant Officer Chiliza to implicate the plaintiff.

[10] Captain Sookdhoo said that he had gone to Westville Prison together with the plaintiff in order to enable the plaintiff to identify Mr Moloi. Thereafter, in the absence of the plaintiff, Captain Sookdhoo had written down the statement by Mr Moloi alleging that he had been forced to implicate the plaintiff by Warrant Officer Chiliza.

[11] The plaintiff himself testified that he had returned to his room at the police barracks (room 202) after visiting the doctor, having had an X-ray on his right leg which he had injured when involved in a motor vehicle collision. Whilst in the room he heard a knock and upon answering the door, it was kicked open hitting him on the forehead and he fell on a chair injuring his right thigh. Warrant Officer Chiliza and Inspectors Thabethe and Cele then entered, shouting at him. They searched through his possessions looking for items belonging to Warrant Officer Chiliza. According to the plaintiff he was abused by these police officers who swore at him and demanded that he show them certain items. They confiscated his service

weapons, as well as a 9 mm pistol for which he held a private licence. They also took possession of his police handcuffs and his cellphone.

[12] It was suggested by the plaintiff that at some stage Warrant Officer Chiliza picked up his television set which he said he was going to keep in compensation for the other items which had been stolen from him by the plaintiff. Inspector Cele prevented Warrant Officer Chiliza from doing so. They then arrested the plaintiff and took him outside where many people were standing laughing at the plaintiff. He was not allowed to take his crutches, and was taken to C R Swart Square in a white Golf motor vehicle. After several hours at the police station he was then booked out by Warrant Officer Mngadi, the investigating officer, who took the plaintiff to the Phoenix Police Station. On the way there, and at or near the Gateway turnoff, Warrant Officer Mngadi, apparently irritated by the continual questions put to him by the plaintiff, stopped the motor vehicle and assaulted the plaintiff by kicking his left thigh. The plaintiff was then taken to the Phoenix Police Station where, despite objections from the Indian police officers there, he was kept overnight on the instructions of the Phoenix Police Station commander, Director Mpethe.

[13] The next day the plaintiff was taken to C R Swart Square where his fingerprints were taken. That night he was taken to the Durban North Police Station and kept there. The next day he appeared in court, and he was told by the magistrate that he was charged with housebreaking. The prosecutor sought to oppose bail because, apparently, another charge was to be added to those which the plaintiff was facing at that stage. According to the plaintiff, this had been after

Warrant Officer Chiliza had whispered to Warrant Officer Mngadi and Warrant Officer Mngadi had spoken to the prosecutor.

[14] The plaintiff maintains that when the prisoners were to be returned to Westville Prison, his name was called out by Warrant Officer Chiliza loudly, even though he was standing just in front of Warrant Officer Chiliza. He was placed in a police van with other prisoners who robbed him of his money. They had apparently claimed that they had been given a knife by Warrant Officer Chiliza, and that the intention was that they would stab the plaintiff with the knife. The plaintiff was then detained at Westville Prison for approximately two weeks until his release on bail on the 22nd January 2001.

[15] It was common cause that the charges were eventually withdrawn by way of a letter from the Director of Public Prosecutions dated the 6th June 2002. The letter declining to prosecute the plaintiff recorded that Mr Moloi was to be prosecuted on charges of housebreaking with intent to steal and theft and possession of an unlicensed firearm. On the 2nd September 2003 a summons and particulars of claim were served in this action.

[16] The plaintiff also testified to the fact that he had accompanied Captain Sookdhoo to Westville Prison in order to point out Mr Moloi, and that Captain Sookdhoo had taken a statement from Mr Moloi at Westville Prison, and a copy was handed to the plaintiff.

[17] Some time thereafter, and during or about 2004 the plaintiff was summoned to C R Swart Square Police Station by Captain Maphanga. When he arrived at C R Swart Square Police Station, Captain Maphanga took the plaintiff over to the Durban Magistrates' Court where the plaintiff was told he was being charged with housebreaking and bail was set at R2 000.

[18] Thereafter Mr Moloi was persuaded to testify against the plaintiff as a s 204 witness, but was unable to do so because when he started his evidence, he experienced an anxiety attack and was unable to testify. The charges were consequently withdrawn against the plaintiff.

[19] It was put to the plaintiff in cross-examination that his then attorney had subsequently written a letter to the Minister of Safety and Security, the first defendant in the action, in February 2003. In that letter it was alleged that the plaintiff was assaulted by Sergeant Chiliza on the 8th January 2002. The plaintiff's explanation for this was that when he was in his room in the police barracks and the police officers arrived, as a result of the door being kicked he had fallen onto a chair. It was then pointed out that in the summons it was only ever claimed that Warrant Officer Mngadi had assaulted him. The plaintiff then said that that assault referred to the assault near the Gateway turnoff on the way to the Phoenix Police Station. In his evidence he then denied that Warrant Officer Chiliza had assaulted him. He described his attorney's letter as a mistake.

