



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Not Reportable

Case No: 3147/2021

In the matter between:

DANIEL PIETER LIEBENBERG

PLAINTIFF

and

**THE NATIONAL DIRECTOR
OF PUBLIC PROSECUTIONS**

FIRST DEFENDANT

**THE DIRECTOR OF PUBLIC PROSECUTIONS,
FREE STATE**

SECOND DEFENDANT

THE MINISTER OF POLICE

THIRD DEFENDANT

ITUMELENG JACOB WILFRED NZAMA

FOURTH DEFENDANT

Neutral citation: *Liebenberg v NDPP and Others* (3147/2021) [2026] ZAFSHC 247
(16 April 2026)

Coram: HEFER AJ

Heard: 19-22 November 2024, 23-25 and 27 June 2025 and 8-12 December 2025.

Delivered: 16 April 2026

Summary: Malicious prosecution – *actio iniuriarum* – charge brought against plaintiff not false – prosecuting authorities held liable for compensation based on failure to ascertain all the facts relating to the charge – the charge subsequently withdrawn – damages – quantum.

ORDER

1 The first and second defendants are liable for payment of the amount of R80 000.00 (Eighty Thousand Rand) in respect of the malicious prosecution of the plaintiff, jointly and severally, payment by the one to absolve the other.

2 Interests a *tempore morae* on the above amount.

3 The claim against the fourth defendant is dismissed.

4 First and second defendants are to pay the costs of the plaintiff and fourth defendant on a party and party scale, counsel fees to be taxed on scale B of the Uniform Rules of Court jointly and severally, payment by the one to absolve the other.

JUDGMENT

Hefer AJ

[1] This action stems from the animosity between two colleagues who at all relevant times were members of the South African Police Service (SAPS). The plaintiff, Captain Liebenberg (Capt. Liebenberg), employed as a detective in the SAPS, instituted action against all four defendants for payment in the amount of R2 000 000.00 plus interest, based on malicious prosecution. The action against third defendant had subsequently been withdrawn. It is plaintiff's case, as per the particulars of claim, that the fourth defendant Warrant Officer Nzama (W/O Nzama), who was a member of the SAPS at the time:

'... proceeded to lay a charge of *crimen injuria* against the plaintiff when he had no reasonable or probable cause for doing so, nor did he have any reasonable belief in the truth of the information given.'

[2] In respect of the second and fourth defendants, plaintiff further founded his claim as follows:

'... [the] fourth defendant himself, and/or a prosecutor in the employ of the National Prosecuting Authority whose identity is unknown to the plaintiff, wrongfully and maliciously

prosecuted the plaintiff on the false charge of *crimen injuria*'.

As far as the fourth defendant is concerned, plaintiff's claim is further based on the fact that he, as a member and/or employee of the SAPS, ought to have foreseen that if he acted wilfully and/or negligently in unlawfully laying false charges of *crimen injuria* against the plaintiff and that plaintiff is prosecuted on the basis of such false charges, that the plaintiff might suffer damages as a direct result of the fourth defendant setting the law in motion.

[3] The claim against first, second and fourth defendants is based on the allegation that, in prosecuting the plaintiff, the prosecutor in the employ of the first defendant:

- (a) had no reasonable and probable cause for doing so; and
- (b) had no reasonable belief:
 - (i) in the truth of information given; and/or
 - (ii) that there was insufficient and admissible evidence to provide a reasonable prospect of successful prosecution of the plaintiff on a charge of *crimen injuria*.

[4] In the alternative, the plaintiff pleaded that in the event of the Court finding that the prosecutor acted for proper reason and/or with reasonable probable cause at the time of institution of the proceedings, then and in that event the plaintiff contended:

- (a) at a later point in the proceedings and whilst proceedings were being maintained by the said prosecutor, the sole and/or dominant purpose of maintaining the proceedings became an improper and/or malicious one in view of the fact that the aforesaid prosecutor is reasonably believed to have become aware that reasonable and probable cause for the proceedings do not exist or no longer existed;
- (b) notwithstanding the aforementioned realisation and/or awareness, the relevant prosecutor failed and/or neglected and/or refused to terminate the proceedings when he could and should have done so, resulting in the prosecution being malicious.

Evidence

Captain Liebenberg

[5] The plaintiff was the sole witness who testified in support of his claim. He had been in the employment of the SAPS for a period of 31 years of which he served as

captain for 27 years. He testified that approximately a year before the alleged incidents which formed the basis of the charge instituted, W/O Nzama had been transferred to the same shift of which the plaintiff had been a group leader at the time. According to the plaintiff, the relationship between himself and W/O Nzama was bad. Most of the time W/O Nzama failed to comply with instructions and always challenged him on instructions. According to the plaintiff, W/O Nzama was very arrogant towards him and failed to address him as 'captain'.

[6] As a result of the behaviour of W/O Nzama, the plaintiff dealt with a few incidents and made reports for departmental procedures. Nothing came of these reports. Dealing with the two relevant incidents, the plaintiff stated that on 3 March 2015, certain case dockets were booked out to W/O Nzama to deal with. Regarding one of these dockets, W/O Nzama failed to charge a suspect in custody, claiming that he was unable to do so because the suspect was under the influence of alcohol. In regards to another suspect on the same date, it appeared that W/O Nzama had failed to take fingerprints from such a suspect because, according to W/O Nzama, the relevant SAP218 forms were not available at the time. When the plaintiff subsequently however visited the holding cells himself, he ascertained that such forms were indeed available and that the suspect referred to, was not under the influence of alcohol as alleged by W/O Nzama. When plaintiff got hold of W/O Nzama telephonically, he refused to attend at the plaintiff's office. Plaintiff and W/O Viviers then attended to the work themselves.

[7] In respect of the second incident on 15 July 2015, the plaintiff testified that whilst he was in his office in the company of an attorney Mr Carpede, W/O Nzama entered his office and informed the plaintiff that he cannot tell him when to go and eat. This was after the plaintiff had instructed W/O Nzama to do some work upon which he, W/O Nzama, then indicated that he was busy eating. According to the plaintiff he then asked W/O Nzama to leave the office because Mr Carpede was present and the plaintiff was not prepared to have an argument in the presence of an attorney. The plaintiff further testified that he did not utter any vulgar words because there was an attorney present.

[8] The evidence by the plaintiff pertaining to both the incidents was confirmed by certain entries made in the occurrence book by the plaintiff on the relevant dates, which was handed in as evidence. As far as the first incident is concerned, the occurrence book shows that according to an entry made by the plaintiff at 04h50 the plaintiff attempted to contact W/O Nzama as well as W/O Officer Kotoane regarding certain case dockets. Both officials failed to respond to his telephone calls and messages. It was further recorded that both the officers had a recalcitrant attitude and were not willing to charge a certain suspect.

