IN THE HIGH COURT OF SOUTH AFRICA
{EASTERN CAPE DIVISION, GRAHAMSTOWN}

Case No. 3709/2016 and 3710/2016

In the matter between:

LITHA SIBUTA	First Plaintiff
LUBABALO QUWE	Second Plaintiff

And

THE MINISTER OF POLICE	First Defendant
NATIONAL DIRECTOR OF PUBLIC PROSECUTION	Second Defendant

JUDGMENT

TONI AJ

Introduction

[1] This is an action for damages. The plaintiffs seek payment in the sum of R1 000 000.00 each from the defendants for damages they allegedly suffered consequent upon their unlawful arrest and detention by members of the SAPS employed by the first defendant and for malicious prosecution against the second defendant. The plaintiffs' claim is premised on vicarious liability, it being their pleaded case that the police officers who arrested and detained them were at the time employed by the first defendant and were thus acting within the scope of their employment and in execution of their duties. This is also so, so they say, in respect

of the members of the National Prosecuting Authority who maliciously prosecuted them.

[2] The plaintiffs were arrested on 30 July 2013 and kept in police detention until they were released on 15 August 2013. They spent 16 days in police custody. Their prosecution commenced on 1 August 2013 when they appeared for the first time before a magistrate who kept on remanding their case until charges were withdrawn against them on 22 November 2013.

Common cause facts

[3] The common cause facts which formed the basis of an agreement between the parties, signed by their respective Counsel on 19 October 2018, are that the plaintiffs were arrested by constable Jonathan Deon Raats, (Raats), without a warrant at a bus stop shelter at Douglas Smith highway, Duncan village, East London. The bus shelter is adjacent to the home of the first defendant. The arrest was effected in full view of the public.

[4] At the time of their arrest the second plaintiff was sitting on the front passenger seat of a blue VW Golf motor vehicle with registration letters and numbers FCY 139 EC, (the motor vehicle), which had all its passenger doors open. Among those arrested with the plaintiffs were 5 members of their lot which included one Siphelele Ngozi, (Ngozi), who was the driver of the motor vehicle and was also in possession of its keys. It later transpired during evidence that Ngozi was the only perpetrator of the offences with which they were later charged and which formed the basis of their arrest. I will revert to this pivotal aspect later in this judgment.

[5] On being questioned by the police at the scene of the arrest, Ngozi told Raats and captain Marais, (Marais), that he was the driver of the motor vehicle. Upon being arrested the plaintiffs were transported in the back of the police van to Duncan Village police station where they were detained by Raats. On 31 July 2013 the plaintiffs and their number were placed in the back of a police van by members of the South African Police Service (SAPS) and were transported to the police offices at Mthatha where they were detained. Ngozi was separated from them and taken to

another office where he remained for about 30 minutes. He was brought back to join them.

[6] The plaintiffs were then taken to Central police station where they were detained without having been questioned about any offence. On 1 August 2013 they were taken to the SAPS offices in York Road where they were kept on their arrival on 31 July 2013 and thereat warning statements were obtained. They were then taken to the magistrate's court during the afternoon after Ngozi had revealed at the pointing out the whereabouts of the body of Dumisani Tiya (Tiya). They appeared on charges of murder, kidnapping and theft of motor vehicle. They were then remanded in custody to 8 August 2018 (*sic*) for an attorney (ostensibly to legally represent them) from the Legal Aid and profiles, and were detained at Wellington prison, Mthatha.

[7] It was further recorded as a common cause fact that in the morning of 1 August 2013 Ngozi made a written confession to a member of the SAPS in which he admitted to the murder of Malibongwe Tiya and the hijacking of his Golf motor vehicle. It is not explicit from the common cause facts whether Dumisani and Malibongwe Tiya is the same person but common logic dictates that it should. Ngozi also made a pointing out of where he had thrown the body of Tiya in a dam at Lurhasini Locality, Zandukwana Administrative Area, Libode. The body of Tiya was recovered by SAPS divers at the said dam at about 14:00.

[8] On 3 August 2013 Thulani Ndakisa ("Ndakisa"), an accomplice of Ngozi, was arrested and he made a confession before a member of the SAPS at Mthatha on 4 August 2013. On 5 August 2013 Ndakisa appeared before the magistrate's court, Mthatha, and was joined by his co-accused. On 8 August 2019 the plaintiffs further appeared before the Mthatha magistrate's court and were remanded to 15 August 2013 for police profiles and bail consideration. On their appearance on 15 August 2013 the plaintiffs were granted bail in the sum of R500.00. The state did not oppose bail and they were released. On their appearance on 22 November 2013 charges against them were withdrawn.