[20] The plaintiff also testified that Warrant Officer Mngadi had made him sign a blank interview statement. He said he had done so after arguing with Warrant Officer Mngadi about doing so.

[21] That was the case for the plaintiff.

[22] Warrant Officer Chiliza testified that on the 18th December 2001 he had left his flat (room 203) in the South African Police barracks next to C R Swart Square and had returned to his home. Upon returning four days later he found that a number of items had been stolen from his room. Those items included a television set, a video recorder with video cassettes containing scenes of his wedding, a hifi set and certain clothing. He had later received information via an informer as to the whereabouts of his possessions in QwaQwa. He had proceeded to QwaQwa where he had found Mr Moloi and recovered a number of his items which had been stolen. He had been given various names by Mr Moloi as fitting the person who had told him to remove the items from Warrant Officer Chiliza's room. Those names included Siphwe Sithole.

[23] Warrant Officer Chiliza also testified that the plaintiff was his neighbour in the South African Police barracks. He said that in December 2001 the plaintiff was staying in the barracks although he did not wear a uniform. Warrant Officer Chilizawas told by Mr Moloi that he had met one 'Sithole' at the Workshop and that

he was the one who was not wearing a uniform, had been limping, and had promised to give Mr Moloi a job.

[24] Warrant Officer Chiliza described the functions he was required to perform as a court orderly as follows :

- (a) fetching prisoners from the grille and taking them to the particular court they were to appear in;
- (b) after the court proceedings taking the prisoners back down to the grille;
- (c) during the tea adjournment and at lunchtime, he would take the prisoners down to the grille so that they could have their meal and the prisoners who had completed their appearance in court would be taken by vehicle back to Westville Prison;
- (d) he would assist in the calling out of the names of the prisoners as they were required to get into the vehicle to take them to Westville Prison;
- (e) he was one of the drivers who was authorised to drive State vehicles conveying prisoners to Westville Prison.

[25] Warrant Officer Chiliza denied that he had called out the name of the plaintiff in the manner suggested by the plaintiff and he also denied having given the prisoners in the prison van a knife with which to stab the plaintiff. He also denied having told the prisoners that they could do what they liked with the knife.

[26] Under cross-examination Warrant Officer Chiliza admitted that he had had a

problem with the plaintiff, because he did not appreciate the fact that the plaintiff brought girlfriends to wait in Warrant Officer's Chiliza's room. This was because it caused friction between Warrant Officer Chiliza and his wife. He had also been worried about an incident when the plaintiff had opened his door and stood there naked. Warrant Officer Chiliza was worried at the time that his wife would see the plaintiff naked. He said that despite the fact that he did not wish to be friends with the plaintiff, he was civil towards the plaintiff. Warrant Officer Chiliza went to QwaQwa because Warrant Officer Mngadi who was the investigating officer at that stage, was refused permission by his superiors to go to QwaQwa. Warrant Officer Chiliza had been praised by his superiors for his actions on his return from QwaQwa. Under cross-examination Warrant Officer Chiliza reiterated that Mr Moloi had mentioned the name of the plaintiff and said that he lived in a room next door to Warrant Officer Chiliza's room.

[27] Warrant Officer Chiliza suggested that Mr Moloi was changing his evidence when he said in court that the person who had undertaken to help him at the Workshop was wearing a police uniform. Warrant Officer Chiliza maintained that during that period the plaintiff was working at the Workshop but that he was not aware whether he was on duty or not on the day in question.

[28] Warrant Officer Mngadi, the third defendant, then testified. He was appointed investigating officer in the matter of the theft of the items from the room of Warrant Officer Chiliza. The case had been allocated to him by Captain V Moodley and he had no part in that allocation.

[29] Warrant Officer Mngadi testified that on a particular Friday, Warrant Officer Chiliza had come to him and told him that he had received information from QwaQwa that some of his goods had been found there. This information had come via Mr Mokoena. Warrant Officer Mngadi's commander had then refused him permissions to go to QwaQwa because he was on call duty over the weekend. He then agreed with Warrant Officer Chiliza that he, Warrant Officer Chiliza, would go to QwaQwa to fetch the goods. When he returned from QwaQwa, Warrant Officer Chiliza had brought back a suspect, Mr Moloi, as well as his goods. Warrant Officer Mngadi had then taken a statement from Mr Moloi. Mr Moloi had read the statement through and then signed it. They both signed each page of Mr Moloi's statement. Warrant Officer Mngadi said that he had asked Mr Moloi to sign alongside the places in the statement where a word had been scratched out or corrected. A perusal of the statement shows that this was done in about half a dozen places.