[9] In respect of the second incident, the entry by plaintiff at 21h50 confirms the evidence by the plaintiff. It further appears from this entry that on this occasion the plaintiff also addressed W/O Nzama in respect of the manner in which he was dressed, whereas W/O Nzama entered his office dressed in an overall. W/O Nzama subsequently brought a charge of *crimen injuria* against plaintiff and plaintiff was charged during August 2015 in regards to the March incident only. From the information provided by the investigating officer, Lt. Col. Poona, it appears that the said official, when taking down the warning statement from plaintiff, was investigating the crime of *crimen injuria* which was committed on 3 March 2015 at 04h30 at Parkroad SAPS.

[10] The charge sheet in respect of this incident reads as follows:

'Charge: Crimen Injuria

That the accused is/are guilty of the crime of Crimen Injuria in that upon or about the 5th day of March 2015 and at or near Parkroad in the district of Bloemfontein the accused did unlawfully and intentionally injure and insult and impair the dignity of Itumeleng Nzama, by calling saying (sic) he is 'fokken useless'.

In the warning statement by the plaintiff, the plaintiff denied the allegations and stated that the complainant, W/O Nzama, made false allegations against him because the plaintiff had brought departmental charges against him and also because there had been a medical council investigation against W/O Nzama through the plaintiff. This warning statement further referred to two earlier statements by the plaintiff which he made for departmental process purposes.

[11] The plaintiff further referred to an entry in the occurrence book which showed that Capt. Liebenberg reported at 06h15 on 4 March 2015 that he had found W/O Kotoane and the fourth defendant sleeping in one of the government vehicles behind the police station. The plaintiff further referred to a medical evaluation form by the detective commander wherein an evaluation of fourth defendant was requested due to alleged negative and unbecoming behaviour for the past years. According to the plaintiff he deposed to an affidavit to institute departmental steps against fourth defendant. However, he does not have knowledge of the outcome thereof.

[12] The plaintiff was then referred to the contents of an affidavit by W/O Kotoane. In this affidavit he stated that on 3 March 2015, at approximately 04h30, while he, together with W/O Nzama was in the parking lot at Parkroad Police Station, sitting in a police vehicle, the plaintiff approached them and said to W/O Nzama:

'Jy moet bedank by die polisie. Jy is fokken useless. Jy wil altyd op jou fokken gat sit en fokken niks doen nie'.

The plaintiff's response to the contents of the affidavit referred to, was that he did not see the fourth defendant in the parking lot on that date.

[13] The plaintiff was further referred to an affidavit by fourth defendant wherein W/O Nzama stated as follows in regards to an alleged incident which occurred on the 8th of July 2015:

'At 20:05 I arrived at the office and found Capt. Liebenberg with DWO Viviers in the office. Capt. Liebenberg then confronted me saying 'I don't want to work'. Ek is 'n fokken poes. I asked him not to use vulgar words when he talk to me. I reminded him of many incidents where he used words like 'fok' and 'fokken' when he speaks to me'.

[14] The plaintiff admitted that on that particular date and time he was in the office with W/O Viviers, who is still in the services of the SAPS. The plaintiff however denies that he uttered the words as alleged by W/O Nzama. An affidavit by Mr Carpede, the attorney referred to, was also put before Court. According to this statement, Mr Carpede was in the office of the plaintiff on 3 March 2015 when an alteration

between the plaintiff and W/O Nzama has taken place. Mr Carpede was however according to the statement not able to say what was said.

[15] A letter dated the 12th of December 2016 from Advocate Lesie-Shale from the office of the National Prosecuting Service – Director of Public Prosecutions: Free State, addressed to the Prosecutor Bloemfontein, reads as follows:

'State v Daniel Pieter Liebenberg

Parkroad CAS: 853/07/2015

1. The accused, Daniel Pieter Liebenberg must be arraigned for trial in the Magistrate Court on the following count:

CRIMEN INJURIA

In light of the special circumstances in this case, it is recommended that this matter be referred for mediation.

This office must be informed of the results of the trial.

4. Return date: 30 June 2017.

5. I decline to prosecute the alleged incident of the 08/07/2015. There are no reasonable prospects of a successful prosecution.

6. Docket herewith.'

[16] Upon being charged, the plaintiff went to the prosecutor who advised him to make representations in writing, which he had done within a day or two. The relevant parts of the representation by the plaintiff, dated 06 October 2017 read as follows:

'On 2015/07/16 at 19:24 WO Nzama reported a case of Crimen Injuria at Heidedal SAPS. He then mentioned the incident on 2015/03/03, four months later. He opened the case to cover himself because he was notified of the departmental steps to be taken against him. He wanted to put me in a bad light as a commander. W/O Kotoane, who is his witness, was also a member who has submitted statements against for departmental steps.

It is very strange that W/O Nzama only opened the case of Crimen Injuria that allegedly happened on 2015/03/03 on 2015/07/16 (four months later). He opened the case at Heidedal SAPS and not at Parkweg SAPS where he is stationed. If he was so aggrieved why 4 months later. . .

Useless means: not fulfilling or not expected to achieve the intended purpose or desire (sic) outcome.

I deny all allegations against me made by W/O Nzama and request humbly that the case against me to be withdrawn.'

[17] In response to this the plaintiff had been informed by Advocate Leslie-Shale (Adv Shale) on the 3rd of November 2017 that his representation has been unsuccessful and that prosecution was to proceed as normal. This was then followed by a further representation dated the 6th of August 2019 by an attorney, the late Mr Nico Naudé (Mr Naudé), on behalf of the plaintiff. The relevant parts of this representation read as follows:

'The uttered words, we feel, does not make out the crime for which the accused is being charged with. It is not Crimen Injuria at all.

We further attach hereto the meaning of the word 'USELESS' as in the Oxford Dictionary, which speaks for itself. Printed marked B. Further the word 'fucking' was never directed to the complainant in person, but rather to accentuate the word 'useless'.

You have been placed in possession of the documents regarding the guilty finding of the complainant. He absence of work so many times that upon being found guilty, he received a harsh sentence of suspension for 1 month WITHOUT PAY! Does not accentuate how useless the complainant in fact is.

In the present case one can never even come to the conclusion by saying 'something is fucken (spelt as in the charge sheet) useless and want to do fuckall, boils down to vulgar swearing or would amount to crimen injuria, given the background of the work ethics of the complainant.

The accused in any event denies that he uttered work (sic) to that effect.'

This presentation was addressed to the Director of Public Prosecutions, Free State.

[18] The late Mr Naudé then addressed a further representation, this time to the first defendant dated 2 October 2019, the relevant parts of which read as follows:

'We are also of the opinion and even if it is found that he did say the words as alleged, that he does not bear all the elements of the said crime.

Keep in mind that the complainant was found guilty of being absent and evading work recently and that his sentence was suspension for a month without pay. The 'Presiding Officer' must have seen his conduct in a very serious light.'

[19] In his evidence, the plaintiff then referred to a letter by Advocate Mzinyathi, the Acting Deputy National Director of Public Prosecutions, dated 21 January 2020,

addressed to Advocate Somara, the Acting Director of Public Prosecutions at the time in which a comprehensive report on the matter together with a copy of the case docket had been requested from Advocate Somara.

