

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

CASE NO.: 612/2019

Reportable: Yes

In the matter between:

ZIENEDIEN NURI HASSIEN

Plaintiff

and

**MINISTER OF POLICE FOR THE
REPUBLIC OF SOUTH AFRICA**

1ST Defendant

**NATIONAL DIRECTOR OF PUBLIC
PROSECUTIONS**

2nd Defendant

**MINISTER OF JUSTICE AND CORRECTIONAL
SERVICE FOR RSA**

3rd defendant

**THE HONOURABLE MISS MFOBO
(THE REGIONAL COURT MAGISTRATE,
MTHATHA)**

4th Defendant

JUDGMENT

ZONO AJ:

Introduction

- [1] He who claims proves, and not he who denies¹. The basic rules governing the incidence of onus of proof have been set out in the case of *Pillay v Krishna* referred to above in the following way:

“(a) if one person claims something from another in a court of law, then he has to satisfy the court that he is entitled to it.

(b) Where the person against whom the claim is made is not content with a mere denial of that claim, but sets up a special defence, then he is regarded quo ad that defence, as being the claimant: for his defence to be upheld he must satisfy the court that he is entitled to succeed on it.

And

(c) He who asserts, proves and not he who denies, since a denial of a fact cannot naturally be proved provided that it is a fact that is denied and that the denial is absolute.”

- [2] Central to this matter is the parties’ duties to discharge their duties of proof. Antecedent to the issue of onus of proof, I deal with parties’ cases and evidence.

- [3] The plaintiff instituted the instant action for damages arising from plaintiff’s arrest and detention that apparently occurred on 10th August 2013 at Bhongweni Location of Zimbane Administrative Area, Mthatha. The second claim relates to the plaintiff’s prosecution both in the district and the regional court, Mthatha. The plaintiff asserts that in both claims defendant’s conducts were malicious. The precise assertion is that the plaintiff was maliciously arrested by the members of the South African Police Service (SAPS) hence citation of the first defendant². He further asserts that the first, second and fourth defendants set the law in motion,

¹ *Pillay v Krishna and another* 1946 AD 946 at 951-2.

² Section 2 of State Liability Act 20 of 1957 as amended.

thereby exposing him to malicious prosecution. In a nutshell they are responsible for his prosecution which he considers it to be malicious.

[4] It is prudent to mention other historical steps of the case. Initially the plaintiff instituted a claim for unlawful arrest and detention on 08th February 2019. Upon filing of the first defendant's special pleas relating to the prescription and non-compliance with section 3 of Act 40 of 2002 (failure to give statutory notice) the claim was amended to be a claim of malicious arrest and detention. Consequently, a claim of unlawful arrest and detention was withdrawn together with first defendant's special pleas. My views about the prescription of the claim relating to malicious arrest are of less significance³.

[5] The parties agreed that the plaintiff bears the onus of proof and duty to begin in all the claims. The plaintiff tendered his evidence in an attempt to discharge his duty and onus. He was the sole witness to support his case.

[6] The plaintiff testified that on 10th August 2013 he was running a spaza shop in Mr B[...]’s premises at Zimbane Administrative Area, Mthatha. On the said day he was approached by Mr B[...] advising him that he had raped his child and he denied that. Mr B[...] then told the plaintiff that he would be arrested for raping his child and the plaintiff continued to deny having committed that crime. Mr B[...] requested him to give him R20 000.00 for what he did. Plaintiff apparently refused. Twenty to thirty minutes later the police officers arrived and sought confirmation if he was Julius and the

³ Section 17 of Prescription Act no 68 of 1969.

plaintiff confirmed. He was instructed to come out of the shop as he was being arrested and he obliged, but still denying that he committed the offence. He was thereafter taken to Central Police Station. At the Police Station finger prints were taken and he was then detained in the police cells until 13th August 2013 when he first appeared in court. On 13th August 2013 the matter was postponed for plaintiff's interpreter. Only when the interpreter became available that the plaintiff was advised by the court about the charges he was facing. I may interpose and state that the plaintiff is person of Ethiopian origin. He required even in this court an *Amharic* Interpreter.

[7] The Plaintiff was informed of the charges he was facing: that he is facing charges of rape of a minor child, and he denied having committed such an offence. He thereafter appeared four times in the district court and on the fourth time the matter was transferred to the regional court. In the regional court the matter proceeded before Ms Mfobo, who is a regional court Magistrate. According to him the child testified that she was raped by the plaintiff while the doctor who examined the child testified that the child was not raped. The plaintiff testified further that he was convicted by the fourth defendant for an offence (rape) he did not commit for twelve (12) years in prison. He thereafter appealed the judgment and the regional court judgment was set aside. His appeal was successful.

[8] In cross examination by Adv Simoyi SC, Counsel for the first defendant (Police) the Plaintiff confirmed that the police officer who arrested him did not know him and did not have personal issues with him. When the police officer received the complaint, he attended to it and when he arrived at the

plaintiff's place, which is the same place where the alleged rape took place, the arresting officer met with Mr B[...], the father of the child allegedly raped, who told the arresting officer that the plaintiff was the suspect. He further confirmed that without the information from B[...], the police would not have acted or arrested the plaintiff. He also confirmed that he was arrested because of the information received from Mr B[...] that he raped the child. He could not dispute that the statements were taken at the police station from Mr B[...] and the child. The plaintiff was charged at the police station and the docket was taken to the prosecutor for decision. It was not the role of the police to take a decision to prosecute or not. The plaintiff confirmed that he was taken to court and applied for bail which was refused.

[9] Under cross examination by Adv Ncalo, Counsel for the second defendant (NPA) the plaintiff re-emphasized that he was arrested, prosecuted and ultimately convicted for a crime he did not commit. Doctor's report stated that the child was not raped. The prosecutors ought not have prosecuted on the basis of the information available in the docket. He stated that the prosecution was unfair and baseless with the resultant judgment being unlawful as that was confirmed by the success of his appeal. He repeated his testimony when cross examined by Adv Matanda, Counsel for the third and fourth respondent.

[10] Ideally it would be to this evidence I would have to look to determine if the plaintiff had made out a *prima facie* case on his claim for malicious arrest and detention against the first defendant; malicious prosecution

against the first and second, the fourth defendant⁴. However, the defendants called their evidence to support their respective cases.