[30] In that statement Mr Moloi set out how he had come into possession of the items recording that the person to whom he had spoken at the Workshop had identified himself as Sipiwe Rodgers. He said that when he had returned home and opened the bag, he had found various items including video cassettes and two firearms, and he had locked the firearms away.

[31] Warrant Officer Mngadi then spoke to the senior prosecutor and made a sworn statement that Mr Moloi had implicated the plaintiff who stayed in the room

next to Warrant Officer Chiliza. He requested that a warrant of arrest be issued. That was subsequently done on the 8th January 2002.

[32] Warrant Officer Mngadi then proceeded to Room 202 at the police barracks accompanied by Warrant Officer Cele, the fifth defendant, and Warrant Officer Thabethe, the fourth defendant. They knocked at the door which, after some time, was opened by the plaintiff. They explained to him why they were there and they asked Warrant Officer Chiliza to see if any of his goods were present in the flat. He denied any suggestion that the door had been kicked open thereby injuring the plaintiff. He also denied that Warrant Officer Chiliza had purported to claim a television set belonging to the plaintiff as compensation for his goods. He did however say that the two had argued to the extent where it was necessary for the other police officers to intervene between them. Until the time of the arrest Warrant Officer Mngadi had a good relationship with the plaintiff. He knew nothing of the relationship between the plaintiff and Warrant Officer Chiliza.

[33] Warrant Officer Mngadi said that at the stage when the plaintiff was arrested he was walking normally. When he had returned to C R Swart Square Police Station, Warrant Officer Mngadi received instructions from his commander that he should move the plaintiff to another police station i.e. not one where he had been working. His commanding officer had been the late Colonel Mabaso. Warrant Officer Mngadi then confirmed an entry from the C R Swart Square occurrence book recording at 6.10pm that 'suspect out to place of safekeeping' which entry was

signed by Warrant Officer Mngadi. The suspect is recorded in the note as being 'Siphiwe R Sithole'.

[34] Warrant Officer Mngadi said that he then took the plaintiff to the Durban North Police Station but the cells were full. He then took him from there to the Phoenix Police Station. He took the plaintiff along with him into the premises at each police station because he did not want to leave him alone because he had not been handcuffed. They were travelling in a small sedan motor vehicle. He denied having stopped the vehicle along the road to any reason, and denied having assaulted the plaintiff.

[35] Warrant Officer Mngadi said that prior to the plaintiff being admitted to the police cells at the Phoenix Police Station he had been asked by the officers there whether or not he was injured. An entry was made to the effect that the plaintiff was free from injury and a copy of the Phoenix Police Station occurrence book was adduced in evidence which recorded that the plaintiff was 'searched and lodged in cells free of injuries'. Warrant Officer Mngadi and a police officer from the Phoenix Police Station signed that occurrence book entry.

[36] Warrant Officer Mngadi testified that the plaintiff was then detained at the Phoenix Police Station overnight and he fetched him the next day so that he could be charged and taken to court which occurred on the 10th January. On that day the matter was adjourned for a bail hearing.

[37] The next witness for the defendants was Valerie Jean Mellis, who during June of 2003 and early 2004, was employed by the National Prosecuting Authority as a senior public prosecutor in Durban. Ms Mellis compiled the warrant of arrest application in respect of the plaintiff on the 20th May 2004. Ms Mellis was referred to a letter addressed to the senior public prosecutor by the Director of Public Prosecutions querying the re-prosecution of the plaintiff notwithstanding paragraph 9 of a circular issued by the Director of Public Prosecutions. Ms Mellis responded to this letter pointing out that she had discussed the contents of the docket with the public prosecutrix, Ms K Shazi, and had agreed with her representations to charge the plaintiff. She had applied for a warrant of arrest because of the difficulties which Ms Shazi explained to her had been experienced by the investigating officer in securing the plaintiff's attendance at court.

[38] Ms Mellis recorded that she was thereafter approached by an attorney acting for the plaintiff who wanted to know why the plaintiff had been re-charged in the light of an affidavit purported to have been made by Mr Moloi exculpating the plaintiff. Ms Mellis again consulted with Ms Shazi and recorded in a letter dated the 6th December 2004 that it was the intention of the State to challenge the admissibility of the affidavit exonerating the plaintiff. She concludes the letter by reiterating her opinion that the decision to prosecute the plaintiff was a correct one, both in substance and procedure.