[20] We then find an internal office note dated 4 March 2020 wherein JR *inter alia* opined as follows:

'I draw a negative inference from the fact that [the] complainant only later charged some four months after the incident. If his good name or dignity was so bad impacted upon, why wait so long?

The complainant is a police officer and certainly, he is used to the type of language uttered.

The objective facts seem to support the utterance by Liebenberg.

... seen in the context of what actually transpired on the day in question, it is my view that it is *de minimis* and should prosecution not follow.

I also hold the view that this is not a racially motivated incident based on the objective facts. I therefore hold the view that once you remove colour from the facts, prosecution in these circumstances would never be instituted.'

[21] This is then followed by a letter from Advocate De Kock, the Acting Deputy, National Director at the time dated 18 March 2020, in which the following opinion was expressed:

'... It is clear that after he realised departmental were imminent, he opened this case against a representor four months after the fact.

Indeed it begs the question, and it will certainly play an extremely pivotal role at the trial, that if the complainant was so insulted, humiliated and aggrieved, why did he only lay the complaint and registered the docket four months after the incident.

In addition, I am also of the opinion that this matter is extremely trivial and does not belong on our crowded district court rolls which are currently dealing with many house break-ins, robberies and other serious such cases.

It is my opinion to exceed to request of the representor and withdraw this matter. Furthermore, it is my view that the allegations of the representor be handled and deposed of departmentally if SAPS deems it so necessary.'

[22] Advocate M Khaeane, a senior state advocate, in response to the above however indicated on the 28th of March 2020 that he disagrees with the latter decision

and recommended that '... the accused be charged forthwith'. On the 24th and 29th of May 2020, the Deputy Director of Public Prosecutions, Advocate Matzke expressed the view that the matter should be dealt with as a disciplinary complaint and not in Court, which opinion was supported by the Acting Deputy, National Director of Public Prosecutions, Advocate De Kock, on the 29th of May 2020.

[23] The charge was then formally withdrawn only on the 18th of June 2020. As far as the impact on the charges against the plaintiff is concerned, the plaintiff testified that 'he was, as he put it, the laughing stock of his colleagues', his general credibility was affected as well. According to the plaintiff, when he applied for promotion, he was not even considered because of the charges. He further testified that the prosecutors did not view him in the same light as before. Subsequent to the 'incident' as the plaintiff put it, he was still influenced negatively. The plaintiff's wife used to get very upset every time he had to appear in Court on the charges brought against him. The plaintiff further testified that he started abusing alcohol excessively because of the charges.

[24] During cross-examination by Mr Jonase, appearing on behalf of the first and second defendants, it was pointed out to the plaintiff that according to the statement by the attorney, Mr Carpede, he witnessed an altercation between W/O Nzama and the plaintiff on the 3rd of March 2015 and not the 25th of July 2015. When being confronted with the allegations contained in the statement by W/O Nzama, to the effect that he insulted him by saying that he was 'fokken useless', the plaintiff responded by saying that he did not insult him on that day. The plaintiff then went further and testified that W/O Kotloane was not present when the alleged incident occurred on the 3rd of March 2015.

[25] The plaintiff then explained the procedure to be followed before prosecution to be initiated by the prosecuting authority. Of importance in deciding whether to proceed, is the evidence as contained in the docket. If the docket does not contain sufficient evidence, the senior prosecutor may either request further investigation or dismiss the charge. It is mostly the statement of witnesses in the docket which is the deciding factor.

[26] Referring to the first representations made by the plaintiff himself, Mr Jonase asked the plaintiff to explain why he deemed it necessary to mention the meaning of 'useless' in such representation. To this the plaintiff responded by saying that 'because it was the word used in the charge sheet'. He 'googled' the meaning of the word for that purpose. Mr Jonase then further put it to the plaintiff that considering the contents of the representations by Mr Naudé as well as that of the plaintiff himself, it shows by implication that it had been conceded that the alleged words had indeed been uttered by the plaintiff. To this, the plaintiff could not provide an answer.

[27] The plaintiff further testified that no investigations have been conducted in regards to the charges against him. After the close of the plaintiff's case, Mr Jonase applied for absolution of the instance, on behalf of the first and second defendants. After comprehensive arguments had been heard, this application had been dismissed and the reasons had been provided in an *ex tempore* judgment. It needs to be mentioned that up to the stage when application for absolution had been heard, fourth defendant did not have legal representation. After the reasons in the application had been provided, fourth defendant was however represented by both an attorney as well as counsel who had been appointed on a *pro bono* basis upon request of the Court.

Adv Leslie -Shale

[28] Upon resumption of the trial, Adv Lesie-Shale (Adv Shale), testified on behalf of first and second defendants. Adv Shale holds an LLB degree and is currently employed by the first defendant and stationed in George in the position of Deputy Director of the Prosecuting Authority Specialised Crimes Unit. She has held her current position since 1 September 2024. Prior to that, Adv Shale was employed as senior state advocate at the SCU in Cape Town during the period from March 2020 until August 2024. Adv Shale held the position of junior state advocate during the period from 2013 to 2020.

[29] Adv Shale confirmed that she understood that she was to testify pertaining to an action instituted against the state due to a decision which she had taken when she

was a junior state advocate. The decision referred to, is the one taken by herself in respect of a docket which was referred to the second defendant from Parkroad Police Station after the fourth defendant brought a charge of *crimen injuria* against plaintiff, dated 12 December 2016. According to Adv Shale, she had taken the decision to continue with prosecution on account of what was contained in the case docket at the time, namely the complaint statement, the witness statement of W/O Kotloane as well as a warning statement by the plaintiff. Furthermore, some entries in the occurrence book as well as some documents relating to internal disciplinary process had also been taken into consideration.

[30] Of particular importance is that an internal memorandum of the investigating officer, Lieutenant Colonel Poone (Lt Col Poone), in which he expressed the opinion *inter alia* that the words were uttered in the spur of the moment and intention could not be detected, was also submitted to Adv Shale. When asked whether she has taken this into consideration, she responded by saying that such memorandum is of no binding force and she took the decision after reading the docket. As far as the March incident is concerned, the version of the complainant W/O Nzama was corroborated by that of W/O Kotloane. As far as the July incident is concerned, she referred it for further statements to be obtained from W/O Viviers and Mr Carpede. The dates of such affidavits were shown to be 20 September and 24 August 2016 respectively. These affidavits were filed in the docket.

[31] According to Adv Shale she decided not to pursue the July incident because there was no corroboration in respect of the allegations relating thereto. When asked what she based her decision on the prosecuting in regards to the March incident, Adv Shale responded by saying that the alleged utterance of the words 'fokken useless' amounted to unlawful injury to the person of W/O Nzama. According to Adv Shale there was no malicious intent with the prosecution of the March incident. She had no reason to act in bad faith towards the plaintiff, as she does not know either the plaintiff nor the fourth defendant.

