

**REPUBLIC OF SOUTH AFRICA**



**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA**

**CASE NO: 38026 / 2016**

1. REPORTABLE: NO
2. OF INTEREST TO OTHER JUDGES: NO
3. REVISED: YES

DATE: 20 January 2026

SIGNATURE OF JUDGE:

A handwritten signature in black ink, which has been partially redacted with a black rectangular box.

In the matter between:

**PABALLO MOTHULWE**

Plaintiff

and

**THE MINISTER OF POLICE**

First Defendant

**THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS**

Second Defendant

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## JUDGMENT

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**Woodrow, AJ:**

**Introduction:**

[1] In his particulars of claim, the plaintiff claims<sup>1</sup> damages from the respective defendants as follows:

- a. CLAIM A – For ‘unlawful and/or wrongful arrest’: The plaintiff claims payment of R100,000 (one hundred thousand rand) from the first defendant;
- b. CLAIM B – For ‘unlawful or wrongful detention’: The plaintiff claims payment of R100,000 (one hundred thousand rand) from the first defendant;
- c. CLAIM C – For ‘malicious and/or wrongful prosecution’: The plaintiff claims payment of R1,270,000 (one million two hundred and seventy thousand rand) from the first and second defendants jointly and severally, the one paying, the other to be absolved;

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<sup>1</sup> Combined summons, p 043-3 – served on 13 May 2016 as per returns of service at p 043-20 and 043-21.

- d. CLAIM D – For ‘legal costs incurred’ in defending himself against the prosecution/criminal charges: The plaintiff claims payment of R30,000 (thirty thousand rand) from the first and second defendants jointly and severally, the one paying, the other to be absolved.

[2] The plaintiff claims *mora* interest on the aforesaid amounts *a tempore morae* and costs of suit.

[3] Before me, the plaintiff sought judgment and relief as follows (plus interest and costs):<sup>2</sup>

- a. In respect of Claim A and B, that the first defendant be ordered to pay damages in the sum of R90,000 (ninety thousand rand) to the plaintiff.
- b. In respect of Claim C, that the defendants be ordered, jointly and severally, the one paying, the other to be absolved, to pay damages to the plaintiff in the sum of R175,000 (one hundred and seventy-five thousand rand).
- c. In respect of Claim D, for legal costs incurred in defending against the criminal charges, no order was sought as this claim had been abandoned by the plaintiff in prior proceedings. Counsel for the plaintiff confirmed that the plaintiff does not persist with such claim.

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<sup>2</sup> Plaintiff’s practice note, at p 031-27.

**The plaintiff's pleaded case and aspects of the litigation history of the matter:**

[4] The plaintiff pleads that:

- “5. On or about the 15<sup>th</sup> of May 2013 at approximately 09H00 and at Greylingstad Police Station in Mpumalanga Province the plaintiff was arrested by a member of the South African Police Services identified as Mr. Masango (hereinafter called “the police”) then stationed at Greylingstad Police Station and whose full names and rank are unknown to the plaintiff.*
- 6. Subsequent to the afore-stated arrest:*

  - 6.1. The plaintiff was briefly detained at Greylingstad Police Station, allegedly on charges of corruption per a CAS Number unknown to the plaintiff;*
  - 6.2. The plaintiff appeared at Balfour Magistrates' Court under court case number G57/2013 and was released on bail of R2 000 – 00 (Two Thousand Rands) on the 15<sup>th</sup> of May 2013;*
  - 6.3. From time to time the charges against the plaintiff were withdrawn and/or struck off the court roll and were reinstated again; and*
  - 6.4. The plaintiff eventually stood trial until he was acquitted of all the charges against him on or about the 05<sup>th</sup> of November 2015.”*

- [5] The plaintiff thereafter pleads the grounds upon which each of the separate Claims A – D are based (which I do not repeat herein), alleges vicarious liability and that the police and prosecutors referred to in the particulars of claim acted in their capacities as servants of the respective defendants, pleads compliance with the notification requirements of Act 40 of 2002, and thereafter prays for judgment under each separate head of damage (as outlined above).
- [6] Whilst the defendants had filed a plea in this matter, the defences raised had been struck out by virtue of the defendants' failures to have complied with an order of this court pertaining to discovery.<sup>3</sup> The defendants' attempts to revive / reinstate their defences were unsuccessful.<sup>4</sup> It is unnecessary to dwell on this aspect any further.
- [7] The plaintiff brought an application for default judgment.<sup>5</sup> The defendants opposed the default judgment throughout the proceedings. The court seized with the default judgment application declined to hear the application and held *inter alia* that: "... *The plaintiff is required to prove its damages and in so doing would require to lead evidence.*"<sup>6</sup> The court removed the matter from the roll.

