



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

CASE NO: 1076/2019

In the matter between:

MASIBULELE LEPOROPORO

Plaintiff

and

MINISTER OF POLICE

1st Defendant

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

2nd Defendant

JUDGMENT

RUSI J

[1] On 14 April 2016, and in Saphulanduku locality in the rural Ntabankulu, Mr Kahleho Tsoanyane (the deceased) was murdered. The plaintiff in these proceedings was arrested without a warrant in Saphulanduku together with three other males on 16 April 2016, by the members of the first defendant, for the murder of the deceased.

[2] Subsequent to their arrest, they were detained at the Ntabunkulu police station and made their first appearance in the Ntabankulu Magistrates' Court on 18 April 2016. Their bail was initially opposed by the prosecutor in charge of the case against them but on 05 May 2016, they were admitted to bail of 500.00 each. The plaintiff, together with his co-accused later stood trial in the Mt Frere Regional Court on the aforementioned charge. On 5 June 2017, the charge was withdrawn against him.

[3] The plaintiff now holds the first defendant liable for damages resulting from his arrest and subsequent detention from 16 to 18 April 2016 when he made his first appearance in court; his further detention after his first appearance in court, until 04 May 2016. He holds the second defendant liable for damages resulting from his prosecution from 18 April 2016 until on 05 June 2017 when the prosecutor withdrew the charges against him. He claims damages in the total sum of R990 000.00, for deprivation of liberty, loss of enjoyment of the amenities of life, pain, suffering discomfort and contumelia, contending that his arrest and detention were unlawful, and he was prosecuted by the employees of the second defendant maliciously.

The trial of the case

[4] The trial of this action proceeded on both the merits and quantum of the plaintiff's claim. Each of the parties adduced oral evidence in support of their respective cases. The contents of the police docket entailing the criminal case against the plaintiff and the record of proceedings against him in the Ntabankulu Magistrate's Court and Mt Frere Regional court, respectively, which the parties discovered *inter se* in terms of the Uniform Rules, were also used during trial.

[5] The plaintiff was the only witness in his case. On behalf of the first defendant, Captain Mfokazi, formerly a constable, came forward to testify as one of the three members of the defendant who were involved in arresting the plaintiff. Mr Sitsheke, an employee of the second defendant, gave evidence as the public prosecutor assigned to the Ntabankulu Magistrates' Court and who, albeit not the person who enrolled the case against the plaintiff on 18 April 2016, had read the docket after the institution of these proceedings.

The pleadings

[6] In his particulars of claim (as amended), the plaintiff essentially relied on the following material facts as the basis of his claims against the two defendants:

- (a) His arrest and detention were unlawful in that his arrestor failed to investigate an exculpatory explanation in the form of an alibi defence which he proffered in relation to the murder of the deceased, in circumstances where they had a duty to do so before arresting and detaining him.
- (b) The arresting officers failed to observe that he was instead the victim of an attack by the deceased who stabbed him, and that he had fresh wounds following that attack. They failed to perform their legal duty, alternatively, they performed it negligently, resulting in his unlawful arrest and detention.

[7] In support of the claim founded on malicious prosecution, and as against the first defendant, the plaintiff alleged that his arrestors set the law in motion when they arrested him on the charge of murder in circumstances where they had no reasonable and probable cause for doing so nor reasonable belief that he committed the murder.

[8] Against the second defendant, and in the alternative, he alleged that:

- (a) The prosecutor who charged him of murder in the Ntabankulu Magistrates' Court set the law in motion against him when she prosecuted him, she had no reasonable and probable cause for doing so, and she did not have honest belief founded on reasonable grounds, that setting the law in motion against him was justified.
- (b) In setting the law in motion against him, Captain Mfokazi alternatively the prosecutor was actuated by malice, alternatively, they failed to discharge their duties in accordance with statutory and constitutional prescripts and that resulted in his 'unlawful' and unjustified prosecution.
- (c) On 05 June 2017, he was found not guilty of the charge against him and discharged by the Mount Frere Regional Court.

[9] While admitting the plaintiff's arrest and subsequent detention, the first defendant, in her amended plea, denied that his arrest and detention were unlawful. She pleaded that the plaintiff's arrest 'was justified in terms of section 40(1) of the Criminal Procedure Act 51 of 1977 (the CPA), as he was implicated in the murder of the deceased.' He further denies that his members unjustifiably set the law in motion against the plaintiff when they arrested him. He further denies liability for the plaintiff's malicious prosecution.

[10] In denying liability for the claim of malicious prosecution, the second defendant, who admits that her employee prosecuted the plaintiff on 18 April 2016, alleged, in her amended plea, that his release on bail was opposed on his first appearance in court as he was charged with an offence listed in schedule 6 to the

CPA. She further alleged that the plaintiff was admitted to bail, not on 05 May, but 04 May 2016.

[11] The second defendant further alleged that there was a prima facie case against the plaintiff in that he and three other males were implicated in the murder of the deceased by witnesses who made sworn statements to the police. For this reason, there was reasonable and probable cause to prosecute him. In answer to the plaintiff's allegation that he was acquitted of the charge against him, the second defendant further pleaded that charges against him were withdrawn on 05 June 2017.

The issues

[12] Although the plaintiff's particulars of claim are no model of clarity, as far as I could have ascertained from the parties' pre-trial conference minutes dated 08 June 2023, and their joint practice note dated 15 January 2025, the issues to be determined are whether the plaintiff's arrest and detention as pleaded, were justified; whether the first and second defendant are liable for the plaintiff's post court appearance detention; and, whether the plaintiff was maliciously prosecuted by the employee of the second defendant. If the plaintiff succeeds on these issues, I am to determine the quantum of his damages.

The onus and duty to begin

[13] The onus to justify the plaintiff's arrest and detention rested on the first defendant as the arrest and detention were admitted. In respect of the claim against the second defendant, the plaintiff bears the onus of proof. On the date of hearing, the parties agreed that the plaintiff would lead evidence first. This accords well with Uniform Rule 39(13).