[32] As far as the probable cause requirement is concerned, the evidence contained in the docket indicated to her a criminal offense of *crimen injuria*. According to her, the mere utterance of those words amounted to *crimen injuria*. Adv Shale conceded that it is common cause that the plaintiff had always been willing to take part in the mediation process as recommended by herself whilst W/O Nzama was not co-operative in this regard at all. Regarding the representations by and on behalf of the plaintiff, Adv Shale testified that the main issues in such representations were not matters addressing the charge but mainly plaintiff addressing his frustrations with the fourth defendant in the workplace. When asked whether the plaintiff's denial of uttering such words did not constitute dealing with the charges, Adv Shale responded that the plaintiff dealt only with the second incident and not the first.

[33] According to Adv Shale, as far as the second representations on behalf of the plaintiff are concerned, she considered the case law referred to therein. According to her, it was clear from the plaintiff's representations that he had frustrations with the fourth defendant, however he is a senior and there were internal processes which he could have followed. According to Adv Shale, the words uttered by the plaintiff did impair the dignity of W/O Nzama. Adv Shale disagrees that it is not vulgar and does not amount to *crimen injuria* if those words were indeed uttered.

[34] After she had taken the decision, national office requested her to report on the matter because plaintiff escalated the representations to the national office. She drafted the report after she had left Bloemfontein and did not have the docket with her at the time. The relevant parts of such report read as follows:

'It is my view that the representor only insulates the word 'useless' and their main contention is that the word is not *crimen injuria* at all. I however, beg to differ with their view in that firstly the words 'fucken, as and fokol' are vulgar and indecent words. Secondly, the manner and the context in which the words were uttered is described the witnesses being aggressive and harsh. Lastly, they were uttered by a Captain to a subordinate in the presence of colleagues and members of the public. Therefore, they definitely must have impaired the dignity of the complainant as he felt humiliated.

The statement by the defence to the effect that the words alleged to have been said by the accused does not bear all the elements of the crime is not only vague, as they do not specify

which element, but incorrect as well. Bearing in mind that for a crime of this nature both a subjective and objective test are applied.'

Adv Shale testified that she still stands by the report.

[35] Adv Shale reiterated that she was a junior when she took the decision to prosecute and that Mr Lenchoe acted as her supervisor at the time and that he checked every decision she made and agreed with her decision.

[36] During cross-examination by Ms Ferreira, it was put to Adv Shale that the statement by W/O Kotoane was not corroboration of how W/O Nzama felt after the alleged incident. When being confronted with certain discrepancies in the versions of W/O Viviers and Mr Carpede against that of fourth defendant and Mr Kotloane, she disagreed that this should have been clarified prior to taking the decision to continue prosecution. She also disagreed that the mere obtaining of further supplementary affidavits by fourth defendant, W/O Viviers and Mr Carpede, could have clarified what appeared to be confusion.

[37] When asked whether she has noted, when she requested the affidavits from Mr Carpede and W/O Viviers, that the dates do not correspond with those in respect of the second incident, she answered that she did not clarify this as there was corroboration from what fourth defendant and W/O Kotloane had said. Adv Shale conceded that the instruction by the Director of Public Prosecutions must be followed and that the matter must then be taken to trial. This is also confirmed by the use of the word 'must' in the instruction by Adv Shale herself. During cross-examination by Mr J Van Rensburg, on behalf of fourth defendant, the requisites for the crime of *crimen injuria* was put to the witness, who agreed with such requisites.

[38] As far as the subjective test is concerned, regarding how W/O Nzama was affected by the alleged utterance of the words, Adv Shale responded that W/O Nzama stated in his affidavit that 'he was not happy'. Again Adv Shale was confronted with the fact that she did not obtain a supplementary affidavit from the claimant to establish whether his dignity had indeed been infringed. According to her, she deemed it

sufficient that W/O Nzama stated that he was not happy. Thereafter, Mr Jonase closed the case of first and second defendants.

W/O Nzama

[39] W/O Nzama testified that he is currently unemployed after having resigned from the SAPS during approximately September 2020. He had been in the employment of the SAPS for approximately thirty years. W/O Nzama testified that on 3 March 2015 the plaintiff called him and assigned two dockets to him. One of the dockets was in respect of a charge of drinking and driving. Because the suspect was still asleep, he was however not able to charge him at that stage. In respect of the other docket, the SAP forms which he needed to take fingerprints from the suspect were not available. He did however manage to charge the suspect.

[40] According to W/O Nzama he informed the plaintiff then that he was going to go home to have a meal and take his treatment. The plaintiff however then at some stage phoned him whilst he was at home and instructed him to return to work. Upon his return at the police station he tried to explain to the plaintiff that he needed to take the treatment on a daily basis, usually before 08h00 at night so that 'it can work properly'. Whilst in the office of the plaintiff, the plaintiff started arguing with him. W/O Nzama then testified that whilst they were outside the office in the parking lot where they usually park, the plaintiff then uttered the words which form the basis for the charge of *crimen injuria*. According to W/O Nzama, this occurred in the presence of W/O Kotoane. W/O Nzama testified that he did not bring a charge against plaintiff on that day.

[41] On the 7th of July 2015, according to W/O Nzama, the plaintiff told him that he did not do his work in respect of a particular docket. This was said in the presence of another person who appears to be W/O Viviers according to W/O Nzama. According to him, there was also another person in the office of the plaintiff when this was said. This was apparently Mr Carpede. After W/O Viviers had left the office, he and the plaintiff had another argument during which the plaintiff again said 'you are fokken useless'. He then left the office. He testified that he was not happy and that he decided

to lay a complaint. He testified in particular that he thought that the plaintiff was going to change and because he did not, the fourth defendant then brought a charge against him. He did not follow any internal process like raising a grievance.

[42] According to W/O Nzama, he wrote down the statement in regards to the two alleged incidents which was placed before Court himself. He wrote the statement eight days after the second incident. When asked why he made the statement, he again repeated that he waited for the plaintiff to change which did not happen. According to W/O Nzama defendant he brought a charge against the plaintiff because he wished the Court to assist him in reprimanding the plaintiff. He testified that he and W/O Kotoane attended Court with the appearances of the plaintiff although they did not get to the stage where they testified.

[43] According to fourth defendant the investigating officer, Lt Col Poone, never contacted him and obtained a further statement from him. He conceded that he and the plaintiff had a volatile relationship. During cross-examination by Ms Ferreira, W/O Nzama testified that he resigned from the SAPS because of his illness. He also got divorced and had three operations. He was booked off and was then physically unfit to continue employment. He further testified that usually, because the plaintiff is his senior, when plaintiff says something to him, he does not say anything.

[44] He conceded that he had been absent from work and in particular on sick leave on many occasions as contained in the records which was put before Court and to the witness himself. He further testified expressly and reiterated that he remembers the events of the first incident very well, but that he cannot recall the second incident. He testified that he thinks the second incident was when the plaintiff called him to the office to make him aware that he did not do his job regarding dockets. During cross-examination by Ms Ferreira it was put to the W/O Nzama that his version in Court differs materially from the content of his statement. He never mentioned before that he was at home on the evening of 3 March 2015, that he was telephoned by plaintiff and that there was also an altercation in the office of the plaintiff on that evening.