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<sup>3</sup> Court order, p 005-1.

<sup>4</sup> Application to reinstate defence, p 009-1 read with Court order confirming the defendants' withdrawal of the aforesaid application, Court order, p 010-1.

<sup>5</sup> Notice of motion, p 002-1 read with Founding affidavit, p 003-1 - 003-16.

<sup>6</sup> Judgment of Kumalo J, p 000-1.

[8] The matter was case managed. It was envisaged that a stated case would be heard dealing with *inter alia* the defendants' rights to cross examine in circumstances where their defence had been struck out. However, at the hearing of the matter before me the parties agreed to simply run the case and to request that judgment be granted in the matter.

[9] The matter accordingly proceeded before me.

[10] The plaintiff called one witness, namely the plaintiff, who led oral evidence as well as confirming the facts set out in the founding affidavit in support of default judgment,<sup>7</sup> (which was marked exhibit **A** in the proceedings). I deal briefly with such evidence below.

#### **The evidence of the plaintiff:**

[11] The plaintiff is currently forty-nine years old and unemployed (having lost his employment after the incident). (At the time of his arrest, he was accordingly thirty-seven years old.)

[12] The plaintiff passed matric. He studied teaching but dropped out.

[13] He has three children.

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<sup>7</sup> Founding affidavit, p 003-1 - 003-16.

- [14] At the time of his arrest, the plaintiff was a senior traffic transport inspector, a role he had occupied since 2005. On the relevant day, the plaintiff was busy with his duties checking on public transport taxis and busses for compliance with public transport legislation.
- [15] At the time of his arrest, he was earning a net salary of approximately R16,000 per month. The plaintiff attributes his loss of employment to the incident.
- [16] On 15 May 2013, the plaintiff and his colleague were arrested on an alleged charge of corruption whilst they were busy performing their duties as traffic inspectors in the vicinity of Greylingstad. The arresting officer, one Captain Masango ("**Captain Masango**"), informed them that they had allegedly extracted a bribe of R200 from his (Captain Masango's) colleague (and also a police officer) who was allegedly pulled over in a Toyota Avanza. The plaintiff and his colleague immediately denied the allegations as false. The arrest took place at the Greylingstad Police Station in circumstances addressed later herein.
- [17] The plaintiff gave evidence regarding what in fact occurred. The plaintiff stated that at the time when he pulled the complainant over, the complainant was wearing police trousers and also had a firearm in his possession. Furthermore, when the plaintiff asked the complainant for his permit to operate a taxi (as he was conveying children to school), he presented the plaintiff with his appointment certificate as a police officer. The plaintiff states that he therefore knew that the complainant was a police officer and the plaintiff states that he

would not have solicited a bribe from a police officer and risk his career. The plaintiff states that he never solicited or took a bribe from the complainant.

[18] On the day of the arrest, the plaintiff and his colleague were told by police officers to come to the police station after completing their duties. Upon their arrival at the Greylingstad Police Station at about 09h00 they were taken to the office of Captain Masango where they waited until the complainant arrived. When the complainant arrived, the plaintiff and his colleague were told to sit outside the office. After about 15 minutes, the complainant came out and they were called into the office where Captain Masango informed them that their superior had told him to arrest them.

[19] Captain Masango instructed them to empty their pockets and to hand over their firearms and epilates. The cash in the possession of the plaintiff (R20) and his colleague (R40) evidenced the fact that they had not taken a bribe of R200 as alleged by the complainant policeman. None of the police officers involved made any attempt to reconcile the allegations against them with, for instance, any receipts and money they had on themselves / on their persons, or in their motor vehicle. Without eliciting any version from the two nor doing any preliminary investigation prior to their arrest, the plaintiff and his colleague were placed under arrest. The plaintiff states that it was clear to him that no matter the explanation he would have given, the arresting officer merely accepted the version of his colleague (the complainant) and arrested them.

- [20] Once fingerprints and formalities had been completed, the plaintiff and his colleague were then taken to the cells and detained. The Investigating Officer then took them to court where they waited in the holding cells. At court they were charged with the offence of Corruption (Accepting a Benefit) under Section 3(a)(i) (aa) of the Prevention and Combating of Corrupt Activities Act, Act 12 of 2004. The charge sheet alleges that they received a gratification (bribe) of R200.
- [21] At their first appearance they were granted bail of R2,000 (two thousand rand) each and warned to appear in court on a future date.
- [22] There were many members of the public in court and some of the plaintiff's colleagues arrived at court when they heard what had happened. The plaintiff felt extremely embarrassed and humiliated.
- [23] The plaintiff and his colleague were detained and deprived of their liberty for about 5 hours. They were released on bail after having been taken to court for their first hearing on the same day.
- [24] The plaintiff states that he felt terribly worried about his future and that of his children. He testified further that this occurred in a rural area where people know the plaintiff and his roll. He testified that he and his colleague were laughingstock, and he felt extremely ashamed. The plaintiff testified that he was dismissed after the incident.