The case for the plaintiff

[14] The plaintiff denied any involvement in the murder of the deceased. He testified, in essence that on the day of deceased's murder, he and several other persons had been consuming traditional beer outside the premises of Saphulanduku Secondary School. This was after a celebration that was held at that school where traditional beer, among other things, was served. At some point, the group people of which he was a number, left to a local tavern known as Madida's Tavern. While at the tavern, a quarrel broke out involving one Ntobeko, the deceased and Retsepile King Mabekebeke. For the sake of brevity, the persons that were mentioned during testimony of the witnesses shall henceforth be referred to in this judgement by their first names only, no disrespect is intended towards them.

[15] The plaintiff went on to testify that during the quarrel, the deceased drew out a knife and stabbed Retsepile. This impelled him to phone his brother, Fundile Leporoporo in order for him to come and intervene in the fight. While he spoke with Fundile on the phone, the deceased stabbed him on the neck below his jaw. In order to quell the brawl, the owner of the tavern chased all of his patrons out of his premises except for deceased and thereafter locked the gate.

[16] After he was stabbed by the deceased, he collapsed near the gate of the tavern and lost consciousness. He regained consciousness in Mt Ayliff Hospital. He learned of deceased's death after his discharge from hospital the next day. On arrival at his home from hospital, his mother informed him that the police were looking for him and asked that he presents himself at the Ntabankulu police station in connection with the death of the deceased. He proceeded to the police station

with his brothers, Fundile, Ntsikelelo; and Retsepile. At the police station, he was caused to make a statement detailing what he knew about the murder.

[17] In his sworn statement dated 15 April 2016, the plaintiff gave details of the fight that erupted at the tavern, how he collapsed and lost consciousness after being stabbed by deceased in the course of that fracas. After he made this statement (presumably *qua* witness or person of interest to the police), he and Ntsikelelo were told by the police to go home. Their brother, Fundile, who admitted that he murdered the deceased, was detained.

[18] On 16 April 2016, the police, among which was Captain Mfokazi, came to his home and arrested him in connection with the murder of deceased. In his warning statement which he made subsequent to his arrest, it is recorded that he elected not to give any explanation concerning the allegations against him. He was detained at the Ntabankulu police station and made his first appearance in court on 18 April 2016. At his first appearance, his bail application was postponed and only heard on 04 May 2016 when he was admitted to bail of R500.00.

[19] While in detention, he was raped by an inmate. The rape incident left him with psychological scars that no award of money would erase. He still wished to attend counselling if he had the means to do so. The cell in which he was detained was dirty and overcrowded. He was detained with hardened criminals who ill-treated and them as new inmates. They deprived them of beds and blankets, as a result, he slept on the floor next to the toilet with no blanket. His stab wound became septic, and he was not referred to the clinic. One inmate removed the stitches on his wound with an okapi knife. This was the inmate who raped him. The medication he was taking for his stab wound before his detention was taken away from him by Captain Mfokazi. At the time of his arrest, he was due to attend

registration as a student at the University of Zululand. He was forced to cancel his registration while the case against him continued. The case against him ruined his life.

The case for the first defendant

[20] Captain Mfokazi testified that on 14 April 2016 around 20h00, he and two of his colleagues, Constable Vezi and Sergeant Ntshobane, attended to a scene of after receiving a complaint via a telephone call. They undertook their investigations of the scene of murder as a team. On arrival at the scene, which was at an open field, they found the deceased and were informed that two males who were also present at the scene were conveyed to hospital. They subsequently went to Mt Ayliff Hospital where they found the plaintiff and Retsepile, and they were both injured. He observed they were still under the influence of liquor, as a result they did not speak with them. Captain Mfokazi confirmed that it was at their behest that the plaintiff, Fundile, Ntsikelelo and Retsepile presented themselves at the police station and made their respective sworn statement. The plaintiff was not arrested on 15 April 2016 as there was no information at that stage which implicated him in the murder, but Fundile was, after he admitted murdering the deceased.

[21] Further investigations were conducted on 16 April 2016 during which several witnesses were interviewed. Among those witnesses were Sabata Molotsi and Kabelo Setemane who witnessed the murder of the deceased. Captain Mfokazi was the one who recorded Sabata's statement, while his other colleagues obtained a statement from Kabelo. The two statements implicated the plaintiff, Fundile, Retsepile and Ntsikelelo in the murder of the deceased. He and his colleagues analysed the two statements and took a decision to arrest the persons they implicated, including the plaintiff and Retsepile. He was asked about the apparent

alteration of the date on which Sabata's statement was taken. His explanation was that that was overwriting, otherwise the statement was obtained on 16 April 2016.

[22] Having arrested the plaintiff and his companions, they detained them in the Ntabankulu police cells. He denied that the cells were dirty stating that cell visits are done daily. He further testified that if there was any complaint of rape by an inmate, he and the station commander would have known as it would be reported to them and investigated accordingly. As regards the plaintiff's whereabouts at the time of the murder, Captain Mfokazi testified that none of the persons he interviewed or sought information from in the course of his investigation mentioned anything about the fact that the plaintiff collapsed at the gate of Madida's tavern and was collected by the ambulance from a neighbouring home. The statement of the tavern owner, Teboho Madida Mokoko which was also referred to during his evidence, makes no mention of this fact. On the issue of the plaintiff's release on bail, Captain Mfokazi testified that since he knew the plaintiff's place of residence and in the light of his co-operation with the police investigation, he did not oppose bail. According to him, the plaintiff's arrest and detention were justified.

[23] Asked if he completed any bail information sheet which is used to record essential information for use by the prosecutor at first appearance in court in deciding whether bail should be granted or not, Captain Mfokazi testified that none was completed, but he discussed his views with the prosecutor in person. Confronted with the record of proceedings on the plaintiff's first appearance in court on 18 April 2016 where the prosecution is recorded as having opposed bail stating that he and his co-accused were charged with a schedule 6 offence, Captain Mfokazi explained that the scheduling of offence for bail application purposes was the prosecutor's prerogative.