[45] W/O Nzama was referred to his statement which he wrote himself two to three months after the first incident and at some stage the Court adjourned to provide him the opportunity to read and consider the statement. When confronted with the date of the statement, he conceded that he made the statement eight days after the second incident. W/O Nzama testified that Mr Carpede and W/O Viviers should have put the words uttered by the plaintiff in their statements because they were in close proximity when those words were uttered. During cross-examination by Ms Ferreira, he was confronted with the fact that his evidence in Court differed materially from the contents of the statement. As far as the first incident is concerned, the statement did not set out that it took place in the parking lot as he testified, and the statement did also not mention the fact that the plaintiff contacted W/O Nzama whilst he was at home.

[46] As far as the second incident is concerned, W/O Nzama at no stage repeated the vulgar words as contained in the statement which was allegedly uttered during the second incident during July 2015. Further, in respect of the two different versions of the fourth defendant as set out in his statement versus his evidence in Court, it later became apparent during the Court's questions that the fourth defendant had a third version which materially differed from the previous versions in that he then testified that W/O Viviers was present during both the first and second incident.

[47] During cross-examination by Mr Jonase, W/O Nzama testified that he brought the charge at the Heidedal Police Station because that is where he is resident. Mr Jonase also drew W/O Nzama's attention to the fact that apart from stating that he was not happy, nothing was contained in the statement by himself of how he felt after the incidents. When asked why he did not wish to take part in the mediation process, fourth defendant testified that he was not aware of the mediation process. Had he been aware thereof, it would, according to him, assisted a lot.

[48] When asked how he feels towards plaintiff presently, he responded by saying that he still feels that he has a strong case against the plaintiff and that he had been denied justice because the matter did not proceed to trial in the Magistrate Court.

[49] This concluded the evidence which was presented before Court.

Issues to be decided

[50] Upon an overview of the evidence before Court, the following aspects crystallised out which need to be decided upon:

- (a) Had the alleged words been uttered by the plaintiff towards the fourth defendant?
- (b) Coupled with the above, if it be found that the words indeed were not uttered by the plaintiff, to what extent does it affect the claim against the defendants based on malicious prosecution?
- (c) Was the prosecution by the first and second defendants malicious?
- (d) Coupled with the latter, are the first, second and fourth defendants liable towards the plaintiff for the alleged malicious prosecution?

Utterance of the words

[51] In deciding whether the words as contained in the charge itself had been uttered, the surrounding circumstances prevailing at the time should be taken into consideration. There is no doubt that the working relationship between the plaintiff and fourth defendant was, to say the least, strained. W/O Nzama described it as being volatile. What is of further importance is that not once during the presentation of evidence before Court did, I gain the impression that fourth defendant disputed the fact that his superior, Capt. Liebenberg, had been dissatisfied in general with his performance at work.

[52] As a result of the behaviour of W/O Nzama, the plaintiff reported his behaviour for departmental procedures. What is important to be mentioned at this stage already, is that the two statements by the plaintiff which were appended and to which reference was made to in his warning statement, dated 11 August 2015, were statements made for the purpose of instituting the departmental steps against W/O Nzama and were dated 10 March and 16 July 2016 respectively. The plaintiff did not in particularity deal with what transpired between himself and fourth defendant on the 3rd of March 2015 and for that matter on the 7th of July 2015 in his warning statement itself.

[53] The plaintiff denied that he uttered the words which form the basis of the charge against him towards fourth defendant. Save for the warning statement and the statements in regards to the departmental steps, the plaintiff did not put his version in writing. The first time he has done so is through his written representation dated 6 October 2017. Therein he again only referred to the 'departmental affidavit'. Together with this, the plaintiff then with reference to the statement by Mr Khampede, advances an argument that no incident in the parking area as alleged by fourth defendant could have taken place. The plaintiff then went further and stated that he, referring to Mr Carpede, '... could have overheard the argument in my office where W/O Viviers was present as confirmed by his statement.'

[54] However, according to an entry made in the occurrence book on the 8th of August 2015, not the 3rd of March 2015, that incident between plaintiff and fourth defendant had taken place during which Mr Carpede had been present. To put it into perspective, the plaintiff in his first representation dealt with the presence of Mr Carpede as it was part of the first incident, which is not the case. Of importance is further that as far as the entry in the occurrence book is concerned, it lends support for the version by the fourth defendant, although in respect of a different date, that the plaintiff did phone him at some stage during that evening around 20h03 upon which fourth defendant informed him that he was busy having a meal at his house.

[55] Coupled with this is that according to the plaintiff both Mr Carpede as well as W/O Viviers had been present in his office or at least in the immediate vicinity of his office when this altercation between plaintiff and W/O Nzama had taken place. Both these persons should therefore in all probability would have been able to hear the exchange of words between plaintiff and fourth defendant. Mr Carpede states that he witnessed an altercation between the plaintiff and fourth defendant and two other white officials who were assisting him. He states further that he does not know what the argument was about but he did hear that there was some exchange of 'harsh words' from the two officers to fourth defendant. According to Mr Carpede, he can however,

not precisely state which words were uttered because of a lapse of time. This, according to Carpede transpired on the 3rd of March 2015.

[56] W/O Viviers in his statement also refers to an incident which had taken place on the 3rd of March 2015. According to him, he heard W/O Nzama speaking to the plaintiff in an inappropriate manner but nothing further, because he left the offices. The objectivity of W/O Viviers is also questionable whereas he also commented upon the behaviour of the W/O Nzama in the past. In respect of both these persons who had been present during the altercation between plaintiff and fourth defendant, it appears that are both shying away from putting the full facts before Court. Neither one of these witnesses were called to testify at Court. Of importance again, is that all three of them dealt with an incident which had taken place on the 3rd of March 2015.

[57] Then we get to the representation on behalf of the plaintiff by the attorney, the late Mr Nico Naudé, a well-known criminal law attorney in the Bloemfontein area, stated in no unequivocal terms:

'the uttered words we feel, does not make out the crime with which the accused is being charged with.

. . .

Further the word 'fucking' was never directed to the complainant in person, but rather to accentuated the word useless.' (My emphasis.)

The only inference from these phrases is that it must have been his instructions from the plaintiff that these words were indeed uttered. The sentence which follows at the end of the representation to the effect that the plaintiff deny that he uttered the words, does not do away with such inference.

[58] As far as the second representation by Mr Naudé is concerned it does not contain a denial that the words were indeed uttered. It only goes as far as to say '... even if it is found that he did say the words as alleged ...'. It then also contains the following phrase which can be interpreted as a justification for the words being uttered which reads as follows:

'Keep in mind that the complainant was found guilty of being absent and evading work recently and his sentence was a suspension for a month without pay. The Presiding Officer must have

seen his conduct in a very serious light'.