[11] The first defendant who is cited on the basis of vicarious liability for the wrongs of the police called the evidence of Mr Khulebona Isaac Mkhamkelwa who was a Warrant Officer in the SAPS before his retirement. On 10th August 2013 he was stationed at Mthatha Central Police Station performing charge office duties (CSC), which also entails attending complaints outside of the police station. When he was on duty on that day he received a radio control call instructing him to attend a complaint at Mr B[...]’s premises at Zimbane Administrative Area, which he did together with another female police officer.

[12] On their arrival at Mr B[...]’s place, Mr B[...] advised them *inter alia* that he left his female child with the plaintiff when he was going to town. Having come back from town, Mr B[...] offered supper to the female child, Q[...] which she did not take and she complained of pain. He inspected the child and observed that she sustained some abrasions or bruises which led to a suspicion of sexual violation. At that point Mr Mkhamkelwa, the police asked the whereabouts of the plaintiff.

[13] On his arrival at the plaintiff, when he was seeing him for the first time he introduced himself and informed the plaintiff of Mr B[...]’s accusations relating to sexual violation and then advised him that he was arresting him. He then took him to the police station where he ultimately detained him.

⁴ Setting the law in motion: according to particulars of claim as amended.

He testified that the child was taken to the hospital for medical examination by a female police officer.

[14] Mr Mkhamekwa categorically testified that he arrested the plaintiff because he was pointed out by Mr B[...], the child's father. He further testified that he detained the plaintiff because he committed rape, for that reason he could not leave him. Lastly he testified that he was protecting the plaintiff from community members; he could be injured by those members. Additionally, he testified that the purpose of the arrest was to take the victim to the hospital and that a case be opened. He took into account the fact that the plaintiff is a foreign national who is only a tenant where he is staying. He made a point that he has a power to arrest and detain but he does not have a power to release the suspect. He concluded by saying he did not have malicious intent when arresting the plaintiff.

[15] Under cross examination by Ms Ncalo, the police officer testified that he arrested the plaintiff because there was a case opened against him. Under cross examination by Mr Qitsi SC he stated that he did not at all suspect the plaintiff of any wrong doing; it was Mr B[...] who suspected the commission of an offence. And because of Mr B[...]’s suspicion he arrested the plaintiff. However, he stated that he had no bad blood with the plaintiff. He does not know who charged the plaintiff. He confirmed that he never interviewed the child as the child was too young. It later turned out that the child was approximately six to seven years old. The first defendant closed his case.

[16] The second defendant called the evidence of Noluvo Msekela who is a regional court prosecutor. She testified that she did not enrol the matter or prosecute the plaintiff in the regional court. She did not take a decision to prosecute. Mr Dondashe was the prosecutor in the plaintiff's matter in the regional court. However, she testified that she perused the transcribed record and the docket and concluded that any reasonable person would believe that there was a *prima facie* case against the plaintiff. She refuted that there was malicious prosecution of the plaintiff. As a consequence of the prosecution the plaintiff was convicted, therefore the prosecution did not fail, it succeeded. This captures the evidence of the second defendant.

[17] The fourth defendant, Ms Noxolo Mfobo gave evidence also on behalf of the third defendant who is cited on the basis that she is vicariously liable for the delicts committed by the employees of her Department. She presided over the matter of the plaintiff in the regional court. She did not know the plaintiff at the time the criminal matter served before her. She saw the plaintiff for the first time when he appeared before her- she found the plaintiff guilty on the basis of the evidence that served before her.

[18] She testified that Mr B[...], the child's father, and the child testified before her. It transpired that the Doctor who examined the child also gave evidence in the regional court. According to the fourth defendant, the child testified in the regional court that the plaintiff sexually penetrated her. She further stated that the child father testified before her that he saw something oozing from the child's vagina and the father called local woman and the child implicated the plaintiff. The fourth defendant confirmed that the doctor testified before her that child's hymen was intact, but stated that it

was red and that gave her a belief that there was an interference with the child's private parts. The fourth defendant relied on the evidence of the three witnesses. She refuted that she was malicious when she was convicting and sentencing the plaintiff. She denied that she set the law in motion as pleaded in the plaintiff's particulars of claim.

[19] Under cross examination she confirmed that she was aware of the J88-medical report stating that the hymen was intact. However, she believed that there was interference with the child's private parts and she therefore came to a conclusion that there was some form of penetration however slight. She found solace for that conclusion on the fact that the child had an infection on her private parts. She considered all the evidence before her and found that the state had proved its case beyond reasonable doubt. She acknowledged that her judgment was overturned on appeal. She refuted that the mere fact that the hymen was intact means that there was no penetration. She stated that the swelling and redness showed that there was tempering with the child's private part. She declined to comment on the oral testimony of the Doctor who examined the child. In conclusion she flatly denied that she instigated or set the law in motion or acted with malice.

[20] In what follows I discuss the causes championed by the plaintiff against each of the defendant's. It is apposite to restate those causes and how they relate to the respective defendants. The first defendant, the Minister of Police is sued on the basis of vicarious liability for the alleged malicious arrest and detention of the plaintiff on 10th August 2013. He is further sued for the malicious prosecution that was allegedly instigated at the instance

of the employees of his department. The second defendant, the National Director of Public Prosecutions, is sued on the basis that she is vicariously liable for the alleged setting law in motion and instigation of criminal proceeding by a member or members of prosecuting authority against the plaintiff. The third defendant is cited as an employer of all Magistrates and on the basis that she is vicariously liable for the delicts committed by the Magistrates performing their work within the course and scope of their employment with the third defendant's department. The fourth defendant is cited as the presiding judicial officer who convicted and sentenced the plaintiff thereby setting the law in motion.

Malicious arrest and detention: First defendant

[21] Under this heading the issue for determination is whether the members of the first defendant have intentionally, maliciously⁵ and without reasonable and probable cause⁶ instigated the arrest or detention of the plaintiff by the proper authorities⁷. In malicious arrest and detention, the plaintiff must allege and prove the following requirements for his claim to succeed:

- “ (a) *The defendant instigated the arrest;*
- (b) acted without reasonable and probable cause;*
- (c) had animus iniuriandi; and*
- (d) was actuated by malice”⁸.*

[22] In *Nontsele*⁹ the SCA remarked thus:

“[37] Malicious deprivation of liberty occurs when lawful restraint is inflicted upon a person's liberty by means of an act of law, unjustifiably, with an intention

⁵ *Prnsloo v Newman* 1975 (2) ALL SA 89; 1975(1) SA 481 AD 491.