The statement of Sabata Molotsi

[24] In his statement, Sabata mentioned that when he first saw the deceased, he was jumping over a fence and running. Upon asking him why he was running, he told him that he was being chased. While the deceased was running, four men that were all known to him came upon him, they were Retsepile, the plaintiff, to whom he also referred by his alias, ‘Mara’, Fundile to whom he referred by his alias “Tsitsila,” and Ntsikelelo, and they were all armed with knives, spears and bush knives. The plaintiff and Fundile were armed with open okapi knives. He tried to intervene by telling them to refer their dispute to the community elders for resolution. They did not heed his request and instead began stabbing the deceased with knives and they assaulted him with bush knives. They left the deceased who ultimately died. He is the one that pointed the body of the deceased to the local people who arrived afterwards.

The statement of Kabelo Setemane

[25] Kabelo states, in his statement, that he was in the company of Sabata when he saw ‘a mob of people’ who came upon the deceased, stabbed him with knives and spears, and also hacked him with bush knives. He further explained that since he is not from Saphulandulu locality, he did not know the names of the persons who were involved in the murder of the deceased.

Further witness statements

[26] There were two further statements from Mabereng Mabekebeke, the mother of Retsepile, and Matukiso Leporoporo, the mother of the plaintiff. These statements were both made on 14 April 2016 and in them they state, respectively, that around 20h00 they went to ‘the scene’ where they found their respective children injured.

Case for the second defendant

[27] Mr Sitsheke’s testimony related to the information that was contained in the docket when the case against the plaintiff was enrolled in the Ntabankulu Magistrates’ Court on 18 April 2016 and the proceedings against the plaintiff until his release the withdrawal of the charges against him on 05 June 2017. He testified that even though he was not the one who enrolled the case against the plaintiff, when he perused the contents of the docket at the time the case was enrolled, it contained several statements including those of Sabata, the tavern owner, Teboho Madida, and Kabelo. Having considered the body of statements filed in the docket as at 18 April 2016, with specific emphasis on the statements of Sabata, Kabelo and Teboho Madida, he was satisfied that there had been a prima facie case against the plaintiff which justified his prosecution.

[28] Explaining why the murder charge against the plaintiff was categorized as a schedule 6 offence for bail purposes, Mr Sitsheke testified that the deceased was murdered in the execution of common purpose. The implications of the offence being a schedule 6 offence were that the plaintiff and his co-accused in that court had the onus in terms of section 60(11)(a) of the CPA, to satisfy the court that there were exceptional circumstances which permitted their release in the interests of justice. He was shocked to see that the scheduling of the offence was changed on 04 May 2016 to schedule 1, whereupon the plaintiff was released on bail. Mr

Sitsheke conceded that since Captain Mfokazi did not oppose bail, and therefore, the plaintiff's further detention after first appearance was at the instance of the second defendant. But he denied that such further detention was not justified.

[29] As regards the withdrawal of the charges against the plaintiff in the Mt Frere Regional Court on 05 June 2017, Mr Sitsheke testified that this came about when Fundile pleaded guilty to the charge. In this regard, the record of the proceedings on 05 June 2017 in the Mt Frere Regional Court, which included the plea explanation of Fundile which he made on that same date in terms of section 112(2) of the CPA, was handed to court as part of the evidential material to be considered. In the plea explanation, Fundile accepted sole responsibility for the murder of the deceased. Further according to the plea explanation, he single-handedly murdered the deceased after he found that he stabbed his brother Ntsikelelo, and Retsepile.

The parties' submissions

[30] Mr Xozwa who appeared for the plaintiff submitted that the first defendant did not specifically plead that the plaintiff's warrantless arrest was justified in terms of section 40(1)(b) of the CPA in that he was reasonably suspected of committing a schedule 1 offence. I must swiftly dispose of this contention.

[31] As afore set out, the first defendant asserted that "the plaintiff's arrest was justified in terms of section 40(1) of the CPA as they were implicated in the murder of the deceased. There was, however, no pertinent objection at the appropriate time, against the lack of particularity in the first defendant's plea on this aspect. Apart from this, in their joint practice note duly signed by both parties and dated 15 January 2025, the parties agreed that the issues for the court's determination

included “whether the defendant entertained a reasonable suspicion based on reasonable grounds that the plaintiff committed a Schedule 1 offence listed in [the] Criminal Procedure Act 51 of 1977 when arresting [him] on 16 April 2016.

[32] Moreover, the trial of this case proceeded on this aspect, on the premise that the first defendant relied on the provisions of section 40(1)(b) of the CPA in justifying the plaintiff’s arrest and detention. Not to say that the kind of ineptness that is apparent in the drawing of the first defendant’s plea is condoned, but the contention that Mr *Xozwa* raised is a technical one and a ruse.

[33] On the merits of the claim, Mx *Xozwa*’s principal submissions were that Captain Mfokazi’s failed to investigate the exculpatory explanation that the plaintiff proffered. His evidence also failed to establish that the statements of Sabata and Kabelo were contained in the docket when the plaintiff was arrested as there are no entries in the investigation diary detailing when these statements were obtained in relation to the arrest of the plaintiff. He also persisted with the contention that the date on which Sabata made his statement appeared to be altered.

[34] As regards the detention of the plaintiff from 16 April 2016 and beyond his first appearance in court, Mr *Xozwa* submitted that the plaintiff has established a causal connection between the opposition of bail by Captain Mfokazi and his further detention. This contention was persisted with, notwithstanding Mr Sitsheke’s concession that bail was indeed not opposed by Captain Mfokazi. Mr *Xozwa* highlighted the fact the relegation of the charge against the plaintiff to Schedule 1 was indicative of the fact that the plaintiff was unlawfully exposed to a

higher onus under section 60(11)(a) by placing the charge in Schedule 6 of the CPA.