Facts in dispute

[9] The first issue in dispute is the liability of defendants for damages suffered by the plaintiffs for unlawful arrest, detention and malicious prosecution. The second disputed issue is, in the event of a finding in favour of the plaintiffs, the quantum for such damages.

Issues for determination

[10] In relation to the 1st defendant the issue lying for determination is whether when he effected arrest on the plaintiffs the arresting officer entertained a reasonable suspicion that the plaintiffs had committed the offence with which they had been charged. As regards the 2nd defendant the issue to be determined is whether in deciding to prosecute the plaintiffs its members had a reasonable and probable cause that the plaintiffs are guilty of the offences with which they had been charged. Central to the last issue is whether the police could be held liable for the plaintiffs' further detention after their first appearance before the magistrate.

Pleadings

[11] The common cause facts largely constitute the plaintiffs' pleaded case. In addition thereto the plaintiff pleaded in their amended particulars of claim that whilst siting under the bus shelter, members of the SAPS which included Raats approached them, pointed them with firearms and forced them to lie on their stomachs and arrested them without any legal justification. They were forcibly loaded in a marked police vehicle and whisked away to Duncan Village police station. At the time of their arrest Ngozi had already admitted that he was the driver of the motor vehicle. They were then detained until 31 July 2013 when they were transported to Mthatha police station where they were further detained. The plaintiffs contend that their arrest was wrongful and unlawful on numerous grounds.

[12] The plaintiffs further contend that the arresting officer arrested them: for a purpose not contemplated by the legislature, never considered any explanation or statement the plaintiffs made setting out their innocence, there being no evidence against them and without analysing any information at his disposal, without considering less drastic means of securing their attendance at court or whether the

detention was necessary at all and without considering all other factors relevant thereto. It is also the plaintiffs' case that the arresting officer never exercised his discretion at all and acted in a way that violated their constitutional rights.

[13] When they were being transported from Duncan Village police station to Mthatha by police officials, Diko and Mancoba, they were handcuffed for the 250 km distance despite their cooperation. They were detained at Mthatha Central police station until 1 August 2013 when they appeared before Court. They were remanded in custody for further investigations, legal aid and profiling. Bail was opposed by the police and the prosecutor in a malicious manner and without reasonable cause. On further appearance on 8 August 2013 the matter was further postponed to 15 August 2013 when they were released on bail of R500.00. They spent 16 (sixteen) nights in police detention. When they appeared again on 22 November 2013 charges were withdrawn.

[14] In charging them, so they say, the employees of the 2nd defendant did so without a reasonable and probable cause, acted with malice and had no evidence that they had been involved in the commission of crime. These officials, according to them, together with police officials owed them a duty of care to assess the strength of the state's case, ensure that they were not detained or cause their detention to be extended in circumstances where there was no *prima facie* case against them and without placing before the court all relevant information that would benefit them.

[15] The court appearances were in full view of the public where the plaintiffs were presented as common criminals and their rights to freedom of movement, bodily integrity, good name and reputation were infringed, so their contention proceed. Consequently, the plaintiffs each claim R250 000.00 against the 1st defendant for unlawful arrest and detention from 30 July 2013 to 1 August 2013, R500 000.00 against both defendants for unlawful detention from 1 August 2013 to 15 August 2013 and R250 000.00 against both defendants for malicious prosecution.

[16] In their defence the defendants first raised a special plea of non-compliance with section 3 of the Institution of Legal Proceedings Against Certain Organs of State Act. The defendants also filed a plea over. However, the special plea was not pursued at trial and the trial proceeded on merits. On merits the defendants denied

liability, with the first defendant specifically denying that in effecting the arrest Raats acted without a reasonable and probable cause and that the police maliciously opposed the granting of bail.

[17] The defendants further contended that on the day of the plaintiffs' arrest, Raats and Marais went to Duncan Village on observation of the activities of certain men who were in and around the motor vehicle, in response to information received from one Captain Ngxola ("Ngxola") of the Organised Crime Unit of the SAPS. The motor vehicle in question belonged to one Mr Dumisani Tiya, (the deceased), apparently a prison warder, who was reported missing on 21 July 2013.