[59] Taken all these aspects into account, it would appear therefore that the words as alleged by fourth defendant had indeed been uttered. This is especially so considering the surrounding circumstances regarding an obvious superior police official being frustrated with the work performance of a subordinate. As far as the evidence presented in Court by the W/O Nzama is concerned, it is so that during his testimony he did not refer to the vulgar language contained in his statement with reference to the second incident. It is also true that the fourth defendant's version was not in accordance with that stated in his statement.

[60] During his testimony in Court, the W/O Nzama testified in respect of the first incident that he went home at around 20h00 to have a meal and take his medication. This version of the fourth defendant is however reflected in the occurrence book in respect of the alleged July incident. Furthermore, there is the evidence by the fourth defendant to the effect that the words were uttered in the parking lot and not in the office. Fourth defendant further dealt with the presence of Mr Carpede and W/O Viviers in respect of the second incident whilst not only Mr Carpede and W/O Viviers but the plaintiff in his representation as well in respect of the first incident.

[61] In *S v Oosthuizen*,¹ Nicholas J with reference to Wigmore's *Evidence* 3 ed, chapters 35 and 36, said as follows:

'In the case of self-contradiction on the other hand,

"We do not invoke the assertions of other witnesses to prove his specific error ... We resort simply to the witness' own prior statements, in which he has given a contrary version. We place his contradictory statement side by side, and as both cannot be correct, we realise that at least one of the two he must have spoken erroneously. Thus we have detected him in one specific error ..." (Wigmore at 684-5)

If a contradiction is shown, the question then is,

"What is the exact nature of (the) probated effect? Does the error on that appoint affect his trustworthiness on other points? And on what points?" (Wigmore at 653.)

The probative effect is indefinite:

¹ *S v Oosthuizen* 1982 (3) SA 571 (T).

"We know simply that an erroneous statement has been made on one point and we infer that the witness is capable of making an erroneous statement on other points". (Wigmore at 653.)²

[62] Nicholas J continued as follows:

'Wigmore says of it (at 676):

"It is untrue to human nature. It is not correct that a person who tells a single lie is therefore necessarily lying throughout his testimony, nor that there is any strong probability that he is so lying. The probability is to the contrary."

All that can be said is that where a witness has been shown to be deliberately relying on one point, the trier of the fact *may* (not *must*) conclude that his evidence on another point cannot safely be relied upon.³

I was quite taken by surprise with the turn of events when fourth defendant appeared to be confused regarding the two incidents at the end of his testimony. I do however agree with Mr Van Rensburg, appearing on behalf of the fourth defendant, that it may be because of him being tired at the end of his testimony. This does not mean however that his evidence as a whole must be rejected.

[63] In view of what has been stated in respect of the inference being drawn from the representations by and on behalf of the plaintiff, coupled with the evidence of fourth defendant, I find that the words as contained in the charge sheet relating to the incident on 3 March 2015, were indeed uttered by the plaintiff towards the defendant.

Malicious prosecution

General principles

[64] In order to succeed in a claim for malicious prosecution, the plaintiff is required to prove:

- (a) The defendant set the law in motion (instigated or instituted the proceedings);
- (b) The defendant acted without reasonable and probable cause;
- (c) The defendant was actuated by malice or *animus injuriandi*; and
- (d) The prosecution failed.⁴

² Ibid at 576D–G.

³ Ibid at 577 A.

⁴ *Minister of Justice and Constitutional Development and Others v Moleko* [2008] ZASCA 43; 2009 (2) SACR 585; [2008] 3 All SA 47 (SCA) para 8.

[65] In *Beckenstrater v Rottcher and Theunissen*,⁵ Schreiner JA commented as follows in regards to the reasonable cause requisite:

'I understand this to mean that he did not have such information as would lead a reasonable man to conclude that the plaintiff had probably been guilty of the offence charged; if, despite his having such information, the defendant is shown not to have believed in the plaintiff's guilt, a subjective element comes into play and disproves the existence, for the defendant, of reasonable and probable cause.'⁶

[66] The test for a reasonable cause contains both a subjective and objective element which means that there must be both actual belief on the part of the prosecutor and that that belief must be reasonable in the circumstances.⁷

[67] In *Relyant Trading (Pty) Ltd v Shongwe and Another*,⁸ it was stated that:

'It follows that the defendant will not be liable if he or she held a genuine belief founded on reasonable grounds in the plaintiff's guilt. Where the reasonable and probable cause for an arrest or prosecution exists the conduct of the defendant instigating it is not wrongful. The requirement of reasonable and probable cause is a sensible one: "For it is of importance to the community that persons who have reasonable and probable cause for a prosecution should not be deterred from setting the criminal law in motion against those whom they believe to have committed offences, even if in so going they are actuated by indirect and improper motives".'

The plaintiff bears the onus of proving the absence of reasonable and probable cause.⁹

[68] *Crimen injuria* can be defined as an unlawful, intentional and serious violation of the dignity or privacy of another.¹⁰ The elements of *crimen injuria* can thus be broken down as follows:

(a) the infringement of the dignity or privacy of another;

⁵ *Beckenstrater v Rottcher and Theunissen* 1955 (1) SA 129 (A).

⁶ *Ibid* at 136A–B.

⁷ J Neethling, J M Potgieter & P J Visser *Neethling's Law of Personality* 2 ed (2005) at 176.

⁸ *Relyant Trading (Pty) Ltd v Shongwe and Another* [2006] ZASCA 162; 2007 (1) All SA 375 (SCA) para 14.

⁹ *Joubert v Nedbank Ltd* [2011] ZACPEHC 28 para 11.

¹⁰ *S v Sharp* 2002 (1) SACR 360 (CK) at 366G. See also *S v Mostert* 2006 (1) SACR 560 (N) at 571B–C.

- (b) which is serious; and
- (c) unlawful and with the intent to violate the dignity or privacy of another.

[69] In the matter of *S v S*,¹¹ the accused was convicted by a magistrate of the crime of *crimen injuria* in that he had said to a woman who was pressing him to have her car cleared: '[s]hut up, you bitch'. In his judgment in the court of appeal, Marais J said as follows:

'The elements constituting verbal *crimen injuria* are well known: the speaker must have the intent to degrade or humiliate the complainant, and the latter must be degraded or humiliated by the words uttered

...

What then has the State directly proved in regards to the appellant's use of the word 'fucking'? That it is an obscene word, and that the appellant used it in a state of annoyance. From those two facts by themselves no intent can be inferred, and the surrounding circumstances do not assist the case as I have pointed out above.'¹²

The Court held that in this regard the charge must fail. The Court however did hold that if men were to call women 'bitches' with impunity, a criminal sanction is necessary for the preservation of an orderly society.

[70] According to Ms Ferreira, with regard to the first and second defendant, on the documentation before Adv Shale, which formed part of the docket, no *prima facie* case was made out and the elements of *crimen injuria* was not proven. According to her, no reasonable and probable cause to prosecute existed and evidence which had material value was either not duly considered and not enough weight was attributed to it. I agree with these submissions of Ms Ferreira in that Adv Shale was faced with versions from both W/O Viviers and Mr Carpede which differed materially from the allegations made by W/O Kotoane and fourth defendant. It was expressly put to Adv Shale that at the very least the discrepancies pertaining to the dates reported ought to have been clarified with the witnesses and addressed by way of supplementary affidavits.