- [25] The plaintiff had to return to court on about 6 further occasions, including 28 May 2013, 26 June 2013, 28 August 2013, 31 October 2013, and 20 February 2014. The plaintiff states that the repeated returns to court were not only inconvenient, but every time he went back to court, it felt like everything was happening to him all over again. The plaintiff repeated that the area in which this occurred is such that even when he was not wearing his uniform people know what he does. He felt very ashamed.
- [26] On 20 February 2014, the complainant failed to appear. The court issued a warrant of arrest in respect of him. The matter was struck from the roll in light of the numerous previous enrolments of the matter. The court invoked the provisions of Section 342A(3)(c) of the Criminal Procedure Act, Act 51 of 1977 (the “**Criminal Procedure Act**”), and ordered that the prosecution may not be resumed or instituted ‘*de novo*’ without the written instruction of the second defendant.
- [27] On or about 19 January 2015, the second defendant again decided to prosecute the plaintiff on the charge of Corruption (Accepting a Benefit) (as more fully described above). The plaintiff received a summons in respect of the same charge again, and the trial date was set for 5 May 2015. However, the matter was again repeatedly postponed including on 5 June 2015, 7 August 2015, and 2 September 2015.
- [28] The trial was conducted on 6 October 2015. On 4 November 2015 both the plaintiff and his colleague were found not guilty and were discharged in terms

of Section 174 of the Criminal Procedure Act,<sup>8</sup> there being no evidence in the opinion of the court upon which to find that they had committed the offence with which they had been charged.

[29] The plaintiff states that:

- a. Despite the submissions of his attorney that there was no probable cause to prosecute the plaintiff on the charge against him, the servants of the defendants refused to accept this and persisted with the prosecution.
- b. The complainant was a single witness. His version did not add up - he did not state in what denominations the alleged bribe was made up, there was no exhibit of the money which was allegedly paid to the plaintiff by the complainant, and, even at court, the complainant could not explain this in evidence. The complainant's version was further suspect - as a police officer, the complainant could have arrested the plaintiff and his colleague (in terms of section 40(1)(a) of the Criminal Procedure Act) for allegedly having committed an offence in the presence of the complainant, but he did not do so. Furthermore, had

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<sup>8</sup> **174. Accused may be discharged at close of case for prosecution.**

If, at the close of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any offence of which he may be convicted on the charge, it may return a verdict of not guilty.

the prosecutor and the police genuinely believed the plaintiff was guilty, then the complainant would also have been charged (as he was the alleged person who had bribed the plaintiff), but no criminal charges were brought against the complainant for allegedly paying a bribe, nor was immunity from prosecution granted in his favour.

- c. Apart from the complainant's statement, there was no independent evidence that either the plaintiff or his colleague had solicited a bribe from the complainant.
- d. The plaintiff states that a diligent arresting officer and prosecutor would not have charged and prosecuted him for the alleged offence in the circumstances, given the lack of probable cause and the conduct of the complainant.
- e. The plaintiff had to instruct an attorney to assist him in defending himself against the malicious criminal prosecution which cost him R30,000. No receipts were issued to him and despite his best efforts he has not been able to obtain such receipts.

[30] The plaintiff testified that the matter has taken everything from him, and that he feels like nobody. His children cannot attend the same school that they did previously, and the plaintiff states that he cannot plan for his future. The plaintiff has been significantly affected by his arrest, detention and prosecution.

[31] In cross examination, the plaintiff was referred to the Docket,<sup>9</sup> and to the statement of *inter alia* (a) the complainant, Mr Thusi,<sup>10</sup> (b) Captain Masango,<sup>11</sup> (c) the police officer, Mr Ramaroka,<sup>12</sup> and later that of (d) Mr Sifundo Sydwell. It was put to the plaintiff that the complainant implicated him in his statement. The plaintiff agreed. The plaintiff agreed that there are other statements in the Docket 'building on' what the complainant claimed. The plaintiff testified that he was arrested based on the statement of the complainant.