[18] Pursuant to a request from Ngxola, a Tracker Connect employee, Bathini Joseph Gqoli, activated a Tracker installed in the motor vehicle and traced it to a bus shelter on the Douglas Smith Highway in Duncan Village. In their observation Raats and Marais spotted 7 (seven) men in and around the motor vehicle, including the first plaintiff, who was sitting in the motor vehicle and only the driver remained in the motor vehicle all the time. On their arrival the police arrested all the suspects for possession of stolen property to which they did not protest. Two charges of kidnapping and murder were added after one of the suspects confessed to the killing and dumping the deceased body in the river. The corpse was discovered after a pointing out by Ngozi.

[19] The first defendant further pleaded that the arrest and detention were lawful, with the second defendant denying that the plaintiffs' prosecution was malicious in that there was a *prima facie* case for the offence of possession of a suspected stolen property and that the plaintiffs were released on bail as soon as it was possible. The second defendant further denies that there was no reasonable and probable cause for the plaintiffs' prosecution. Thus, both defendants deny liability.

Evidence

[20] During trial the first plaintiff, Lihle Sibuta, a 23 year old male person, of 1073 Ziphunzana Township, Douglas Smith highway, testified that he was a scholar doing Grade 10 at John Bisika Secondary School at the time of the arrest. He met his 4 (four) friends, Lubabalo Quwe, (Quwe), Siphesihle Ngozi, (Ngozi), Athini Mzamo and

Lihle Mdantile, outside his home on 30 July 2013. They were sitting in a blue Volkswagen Golf. The last two were seated at the back and the first two were seated in the front. Ngozi was in the driver's seat while Quwe was occupying the front passenger seat.

[21] Whilst still in the motor vehicle the police who were carrying firearms arrived and instructed them to lie down before searching them at gun point and the motor vehicle. The police were in large numbers and so were their motor vehicles. Without telling them the reason therefor, the police took them one by one into a police van before heading to Duncan Village police station. One of the police officers whose name is unknown to the first plaintiff asked who the driver of the motor vehicle was and Ngozi admitted that he was. They were not questioned about the motor vehicle. At Duncan Village they were taken straight to the police cells where one of the police officers asked if they knew the reason for their arrest and when they said no, the police officer told them that the motor vehicle was being searched for without telling them why. This police officer left and another policewoman came in and took their details.

[22] Two policemen, one of whom was involved in their arrest, came back again, took away Ngozi and left with him. A while later the police came back with Ngozi and the policewoman who earlier took their details. On 31 July 2013 members of the SAPS from Mthatha came to fetch them and they were handcuffed and put in a police vehicle to Mthatha. They were made to face down and do push ups. They were then taken to Central police station where they were kept at different offices and detained. Ngozi was once again taken away by the police. No reason was proffered for their arrest. They were given some documents but the first plaintiff denied that the signature appearing in one of those documents was his. On 31 July 2013 they were taken to court on foot and their case was postponed to 8 August 2013 for police investigation. The first plaintiff could not remember whether they were handcuffed or not at the time they were taken to court.

[23] They were then taken to Wellington prison and thereafter appeared before court on charges of murder, kidnapping and theft of a motor vehicle on three occasions with their case being remanded on each of those occasions. It is only after the third

occasion that the six of them bar Ngozi were released on bail of R500.00 each. On their fifth appearances at court charges against them were withdrawn.

[24] The first plaintiff also stated that he was outside the motor vehicle and constable Raats had no reason to arrest, detain and charge them as Ngozi had admitted to being the driver of the deceased's motor vehicle and that he had stolen it. The first plaintiff also stated that Ngozi had apparently been driving the motor vehicle for a week. This was confirmed by the statement of Raats in which he says Ngozi was behind the steering wheel when he took them out of the motor vehicle and the keys of the motor vehicle were found on him. According to the first plaintiff Ngozi also made a statement in which he admitted (a) to taking the deceased corpse after the murder to Ginyabantwana dam, (b) that he was alone in killing the deceased, and (c) pointing out the deceased's corpse. The first plaintiff also testified that he told the police that Ngozi left a bag at the first plaintiff's home which later transpired to contain some clothing and he went with the police to fetch the bag. He testified that he did not know what was in the bag.

[25] The first plaintiff also told the court that he did not know any state witnesses in this case and he told the police where he stayed. As regards who asked for the postponement of the case, he said he did not know. He also testified that the state did not have the right to prefer charges against them and the public prosecutor failed to tell the magistrate that there was nothing implicating him in the offences committed.