[35] Regarding malicious prosecution, Mx *Xozwa* highlighted the fact that the charges against the plaintiff were withdrawn after Fundile pleaded guilty to the charge of murder on facts different from those on which the second defendant's case was founded. He submitted that the prosecutor failed to pay attention to the contents of the docket and act with the required objectivity, hence, he had no reasonable and probable cause to prosecute the plaintiff.

[36] It was Mr *Xozwa*'s submission further, regarding the quantum of damages, that an amount of R800 000.00 for the plaintiff's arrest, and detention for 17 days; and R190 000.00 as and for damages resulting from his malicious prosecution, were justified in the circumstances of the present case.

[37] These are the principal submissions that Mrs *Qikila* made on behalf of the first and second defendants. Despite mention having been made that the first scene of crime is where the deceased stabbed the plaintiff and Retsepile, there is one scene of murder. The statement of aforementioned witnesses which were made on 14 and 16 April 2016, respectively, placed the plaintiff at the scene of the murder. A reasonable person faced with the facts as contained in the witness statements concerned, would have a reasonable suspicion that the plaintiff and his co-suspects had committed the murder.

[38] Mrs *Qikila* further submitted that Captain Mfokazi was entitled to detain the plaintiff for a period not exceeding 48hrs after his arrest for the commission of murder. As regards malicious prosecution, she submitted, based on the nature of the evidence that was in the docket when the prosecutor enrolled the plaintiff's case, that there was prima facie evidence that the plaintiff committed the murder

of the deceased or was involved in its commission. With reference to several previous awards and the known principles of law regarding quantum of damages, Mrs *Qikila* submitted that the amounts claimed by the plaintiff for the various heads of damages, are excessive.

The legal principles

[39] It by now trite that a person may only be arrested and detained without a warrant authorizing his arrest in circumscribed instances, which the CPA sets out in section 40. Germane to the present claim are the provisions of section 40(1)(b), in terms of which a peace officer may arrest a person without a warrant if he entertains a reasonable suspicion that that person committed an offence listed in Schedule 1 of the CPA.¹

[40] The facts which must be established for the justification of an arrest effected in terms of section 40 (1)(b) were set out by the Court in *Duncan v Minister of Law and Order*², as being that: (i) the arrestor must be a peace officer; (ii) the arrestor must entertain a suspicion; (iii) the suspicion must be that the suspect (the arrestee) committed an offence referred to in Schedule 1 of the CPA; and (iv) the suspicion must rest on reasonable grounds.

[41] The test for the reasonableness of the grounds of suspicion on which the arrest is effected, was laid down in *Mabona and Another v Minister of Law and Order and Others*,³ where the court held:

‘[T]he reasonable man will therefore analyse and assess the quality of the information at his

¹ *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) at 818G-H.

² 1986 (2) SA 805 (A) at 818G-H.

³ *Mabona and Another v Minister of Law and Order and Others* 1988 (2) SA 654 (SE) at 658G-H.

disposal critically and he will not accept it lightly or without checking it where it can be checked. It is only after an examination of this kind that he will allow himself to entertain a suspicion which will justify an arrest. This is not to say that the information at his disposal must be of sufficiently high quality and cogency to engender in him a conviction that the suspect is in fact guilty. The section requires suspicion not certainty. However, the suspicion must be based upon solid grounds. Otherwise, it will be flighty or arbitrary, and not a reasonable suspicion.’

[42] In a claim for malicious prosecution, in order to succeed, the plaintiff must allege and prove that (a) the defendants set the law in motion (instigated or instituted the proceedings); (b) the defendants acted without reasonable and probable cause; (c) the defendants acted with ‘malice’ (or *animo injuriandi*); and (d) that the prosecution has failed.⁴

[43] In the discussion that follows, I apply these legal principles to the facts of this case to determine whether the plaintiff’s claims should succeed.

Analysis

[44] The parties made common cause of the fact that murder is a Schedule 1 offence and that Captain Mfokazi was a peace officer at the time of the plaintiff’s arrest. It bears re-stating, as the starting point, that a court that is called upon to determine the lawfulness of a warrantless arrest under section 40(1)(b) of the CPA, does no more than consider the facts that were at the disposal of the arresting officer at the time of the arrest. In so doing, it measures the conduct of the police officer against the standard of reasonableness, the question being whether reasonable police officer faced with such facts, would entertain a suspicion that the plaintiff was involved in the commission of a schedule 1 offence.

⁴ *Minister for Justice & Constitutional Development v Moleko* 2009(2) SACR 585 (SCA), para 8; see also *Minister of Safety and Security v Lincoln* 2020 (2) SACR 262 (SCA).

[45] Captain Mfokazi and his colleagues did not require certainty that the plaintiff was guilty of murder. They were only required to have at their disposal at the time of his arrest, facts which, if they had confronted another person in their position, would arouse a suspicion in that person's mind that the plaintiff committed murder. When regard is had to the statement of Sabata on its own, there ought to be little to no doubt, for the purposes of an arrest, that it constituted evidence which directly implicated the plaintiff in the commission of the murder. But not only Sabata was interviewed by the police on 16 April 2016, Kabelo was also interviewed.

[46] Even though issue was taken with the fact that the date on which Sabata's statement was recorded is not clear due to what appears to be an alteration, and that there is no recordal of the time at which it was taken, Captain Mfokazi's explanation was that it was obtained before the arrest of the plaintiff and on the same day and time as that of Kabelo. Kabelo's statement, on the face of it, was taken at 10h20 on 16 April 2016. Captain Mfokazi's evidence was that they arrested and detained the plaintiff at 13h50 on 16 April 2016. This finds confirmation on the SAPS 14 form which is the notice of constitutional rights given to an arrested person at the time of detention.

[47] While it is so that the investigation diary does not indicate when the statement of Sabata was obtained, there are similarly no entries which give an indication of the date and time at which the each of the various statements that were referred to by Captain Mfokazi were obtained. There is, however, a general entry made on 16 April 2016 at 11:50, to the effect that "*the statement (sic) under oath obtained from witnesses.*"⁵ With all of this said, on the facts before me,

⁵ For reasons that were not explained, the folios of the of the investigation diary were disjoined when the cell register (SAPS 10) was placed in between them in the collation of the discovered contents of the docket. The entry

nothing suggests that the Sabata's statement was obtained on a day and at a time other than before the arrest of the plaintiff.