[32] Counsel for the defendants attempted to discredit the version of the plaintiff by seeking to raise what he put to the plaintiff were differences between his oral evidence in the trial and his founding affidavit in the default judgement application. In my view, the witness answered the questions honestly and his credibility held up during cross examination. There are no real differences between his evidence on trial and that contained in his affidavit, and minor differences were satisfactorily explained.

[33] The plaintiff confirmed that Mr Thusi, the complainant, is a policeman employed by the South African Police Services. Further, that the plaintiff had found out at a later stage that the complainant is in fact also a taxi operator

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<sup>9</sup> Contents of Docket, PM25 to the Founding affidavit, p 051-89.

<sup>10</sup> Statement of Mr Thusi, p 051-93.

<sup>11</sup> Statement of Captain Masango, p 051-97.

<sup>12</sup> Statement of Mr Ramoroka, p 051-110.

and that he may have had issues with the section where the plaintiff and his colleague were performing their duties.

## **Findings:**

### ***Wrongful arrest and detention:***

[34] The plaintiff has proven that he was arrested and thereafter detained for a period of approximately 5 hours.

[35] It is trite that once the plaintiff has established an interference with his physical liberty, the burden falls upon the person causing that interference, namely the first defendant and its servants, to establish a ground of justification.<sup>13</sup>

[36] The defendants' defence having been struck out, the defendants have failed to plead or to prove any ground of justification.

[37] The plaintiff must succeed in respect of the merits in proving a wrongful arrest and detention. This was practically conceded by the defendants.

[38] The plaintiff succeeds on the merits of these claims.

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<sup>13</sup> **Zealand v Minister for Justice and Constitutional Development and Another** (CCT54/07) [2008] ZACC 3; 2008 (6) BCLR 601 (CC); 2008 (2) SACR 1 (CC); 2008 (4) SA 458 (CC) (11 March 2008) par [24] - [25].

[39] In respect of *quantum*, notwithstanding what the plaintiff pleaded and as has been set out above already, counsel for the plaintiff submitted that an amount in the region of R90,000 constituted an appropriate award for both the wrongful arrest and detention. Counsel for the defendants submitted that R30,000 is fair and reasonable. Counsel for both sets of parties referred to certain authorities.

[40] The primary purpose of damages is not to enrich the aggrieved party but to offer him *solatium* for his or her injured dignity and loss of liberty. The award for damages in respect of the plaintiff's *injuria* cannot be calculated with mechanical precision. Recourse ought to be had to previous similar fact decisions for guidance.<sup>14</sup>

[41] In **Minister of Safety & Security v Tyulu**<sup>15</sup> the Supreme Court of Appeal ("**SCA**") held as follows:<sup>16</sup>

*"[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 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*

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<sup>14</sup> **Rowan v Minister of Safety and Security NO** ([2011] 3 All SA 443 (GSJ)) [2011] ZAGPJHC 11; 2026/2009 (9 March 2011) par [71].

<sup>15</sup> 2009 (5) SA 85 (SCA).

<sup>16</sup> At par [26] (footnotes omitted).

*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 ...”*

[42] In **Van Der Nest NO v Minister of Police**,<sup>17</sup> the SCA held as follows:<sup>18</sup>

“[29] In *Diljan v Minister of Police (Diljan)* this court stated:

*‘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.*

*... .*

*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:*

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<sup>17</sup> 2025 (5) SA 152 (SCA) (“**Van Der Nest**”).

<sup>18</sup> par [29] – [30] (footnotes omitted).

*"It should be emphasised, however, that this process of comparison does not take the form of meticulous examination of awards made in other cases in order to fix the amount of compensation . . . ."*

[30] In *Brits v Minister of Police & Another* this court further held:

*'Although awards of damages made in previous decisions may serve as a guide in the consideration of an appropriate amount of damages for the injury resulting from unlawful arrest and detention, such awards are not to be followed slavishly, for every case must be determined on its facts. It must be borne in mind that the primary purpose of an award of damages for unlawful arrest and detention is not to enrich the aggrieved party but to offer him or her some solatium for their injured feelings.'* [Footnotes omitted.]"

[43] The duration of the detention is obviously a relevant factor that must be considered in determining quantum. It is however not the only factor. In **Motladile v Minister of Police**,<sup>19</sup> the SCA held:<sup>20</sup>

*"[17] The assessment of the amount of damages to award a plaintiff who was unlawfully arrested and detained, is not a mechanical exercise that has regard only to the number of days that a plaintiff had spent in detention. Significantly, the duration of the detention is not the only factor that a court must consider in determining what would be fair and reasonable compensation to award. Other factors that a court must take into account would include (a) the circumstances*

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<sup>19</sup> [2023] ZASCA 94.