[26] Under cross-examination, the first plaintiff conceded to not having told the police that the motor vehicle was previously driven by Ngozi and that they had nothing to do with it. He attributed this to his fear for the police as it was the first time that he was arrested. He also told the court in cross examination that they did discuss the issue of the motor vehicle with Ngozi who also admitted it to them.

[27] Whilst cross examination was still in process, the first plaintiff sought to amend his particulars of claim which were amended by agreement. Substantial amendments thereto were effected. It was put to the witness by Ms Msizi, counsel for the defendant, that Marais would testify and confirm the contents of Raats's statement and will contradict his testimony that they were not handcuffed and cable

tied at the scene, they were never asked anything and that they were conveyed in one motor vehicle, which the plaintiff disputed. Ms Msizi further put it to the first plaintiff that Marais would further testify that he discovered clothing which belonged to the deceased in the boot of the motor vehicle and that he told the plaintiffs and their crew of the reasons for the arrest to which the witness said that could be possible even though he could not remember.

[28] It was further put to the witness in cross examination that a statement made by Ngozi points to a pointing out as a result whereof the deceased's corpse was discovered and that even though Ngozi did not implicate anybody, it would not have been possible for Ngozi to commit the murder alone because of the miniature size of his body in relation to the deceased's hefty body. This question was obviously speculative, unfair to the witness and belies the clear statement by Ngozi detailing how and under what circumstances he committed the murder. When Ms Msizi suggested that the police found the deceased's bag containing clothing at the first plaintiff's home, the witness's response was that it is he who alerted the police about the bag.

[29] It became obvious during cross examination that when the public prosecutor received the police docket in the afternoon of 1 August 2013, it contained statements of Bonisile Tiya, Captain Ngxola and Siphesihle Ngozi which detailed the manner in which the deceased met his gruesome death as stated above. It was also suggested in cross examination that the employees of the second defendant were not liable for the plaintiffs' further detention after his first court appearance on 1 to 15 August 2013 as it was authorised by the court and beyond their control and that there was a *prima facie* case against the first plaintiff because of Ngozi's clothing found at his home. Obviously the first was too technical a question for the witness to answer. In relation to the last, the witness repeated his explanation that he himself told the police about the bag left by Ngozi at his home.

[30] The first plaintiff's testimony was very clear, frank and straight forward at all times and he did not contradict himself during cross examination. As a witness the plaintiff did not thumb suck or exaggerate his answers to questions put to him. His answers were not speculative and he easily made concessions where these were

due and did not seem to cover himself up for anything. He did not appear to be evasive and would say so if he was not sure of what was asked. Overall he was not a poor witness and his evidence cannot be said to be false and rejected.

[31] The second plaintiff also testified. He stated that he is 24 years old, unmarried, unemployed and was a scholar in 2013. On 30 July 2013 he came out of school early and on his way home in a taxi at Douglas site he saw his friends among which was the first plaintiff, Ngozi and 5 others. There was also a motor vehicle which was parked just across his home. The first plaintiff was next to this motor vehicle standing behind it. He went home and when he came back armed police arrived, came out of their motor vehicles, instructed them to come out of the motor vehicle, ordered them to lie down and searched them but could not find anything.

[32] The police asked who the driver of the motor vehicle was and the second plaintiff pointed out Ngozi as the driver. They were then ordered to go to a marked police van. The police grabbed him and forced him into the police van and 6 others followed. They were seven in all. Without asking them anything, the police whisked them away to Lloyd police station where they were detained. Even at Lloyd police station nobody told them the reason for their detention. At the police station two police officers, one of whom was Raats, came in and took Ngozi away. They returned him after a few minutes and on his return Ngozi told them that he had not implicated them in any wrongdoing. The police said that they "*had long been looking for this car*". They were then driven to Central police station at Mthatha where they were all detained in one holding cell.

[33] They then appeared before court on 1 August 2013 and were refused bail. Their case was remanded to 8 August 2013 for police investigation. They appeared before the court again on 8 August 2013 and their case was remanded again to 15 August 2013 for further investigation. Mr Mgidlana, for the plaintiffs, took the witness through the contents of the SAPS 14A notice administered in terms of section 35 of the Constitution[1] in which the reason for their detention is said to be possession of suspected stolen vehicle. This witness denied ever seeing this document and that

[1] *Constitution of the Republic of South Africa Act 108 of 1996.*

the signature appearing on it was his. The witness further denied having been informed of the kidnapping charges against them. They were then detained at Wellington prison.