⁶ *Thompsn v Minister of Police* 1971 (1) ALL SA 534 E; 1971 (1) SA 371 E at 373.

⁷ *Heyns v Venter* 2003 (1) ALL SA 1 (T); 2 (3) SA 2000 (T).

⁸ LAWSA, Vol 15, Part 2, Page 213 Para 349.

⁹ *Minister of Police v Nontsele* 2025 (1) ALL SA 44 SCA Para 37.

to injure, and with improper motive. Neethling and Potgieter describe it as follows:

“Unlike wrongful deprivation of liberty, where the result complained of must have been caused without justification by the defendant himself or some person acting as his agent or servant, the conduct in the case of malicious deprivation of liberty takes place under the guise of a valid judicial process. The defendant makes improper use of the legal machinery of the state, either through a policeman acting on his own discretion or through a valid warrant, in depriving the plaintiff of his liberty. The actual deprivation of liberty is consequently not carried out by the defendant himself or by his servant or agent, but by the machinery of the state through a valid judicial process.”

As a result, the plaintiff will have to prove the following in order to succeed in an action based on malicious deprivation of liberty: that the defendant instigated the deprivation of liberty; that the instigation was without reasonable and probable cause; and that the defendant acted animus iniuriandi. These requirements are similar to those of malicious prosecution.’

[23] Like in the case of malicious prosecution the plaintiff bears the onus to prove all the requisites of the claim of malicious arrest and detention. They are inextricably linked to one another; and failure to prove one requirement often leads to a dismissal of plaintiff’s claim¹⁰. The plaintiff must prove all the elements of malicious deprivation of liberty. As the word denotes deprivation must be with malice, and that it must be without reasonable and probable cause. I intend to anterially deal with those two requisites before all else.

[24] Malice means either:

(a) that the defendant lacked an honest belief in the fact that the plaintiff has committed the wrong; or

¹⁰ **Funani v National Director of Public Prosecutions** (1296/2016) [2019] ZAECHMHC 71 (5 November 2019) Para 24.

(b) that the defendant had an improper motive in the sense of an absence of the purpose for which the law authorised the arrest¹¹.

The first element of the definition (one mentioned in (a) above) is alternative to the second element of the definition (one mentioned in (b) above) and that is clear from the use of the conjunction “OR”, which denotes that the presence or existence of one of the elements is sufficient to find liability against the defendant. It must be proved that there has been absence of an honest belief in the guilt of the accused.

[25] The plaintiff has been consistent in his testimony that he was arrested for a crime he did not commit and he further stated that the Doctor’s evidence clearly demonstrated that he did not rape the child or the child was not raped. During the plaintiff’s cross examination by Adv Simoyi SC, Counsel for the first defendant it became clear from his questions which were confirmed by the plaintiff that it is the duty of the police to investigate when there is an alleged crime spotted to them. Adv Simoyi SC further suggested to the plaintiff that if the police fail to investigate the reported crime, that becomes a very serious issue against the police. However, nowhere it is suggested that such suggested investigation was conducted prior to the arrest of the plaintiff.

[26] What makes matters worse is the evidence of the arresting officer Mr Mkhamkelwa. He testified that he received a radio control call instructing him to attend at Mr B[...]’s place and he was not given the details of the complaint. From this piece of testimony, it is plain that the arresting officer was not only without details that would enable him to lawfully arrest, he

¹¹ LAWSA, Vol 15, Part 2, Page 213, Para 350.

also was not in possession of the police docket containing the necessary statements taken from the victim (the child) and her father, Mr B[...] the complainant. He expressly testified that statements were taken from the hospital by his female colleague who was in his company when they were heading to Mr B[...]’s place to arrest the plaintiff. The female colleague attended at the hospital after the plaintiff was arrested, processed and detained.

[27] Jones J¹² observed as follows:

“..... It seems to me that in evaluating his information a reasonable man would bear in mind that the section authorises drastic police action. It authorises an arrest on the strength of a suspicion and without the need to swear out a warrant, i.e. something which otherwise would be an invasion of private rights and personal liberty. The reasonable man will therefore analyse and assess the quality of the information at his 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 but not certainty. However, the suspicion must be based upon solid grounds. Otherwise, it will be flighty or arbitrary, and not a reasonable suspicion.”

[28] The arresting officer categorically stated in his evidence in chief, as a reason for his arrest of the plaintiff, that he arrested the plaintiff because he was pointed by Mr B[...] as a person who abused his child. He further testified that he was protecting the plaintiff from the community members as he harboured a view that the plaintiff could be injured by the community members. In the same vain he testified that he arrested the plaintiff because he has powers to arrest and detain the suspect and that he did not have power to release the suspect. He testified that he detained the plaintiff so

¹² *Mabona and another v Minister of law and order and others* 1988 (2) SA 654 (SE) at 659 E-H.

that the victim could be taken to hospital and thereafter a case could be opened. It is clear from this reason that no case had been opened at the time of the arrest. Another startling reason is that he arrested the plaintiff because he is a foreign national staying where he was staying on tenancy basis. He lastly stated that he could not leave the plaintiff because of the accusation of rape. These reasons are hardly acceptable to justify deprivation of personal liberty.

[29] Under cross examination by Adv Ncalo, the arresting officer cited only two reasons for his arrest of the plaintiff, *to wit*, that he arrested the plaintiff because there was a case opened by Mr B[...] against the plaintiff and that he wanted to protect the plaintiff. When asked about the procedure to follow when arresting a suspect, the arresting officer testified that he reads out his or her rights and when he arrives at charge office he opens the case and register the suspect in the records and detain him. It must therefore be accepted that plaintiff's arrest and detention occurred without a case having been opened, statements having not been taken and also without a case docket.

[30] There were serious discrepancies in the arresting officers evidence. The internal contradictions are prevalent in the arresting officers evidence about the opening of the criminal case, namely, that the statement were only taken at the hospital after plaintiff's arrest and that he opened the case, process (register him in the records) and detained him *versus* the fact that he arrested the plaintiff because there was a case opened by Mr B[...]. There was no basis laid for the assertion that he arrested the plaintiff to protect him. Arresting plaintiff because he is of foreign origin is discriminatory

and can never constitute an acceptable reason for the arrest. Discrimination and prejudice against people from other countries as grounds of arrest are highest forms of ulterior and improper motive.