[48] Regard must be had to the fact that when the plaintiff was arrested, the police had conducted further investigation after he made his statement dated 15 April 2024. Nothing should turn on the fact that after he made this statement, the plaintiff was told to go home. This should not be surprising since in that statement he states that he was undeniably a victim of the deceased's violent attack before his death, an observation that Captain Mfokazi also made. Moreover, he placed himself elsewhere than at the scene of the murder. The police would have had no reasonable basis indeed at that point, on which to suspect that he was at the scene of the murder.

[49] Captain Mfokazi made reference to the plaintiff's warning statement as an arrested person, in which he elected to give his explanation in court under the assistance of a legal representative. It was not incumbent on Captain Mfokazi to question the plaintiff including regarding the contents of the statement he made the previous day qua potential witness after he indicated that he wished to exercise his rights to silence and to legal representation.

[50] To my mind, it would be absurd, in the circumstances of the present case, to conclude that whatever the plaintiff explained to the police on 15 April 2016 as a potential witness or person of interest to them, ought to have been taken at face

in question reads: "the statement (sic) under oath obtained from witnesses."; the declaration of death, constitutional rights."

value and as a bar to its scrutiny when other information emerged which clearly pointed to the fact that he was among the people who attacked the deceased. This would be counterintuitive to the nature and purpose of crime investigation, which is to detect and solve crime.

[51] I make the finding that the defendant has discharged the onus of justifying the plaintiff's arrest. However, the lawfulness of the arrest does not automatically render the subsequent detention lawful – there ought to be justification for a person's detention. The police officer effecting the arrest must apply his or her mind to the circumstances relating to a person's detention, this includes applying his or her mind to the question of whether detention is necessary at all. This is trite law.⁶ In terms of the law, a person's detention after arrest by the police shall endure for a period of 48 hours.⁷

[52] I need only mention in this regard that it is not the case advanced by the plaintiff that his arrestor could have avoided his detention by other means of securing his attendance in court, and how they could do so. In any event, and for the sake of completeness, the powers of the police at the time, to release a person after arrest, were circumscribed by section 59 of the CPA, which provided:⁸

‘An accused person who is in custody in respect of any offence, other than an offence referred to in Part II or Part III of Schedule 2 may, before his or her first appearance in a lower court, be released on bail in respect of such offence by any police official of or above the rank of non-commissioned officer, in consultation with the police official charged with the investigation, if the accused deposits at the police station the sum of money determined by such official.’

⁶ *Hofmeyr v Minister of Justice and Another* 1992 (3) SA 108 (C); *Mvu v Minister of Safety and Security* 2009 (6) SA 82 (GJ) para 10.

⁷ See section 50(1)(c), in terms of which a period of 48 hours is allowed for detention after arrest.

⁸ Before its amendment by Act the Criminal ad Related Matters Amendment 12 of 2021, with effect from 05 August 2022.

[53] If it is accepted, as it must be, that murder is listed in schedule 1, as well as in Parts II and III of Schedule 2 of the CPA, it follows that Captain Mfokazi could not have avoided the detention of the plaintiff by exercising his powers under section 59 of the CPA.

[54] It is the finding I make that the first defendant has proven that the plaintiff's detention from 16 April to 18 April 2016 when he appeared in court for the first time was justified. I turn to consider whether the first and second defendants must be held liable for damages arising from the plaintiff's further detention after his first appearance in court until he was granted bail on 04 May 2016.

Liability for the post court appearance detention

[55] In order for the plaintiff to succeed in his claim against the first defendant for his detention after his appearance in court on 18 April 2016, it must be established that Captain Mfokazi caused his further detention by some culpable conduct on his part. In *De Klerk v Minister of Police*,⁹ Theron J, who wrote for the majority, held that if the defendant is to be held liable for the detention of the plaintiff post first court appearance, it must be shown that there is a sufficiently close causal link between a wrongful act or omission of the arresting officer and the subsequent detention after appearance in court.¹⁰

⁹ *De Klerk v Minister of Police* (CCT 95/18) [2019] ZACC 32; 2019 (12) BCLR 1425 (CC); 2020 (1) SACR 1 (CC); 2021 (4) SA 585 (CC) (22 August 2019), (*'De Klerk'*), para 83.

¹⁰ *Ibid*, para 60, 63.

[56] It was Captain Mfokazi's evidence that he did not oppose the plaintiff's release on bail as he had verified his residential address and was satisfied that he would not evade his trial. He further testified that the scheduling of an offence for bail purposes is the prerogative of the public prosecutor. Mr Sitsheke confirmed, in his testimony, that this was so. He conceded that the plaintiff's detention after he appeared in court was at the instance of the second defendant but denied that such detention was unlawful. I have no reason to reject the evidence of Captain Mfokazi. Therefore, there is no basis on which the first defendant must be held liable for the plaintiff's detention after his first appearance in court.

[57] The record of proceedings of 18 April 2016, in the Ntabankulu Magistrates' Court, indicates that the prosecutor who was seized with the docket on that day, determined that for the purposes of bail application, the murder charge against the plaintiff and his co-accused fell under schedule 6 of the CPA. However, on the face of the charge on the basis of which the plaintiff and his co-accused stood trial on 18 April 2016, no averment is made to the effect that the murder was committed in the execution of common purpose. It is trite law that this was required to be clearly stated in the charge.¹¹ The importance of that averment in the present context related to the decision that the court would make regarding the release of the plaintiff upon his appearance in that court.