[39] In cross-examination Ms Mellis reiterated that she had applied for the warrant of arrest because it had been stated to her that the police were unable to contact the plaintiff. In circumstances where a charge is withdrawn against an accused and it is decided to prosecute him thereafter, the accused would be contacted and told to appear. They would then be informed of the charges they would face, and be given an SAPS 496 document telling them when to appear in court again.

[40] Ms Mellis was unable to recall whether the investigating officer, Warrant Officer Mngadi, had made an affidavit prior to her applying for the warrant of arrest, or whether the practice requiring that to have taken place only came into effect later. Ms Mellis had no independent recollection of the circumstances upon which the decision to re-charge the plaintiff was based. It was pointed out to Ms Mellis that the consideration that Mr Moloi would be used as a s 204 witness as a justification for re-charging the plaintiff was not new and had existed as early as the 10th February 2002. Ms Mellis conceded that that matter appeared to have been previously considered, but was uncertain whether or not it had been pursued. She stated that the decision at that stage would have gone to the Director of Public Prosecutions because the plaintiff was a policeman.

[41] Although Ms Mellis had no independent recollection of the circumstances upon which the recommendation to arrest the plaintiff was made, she did not believe that the exculpatory statement shown to her and which was made by Mr Moloi, would have been fatal to the State case in circumstances where the State had decided to challenge the admissibility of that affidavit. She denied that the decision

to prosecute the plaintiff had been a malicious one because there had been no new evidence available to the prosecution. Ms Mellis reiterated that her decision was made on legal grounds.

[42] The next witness for the defence was Mr Mark Erskine Dyson who was a Senior Public Prosecutor in the employ of the State from 1996. He was referred to a letter which he had written on the 21st September 2004 recording that he had the authority to, and did authorise the prosecution of, the plaintiff in the above matter. Mr Dyson no longer works for the State and he practices as an independent legal consultant.

[43] His recollection of the facts underlying the letter of the 24th September 2004 were very vague, but he said that Ms Shazi had approached him asking for advice on the prosecution of the plaintiff. Ms Mellis had not been available on that day but Mr Dyson said that he agreed with the instructions given by Ms Mellis.

[44] This matter had arisen because the plaintiff's counsel had maintained that the Senior Public Prosecutor's office had no authority to change the decision of the Director of Public Prosecutions not to prosecute the plaintiff.

[45] Mr Dyson maintained that he did have authority in terms of the circulars from the Director of Public Prosecutions to recharge the plaintiff. He asked Ms Shazi to

give his letter to the counsel acting for the plaintiff. In November of 2004 Mr Dyson had been shown the letter from the Director of Public Prosecutions querying the authorisation of the prosecution of the plaintiff, and he replied in detail to that letter on the 2nd December 2004. In his reply, Mr Dyson refers to the circular from the Director of Public Prosecutions authorising him to make the decision which he did to prosecute the plaintiff. On the 11th January 2005, and pursuant to the correspondence referred to above, the Director of Public Prosecutions addressed a letter to the plaintiff's attorneys indicating that both Mr Dyson and Ms Mellis had acted properly in the matter.

[46] The last witness for the defence was Khumbuzile Shazi a senior State advocate with the office of the Director of Public Prosecutions in Durban. At the time this matter arose she was a public prosecutrix in the Regional Court. She was responsible for writing a letter dated the 5th November 2004 to the Director of Public Prosecutions in response to the same letter of the Director of Public Prosecutions of the 5th November 2004 which had been dealt with by both Ms Mellis and Mr Dyason as set out above.

[47] When Ms Shazi took over the docket, it occurred to her that no-one had properly considered the option of making Mr Moloi a s 204 witness against the plaintiff. On the instructions of the Director of Public Prosecutions she approached Ms Mellis who agreed with Ms Shazi's approach that the plaintiff should be re-charged. Ms Shazi then instructed the investigating officer Warrant Officer Mngadi to issue and serve the plaintiff with a warning to appear in court (an SAP 496

document). Weeks went by and Warrant Officer Mngadi told her that the plaintiff refused to accept the warning. It was pursuant to this that she spoke to Ms Mellis and the warrant of arrest was authorised. The matter came before the magistrate Mr Hahn who considered the point *in limine* raised by the defence counsel that there was no authority to charge the plaintiff. He accepted the State's explanation and the trial continued.

[48] Ms Shazi said that she had first seen the exculpatory affidavit deposed to by Mr Moloi suggesting that he had been coerced into naming the plaintiff as a participant in the housebreaking, when it was given to her by Mr Tembe who was acting for the plaintiff at that stage.