[31] In Stellenbosch¹³ Nienaber JA held:

“On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So too on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court’s finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness’s candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness’s reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party’s version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court’s credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail.”

Arresting officer’s evidence was not credible, his conduct and demeanor in the witness box was not satisfactory as he was overly confident and exaggerative at times.

¹³ *Stellenbosch Farmers’ Winery Group Ltd and Another v Martell and others* 200 (1) SA 11 (SCA) at Para 5.

[32] During cross examination by Adv Qitsi SC, the arresting officer confirmed that he arrested the plaintiff because he was suspected [of having committed an offence] by Mr B[...]. He boldly stated that it was not for him to suspect, it was for Mr B[...], his was to arrest. Reverting back to the first element of malice, *to wit, honest belief in the fact that the plaintiff had committed the wrong,*” it is crystal that the arresting officer did not have the belief at all that the plaintiff committed the rape¹⁴. This renders unnecessary to deal with the second and alternative element of the definition of malice.

[33] Malice is both subjective and objective. Both tests are satisfied in this matter. Malice in the sense of absence of an honest belief coincides with want of reasonable and probable cause in the subjective sense. It is objective in that the arresting officer had no reasonable cause for arresting the plaintiff in that he did not have such information as would lead a reasonable person to conclude that the plaintiff had probably been guilty of the offence¹⁵.

[34] Elements or components of malice are the same as or coincide with elements or definition of absence of reasonable and probable cause. Absence of reasonable and probable cause means either:

“(a) that subjectively the defendant had no honest belief that the plaintiff had committed an unlawful act for which he or she could have been arrested.

(b) that objectively on the facts and the law as known to the defendant at the time a reasonable person could not have concluded that the plaintiff had committed such unlawful act¹⁶”.

¹⁴ *Lefdahl v Dredge* 1910 CPD 452 at 456.

¹⁵ LAWSA, Vol 15, Part 2, Page 201, Para 326.

¹⁶ LAWSA, Vol 15, Part 2, Page 214, Para 351.

If either element is proved the defendant would have acted without reasonable and probable cause¹⁷. I however, find that both these elements were satisfied in this case. Accordingly, plaintiff's case must succeed on the claim of malicious arrest of the plaintiff at the instance of the first defendant. Plaintiff's case is probably true¹⁸. I shall deal with quantum later in this judgment.

- [35] The plaintiff was arrested on 10th August 2013. His first appearance was on 13th August 2013, which period is a period within 48 hours of his arrest. During the first appearance the matter was postponed for “*Amharic*” interpreter. The plaintiff was then dealt with by the court and the prosecution. No role appears to have been played by the members of the first defendant after the plaintiff's first appearance in court. There is no evidence that the arresting officer foresaw that the plaintiff would be remanded further in custody¹⁹. Accordingly, the first defendant's liability for plaintiff's malicious arrest is limited to the time of the plaintiff's detention until the date of his first appearance before the Magistrate, which is 13th August 2013. It is well established that the purpose of arrest is to bring the suspect to court for trial²⁰. There is no evidence that the arresting officer or investigating officer exceeded the purpose of the arrest. Accordingly, the plaintiff spent three (3) nights in custody at the instance of the police.

¹⁷ *Beckenstrater v Rottecher and Theunissen* 1955 (1) ALL SA 146 (A); 1955 (1) SA 129 (AD) at 136.

¹⁸ *National Employers General Insurance Company v Jagers* 1984 (4) SA 437 at 440 E-G.

¹⁹ *De klerk v Minister of police* 2021 (4) SA 585 (CC); 2020(1) SACR (1) (CC); 2019 (12) BCLR 1425 (CC) Para 76-77.

²⁰ *Minister of Safety and Security v Sekhoto* 2011 (1) SACR 315 SCA Para 41.

[36] The arresting officer foresaw the possibility of the plaintiff being subjected to injury to his right to personal liberty²¹ and his right to dignity²² but nonetheless reconciled with that possibility²³. Arresting a person when there is no honest belief that such person has committed the offence is definitely injurious. An arresting officer brazenly stating that it was not for him to suspect that the plaintiff committed an offence clearly spells out an intention to injure. Even at the lower level of unlawful arrest, the arresting officer must at least have a reasonable suspicion that an offence referred to in schedule 1 has been committed²⁴.

Malicious Prosecution: First to Fourth Defendant

[36] In order to succeed with a claim for malicious prosecution, the plaintiff must allege and prove: -

“(a) that the defendants set the law in motion in that it instigated and instituted the proceedings;

(b) that the defendants acted without reasonable and probable cause;

(c) that the defendants acted with malice (or animus injuriandi);

(d) that the prosecution has failed”²⁵.

[37] Apparently, all the defendants are sued under this head. The South African Police Service (Minister of Police), National Prosecuting Authority and the Regional Court Magistrate (Minister of Justice and Correctional Services)

²¹ Section 12(1) of the Constitution.

²² Section 10 of the Constitution.

²³ *Dolus Eventualis*.

²⁴ Section 40(2)(b) of Criminal Procedure Act 51 of 1977 as amended.

²⁵ *The Minister of Justice and Constitutional Development v Moleko* 2008 (3) ALL SA 47 SCA Para 8.

are herein sued for malicious prosecution. In what follows I deal with the amended particulars with a view to demonstrate this unusual situation.

[38] With regard to the first and second defendants the plaintiff avers:

“7.4 Had it not been for the plaintiff’s malicious arrest, detention and malicious prosecution on the part of the employees of both first and second defendants of plaintiff without just and probable cause as well as the Prosecutors conduct of confirming charges preferred against plaintiff despite lack and absence of or minimum of evidence upon which the plaintiff could have convicted both police and prosecutor(s) are liable for plaintiff’s malicious prosecution.

.....

7.5.3 The Prosecutor who also confirmed the charges and enrolled the matter did not apply her mind to the content of the docket in that:

(a) Despite lack or absence of a minimum of evidence upon which the plaintiff could have been convicted, she just enrolled the case to be postponed;

(b) She failed in her duty to act objectively and protect the public interest particularly the interest of the plaintiff;

.....

12. The action of both the defendants of setting the law in motion were without any reasonable and probable cause, they were actuated by malice aimed at injuring the plaintiff’s reputation and dignity, eventually the prosecution on the part of both first and second defendant, plaintiff suffered damages.

.....