[58] The charge against the plaintiff was relegated to Schedule 1 on 04 May 2016. This would not be surprising if, on that date, no averment appeared in the charge against the plaintiff and his co-accused, that the murder was committed in the execution of common purpose. Even assuming that it had been the intention of the prosecutor who enrolled the case against the plaintiff on 18 April 2016 to

¹¹ *S v Legoa* 2003 (1) SACR 13 (SCA) at para 20.

charge him and his co-accused of murder in circumstances where the perpetrators acted in execution of common purpose, it was open to her to amend the charge on the conditions permitted in terms of the CPA. However, no such amendment was effected until 04 May 2016.

[59] The importance of this observation is this – the application for bail in respect of an offence listed in Schedule 6, is determined in terms of section 60(11)(a) of the CPA. This section provides:

‘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.
...’

[60] Simply put, the implications of section 60(11)(a) are that the default position, for the purposes of an application for bail, is that for an offence listed in schedule 6, the court must order the detention of the accused until he discharges the onus of satisfying it that there are exceptional circumstances which justify his release in the interests of justice. There is no dispute between the parties that on the plaintiff’s first appearance in court, the prosecution having opposed bail, the case was postponed for formal bail application, to 28 April 2016. On this latter day, it was further postponed for the same reason to 04 May 2026.

[61] If the charge that the plaintiff stood trial for in the Ntabankulu District Court was as I have described it above when the matter was enrolled on 18 April 2016, it must be accepted that the prosecutor determined that he did not act in the execution of common purpose. I am fortified in this regard, by the fact that prefixed to the

charge that the prosecutor preferred against the plaintiff and his co-accused, is a statement to the effect that ‘it was read with the provisions of section 51(2) of the Criminal Law Amendment Act 105 of 1997’. The implications of this statement are that the murder was not one that was committed in the circumstances listed in schedule 6 of the CPA. It becomes difficult to comprehend why, then, the Magistrate was informed that bail was opposed as being one where the plaintiff and his co-accused faced an offence listed in Schedule 6 of the CPA.

[62] The public prosecutor exposed the plaintiff to a higher onus which, as apparent from the afore quoted provisions of section 60(11)(a), meant that the plaintiff would remain in custody until his application was heard. In this case, this was from 18 April 2016 until 04 May 2016. Regard must be had in this regard to the fact, as mentioned, that Mr Sitsheke conceded, that Captain Mfokazi had not opposed bail. In any event, Captain Mfokazi would have been the relevant person to place before court the necessary information to aid its decision on bail should it have become necessary for the prosecutor to oppose it as a Schedule 1 offence that it was.

[63] In the absence of the relevant averment from the charge that the prosecutor preferred against the plaintiff, that it was committed in the execution of common purpose, there cannot have been any justification for the opposition of bail on the grounds that she asserted on the plaintiff’s first appearance in court. She maintained those grounds until 28 April 2016, on which day the case was further postponed to 04 May 2016 for bail application in terms of section 60(11)(a) in keeping with her assertion in court that the murder charge fell under Schedule 6 of the CPA.

[64] For all these reasons, the plaintiff was unlawfully detained at the instance of the prosecution from 18 April until 04 May 2016. The second defendant is held liable for that detention. Even though the plaintiff contended that he was detained until 05 May 2016, the evidence adduced in these proceedings amply suggests that he was granted bail on 04 May 2016. The second defendant cannot be held liable for the plaintiff's incarceration for another day while he awaited payment of bail after it was granted on 04 May 2016. In the discussion that follows, I consider whether the plaintiff has succeeded in proving his claim for malicious prosecution.

The claim for malicious prosecution

[65] That the prosecutor who enrolled the matter on 18 April 2016 set the law in motion against the plaintiff is not in dispute. Equally not in dispute are the fact that the statements whose contents I have summarized elsewhere in this judgment were at the disposal of the prosecutor when the case was enrolled; and that charges were withdrawn against the plaintiff on 05 June 2017.

[66] To the extent that an allegation was made in the plaintiff's amended particulars of claim that Captain Mfokazi set the law in motion against him and in so doing he was actuated with malice, suffice it to say that not an iota of evidence was adduced to establish that Captain Mfokazi did more than to convey to the prosecutor the information and evidence they gathered in the course of their investigation of the murder. This is what would render Captain Mfokazi's conduct

malicious.¹² Nothing further need be said regarding the plaintiff's assertion in this regard.

[67] It is indeed so, that the decision to prosecute a person accused of crime can only be made after the prosecutor has interrogated the docket in its entirety and applied his/her mind properly. This is in keeping with his/her duty not to act arbitrarily but with objectivity.¹³ Reasonable and probable cause is based on an objective test, not on the subjective beliefs and motives of the prosecutor. It exists if a reasonable person would have concluded that the accused was probably guilty on the facts available to the prosecutor at the time.¹⁴ In *Beckenstrater v Rottcher and Theunissen*¹⁵ Schreiner JA put it this way:

‘[W]hen it is alleged that a defendant had no reasonable and probable cause for prosecuting, I understand this to mean that he did not have such information as would lead a reasonable man to conclude that the plaintiff had probably been guilty of the offence charged; if, despite his having such information, the defendant is shown not to have believed in the plaintiff's guilt, a subjective element come into play, and disproves the existence, for the defendant, of reasonable and probable cause.’

[68] The Supreme Court of Appeal has recently held, in *The National Director of Public Prosecutions v Sijoyi Robert Mdhlovu*,¹⁶ that a suspicion on reasonable grounds that the plaintiff is guilty of the offence suffices in initiating the

¹² *Relyant Trading (Pty) Ltd. v Shongwe and Another* (472/05) [2006] ZASCA 162; [2007] 1 All SA 375 (SCA) (26 September 2006), para 9.

¹³ *Patel v National Director of Public Prosecutions and Others* (4347/15) [2018] ZAKZDHC 17; 2018 (2) SACR 420 (KZD) (13 June 2018), para 27.

¹⁴ *Prinsloo and Another v Newman* 1975 (1) SA 481 (A), at 484B and 509B.

¹⁵ 1955 (1) SA 129 A 136 A-B; *Relyant Trading (Pty) Ltd. v Shongwe and Another* (472/05) [2006] ZASCA 162; [2007] 1 All SA 375 (SCA) (26 September 2006), para 14.