<sup>20</sup> par [17] (footnotes omitted).

*under which the arrest and detention occurred; (b) the presence or absence of improper motive or malice on the part of the defendant; (c) the conduct of the defendant; (d) the nature of the deprivation; (e) the status and standing of the plaintiff; (f) the presence or absence of an apology or satisfactory explanation of the events by the defendant; (g) awards in comparable cases; (h) publicity given to the arrest; (i) the simultaneous invasion of other personality and constitutional rights; and (j) the contributory action or inaction of the plaintiff.”*

[44] The plaintiff referred the court to the following cases *inter alia*:<sup>21</sup>

- a. **Masisi v Minister of Safety and Security**,<sup>22</sup> a case in which the court found that the “*arrest in itself was undoubtedly and decidedly malicious, the execution thereof despicable and humiliating*” but the detention comparatively short – just over 4 hours.<sup>23</sup> The plaintiff was awarded R65,000.
- b. **Minister of Safety and Security & Another v Swart**,<sup>24</sup> a case in which a police officer was arrested on suspicion of driving under the influence and detained for four and a half hours in police cells. The

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<sup>21</sup> The amounts referred to in each case have to be adjusted in order to cater for the time-value of money.

<sup>22</sup> 2011 (2) SACR 262 (GNP).

<sup>23</sup> At par [19].

<sup>24</sup> (194/2011) [2012] ZASCA 16 (22 March 2012).

court of appeal, the SCA, did not set aside the High Court (a full bench) *quantum* award of R50,000.<sup>25</sup>

c. **Olivier v Minister of Safety and Security and Another**,<sup>26</sup> a senior police officer was arrested on a charge of theft in full view of his colleagues, his home was searched and he was detained (not in a cell) and not handcuffed for a period of five to six hours. The plaintiff was awarded R50,000.

d. **Rowan v Minister of Safety and Security**,<sup>27</sup> an attorney was detained for just over 5 hours (10h15 to 15h30) in the Randburg Magistrate Court's holding cells with awaiting trial prisoners and

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<sup>25</sup> See par [24]:

*"[24] I now wish to deal with quantum. This matter has serious aggravating features. The respondent is a police officer, a sergeant of some 16 years' standing, with both the second appellant and Nel being his subordinates. They were all stationed at the same police station. The manner in which he was physically manhandled and thrown into the police van was truly demeaning. This happened in front of his son and his commanding officer. Whilst at the charge office, he was taunted and ridiculed in the presence of junior officers. The fact that some police officers were asking who was going to have the privilege of taking the respondent to the cells makes the whole arrest and detention even more demeaning. Clearly his dignity and reputation was gravely impaired. He spent four and a half hours in detention for no good reason. I am unable to find any misdirection in the award made by the court below which warrants any interference by this Court."*

<sup>26</sup> (05/9489) [2008] ZAGPHC 50; 2008 (2) SACR 387 (W) (28 February 2008).

<sup>27</sup> (2026/2009) [2011] SGJ (9 March 2011).

convicted criminals under appalling conditions. The plaintiff sustained embarrassment and humiliation. The plaintiff was awarded R50,000.

[45] In oral argument, counsel for the defendants relied relatively heavily on the case of **De Klerk v Minister of Police**,<sup>28</sup> and referred also to the SCA judgment in that matter. Counsel for the defendants submitted that an award in the sum of R30,000 is fair and reasonable in the circumstances.

[46] In **Ntombela v Minister of Police** (23541/2018) [2025] ZAGPJHC 1064 (24 October 2025) (majority decision) at par [185], the court held as follows (with reference primarily to duration of detention), and referring to **De Klerk**:

*“[185] In De Klerk, the Constitutional Court awarded R300 000 for seven days’ detention. We must take that as our starting point. This works out at just over R40 000 per day. ...”*

[47] In **Van Der Nest NO**,<sup>29</sup> the plaintiff was awarded R50,000 in circumstances where the arrestee was detained for a day and a half (in circumstances where she was arrested with her neighbours looking on, put in the back of a police van and driven at high speed through potholes and in the darkness to the police station, she experienced pain and was frightened *et cetera*.)

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<sup>28</sup> (CCT 95/18) (2019) ZACC (22 August 2019) (“**De Klerk**”).

<sup>29</sup> 2025 (5) SA 152 (SCA).

[48] Considering the age and circumstances of the plaintiff *in casu*, the manner of the arrest, including the fact that such arrest ought never to have taken place on the facts before the court, the relatively short duration of the detention for approximately five hours, the degree of humiliation which the plaintiff endured (as has been set out in the body of this judgment), the fact that the plaintiff lost his employment which he attributes to the arrest, and with reference to awards made in comparable cases, in my view, the fair and appropriate award of damages for the plaintiff's unlawful arrest and detention is an amount of R40,000.