16.1 the police and prosecutor(s) set the law motion by institution or instigating the proceedings against the plaintiff;

16.2 The police and prosecutor(s) when instituting or instigating these proceedings had no reasonable or probable cause;

16.3 Both the police and prosecutors(s); were actuated by malice, with the intention to injure the plaintiff’s dignity and reputation.

16.4 As a result the case against the plaintiff failed” (sic).

[39] The third defendant is sued on the basis that she is vicariously liable for the wrongs or omission of the employees of the department of justice and

correctional services²⁶. The fourth defendant is said to have been acting within the course and scope of her employment with the third defendant. The third and fourth defendants are connected to the claim of malicious prosecution by the following averments:

18.

As a result of the conviction and sentence by the fourth defendant, plaintiff had to be incarcerated for a very long time, four (4) years to be precise.

19.

Fourth defendant in doing so set the law in motion, when there was no reasonable and probable cause and was actuated by malice in doing so in that, in appeal, 4th defendant's conviction and sentence and sentence were set aside, which means therefore the plaintiff was successful and the prosecution failed.

20.

Fourth defendant in her conduct was working within the course and scope of his employment with the third defendant. As a result of the malice on his part of third defendant of the instance of fourth defendant plaintiff suffered damages" (sic).

First Defendant: Malicious Prosecution

[40] Thereanent to the claim for malicious prosecution the first defendant pleads as follows:

"20.1.6 The first defendant pleads that the decision to prosecute the plaintiff was taken by the second defendant on the basis of information contained in the case docket and does not affect him.

20.1.7The first defendant further pleads that the plaintiff's case was postponed several times for a formal bail application which was ultimately refused at the instance of the judicial officer because there were no facts which justified the granting of bail.

2.1.8The further detention of the plaintiff was justified and in accordance with the law" (sic).

²⁶ Section 2 of State Liability Act 20 of 1957 as amended.

[41] The first defendant identified these facts with a view to demonstrate that provisions of section 20 of the National Prosecuting Authority Act 32 of 1998 (the Act) are applicable and operative. It is not necessary to specify in the pleading the statutory provision relied upon. It is enough that the facts alleged by the litigant clearly show that the statutory provision is relevant and operative.²⁷ Chapter 4 of the Act provides for powers to institute and conduct of criminal proceedings. Section 20(1) of the Act provides:

“The power, as contemplated in section 179(2) and all other relevant sections of the Constitution, to-

(a) institute and conduct criminal proceedings on behalf of the state;

(b) carry out any necessary functions incidental to instituting and conducting such criminal proceedings; and

(c) discontinue criminal proceedings; vests in the prosecuting authority and shall, for all purposes, be exercised on behalf of the Republic”. Both the

Constitution and the Act provides for prosecutorial decisions and conduct of criminal proceedings.

[42] Plaintiff’s evidence does not deal specifically with the claim of malicious prosecution against the first defendant. It clearly does not link the conduct of the police to the alleged malicious prosecutions. He who alleges proves²⁸. The plaintiff has failed to discharge this duty in respect of malicious prosecution against the first defendant. It admits of no doubts that the police arrested the plaintiff on 10th August 2013 and he appeared in court on 13th August 2013. No role has been disclosed to have been played by the members of the first defendant in the prosecution of the

²⁷ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) Para 27.

²⁸ *Pillay v Krishna and another* 1946 AD 946 at 951-2.

plaintiff. First defendant's members did not identify with the prosecution²⁹. Plaintiff's Counsel, Mr Qitsi SC was invited to make submissions in court in the light of the provisions of section 20 of the Act and he was unable to do so, but promised to deal with that aspect in the plaintiff's supplementary heads of argument which were not filed.

- [43] Grammatical interpretation³⁰ of the provisions of section 20(1) of the National Prosecuting Authority Act conduce to a meaning that is consistent to the fact that the institution and conduct of criminal proceedings on behalf of the state is a power conferred on the prosecuting authority. The provisions of section 20 of the Act is a mirror image of section 179 (2) of the Constitution which provide thus:

“2. The prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings”.

- [44] The Prosecuting Authority exercises the constitutional and statutory power when instituting and conducting criminal proceedings. There is no evidence or suggestion of any nature that such power is shared with another arm of government, institution or organ of state. Put differently, there is no evidence or a case made out that there is another arm of government, institution or organ of state that exercises power in terms of the law to perform prosecutorial duties. It is a prosecutorial duty to institute and conduct prosecution. There is no factual or legal basis to hold the first defendant liable for damages arising out of his prosecution. I do so because there is an authority for proposition that:

²⁹ *Heyns v Venter* 2003 (3) ALL SA 176 (T); 2004 (3) SA 200 (T) at 207.

³⁰ *SATAWU and Another v Garvas and others* 2013(10 SA 8 (C; 2012 8) BCLR 840 (CC).

“the doctrine of legality which requires that power should have a source in law, is applicable whenever public power is exercised. Public power can be validly exercised only if it is clearly sourced in law”³¹.

[45] To conclude on this topic, the object of police services is set out in section 205(3) of the Constitution which reads thus:

“(3) The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.

Nowhere in the whole section it is provided that the police service is saddled with a responsibility to undertake prosecutorial functions. I am therefore unable to find that the first defendant is liable for malicious prosecution.

Third and Fourth Defendants: Malicious Prosecution

[46] Plaintiff’s failure in this regard extends to the third and fourth defendants. Magistrates exercise judicial authority as opposed to prosecutorial power. The Magistrates are part of Judiciary that is referred to in section 165 of the Constitution which provides for judicial authority. Subsection 1 thereof provides thus:

“(1) The judicial authority of the republic is vested in the courts”.

Magistrates duties and powers are adjudicative and not prosecutorial. They exercise adjudicative powers. I have held that prosecutorial powers vest in the prosecuting authority. Magistrates courts are creatures of statute. As such, they have no inherent jurisdiction and their powers must be deduced from the four corners of statute³². The Magistrates court Act 32 of 1944 is

³¹ *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council* 2007 (1) SA 343 (CC) Para 68; *Lester v Ndlambe Municipality* 2014(1) ALL SA 402 SCA;2015 (6) 283 SCA Para 26.

³² *Kondlo v Eastern Cape Development Corporation* 2014 (2) ALL SA 328 (ECM) Para 39.

the source of Magistrates powers³³. In addition, thereto, the criminal procedure Act 51 of 1977 as amended does not confer prosecutorial powers upon the Magistrate or Magistrates court.