¹⁶ *Mdhlovu v National Director of Public Prosecutions* (677/2018) [2022] ZAMPMBHC 36; [2023] 1 All SA 458 (MM) (24 May 2022).

prosecution. The question is what a reasonable prosecutor would have done in light of the information available at the relevant stage.¹⁷

[69] For what it is worth, I must deal at this stage with the plaintiff's contention that the prosecutor failed to have regard to the fact that he was told by the police to go home after he made the statement dated 15 April 2016, and therefore there could not have been a reasonable basis to believe that he was guilty of murder. As it happened, in the course of further investigation into the murder of the deceased, the plaintiff was implicated in the murder by Sabata in the statement he made on 16 April 2016. It cannot be said that the prosecutor was in some way or at all estopped from having regard to such further evidence as would have emerged after the statement made by the plaintiff which, naturally, had an effect of exonerating himself from guilt. When regard is had to the contents of the statements that the prosecutor relied on in enrolling the case against the plaintiff, it is difficult to fathom how it can be said that she/he entertained no honest belief founded on reasonable grounds that the plaintiff was guilty of murder.

[70] A further nuance of the prosecutor's power to prosecute entails that before the trial commences, i.e. at the plea stage, the prosecutor is *dominis litis* and the case is still in his/her hands. The implications are that the court cannot prevent the prosecutor from accepting a plea of guilty from any accused on the charge as it stands, or on an alternative or permitted other charge.¹⁸ Furthermore, in terms of section 6 of the CPA, the prosecutor may, before the accused pleads to the charge, withdraw charges against that accused.

[71] It is not unheard of that where there are multiple accused, and one accused decides to plead guilty; the prosecution withdraws the charges against the rest of

¹⁷ Id, paras 20 and 21.

¹⁸ A Kruger - Hiemstra's Criminal Procedure, (Lexis Nexis) Issue 11, 2018 page [17-12].

the accused. In practice this is done in the context of informal agreements between the prosecution and the defence – an everyday experience and a tool to alleviate heavy court rolls in the lower courts. However, a withdrawal of the charges will not entitle the accused to an acquittal, as the prosecution is at liberty to re-instate them at a later stage. It can hardly be said that the withdrawal of the charges in those circumstances, in and by itself, amounts to an acknowledgment of the absence of evidence against a particular accused. I qualify this by saying that for the purposes of malicious prosecution, the withdrawal of the charge suffices as proof that the prosecution terminated in the plaintiff's favour.¹⁹

[72] In the present case, it is apparent from the record of proceedings in the Mt Frere Regional Court that on 10 April 2017, the case was postponed for trial to 05 June 2017. On that occasion, the State's witnesses, Tebogo Mokoko, Motlalepula Tsita, and Sabata, were present in court and warned to attend court on 05 June 2017. Fundile's plea of guilty was tendered on the date on trial, being 05 June 2017. From the statements that were contained in the docket when the prosecutor enrolled the case against the plaintiff on 18 April 2016, viewed wholistically, nothing suggests that as at 05 June 2017, the prosecutor had no reasonable suspicion that the plaintiff was guilty of murder. The plaintiff's contention of the absence of reasonable and probable cause to prosecute the plaintiff, and malice on the part of the prosecutor, cannot be sustained. The present case is a stark reminder of the fact that not all unsuccessful prosecutions are malicious.

[73] In the final analysis, in order for the plaintiff to succeed in the claim for malicious prosecution, all the requirements for a claim of malicious prosecution must be established. In this case, the plaintiff has failed to establish that the

¹⁹ *Else v Minister of Law and Order and Others* 1993 (1) SA 12 (C) at 14J-15A, 15F and 17-19.

prosecutor had no reasonable and probable cause to prosecute him; and that he acted with malice in prosecuting him. For this reason, the claim for malicious prosecution must fail.

Quantum of damages

[74] The determination of an appropriate award of damages is a matter for the court's discretion. The court is enjoined to consider all available facts, based on what the court considers to be fair in the circumstances of a particular case. The primary purpose of an award of damages is not to enrich the aggrieved party, but to offer him or her some much-needed *solatium* for his or her injured feelings.²⁰ The Constitutional Court, in *Mahlangu and Another v Minister of Police*²¹, has said that damages are awarded to deter and prevent future infringements of fundamental rights by organs of state. They are a gesture of goodwill to the aggrieved and they do not rectify the wrong that took place.²²

[75] The unlawful deprivation of a person's liberty is, in itself, a serious injury which constitutes an impermissible infringement of his/her constitutional rights to freedom and security of the person, and to human dignity.²³ The conduct of the public prosecutor in the Ntabankulu District Court, in unlawfully causing the detention of the plaintiff upon his appearance in court on 18 April until 04 May 2016, must be viewed in this light. In determining the *quantum* of damages to be

²⁰ *Minister of Safety and Security v Tyulu* 2009 (5) SA 85 (SCA); *Mahlangu and Another v Minister of Police* (CCT 88/20) [2021] ZACC 10; 2021 (7) BCLR 698 (CC); 2021 (2) SACR 595 (CC) (14 May 2021).

²¹ *Mahlangu and Another v Minister of Police* (CCT 88/20) [2021] ZACC 10; 2021 (7) BCLR 698 (CC); 2021 (2) SACR 595 (CC) (14 May 2021).

²² *Ibid* para 50.

²³ *Motladile v Minister of Police* (414/2022) [2023] ZASCA 94 (12 June 2023) para 22; *Rahim v The Minister of Home Affairs*, (965/2013) [2015] ZASCA 92; 2015 (4) SA 433 (SCA); [2015] 3 All SA 425 (SCA) (29 May 2015).

awarded for the violation of a person's liberty, evidence of the conditions under which a person was arrested and detained plays a significant part.²⁴

[76] The plaintiff's evidence was that he was detained in unhygienic conditions, he was deprived of his treatment for his stab wound and it became septic. He was mistreated by other inmates, and he was also raped. He had never been detained before. That the plaintiff was raped is his *ipse dixit*. No evidence was adduced that he reported the rape. Captain Mfokazi disputed the veracity of this allegation, stating that if it happened, it would have been reported. I hold the view that rape is a serious violation of a person's dignity and person. It is no small matter, regardless of the gender of the victim. However, the difficulty I have is the fact that the plaintiff did not specify any date on which the rape took place. This is important, in that he had the option of reporting the rape to the court before which he appeared from 18 April to 04 May 2016.