[49] On the day of the trial Ms Shazi called Mr Moloi and his legal representative Mr Mkhize to her office. She showed Mr Moloi the exculpatory affidavit and it was confirmed by him. She asked him about the circumstances under which the statement was made and Mr Moloi told her that whilst he was in prison he was visited by a gentleman accompanied by the plaintiff and that he had been threatened to make a statement. Ms Shazi was of the view that she could challenge the validity of the statement because it had been made under duress. She said that if Mr Moloi had indicated to her that he stood by the contents of the exculpatory statement, she would have re-considered his s 204 status as that would have meant that Mr Moloi was recanting his previous statement regarding the involvement of the plaintiff. In those circumstances she would not have continued with the prosecution against the plaintiff, which would have been destined to fail.

[50] Ms Shazi maintained that before the trial Mr Moloi was very co-operative telling her that the plaintiff had threatened him. Mr Moloi was aware of his status and whilst on bail he used to check in with the investigating officer Warrant Officer Mngadi from time to time. On one occasion when he could not do so he got hold of Ms Shazi herself.

[51] On the date of the trial Ms Shazi led the evidence of the complainant first. Mr Moloi then took the witness stand and was warned in terms of s 204 of the Criminal Procedure Act that he was required to answer questions put to him honestly and frankly and that if he did so he would be discharged from prosecution. Thereafter Mr Moloi started hyperventilating in the witness stand and was in obvious distress. The matter was stood down and paramedics were called. Because of the anxiety attack which Mr Moloi had experienced, the matter was rolled over for the next day, when Mr Moloi returned with a medical certificate saying he was suffering from anxiety. He said he could not continue giving evidence.

[52] On the next day, the 23rd August 2005 Mr Moloi resumed his evidence and when Ms Shazi tried to start his evidence, Mr Moloi started vomiting. Ms Shazi believed he was vomiting blood and the magistrate stopped the trial. At the insistence of the magistrate Ms Shazi spoke to her superiors and decided not to continue with the evidence of Mr Moloi. She closed her case and the plaintiff was acquitted in terms of s 174 of the Criminal Procedure Act, 1977.

[53] It was suggested to Ms Shazi in cross-examination that the question of whether or not Mr Moloi should have been used as a s 204 witness had previously been considered. Ms Shazi replied that someone had considered it, but not someone in the department of the Director of Public Prosecutions who had made a decision in that regard. An undated document was shown to Ms Shazi which became Exhibit 'E' in the trial. The document suggested that Mr Moloi be used as a state witness against the plaintiff. It was suggested that that was a document which would have been produced by the public prosecutor and sent to the Director of Public Prosecutions. Ms Shazi replied that the document did not look like something which had been produced by a prosecutor because all such documents are produced on letterheads (and this document was not!). As this document contained the South African police force number of the plaintiff, she surmised that the document was probably the work of a police officer and not something submitted to the Director of Public Prosecutions for consideration.

[54] Ms Shazi also recorded that the probability that the plaintiff had been involved in the housebreaking was much greater than the probability of Mr Moloi being able to do the housebreaking in a South African Police compound on his own. This was particularly so where there was no forced entry. This she said was reinforced by the fact that Mr Moloi had been caught trying to open a window at premises in the compound on a later occasion.

[55] Ms Shazi was cross-examined at length on the timing of the decision to re-charge the plaintiff and the fact that it was unnecessary for a warrant of arrest to have been issued against him. It transpired, however, from the evidence that the warrant of arrest was never executed and the plaintiff responded to the request of Colonel Maphanga to come to court. All the evidence regarding the issue of a warrant of arrest during 2004 is only relevant insofar as it may demonstrate malice on the part of the officials of the sixth defendant. I deal with that in due course.

[56] When the cases for the defendants were closed, Mr *Tembe*, who appeared on behalf of the plaintiff applied to re-open the plaintiff's case. After listening to argument I permitted him to do so.

[57] Siyabonga Moloi was then re-called and testified to the following aspects :

- (a) he denied that he had ever called Ms Shazi to tell her that he was unable to locate the investigating officer but wanted to report to her of his whereabouts;
- (b) he denied that he had ever told Ms Shazi that he had been forced to make the exculpatory affidavit – this was a reiteration of his earlier evidence;
- (c) he reiterated that he had had a meeting with Ms Shazi and Warrant Officer Chiliza in her office. He denied ever having had a meeting with Ms Shazi where his legal representative Mr Mkhize was present. Mr Moloi said that he saw Mr Mkhize for the first time when he was in the cells.

[58] Captain Feros Dawood Ebrahim was then called on behalf of the plaintiff. He testified that between 2001 and 2002 he was working with the plaintiff. He was recently contacted to check the police leave records in order to establish whether the plaintiff was on duty for the period between December of 2001 and January of 2002. Captain Ebrahim testified that according to the records the plaintiff was booked off sick from September of 2001 to the end of March 2002, a period of 199 days. He confirmed that during that period the plaintiff would have been allowed to continue residing at the police barracks. He confirmed that this would have been the case even though he had been injured. He was unable to comment on the proposition put to him that the plaintiff was not bedridden during that period.