***Malicious and /or wrongful prosecution***

[49] In order to succeed (on the merits) with a claim for malicious prosecution, a plaintiff must allege and prove:<sup>30</sup>

- a. that the defendants set the law in motion (instigated or instituted the proceedings);
- b. that the defendants acted without reasonable and probable cause;
- c. that the defendants acted with malice (or *animo iniuriandi*); and

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<sup>30</sup> **Minister for Justice and Constitutional Development v Moleko** [2008] 3 All SA 47 (SCA) par [8] ("**Moleko**"); see also: **Nakana v Claassens and Others** (137/2024) [2025] ZASCA 52 (7 May 2025) par [12] citing **Beckenstrater v Rottcher and Theunissen** 1955 (1) SA 129 (A) at 135B-F and 136D.

d. that the prosecution has failed.

[50] The plaintiff pleads *inter alia* that:<sup>31</sup> (my emphasis)

“11.1. The police, **including the complainant**, had no probable cause in setting in motion the plaintiff’s prosecution and were actuated by malice and/or acted in the context of *dolus eventualis*;

...

11.3. The police had in their investigations **misled the prosecutors** and/or neglected or failed to disclose certain material facts which, if disclosed, could have abated the prosecution of the plaintiff.

...”

[51] I have dealt with the evidence of the plaintiff already. The plaintiff states in conclusion in his affidavit in support of default judgment, which he confirmed in oral evidence, *inter alia* that:<sup>32</sup>

“10.2. ... regarding my claim for damages as a result of the malicious prosecution, it is clear from the aforesaid that the defendants acted intentionally and in concert when they instigated the criminal proceedings against me when there was no reasonable or probable cause present for doing so. My prosecution was actuated by an improper motive with malice. The prosecutors and the police have not applied their minds objectively regarding

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<sup>31</sup> Particulars of claim, par 11, p 043-12.

<sup>32</sup> Founding affidavit, p 003-15, par 10.2.

*the criminal charges against me. The police officers who instigated the prosecution failed to disclose certain material facts to the prosecutors such as the fact that combined, my colleague and I did not even have the amount of money in our possession upon arrest. The police made no effort whatsoever to search us or the motor vehicle for receipts for that day. They merely relied upon the complainant's word with no independent evidence to back the allegations up. Moreover, if the complainant's version was to be believed, he himself would have had to be prosecuted for the same alleged crime of corruption.*

10.3     *... I suffered a great degree of embarrassment and humiliation during my prosecution and it was very inconvenient to have to attend the court on so many occasions. It caused great discomfort and distress for me. Even though I was innocent, I still feel that my self esteem is impaired. Any newspaper article or television program about criminal prosecution and specifically corruption triggers the memories and feelings I endured and I cannot stop thinking about it. It can certainly be said that I suffered damages."*

[52]     Counsel for the defendants submitted that the elements (a) that the defendants set the law in motion, and (d) that the prosecution has failed, were present / proven. I agree. This is quite apparent from the evidence. No more need be said about these elements.

[53]     Counsel for the defendants submitted that what is in issue is the elements: (b) that the defendants acted without reasonable and probable cause; and (c) that the defendants acted with malice (or *animo iniuriandi*).

[54] Counsel for the defendants submitted with reference to the statements in the Docket that a reasonable prosecutor would prosecute on the evidence in the Docket. Counsel for the defendants submits that the plaintiff has not proven that the prosecutor acted without reasonable and probable cause, and that the prosecutor was actuated by malice. Counsel for the defendants calls in aid the case of **Relyant Trading (Pty) Ltd. v Shongwe and Another**,<sup>33</sup> in submitting that the evidence in the Docket is such to lead a reasonable person to conclude that the plaintiff had probably been guilty of the offence.