[77] Even though the plaintiff testified that he was a in the process of registering as a student at the University of Zululand when he was arrested and had to cancel his registration while the case against him was proceeding, he produced no confirmation of this fact. With that said, I have taken into consideration the conduct of the prosecutor who, as I alluded to in the preceding paragraphs, unlawfully caused the plaintiff's detention for 16 days by conveying to the court incorrect information regarding the scheduling of the offence for bail application purposes.

[78] Previous awards are not meant to be a benchmark of the amount of damages to be awarded in a given case, otherwise, the court's discretion in determining an

²⁴ *Zealand v Minister for Justice and Constitutional Development and Another* (CCT54/07) [2008] ZACC 3; 2008 (6) para 40-41.

appropriate award of damages would be impermissibly fettered.²⁵ As held in *Minister of Safety and Security v Tyulu*²⁶ while it is always helpful to have regard to previous awards, such an approach, if slavishly followed, can prove to be treacherous. The correct approach is to have regard to all the facts of the particular case and to determine the quantum of damages on such facts.²⁷

[79] In *Motladile v Minister of Police*²⁸, an award by the court *a quo* of R60 000.00 for detention for four nights was increased on appeal to R200 000.00. The appellant in that case gave testimony of the manner in which the conditions of his detention affected him and his family. In *Nyanya v Minister of Police*²⁹, the plaintiff was awarded R160 000.00 for detention for three and a half days. In *Mtola v Minister of Police*³⁰, the Full Court of this Division on appeal awarded the plaintiff R125 000.00 for his unlawful detention for 5 days. In *Diljan v Minister of Police*³¹, on appeal, the Plaintiff was awarded R120 000.00 for a period of 3 days' detention. In *Minister of Police v Mjali and Others*³² the Full Court of this Division awarded R100 for arrest and detention a period of two days. In *Sabisa and Another v Minister of Police*,³³ an amount of R400 000.00 was awarded where the plaintiffs were detained for eight days.

[80] I acknowledge the fact that the plaintiff's detention took place a little more than 9 years ago. However, I must have regard to the depreciating value of money

²⁵ *Spannenberg and Another v Minister of Police*²⁵ (2993/2019) [2022] ZANWHC 4 (24 February 2022) para 20.

²⁶ 2009 (5) SA 85 (SCA).

²⁷ *Ibid*, para 26.

²⁸ *Supra*, footnote 22.

²⁹ *Nyanya v Minister of Police* (3577/2013) [2019] ZAECGHC 136; 2020 (2) SACR 550 (ECG (12 December 2019)).

³⁰ *Mtola v Minister of Police*³⁰ (CA 23/2016) [2017] ZAECMHC 56 (29 June 2017).

³¹ *Diljan v Minister of Police* (746/2021) [2022] ZASCA 103 (24 June 2022).

³² *Minister of Police v Mjali and Others* (CA 91/2022) [2023] ZAECMHC 62 (7 November 2023).

³³ *Sabisa and Another v Minister of Police* (2889/2016) [2023] ZAECMHC 30 (20 June 2023.)

due to the effects inflation. As held in *SA Eagle Insurance Co Ltd v Hartely*,³⁴ the Court's evaluation of an appropriate award must take into account the current day value of currency and not at the earlier time. For the purposes of the instant case an award that I consider appropriate must be in terms of the value of currency in 2025 being the time of assessment of the plaintiff's damages. The award I make below, is what I consider to be fair in the present circumstances.

Costs

[81] The general rule is that the successful litigant must be awarded its costs, unless there are exceptional circumstances warranting a deviation from this rule. In this case, there are no such circumstances. Costs must follow the result. Mr Xozwa submitted that costs should be on scale B referred to in Uniform Rule 67A. He made no further submissions to substantiate this assertion. This Full Court of this Division, in *Khuza and Another v Khanyiwe*,³⁵ observed that the default position set by rule 67A is that costs will be recovered on scale A unless there is justification for the application of a higher scale. The complex nature of the case will be once such justification. This is not an unusually complex matter. There is no reason why the losing party should pay costs on a higher scale.

Order

[82] In the result, I make the following order:

1. The plaintiff's claims against the first defendant for unlawful arrest and detention; and his claim against the second defendant for malicious

³⁴ 1990 (4) SA 833 (A) at 841D-E.

³⁵ *Khuza and Another v Khanyiwe* (5009/2018) [2025] ZAECHMHC 15; [2025] 2 All SA 463 (ECM) (4 March 2025), para 27.

prosecution, are dismissed, with costs, on scale A referred to in Uniform Rule 67A.

2. The claim against the second defendant for the plaintiff's unlawful detention from 18 April to 04 May 2016, is upheld, with costs, on scale A referred to in Uniform Rule 67A.
3. The second defendant shall pay to the plaintiff, within 30 days from the date of this judgment, an amount of R600 000.00 for damages suffered by the plaintiff resulting from his unlawful detention at the instance of the public prosecutor from 18 April to 04 May 2016.
4. The damages award shall attract interest at the prescribed legal rate calculated from a date fourteen (14) days after the date of judgment to date of payment.

L RUSI
JUDGE OF THE HIGH COURT

Appearances:

For the plaintiff : *Adv. M Xozwa*
Instructed by : *S Vapi Inc Attorneys, Mthatha*

For the 1st and 2nd defendants : *Adv. CN Qikila*

Instructed by : The Office of the State Attorney, Mthatha

Dates heard: 03, 04 05, 18 February 2025, and 14 March 2025.

Date delivered: 02 September 2025