[59] The plaintiff's case was then closed. No further evidence was led on behalf of the defendants.

[60] Having recorded the evidence led on behalf of the parties, it now falls to me to assess the value of that evidence. Dealing with the evidence of Mr Moloi, I do not believe that it would be appropriate to accept his evidence on any aspect save where it is corroborated by others. I say this because :

- (a) he was clearly a party to the theft of the various items from the flat of Warrant Officer Chiliza;
- (b) he gave no adequate explanation for the fact that he was asked to take a bag of belongings to QwaQwa with him and to keep them there until they were fetched by the person he identified as 'Sithole';

- (c) the contradiction between his evidence that he was never tempted to, nor did he look into, the bag whilst it was in his possession to ascertain the contents, whereas his statement clearly shows that he did so. It is wholly improbable in any event that he did not do so. Clearly the contents of the bag came to the attention of the informer who is referred to as Mr Mokoena – so much so that he was able to identify the person who had made the video recording of Warrant Officer Chiliza's wedding and was able to contact him thereby ensuring that Warrant Officer Chiliza was alerted to the whereabouts of his goods. That much is common cause between the parties;
- (d) the improbability that Mr Moloi would have taken the bag in all innocence is accentuated when one considers that the bag was not very large and was taken from the vehicle into which some of the stolen items were placed by Mr Moloi. There was clearly room in that vehicle to have carried the bag conveyed by Mr Moloi to QwaQwa. An additional factor to be considered is that Mr Moloi was going by taxi to QwaQwa;
- (e) a further improbability is that Mr Moloi would have been paid the sum of R200 for doing what he did for the person who identified himself as 'Sithole'. This is because on the evidence of Mr Moloi the job was one which, relatively speaking, took no time at all, and involved very little effort on his part;
- (f) in his evidence-in-chief Mr Moloi said that when the police officers arrived at the place he was residing at in QwaQwa he told them that the stolen goods were given to him by a police officer whose name was 'Sithole'. He showed them the bag he had received from Sithole. He was then again asked for the name of the person, this time by Warrant Officer Chiliza and he said, in

relation to the police officer who had sent him, 'He explained himself to me as Sithole'.

[61] The evidence of Warrant Officer Haynes, insofar as it purports to bolster the case of the plaintiff, is not helpful. What he does confirm is that Warrant Officer Chiliza was at the grille on the day that the plaintiff first appeared in court and assisted in calling out the names of the prisoners including that of the plaintiff. However, Warrant Officer Haynes himself contradicted this evidence by saying that Warrant Officer Chiliza called out the names of the prisoners including that of the plaintiff, but then went on to say he was in the office when the names were called and could not hear this being done.

[62] The evidence of Captain Sookdhoo is useful inasmuch as he was the person who commissioned the affidavit by Mr Moloi to the effect that he had been asked by Warrant Officer Chiliza to implicate 'Sithole'. He had gone to Westville Prison for that purpose and had been accompanied by the plaintiff in doing so. The alleged purpose of the plaintiff accompanying Captain Sookdhoo was to point out and ensure the correct identification of Mr Moloi. I shall, for the purposes of this judgment, accept the evidence of Captain Sookdhoo. I do not believe it to be contentious, and insofar as it supports the plaintiff's case, it establishes the formalities of the affidavit deposed to by Mr Moloi recanting his earlier evidence.

[63] The plaintiff was not, in my view, an impressive witness. The fundamental basis of his case is that the person who identified himself as 'Sithole' to Mr Moloi was not the plaintiff. It was some other person and that was established by the fact that Mr Moloi himself says so. The suggestion throughout the plaintiff's case is that another person by the name of 'Sithole' introduced himself to Mr Moloi and set him up to assist him in stealing items from the flat of Warrant Officer Chiliza. There is no indication as to who this person could be. Various suggestions which were put to witnesses about other persons by the name of 'Sithole' who did or did not reside at the single quarters from time to time, but those suggestions were vague and uncorroborated. The suggestion that there was another person other than the plaintiff who introduced himself at the Workshop shopping centre to Mr Moloi and who gave him access to Warrant Officer Chiliza's room does not fit with the probabilities or the evidence.

[64] The plaintiff also maintained that, after he was assaulted by Warrant Officer Mngadi, he had been placed in the cells at Phoenix Police Station. He made no effort to draw his assault or injuries to the attention of the other police officers even after Warrant Officer Mngadi left the premises.