[47] In the circumstances, there is no basis both in law and in fact to find that the Magistrate set the law in motion in the context of malicious prosecution. Therefore, the claim for malicious prosecution against the third and fourth defendant cannot succeed. It is fallacious to suggest that, when the Magistrate convicted the plaintiff it was setting the law in motion. She was not. Instead she was exercising her judicial authority. Convicting a suspect is an exercise of court's adjudicative powers.

[48] One aspect deserves comment. There is no other claim against the third and fourth defendant pleaded in the particulars of claim. Plaintiff's evidence did not disclose any other claim or cause of action against the third and fourth defendant. However, during cross examination of fourth defendant, Ms Mfobo, emphasis was placed to make a point that the fourth defendant/ Magistrate was malicious or that she acted with malice. That does not take plaintiff's case any further. Malice or malicious conduct was canvassed in evidence in the context of a claim for malicious prosecution requirement³⁴. That cross examination was following the pleaded facts in the particulars of claim referred to in paragraph 37 above. The examination sought to establish a malice as a requirement of malicious prosecution and nothing more.

³³ Magistrates Court Rules inclusive

³⁴ LAWSA, Vol 15, Part 2, Page 195, Para 315; That the defendant was actuated by an improper motive or malice

[49] A contrary submission would be antithetical to trite principles of pleading. In *Slabbert*³⁵ SCA remarked as follows:

“11. The purpose of the pleadings is to define the issues for the other party and the court. A party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at the trial. It is equally not permissible for the trial court to have recourse to issues falling outside the pleadings when deciding a case”.

I have already found that the Magistrate and her department are not liable for a claim of malicious prosecution. Accordingly, this claim fails against the third and fourth defendant.

Second Defendant (NPA): Malicious Prosecution

[50] I have outlined above the requirements of malicious prosecution claim. From the onset I must indicate that, Mr Dondashe who was a prosecutor who took decision to prosecute was not called to give evidence. Instead Ms Noluvo Msekela, who is a Senior Public Prosecutor was called to testify on behalf of the second defendant. She testified that the reason Mr Dondashe was not before court to give evidence is because he is no longer working for the National Prosecuting Authority. She understood her role in court *standing in* for Mr Dondashe, whatever that means.

[51] It is common cause that criminal proceedings were instituted against the plaintiff which terminated in the appeal in favour of the plaintiff. A point sought to be made that the proceedings terminated in the court *a quo* in second defendant's (NPA) favour, as the plaintiff was convicted in that court. I find no merit in that contention. A notice of appeal and the whole

³⁵ *Minister of Safety and Security v Slabbert* 2010 (2) ALL SA 474 (SCA) Para 11.

appeal process reopened the criminal proceedings. They remained not terminated pending the determination of the appeal. It was the appeal court that would finally determine the criminal proceedings against the plaintiff. Termination of proceedings means only the final determination of the proceedings. In this case the proceedings were finally determined by the appeal court.

[52] It is apposite at this stage to deal with two requisites of malicious prosecution, which I consider to be dispositive of this matter, *to wit*, (i) absence of reasonable and probable cause and (ii) malice. The test for absence of reasonable and probable cause is both objective and subjective. It is objective in that when it is alleged that a defendant had no reasonable cause for prosecution it means that he did not have such information as would lead a reasonable person to conclude that the plaintiff had probably been guilty of the offence charged³⁶. The subjective element of reasonable and probable cause means an honest belief founded on reasonable grounds that the institution of proceedings is justified. Put Differently, the defendant had honest belief that the plaintiff had committed an unlawful act for which he could have been arrested or charged³⁷.

[53] With regard to the subjective element of reasonable and probable cause; a person who exercised a discretion did not give evidence to explain what subjectively had been in his mind when he took a decision to prosecute or when he instituted the proceedings. South African concise oxford dictionary³⁸ defines the adjective:

³⁶ *Landman v Minister of Police* 1975 (2) ALL SA 76 E; 1975 (2) SA 155 E 156.

³⁷ *Lef dahl v Dredge* 1910 CPD 452 at 456; LAWSA, Vol 15, Part 2, Page 214, Para 351.

³⁸ *Dadoo Ltd and Others v Krugersdorp Municipal Council* 1920 AD 530 at 543.

“Subjective” to mean “1. Based on or influenced by personal feelings, tastes, or opinions. 2. Depending on the mind for existence. 3... relating to or denoting a case of nouns and pronouns used for subject of a sentence.”

The first and second definition are apposite. This court has not been favoured with Mr Dondashe’s personal opinions that subjectively influenced his decisions to prosecute in terms of section 20 of the National Prosecuting Act. In this regard Ms Msekelewa’s opinion about plaintiff’s case in the regional court is irrelevant. It is plain that a requirement of reasonable and probable cause was absent.

- [54] Even if it can be said I am wrong in the assessment of subjective element of the absence of a reasonable and probable cause, I would still find that the objective element, too was absent. On 11th August 2013, Dr Meal examined the victim, Q[...] B[...] and recorded in the J88 form the following conclusion: *“Hymen intact & intense red. Sexual assault could not be ruled out”*. The gynaecological examination demonstrated that the following organs were normal. *Clitoris, urethra orifice, labia majora, labia minora, para –urethral folds, frenulum of clitoris*. Bleeding was recorded as *nil* and posterior fourchette: Scarring and tears were recorded to be *intact.*” *Foss navicularis was recorded normal. Bumps, synechiae, clefts and bruising were recorded to be nil. It was further concluded that no physical injury visible”*.

- [55] It bears repletion and sight must not be lost of the fact that the plaintiff was facing a charge of rape of a minor child who was recorded to be seven (7) years of age at the time. In this medical report, nothing objectively suggests that rape of a minor child took place. No penetration objectively appears to have taken place. No facts appear to have justified the

prosecution of the plaintiff. Absence of the objective facts establishing a possibility of rape would have or ordinarily necessitated the public prosecutor who decided to prosecute, to come and explain and justify his decision.