[34] He further stated that the police should have conducted thorough investigation before arresting them as Ngozi had already admitted to the commission of the offences complained of and that he committed the offences alone. Similarly, the public prosecutor was, according to the second plaintiff, wrong in re-enrolling the case and preferring charges against them when Ngozi had already admitted to the commission of the offences in question. He confirmed that when Ngozi did the pointing out this happened before their first court appearance. He also made a statement before 12h00. Charges were then withdrawn.

[35] In cross examination the evidence of this witness was unshaken. He did not contradict himself, neither did his evidence contradict that of the first plaintiff. This witness answered questions posed to him frankly, truthfully and honestly. For example when he was asked under cross examination if he was treated well by the police when taking a statement from him, he said: "*Yes I was comfortable*". When asked whether the statement was read back to him, he was quick to negate this and say: "*No he wrote, I spoke…"; I never saw it until I was released*".

[36] The plaintiff's case having been closed, the defendant called the evidence of the public prosecutor, Mr Mninawe Mhlontlo, (Mhlontlo), who testified that on / or during August 2013 he was stationed at Mthatha as a public prosecutor. During his testimony Mhlontlo detailed the procedure followed by the public prosecutor after receiving a case docket from the police. Mhlontlo stated that the screening officer screens the case docket, determines whether there is anything linking the suspect with the commission of the offence and whether there is a *prima facie* case against the accused. To make such a determination he or she relies on the available evidence as contained in the statements. The dockets are then taken to the public prosecutor at the reception court for first appearances. He testified that Messrs Nqebelele and Mkhwalo who were serving the reception court during August 2013 have since left the second respondent's service.

[37] Mhlontlo stated that he was in the reception court on the day in question and the issue of bail could not be considered at the time of the accused's first appearance for want of legal representation, further investigation relative to the accused profiles, previous cases, addresses, e.t.c, and the seriousness of the offence, such being schedule 6 offences. When the matter served before the court, so continued Mhlontlo's evidence, the case docket had already been screened by the screening prosecutors. In the case docket there was a confession and statements indicating that the stolen motor vehicle was recovered and all the accused were found in it. The corpse was found in a dam at Tsolo and he did not believe that this can be an act of a single man.

[38] The deceased's corpse was tethered to a stone to ensure that it did not float on the water. It was also said that the deceased's clothing was found in one of the accused's flat even though he did not know which of the accused. He could still recollect the facts of the case because of its uniqueness as it was the only case that involved a missing prison warder. The media was awash with the news of the missing man and that his killers were finally apprehended. As a result the court gallery was filled to capacity.

[39] This witness was referred to an entry in the investigation diary contained in the defendants' bundle which referred to the deceased's motor vehicle having been recovered at Mdantsane with 7 (seven) suspects who were subsequently arrested. The entry was made on 31 July 2013 and refers to a case of possession of stolen motor vehicle which was opened at Duncan Village police station.

[40] Mhlontlo conceded in cross examination that he did not make the decision to prosecute as the case docket was brought to him with charges already formulated against the accused. Mhlontlo further conceded that the court's role at that stage was merely to accord the accused their rights as arrested persons and postponement. A further concession made by Mhlontlo is that his reading of the case docket was only a matter of interest as he could not change anything. In relation to clothing that was found in the motor vehicle, Mhlontlo was referred to an affidavit deposed to by Simphiwe Ndzotyama, a draughtsman and photographer attached to the SAPS's Local Criminal Record Centre (LCRC) which purported to

have examined on 31 July 2013 clothing left by Ngozi at the first plaintiff's home. Obviously this statement is of no assistance as it predates the date of the commission of the offence.

[41] The above account and concessions by Mhlontlo were, in my view, well made in view of the fact that he did not take the decision to prosecute.

[42] Mhlontlo also conceded having read the statements of Ngozi in which he admitted to have single-handedly killed the deceased and dumping his body. Mhlontlo also testified in cross examination that Ngozi neither implicated nor absolved anyone from the murder. Mhlontlo's evidence that Ngozi did not specifically absolve the plaintiffs is queer and cannot be accepted in view of his earlier concession that there was no evidence in the case docket implicating the plaintiffs. Simply put, no evidence amounts to no *prima facie* case and the plaintiffs should not have been charged.

[43] Mhlontlo's further answers in cross examination were of no assistance to the court as they were either a tactical avoidance of the questions asked or were manifest bare denials. His answers were characterised by four unhelpful statements, like, *I am not sure, I do not know, I cannot comment on that and I cannot say so*". For whatever it is worth, Mhlontlo's evidence did not throw light as to whether the prosecutorial authority had reasonable and probable cause when it formulated charges against the plaintiffs. Quite understandably, Mhlontlo is not the one who took the decision to prosecute but it was expected of him to throw light as to what was or was not considered by the state when charges were preferred against the plaintiffs.