[65] The plaintiff testified that he had signed an interview statement in blank at the insistence of Warrant Officer Mngadi. This recorded that he had sustained no injuries. I find both these suggestions wholly improbable. As an experienced police officer the plaintiff was clearly aware of the danger of his conduct in regard to both these incidents, and I cannot believe that he would have acted as he said he did.

[66] With regard to his first claim, that the second, third, fourth and fifth defendants wrongfully and maliciously arrested him without any reasonable and/or probable cause, his evidence does not establish the case which he pleaded. Firstly there is no evidence that either the fourth or fifth defendants, Warrant Officer Thabethe or Warrant Officer Cele were involved in the issue of the warrant of arrest for the plaintiff in January of 2002. This was in fact stated by Ms *Lange* who appeared for the defendants at the outset of the trial and confirmed by Mr *Tembe* who appeared for the plaintiff.

[67] With regard to the second and third defendants it is clear from the evidence that :

- (a) Warrant Officer Chiliza was the person whose goods were stolen;
- (b) he was informed of the report made by Mr Mokoena, the informant, in QwaQwa;
- (c) he recovered his goods from Mr Moloi in QwaQwa;
- (d) Mr Moloi himself testified that he was told that the person who told him to remove the goods from Warrant Officer Chiliza's flat was one 'Sithole';
- (e) Mr Moloi then deposed to an affidavit before Warrant Officer Mngadi. In the affidavit which Mr Moloi admitted signing, he stated that the person who had introduced himself as 'Sithole' was not in uniform and that he had a limp. This conforms to the evidence of the plaintiff, although not to the evidence of Mr Moloi as he testified in court;

- (f) In the affidavit deposed to by Mr Moloi he confirmed that they had gone to the room of Warrant Officer Chiliza which was next to the flat of the plaintiff.

[68] In those circumstances I have no doubt that there was reasonable and probably cause to charge the plaintiff with the housebreaking which took place at the flat of Warrant Officer Chiliza.

[69] With regard to the involvement of Warrant Officer Mngadi on Count 1, it is clear that he was appointed the investigating officer in the housebreaking case by his superiors. He only became involved when Mr Moloi was returned to C R Swart Square Police Station in Durban after he had been arrested in QwaQwa and the goods recovered.

[70] Warrant Officer Mngadi testified that he had taken a statement from Moloi and gave various reasons why he thought Moloi was competent to read through the statement himself. He pointed out that in the statement Mr Moloi had initialled various alterations made by him in the statement. When he was cross-examined Warrant Officer Mngadi reiterated that he had personally given the statement to Mr Moloi to read. He said that Mr Moloi was a graduate from the KwaZulu-Natal Technicon and he found it easier to give him the statement to read himself. This was not disputed by the plaintiff's legal representative.

[71] In cross-examination Warrant Officer Mngadi was clear that at all stages Mr Moloi knew that he was talking about the plaintiff. This was in answer to the suggestion that the name Sphiwe Rodgers Khumalo was only mentioned in Mr Moloi's statement and not Sphiwe Rodgers Sithole. However there is no doubt on the evidence of Mr Moloi, which was corroborated by Warrant Officer Chiliza, that Mr Moloi mentioned the name Sithole when he was arrested in QwaQwa. Warrant Officer Mngadi also said that there were two statements taken from Mr Moloi and in one of them he had mentioned Sithole. This was not disputed. In cross-examination this turned out to be a reference to a statement made before Warrant Officer Mngadi by Mr Moloi in which he said that he had been handed an envelope by 'Sithole' on which was written 'S R Sithole'.

[72] It is clear from the affidavit of Warrant Officer Mngadi that he applied for a warrant of arrest for the plaintiff on the basis of the information he had been given. In my view his conduct in this regard was reasonable. Probable cause clearly existed against the plaintiff and in the circumstances I find that there is no substance in claim 1.

[73] With regard to claim 2 the evidence of the plaintiff is that he was assaulted on the 8th January 2002 on the freeway close to the turnoff to the Gateway shopping centre. The only evidence in this regard is that of the plaintiff himself which is contradicted by the evidence of Warrant Officer Mngadi who denies all the allegations of assault. With regard to the assault, no J88 document was adduced to evidence any injuries to the plaintiff. In addition, and when the plaintiff was placed

into the cells at the Phoenix Police Station, the occurrence book recorded that he was free of injuries. Had he been assaulted, as a policeman, I believe he would have insisted in an occurrence book entry recording his injuries at the Phoenix Police Station. In this regard he was in the presence of other officers and any influence which Warrant Officer Mngadi would have had over him would have been watered down. This was more particularly so when Warrant Officer Mngadi left the premises of the Phoenix Police Station, and the plaintiff was left alone there together with other policeman from the Phoenix Police Station.