[55] In my view, the plaintiff has not met his *onus* in respect of the claim against the second defendant regarding the conduct of its employees, namely the relevant prosecutorial employees. The version of the plaintiff himself is that the prosecutors were misled by the relevant police officials, and that material facts were not provided to the prosecutors. Insofar as the element of ‘malice’ is concerned, what the plaintiff must in fact prove is ‘*animus iniurandi*’. The defendant must not only have been aware of what he or she was doing in instituting or initiating the prosecution but must at least have foreseen the possibility that he or she was acting wrongfully, but nevertheless continued to

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<sup>33</sup> (472/05) [2006] ZASCA 162; [2007] 1 All SA 375 (SCA) (26 September 2006) at par [14]. Counsel for the defendants refers also to the decisions of cases of **Beckenstrater v Rottcher and Theunissen** 1955 (1) SA 129 (A) at 136A-B and **Minister of Police and Another v Du Plessis** (666/2012) [2013] ZASCA 119; 2014 (1) SACR 217 (SCA) (20 September 2013) at par [30] with reference to ‘reasonable and probable cause’.

act, reckless as to the consequences of his or her conduct (*dolus eventualis*). Intent (in one form or another is required). Negligence does not suffice.<sup>34</sup>

[56] In **Moleko**,<sup>35</sup> the SCA held as follows:<sup>36</sup>

“[63] *Animus injuriandi includes not only the intention to injure, but also consciousness of wrongfulness:*

*‘In this regard animus injuriandi (intention) means that the defendant directed his will to prosecuting the plaintiff (and thus infringing his personality), in the awareness that reasonable grounds for the prosecution were (possibly) absent, in other words, that his conduct was (possibly) wrongful (consciousness of wrongfulness). It follows from this that the defendant will go free where reasonable grounds for the prosecution were lacking, but the defendant honestly believed that the plaintiff was guilty. In such a case the second element of dolus, namely of consciousness of wrongfulness, and therefore animus injuriandi, will be lacking. His mistake therefore excludes the existence of animus injuriandi.’*

[64] *The defendant must thus not only have been aware of what he or she was doing in instituting or initiating the prosecution, but must at least have foreseen the possibility that he or she was acting wrongfully, but nevertheless continued to act, reckless as to the consequences of his or her*

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<sup>34</sup> **Rudolph v Minister of Safety & Security** 2009 (5) SA 94 (SCA) par [18]

<sup>35</sup> **Minister for Justice and Constitutional Development v Moleko** [2008] 3 All SA 47 (SCA).

<sup>36</sup> At par [63] – [64] (footnotes omitted).

*conduct (dolus eventualis). Negligence on the part of the defendant (or, I would say, even gross negligence) will not suffice.”*

[57] However, my finding that the plaintiff has not met his onus in respect of his claim against the second defendant based on malicious prosecution is not the end of the matter. The plaintiff has claimed against the first defendant in respect of this cause of action also. The uncontroverted evidence establishes the elements of the cause of action of malicious prosecution in respect of the relevant police officers. At the very least, on the uncontradicted evidence before the court, the complainant, a police officer, Mr Thusi, falsely accused the plaintiff of an offence that the plaintiff never committed. On the evidence before the court Mr Thusi quite clearly set the law in motion, without reasonable or probable cause (and in fact without any cause whatsoever), and acted with malice (or *animo iniuriandi*). The plaintiff accordingly succeeds on the merits with his claim based on malicious prosecution against the first defendant.<sup>37</sup>

[58] Counsel for the plaintiff submits that given the effect which the malicious prosecution had on the plaintiff's life and the immense embarrassment and humiliation of having to appear in court and in front of his colleagues, a fair and reasonable award in the circumstances would be the sum of R175,000. He submits further that the arrest, detention and malicious prosecution caused

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<sup>37</sup> Cf. **Minister of Safety and Security v Tyokwana** (827/13) [2014] ZASCA 130 (23 September 2014). See also: **Rudolph v Minister of Safety & Security** 2009 (5) SA 94 (SCA) par [17] – 20]

the plaintiff to lose his employment, and that the plaintiff had to go through the embarrassment of being prosecuted twice, the charges having been struck from the roll and thereafter having been reinstated only for such charges to be discharged in terms of s174 of the Criminal Procedure Act. Counsel for the plaintiff refers to a number of cases and the quantum in each such case in his heads of argument.

[59] Counsel for the defendant refers to the case of **Rudolph v Minister of Safety and Security**,<sup>38</sup> and submits that a fair and reasonable amount *in casu* is R40,000 constituting 80% of the quantum granted in the **Rudolf**. However, this approach loses sight of at least the caution expressed in that very judgment, namely that the “...*ever-changing value of money makes reference to previous decisions not altogether helpful* ...” (the **Rudolf** decision was handed down in 2009).

[60] The SCA in the case of **Nakana v Claassens and Others**<sup>39</sup> has recently referred to the factors that must be considered when determining the quantum of a claim based on malicious prosecution, holding as follows:<sup>40</sup>

“[22] *The factors that a court must consider in awarding general damages in a claim for malicious prosecution include the gravity of the charges; the nature*

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<sup>38</sup> (380/2008) (2009) ZASCA 39 (31 MARCH 2009). (Cited in this judgment already under **Rudolph v Minister of Safety & Security** 2009 (5) SA 94 (SCA)).