[56] In Lubaxa³⁹

“[19] The right to be discharged at that stage of the trial does not necessarily arise, in my view, from considerations relating to the burden of proof (or its concomitant, the presumption of innocence) or the right of silence or the right not to testify, but arguably from a consideration that is of more general application. Clearly a person ought not to be prosecuted in the absence of a minimum of evidence upon which he might be convicted, merely in the expectation that at some stage he might incriminate himself. That is recognised by the common law principle that there should be “reasonable and probable” cause to believe that the accused is guilty of an offence before a prosecution is initiated (Beckenstrater v Rottcher and Theunissen 1955(1) SA 129 (A) at 135C-E), and the constitutional protection afforded to dignity and personal freedom (s 10 and s 12) seems to reinforce it. It ought to follow that if a prosecution is not to be commenced without that minimum of evidence, so too should it cease when the evidence finally falls below that threshold. That will pre-eminently be so where the prosecution has exhausted the evidence and a conviction is no longer possible except by self-incrimination. A fair trial, in my view, would at that stage be stopped, for it threatens thereafter to infringe other constitutional rights protected by s 10 and s 12”.

[57] The prosecution policy⁴⁰ instructs the prosecutors as follows:

“The process of establishing whether or not to prosecute usually starts when the police present a docket to the prosecutor. This often happens after the suspect has been arrested. The case needs to be studied to make sure that it is properly investigated.

The prosecutor must consider whether to—

- request the police to investigate the case further;*
- institute a prosecution;*
- enter into a plea or sentence agreement;*
- decline to prosecute and to opt for pre-trial diversion or other non-criminal resolution; or*
- decline to prosecute without taking any other action*

³⁹ *S v Lubaxa* 2001 (2) SACR 703 (SCA) Para 19..

⁴⁰ Chapter 3A: Prosecution Policy: Revision Dates June 2013

The decision whether or not to prosecute must be taken with care, because it may have profound consequences for victims, witnesses, accused persons and their families. A wrong decision may also undermine the community's confidence in the prosecution system and the criminal justice system as a whole.

Resources should not be wasted pursuing inappropriate cases, but must be used to act vigorously in those cases worthy of prosecution.

In deciding whether or not to institute criminal proceedings against an accused person, prosecutors must assess whether there is sufficient and admissible evidence to provide a reasonable prospect of a successful prosecution. There must indeed be a reasonable prospect of a conviction, otherwise the prosecution should not be commenced or continued. (My underlining)

- [58] A vigilant prosecutor, being guided by the prosecution policy, if he indeed wanted to prosecute, should have instructed the police to conduct further investigations as there were no prospects of a successful prosecution in the matter. Alternatively, a prudent prosecutor would have arranged consultation with prospective witnesses in order to evaluate their reliability, as the prosecution policy further provides that:

“Where the prospects of success are difficult to assess, prosecutors must consult with prospective witness in order to evaluate their reliability. The version or the defence of an accused person must also be considered before a decision be made.”

No evidence that the plaintiff's defence was ever considered before the decisions to prosecute was taken. All of this seeks to ensure that there is a reasonable and a probable cause of the institution or instigation of criminal proceedings against accused persons.

- [59] It suffices to mention that the requirement of malice shares the same elements with the requirement of absence of reasonable and probable

cause. The meaning of malice⁴¹ is expounded. Malice means the defendant had:

*“(a) an absence of an honest belief in the guilt of the accused⁴²
which may include recklessness.*

*(b) An improper or indirect motive in the sense of some other
motive other than that of bringing the plaintiff to justice.*

In the light of the fact that I have discussed above these two elements under the absence of reasonable and probable cause, it is not necessary to discuss them again under the malice. I however, come to conclusion that the prosecution of the plaintiff was malicious.

[60] In the conspectus of all this, I accordingly find that the second defendant maliciously prosecuted the plaintiff. Plaintiff's claim for malicious prosecution against the second defendant (NPA) succeeds. All the requisites for a successful claim of malicious prosecution against the second defendant have been satisfied⁴³.

Conclusion

[61] The plaintiff has succeeded in the claim for malicious arrest against the first defendant (police). He has further succeeded in the claim for malicious prosecution against the second defendant (NPA). The claim for malicious prosecution against the first, third and fourth defendants has failed. This has a bearing on the question of costs which I will deal with hereinafter.

Quantum

⁴¹ LAWSA, Vol 15, Part 2, Page 202 Para 328.

⁴² *Fyne v The African Reality Trust Ltd* 1906 EDC 248, 257

⁴³ *Funani v National Director of Public Prosecution* (1298/2016) [2019] ZAECHMHC 71 (5 November 2019) Para 24

[62] Plaintiff's deprivation of liberty at the instance of the Police occurred from 10th August 2013 until 13th August 2013. When the plaintiff appeared in court in 13th August 2013 he had been in custody for three (3) days. Alternatively, he spent three (3) nights in the cells. Plaintiff's rights to freedom or liberty and human dignity were unjustifiably violated. The detention constitutes an in-road into the freedom and the right to human dignity of an individual⁴⁴. The right to liberty is inextricably linked to human dignity⁴⁵.

[63] In *Du Plessis*⁴⁶ the SCA remarked as follows:

"15. Our new Constitutional Order, conscious of our oppressive past, was designed to curb intrusions upon personal liberty which has always, even during the dark days of apartheid, been judicially valued, and to ensure that the excesses of the past would not recur.³ The right to liberty is inextricably linked to human dignity. Section 1 of the Constitution proclaims as founding values, human dignity, the achievement of equality and the advancement of human rights and freedoms. Put simply, we as a society place a premium on the right to liberty.

[64] Section 12 deals with freedom and security of the person. Importantly it provides as follows in relevant parts:

"Everyone has the right to freedom and security of the person, which includes the right-

- (a) not to be deprived of freedom arbitrarily or without just cause;*
- (b) not to be detained without trial;*
- (c) to be free from all forms of violence from either public or private sources;*
- (d) not to be tortured in any way; and*

.....

⁴⁴ *Thandani v Minister of Law and Order* 1991 (4) SA 904 (A).

⁴⁵ *Minister of Police v Du Plessis* 2014 (1) SACR 217 (SCA); *Zealand v Minister of Justice and Constitutional Development* 2008 (4) SA 458 (SCA) Para 25.

⁴⁶ *Minister of Police and another v Du Plessis* 2014 (1) SACR 217 SCA Para 15.

(2) *Everyone has the right to bodily and psychological integrity.....”*

Section 10 deals with dignity as follows:

“Everyone has inherent dignity and the right to have their dignity respected and protected”.

[65] In *Diljan*⁴⁷ Makaula AJA had the following to say:

“[18] The acceptable method of assessing damages includes the evaluation of the plaintiff’s personal circumstances; the manner of the arrest; the duration of the detention; the degree of humiliation which encompasses the aggrieved party’s reputation and standing in the community; deprivation of liberty; and other relevant factors peculiar to the case under consideration.