[74] The plaintiff's claim with regard to the assault is further contradicted by the fact that on the 14th February 2003 his then attorneys Ngubane & Partners addressed a letter to the first defendant alleging that on the 8th January 2002 the plaintiff had been assaulted by Warrant Officer Chiliza. Notice was then given to the Minister that a claim for R3 million for damages would be instituted against him.

[75] The version of events as given by the plaintiff with regard to the trip from C R Swart Square in Durban to the Phoenix Police Station is weakened by the improbabilities of his version. Warrant Officer Mngadi testified that he took the plaintiff firstly to the Durban North Police Station but was unable to have him kept overnight there because the cells were full. It was for that reason that he proceeded to the Phoenix Police Station. The plaintiff could have obtained evidence that, as he suggested, there had been no visit to the Durban North Police Station on the day he was arrested. There was no suggestion that any attempt had been made to obtain that evidence.

[76] In all the circumstances I am not persuaded that the plaintiff has established his claim of assault on a balance of probabilities.

[77] With regard to claim 4, the malicious prosecution of the plaintiff in 2004, the defendants' evidence largely relies upon that of the prosecutrix Ms Shazi. In my view Ms Shazi gave her evidence in a clear and detailed manner, and she was ready to make concessions where they were warranted. When her evidence is viewed together with that of Ms Mellis and Mr Dyson, it seems clear that serious consideration was given by the prosecution staff to the re-institution of the charges against the plaintiff. The suggestion by Mr Moloi that he had, immediately prior to the trial, told Ms Shazi that he intended to repeat what was in the exculpatory affidavit he had testified to before Captain Sookdhoo was clearly untenable. As pointed out by Ms Shazi it is wholly improbable that she would, having been told that Mr Moloi intended to give evidence which would demonstrate the innocence of the plaintiff, have proceeded with the trial and sought to lead him as a s 204 witness when, on the version of Mr Moloi he was going to give evidence totally undermining the State's case.

[78] Indeed, although Mr *Tembe* suggested in cross-examination that Ms Shazi had acted maliciously in re-charging the plaintiff, no basis whatsoever was laid save for the suggestion that she had colluded with Warrant Officer Chiliza. She denied this, and I have no reason to doubt her denial.

[79] In *Rudolph and Others v Minister of Safety and Security and Another* 2009 (5) SA 94 (SCA) the court said :

‘[16] ...

The requirements for successful claims for malicious prosecution have most recently been discussed in *Minister of Justice and Constitutional Development v Moleko* [2008] 3 All SA 47 (SCA) para 8 as follows :

“In order to succeed (on the merits) with a claim for malicious prosecution, a claimant must allege and prove –

- (a) that the defendants set the law in motion (instigated or instituted the proceedings);
- (b) that the defendants acted without reasonable and probable cause;
- (c) that the defendants acted with ‘malice’ (or *animo injuriandi*); and
- (d) that the prosecution has failed.”

As already indicated, insofar as this claim is concerned, requirements (a), (b) and (d) above are not disputed by the respondents.

...

[18] The requirement of “malice” has been the subject of discussion in a number of cases in this court. The approach now adopted by this court is that, although the expression “malice” is used, the claimant’s remedy in a claim for malicious prosecution lies under the *actio injuriarum* and that what has to be proved in this regard is *animus injuriandi*. See *Moaki v Reckitt and Coleman (Africa) Ltd and Another* 1968 (3) SA 98 (A) at 103 G – 104 E; and *Prinsloo and Another v Newman* 1975 (1) SA 481 (A) at 492 A – B. By way of further elaboration in *Moleko* it was said :

“The defendant must thus not only have been aware of what he or she was doing in instituting or initiating the prosecution, but must at least have foreseen the possibility that he or she was acting wrongfully, but nevertheless continued to act, reckless as to the consequences of his or her conduct (*dolus eventualis*). Negligence on the part of the defendant (or, I would say, even gross negligence) will not suffice.” [Paragraph 64.]’

[80] On a balance of probabilities therefore the evidence of the defence witnesses regarding the re-instatement of the charges against the plaintiff must be accepted and there is accordingly no merit in the suggestion of a malicious prosecution.

[81] As the plaintiff's claims 1, 2 and 4 have failed, his claim 5 which is for damages for the medical conditions from which he suffered, allegedly as a result of those claims, cannot succeed.

[82] In the circumstances I make the following order :

The plaintiff's claims are dismissed with costs.

Date of hearing : 4th September 2013

Date of judgment : 11th October 2013

For the Plaintiff : T A Tembe (instructed by Ngubane & Partners Inc)

For the Defendant : N D Lange (instructed by the State Attorney)