¹¹ *S v S* 1964 (3) SA 319 (T) at 321A.

¹² *Ibid* 322C-323A.

[71] Furthermore, the fact that the elements of *crimen injuria* were not met in the statement of fourth defendant was stated merely that he was 'unhappy' falls short of the required injury to his person and the test for *crimen injuria*. Adv Shale explained her decision to prosecute based on the fact that in respect of the March incident, the plaintiff did not deal with what actually transpired during that incident. Adv Shale merely relied upon the allegations as contained in the two 'disciplinary process statements'. She further differentiated between the two charges on the basis that there was corroboration in respect of the March incident but not in respect of the July incident. However, upon a proper consideration of the alleged words during the July incident, these words come across as much more vulgar and degrading than those uttered during the March incident.

[72] Her attempts to rely upon the fact that at the time she was a junior prosecutor, does not relieve her from the responsibility. In total, I gain the impression that she did not apply much weight to the matter. I further gained the impression that she acted reckless in her decision to prosecute and did not properly consider such decision. It is common cause that the docket which was placed before her, amongst others, contained documentation which showed that the investigating officer, Lt Col Poone, did not deem it advisable to prosecute the matter. Adv Shale is a prosecutor who holds the LLB degree. Surely, even as a junior prosecutor, she should have ensured that requirements of *crimen injuria* had been met at the time when she made the decision. When she was confronted with the elements of the crime of *crimen injuria* and especially the subjective test to be applied by Mr Van Rensburg, she was not able to answer save for saying that fourth defendant was not happy. Fact remains she could have strengthened the case of the complainant, Mr Nzama by making the appropriate enquiries, which she has failed to do. The matter was not ready to be sent to trial.

[73] I agree with the submissions by Mr Van Rensburg that the information in the docket considered by Adv Shale as representative of the second defendant, did not include any assemblance of proof of two elements of the crime *crimen injuria*:

(a) at the first element absent, there was no proof in the docket content, considered by Adv Shale, on the infringement of the dignity of the fourth defendant in that the

subjective test was never considered, on how the words directed at the fourth defendant made him feel, how the fourth defendant felt that his dignity was impaired; (b) coupled with the infringement of dignity element, goes the element of seriousness, which Adv Shale 'read' into the affidavit deposed to by the fourth defendant which had not been established. In this particular instance, had she considered the applicable authorities relating to *crimen injuria* she would in all probability not have come to the conclusion that it was a serious violation of the dignity of fourth defendant. With reference to the *S v S* matter above calling somebody 'useless' may be construed as insulting, but does not establish the crime of *crimen injuria*.

[74] All the above shows that at the very least, Adv Shale did not, properly, consider the merits of the charge as well as the evidence put before her before taking a decision.

[75] This brings me to the final aspect to be considered which actually goes to the very essence of the description of malicious prosecution. Malice is the operative word. Mr Jonase, on behalf of first and second defendants, referred me to the relevant passage in the matter of *National Director of Public Prosecutions v Sijoyi Robert Mdhlovu* (Mdhlovu),¹³ regarding the requisite of *animus iniuriandi*. The Supreme Court of Appeal stated the following in this regard:

'[31] Proof of *animus iniuriandi*, in the sense of intention to injure, is an essential element of the *actio iniuriarum* on which a malicious prosecution claim is based. The DDPP had to intend to prosecute the respondent with the consciousness of wrongfulness. Negligence or even gross negligence is insufficient – there must be *dolus*, at minimum, in the form of *dolus eventualis*.

[32] To show *animus iniuriandi*, the respondent had to demonstrate that the DDPP foresaw the possibility that initiating the prosecution was wrongful in that reasonable grounds for it were lacking but that she acted recklessly as to that consequence. The high court's analysis took an unduly narrow view of the evidence.

...

¹³ *National Director of Public Prosecutions v Sijoyi Robert Mdhlovu* [2024] ZASCA 85; 2024 (2) SACR 331 (SCA).

[35] As discussed above, the DDPP did not act unilaterally but after extensive consultation and upon receiving the NDPP's written confirmation that the dockets disclose a *prima facie* case justifying prosecution. It bears noting that the DDPP had no personal connection to the respondent as she had been appointed to the office from another province just a month prior. These factors reduce the likelihood of her malicious motive. Her conduct, viewed objectively, is incompatible with the consciousness of wrongfulness, recklessness or *animus iniuriandi*. Proving malicious prosecution requires egregious conduct, not just flawed reasoning. The high court here was too quick to impute *animus iniuriandi* without clear evidence thereof.¹⁴

[76] Ms Ferreira on the other hand referred me to the *Minister of Justice and Constitutional Development and Others v Moleko*,¹⁵ matter, in this regard as well. The relevant portion reads as follows:

'[65] In this case, I am of the view that Mr Moleko did prove *animus iniuriandi* on the part of the DPP. Ms Neveling clearly intended to prosecute Mr Moleko and was fully aware of the fact that, by so doing, he would in all probability be 'injured' and his dignity (comprehending also his good name and privacy) in all probability negatively affected. Despite this knowledge, *she took the decision to prosecute without making any of the enquiries which cried out to be made. Thus, acting in a manner that showed her recklessness as to the possible consequences of her conduct.*' [My emphasis.]

Based on the above, I am satisfied that the plaintiff has succeeded in proving the requirement of *animus iniuriandi* and that first and second defendants be held liable for the malicious prosecution of the plaintiff.

Liability of fourth defendant

[77] According to W/O Nzama he brought the charge of *crimen injuria* against plaintiff because, as he put it 'he wanted for Capt. Liebenberg to change. But he did not. He wanted the Court to reprimand Capt. Liebenberg'. As far as it may be described as an improper motive to ask a Court to reprimand a person for that person's past actions, is open for debate. The fact of the matter is that the fourth defendant felt aggrieved about the manner he had been treated by Capt. Liebenberg in the past, apparently on other occasions prior to the alleged two incidents during 2015.

¹⁴ Ibid paras 31–32 and 35.

¹⁵ Op cit fn 5.

[78] In the *Mdhlovu* matter, the Court said as follows:

'[33] An improper motive alone is insufficient to establish *animus iniuriandi* for a malicious prosecution claim. As noted above, the prosecution must also have been initiated without reasonable and probable cause. Given my finding that there was an objectively reasonable basis to prosecute the respondent, any improper motive does not render the prosecution wrongful.'¹⁶

It cannot be said that fourth defendant's initiation of the prosecuting process had been instituted without reasonable and probable cause. It had been proven that the words had indeed been uttered. The charge was not based on false information being provided. The fourth defendant is a lay person as far as the legal requirements of the crime is concerned. Had Adv Shale done her job in a responsible manner by obtaining the necessary supplementary affidavits, it may have resulted in a successful prosecution. But, as Mr Van Rensburg put it quite correctly, W/O Nzama was effectively robbed from his day in Court.