[19] Whilst, as a general rule, regard may be had to previous awards, sight should, however, not be lost of the fact that previous awards only serve as a guide and nothing more. As Potgieter JA cautioned in Protea Assurance Co. Ltd v Lamb:

‘It should be emphasised, however, that this process of comparison does not take the form of a meticulous examination of awards made in other cases in order to fix the amount of compensation; nor should the process be allowed so to dominate the enquiry as to become a fetter upon the Court’s general discretion in such matters. Comparable cases, when available, should rather be used to afford some guidance, in a general way, towards assisting the Court in arriving at an award which is not substantially out of general accord with previous awards in broadly similar cases, regard being had to all the factors which are considered to be relevant in the assessment of general damages. At the same time, it may be permissible, in an appropriate case, to test any assessment arrived at upon this basis by reference to the general pattern of previous awards in cases where the injuries and their sequelae may have been either more serious or less than those in the case under consideration.’

[66] In *Tyulu*⁴⁸ the Supreme Court of Appeal held:

“[26] In the assessment of damages for unlawful arrest and detention, it is important to bear in mind that the primary purpose is not to enrich the

⁴⁷ *Diljan v Minister of Police* (746/2021) [2022] ZSCA 103 (24 June 2022) 22 JDR 1759 SCA Para 18-19.

⁴⁸ *Minister of Safety and Security v Tyulu* 2009 (5) SA 58 (SCA); 2009 (2) SCAR 282 (SCA); 2009 (4) ALL SA 38 Para 26.

aggrieved party but to offer him or her some much-needed solatium for his or her injured feelings. It is therefore crucial that serious attempts be made to ensure that the damages awarded are commensurate with the injury inflicted. However, our courts should be astute to ensure that the awards they make for such infractions reflect the importance of the right to personal liberty and the seriousness with which any arbitrary deprivation of personal liberty is viewed in our law. I readily concede that it is impossible to determine an award of damages for this kind of injuria with any kind of mathematical accuracy. Although it is always helpful to have regard to awards made in previous cases to serve as a guide, such an approach if slavishly followed can prove to be treacherous. 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 (Minister of Safety and Security v Seymour 2006 (6) SA 320 (SCA) 325 para 17; Rudolph & others v Minister of Safety and Security & others (380/2008) [2009] ZASCA 39 (31 March 2009) (paras 26-29).”

[67] The plaintiff is a major unemployed male⁴⁹ born on 01st May 1979 . He does not describe the conditions in Prison where he was detained.

[68] In *Diljan* the Supreme Court of Appeal awarded **R120 000.00** as fair and reasonable amount for appellant’s deprivation of liberty for three (3) days. When dividing that amount by three (3) days, one gets **R40 000.00**. In *Madyibi*⁵⁰ an amount of **R35 000.00** was awarded for twenty (20) hours detention. In *Ncume*⁵¹ this court awarded **R45 000.00** as fair and reasonable compensation for arrest and detention for approximately eighteen (18) hours. Taking into account the circumstances and conditions of plaintiff’s detention or deprivation of liberty, I am satisfied that the first defendant is liable to the plaintiff in the amount of **R120 000.00** as fair and reasonable compensation for deprivation of liberty for approximately three (3) days.

⁴⁹ At the time of institution of these proceedings he was self-employed.

⁵⁰ *Nel v Minister of Police* (Case No CA 62/2017) [2028] ZAECGHC.

⁵¹ *Andile Ncume v Minister of Police (Case No 3219/2021) Eastern Cape, Mthatha*.

[69] With regard to malicious prosecution, no disbursements in the form of legal costs have been pleaded by the plaintiff. However, the plaintiff had been placed under a tremendous hardship. He went through the process of criminal litigation in the District court, Regional court; and after he was convicted he successfully prosecuted his appeal. The length of time when the plaintiff was subjected to prosecution is an important consideration. The anxiety, uncertainty and anguish he went through when he was still under prosecution by the second defendant (NPA) is a relevant factor to be taken into account. The prosecution had a negative impact on plaintiff's dignity. All of the aspects set out herein are incidental to, a natural consequence, component and a quintessence of malice already discussed above. I am therefore satisfied that an amount of **R250 000.00** is a fair and reasonable compensation for a claim for malicious prosecution against the second defendant (NPA).

Costs

[70] The general rule is that costs must follow the result. With regard to the claim of malicious arrest and detention the plaintiff has succeeded against the first defendant. However, the plaintiff has failed in the claim for malicious prosecution against the first defendant. Ordinarily, neither the plaintiff nor the first defendant would be entitled to costs against each other.

[71] Regarding the claim for malicious prosecution against the second defendant, the plaintiff has succeeded. The plaintiff is entitled to his costs

against the second defendant (NPA). However, the third and fourth defendants succeeded against the plaintiff and therefore they are entitled to their costs.

[72] In the result the following order shall issue:

Order

1. **The first defendant (Police) is liable to pay the plaintiff an amount of R120 000.00 (*One Hundred and Twenty Thousand Rands*) in respect of malicious arrest and detention from 10TH August 2013 to 13th August 2013.**
2. **The first defendant (Police) shall pay interest on the capital amount (R120 000.00) referred to in paragraph 72.1 above at the prescribed legal rate calculated from the date of this judgment to the date of final payment.**
3. **The second defendant (NPA) is liable to pay the plaintiff an amount of R250 000.00 (*Two Hundred and Fifty Thousand Rands*) in respect of the claim for malicious prosecution.**
4. **The second defendant shall pay interest on the capital amount (R250 000.00) referred to in paragraph 72.3 above at a prescribed legal rate calculated from the date of this judgment to the date of final payment.**
5. **The plaintiff's claim for malicious prosecution against the first, third and fourth defendants is hereby dismissed.**

6. **The second defendant (NPA) shall pay plaintiff's costs of suit in respect of the claim for malicious prosecution.**
7. **The plaintiff shall pay third and fourth defendants' costs of suit in respect of the claim for malicious prosecution.**
8. **There shall be no order as to costs in respect of the claim for malicious arrest and detention.**

A.S ZONO

JUDGE OF THE HIGH COURT (ACTING)

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Matter heard on : 4, 5, 6, 7 and 8 August 2025

Delivered on : 18th November 2025