<sup>39</sup> (137/2024) [2025] ZASCA 52 (7 May 2025) (“**Nakana**”).

<sup>40</sup> At par [22].

*of the prosecution; the length of time the individual was subjected to the prosecution, absence of reasonable and probable cause in setting the law in motion; the presence of improper motive or malice in initiating or instigating the prosecution; the deprivation of liberty; the status, age, and health of the plaintiff; the publicity given to the criminal proceedings and the absence of a reasonable explanation or apology by the defendant. This is not a closed list."*

[61] In **Nakana** the SCA reduced the quantum of general damages for malicious prosecution from R250,000 to R80,000. The SCA further cautioned against weighing factors both in the assessment of damages for unlawful arrest and again in malicious prosecution.<sup>41</sup>

[62] *In casu*, I consider the sum of R100,000 to be fair and reasonable in respect of the quantum for malicious prosecution. In this regard, I have taken the following into account *inter alia*:

- a. the charge laid against the plaintiff is a serious charge, and based on the evidence before the court such charge was entirely baseless and false;
- b. the plaintiff had to return to court over and over again, and in aggravation, the plaintiff was charged not once but twice;

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<sup>41</sup> At par [26].

- c. the plaintiff was first charged on 15 May 2013, his case was repeatedly postponed, and on 4 November 2015 the plaintiff was found not guilty and discharged in terms of Section 174 of the Criminal Procedure Act. Accordingly, the legal process endured for about two and a half years during which the charges were pursued against the plaintiff;
- d. as has been found already the police officials had no reasonable or probable cause in setting the law in motion, and on the probabilities there was an improper motive in initiating and instigating the prosecution;
- e. the deprivation of liberty has been taken into account already for purposes of assessing the quantum of the unlawful arrest and detention. It is not a consideration for present purposes;
- f. the plaintiff has testified to the publicity and humiliation of the criminal proceedings, and his evidence shows that the criminal proceedings have exacted a significant toll on the plaintiff;
- g. whilst the plaintiff has not pursued his claim for legal costs, the uncontroverted evidence is that the plaintiff incurred expenses in the sum of approximately R30,000 in defending himself against the prosecution, and the matter has accordingly also taken a financial toll on the plaintiff;

- h. there is no reasonable explanation or apology by the first defendant or its servants.

## Interest

[63] Section 2A(2)(a) of the Prescribed Rate of Interest Act, Act 55 of 1975, provides *inter alia* that interest on an unliquidated debt shall run from “... *the date on which payment of the debt is claimed by the service on the debtor of a demand or summons, whichever date is the earlier.*”

[64] The plaintiff seeks payment of interest from date of service of summons on 13 May 2016.<sup>42</sup>

[65] The applicable interest rate is the rate as at date of service of the summons,<sup>43</sup> in May 2016, namely 10.5%.

## Costs:

[66] The parties submitted that costs of counsel on Scale B ought to be granted. Taking into consideration the relevant factors, including the complexity of the matter and the importance thereof to both parties, in my view such a cost order is warranted.

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<sup>42</sup> Returns of service at p 043-20 and 043-21.

<sup>43</sup> **Naidoo v Minister of Police** (20431/2014) [2015] ZASCA 152; [2015] 4 All SA 609 (SCA); 2016 (1) SACR 468 (SCA) (2 October 2015) par [57].

**Order:**

[67] Accordingly, I make the following order:

- a. The first defendant is ordered to pay to the plaintiff the sum of R40,000 for unlawful arrest and detention;
- b. The first defendant is ordered to pay the plaintiff the sum of R100,000 for malicious prosecution.
- c. The first defendant is ordered to pay interest on the aforesaid amounts at the rate of 10,5 per cent *per annum* from the date of service of the summons, 13 May 2016, to the date of final payment.
- d. The first defendant is ordered to pay costs of suit, including costs of counsel on Scale B.



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**WOODROW AJ**  
**ACTING JUDGE OF THE HIGH COURT**

*This Judgment was handed down electronically by circulation to the parties and or parties' representatives by e-mail and by being uploaded to CaseLines. The date and time for the hand down is deemed to be 10h00 on the 20<sup>TH</sup> day of January 2026.*

## **Appearances**

Counsel for the Plaintiff: JM van Rooyen

Attorney for the Plaintiff: N Ndebele Attorneys Inc

Counsel for the Defendants: D Mosoma

Attorney for the Defendants: State Attorney

Date of Hearing: Friday 13 June 2025

Date of Judgment: 20 January 2026