[79] Therefore, I find that fourth defendant cannot be held liable on the grounds of malicious prosecution towards plaintiff.

Quantum

[80] In *Patel v National Director of Public Prosecutions and Others (Patel)*, it was held:

'The assessment of an award for damages is not an easy task. The Court needs to carefully consider the facts and circumstances of the case before it, the aggravating and mitigating conduct of the defendants, the position of the plaintiff and the decided cases for guidance.'¹⁷

[81] In the *Patel*-matter,¹⁸ the plaintiff was the former Judge President of the KwaZulu Natal High Court Division and a few years away from retiring with an unblemished record of service to the judiciary and legal profession. The incident relating to the malicious prosecution had been widely published in the media and he

¹⁶ Op cit fn 14 para 33.

¹⁷ *Patel v National Director of Public Prosecutions and Others* [2018] ZAKZDHC 17 para 35.

¹⁸ Ibid paras 32-33 and 44-45.

had to appear on two occasions as an accused. After claiming the initial amount of R3 000 000.00, the Court held that the amount of R900 000.00 is to be regarded as a fair and reasonable amount for damages suffered by the plaintiff.

[82] In *Nakana v Claassens and Others*,¹⁹ the Supreme Court of Appeal reduced an amount of R250 000.00 to the amount of R80 000.00. The plaintiff, a farmer, was 60 years at the time of his arrest and detention and 67 years when he testified.

[83] In *Makgoba v Minister of Police and Another*,²⁰ the plaintiff, a police reservist who was 30 years at the date of his arrest, was awarded an amount of R180 000.00 for malicious prosecution after the Court has taken into cognisance the fact that seven years had expired since the institution of the prosecution. The plaintiff was arrested and charged with the crime of rape, remained in custody for approximately nine months and appeared in Court on three occasions before the charges had been withdrawn.

[84] In the present case the plaintiff was never detained. The charge was ultimately withdrawn after a period of four years and after the plaintiff had attended Court on fourteen occasions. I do take into account that the plaintiff had been and still is in the service of the SAPS for a very long period of time and that no disciplinary proceedings have ever been instituted against the plaintiff. Very little pecuniary value can be attributed to the fact that according to the plaintiff he became the laughing stock at the police station and that several of his colleagues attended his court appearances. Although the plaintiff further testified that he was not promoted since the charge was instituted and as a result of the fact that the matter was pending for five years, there is no factual evidence before Court that this can be attributed to the prosecution instituted against the plaintiff. It appears that after the charge was withdrawn, the plaintiff still had not been promoted.

¹⁹ *Nakana v Claassens and Others* [2025] ZASCA 52 paras 5, 23, 27 and 29.

²⁰ *Makgoba v Minister of Police and Another* [2024] ZALMPHC 34 paras 3, 10, 12 and 44-45.

[85] The plaintiff's evidence to the effect that when he testified in other cases the same prosecutors did not see him in the same light anymore and that the prosecutors and colleagues ignored him after the institution of the prosecution is also not supported by any objective evidence. There is also no evidence before Court that the admission of the plaintiff to Bloemcare and the psychiatric counselling as well as medical care he received, can be attributed to the charge and prosecution instituted against the plaintiff. The same goes for the deterioration in the plaintiff's marriage relationship and that the plaintiff himself has resolved to abusing alcohol.

[86] The plaintiff is a police officer with the rank of a captain in the SAPS. Although it may be 'more acceptable' in the environment of the police services, as one of the officials commented in a memorandum before Court, a superior officer should know better than to address a colleague of subordinated rank in the manner he has done. It further appears that the words were indeed uttered in the spur of the moment towards a colleague who had the tendency not to perform his duties as a police official properly.

[87] I take further cognisance of the fact that the charge was brought against the plaintiff by the fourth defendant because he wanted the Court to reprimand the plaintiff. Furthermore, it is accepted that the plaintiff was willing to take part in the mediation process whilst the fourth defendant did not co-operate in this regard. It also appears that no disciplinary proceedings have been instigated against the plaintiff which would have been the more appropriate remedy as recommended by some of the representatives of the first and second defendants.

[88] Taking into account all these factors in addition to the fact that the charge by the fourth defendant was not false, in my view an amount of R80 000.00 (Eighty Thousand Rand) as damages for malicious prosecution will be appropriate compensation.

Costs

[89] In awarding costs, the Court has a discretion to be exercised judicially upon a consideration of the facts in each case and in essence, the decision is a matter of

fairness to both sides.²¹ As being successful in respect of his claim against the first and second defendants, the plaintiff is entitled to a cost order in his favour. What remains to be decided is who is to be liable for the costs in respect of the fourth defendant. According to Mr Van Rensburg, as well as counsel acting on behalf of the fourth defendant, he was instructed on a *pro bono* basis, with an understanding of a cross-recovery arrangement in the event that the fourth defendant is successful in litigating.

[90] Mr Van Rensburg referred me to GCB Circular 18 of 2022 dated 8 March 2022 (GCB Circular) in terms whereof counsel may mark a fee on their brief in accordance with the provisions of rule 7, as a professional fee in terms of rule 6(4) of the rules, which shall not be payable, unless the relevant costs are recovered upon taxation. Mr Van Rensburg further submitted that the instructing attorney will also be entitled to recover his costs on the same principle as counsel for the fourth defendant. I am however not familiar with a provision similar to that of the GCB Circular and leave this aspect to the taxing master upon production of provisions to the same effect.

[91] I am further in agreement that taking into account all the circumstances of the case and in particular the actions of the representatives of first and second defendants, that first and second defendants be liable for payment of the fourth defendant's costs. I deem such an order just and equitable. In the absence of argument to the contrary such costs should include the costs of all postponements which stood over for later adjudication .

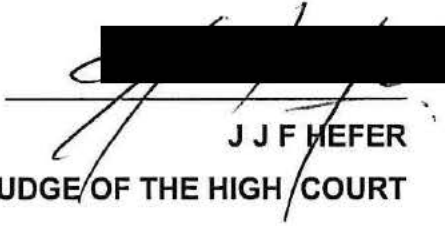
[92] In closing I wish to express my appreciation towards Mr Van Rensburg as well as his instructing attorney, Mr Thebe from the firm Thebe Attorneys Incorporated.

[93] Therefore, I make the following order:

1 First and second defendants are liable for payment of the amount of R80 000.00 (Eighty Thousand Rand) in respect of the malicious prosecution of the plaintiff, jointly and severally, payment by the one to absolve the other.

²¹ D E Van Loggenberg *Erasmus: Superior Court Practice* RS28 (2025) at D1-4.

- 2 Interest *a tempora morae* on the above amount.
- 3 The claim against the fourth defendant is dismissed.
- 4 First and second defendants are to pay the costs of plaintiff and fourth defendant on a party and party scale, counsel fees to be taxed on scale B of the Uniform Rules of Court, jointly and severely, payment by the one to absolve the other.


J J F HEFER
ACTING JUDGE OF THE HIGH COURT