[44] Following on the heels of Mhlontlo's evidence was that of Dumisani Mancoba, (Mancoba), who stated that he was a warrant officer in the South African Police Service. He further stated that upon receipt of the complaint an enquiry was opened before the case docket was opened as the whereabouts of the deceased were not known at the time. Upon investigation it came to pass that the deceased motor vehicle was in East London and attempts to recover the motor vehicle were made. Captain Ngxola was in charge of the operation. Having been requested by Captain

Ngxola to do so, he only got involved in the case on 1 August 2013 after the suspects had already been apprehended.

[45] Mancoba further testified that the plaintiffs together with their co-accused were brought before court from police cells early on 1 August 2013 but they had to wait for another one who was in prison. This witness confirmed that Ngozi did the pointing out of the deceased corpse, made a confession of having killed the deceased and that the deceased corpse was found in the river where he had thrown it. He further stated that upon receipt of the case docket, he briefed the control prosecutor about the manner in which the suspects were arrested. The public prosecutor then drafted the charge sheet and placed the case on the roll. At that time all the information was in the case docket. He also said that they were told that there was clothing recovered.

[46] Mancoba further testified that he also discussed the issue of bail with the public prosecutor and that they requested seven days to verify the accused ID and also for investigation. He further stated that the accused were in a motor vehicle the owner whereof was killed when they were arrested and that 'the sentenced accused' never told the police that those with whom he was arrested were not involved and the deceased clothing was found in the home of one of them. In his statement Ngozi never said that others were not involved when he killed the deceased, so continued Mancoba's evidence.

[47] The above piece of evidence from Mancoba is in direct contradiction with Ngozi's statement in which he stated that he was alone when he killed the deceased and is further gainsaid by the plaintiffs' evidence on this aspect. It also contradicts Mhlonto's evidence which unequivocally stated that Ngozi never implicated the plaintiffs. Mancoba's evidence is a complete fabrication of Ngozi's evidence contained in his statement which is no wonder why when further probed by the defendants' own counsel on this aspect, Mancoba floundered. In all what he stated, Ngozi always referred to himself in a singular form and repeated that he was alone in committing the murder.

[48] Under cross examination, Mancoba himself conceded that there was nothing that implicated the other accused persons. In response to another question posed by Mr Mgidlana in cross examination, Mancoba confirmed that when the public prosecutor formulated charges against the accused, there was no information pointing to the involvement of both the first and the second plaintiff. Mancoba further conceded in cross examination that the remand of the case on 1 and 8 August 2013 was at his instance as they wanted to follow information, verify addresses and the accused's involvement. It escapes one's mind what further involvement was still being probed when there was no information from the beginning implicating the other accused persons except Ngozi.

[49] Further concessions made by Mancoba under cross examination are that the magistrate would ordinarily not know the contents of the case docket as the court gets informed by the public prosecutor. Mancoba further conceded that: the magistrate would not have known that the plaintiffs were not implicated in the commission of the offences if not told by the public prosecutor, at the time the plaintiffs were charged there was nothing implicating them in the commission of the offences in question, at the time they were charged it was only the motor vehicle that was missing and they (the police) did not know that the deceased had died.

[50] What the above inconsistencies from Mancoba's evidence tend to prove is that Mancoba was not well versed with the facts of this case and could not advance the defendants' case in any meaningful way. His evidence was of no probative value and was also of no assistance to the court.

[51] The next witness to be called to testify on behalf of the first defendant is Steven Craig Marais who was a captain in the SAPS during the time of the arrest. Marais also made a statement in relation to the arrest of the plaintiffs. Marais's statement details the event leading to them tracking the motor vehicle which they subsequently found at or near Douglas Smith highway at Duncan Village, East London. Marais's evidence is that he was working in the Oriental Plaza on 30 July 2013 together with Raats when they received information from Tracker that there was a motor vehicle which was involved in the commission of a crime. He told Raats that they must go. They started at Duncan Village where they picked up a signal which got stronger as

they drove towards the highway. They got out of their motor vehicle and when looking down the valley they saw a Golf motor vehicle. They took out their binoculars with which they observed the motor vehicle and saw guys getting in and out of it.

[52] They called for back-up from Mdantsane and Duncan village police stations and when the back-up arrived, they dispersed in different directions and closed in the suspects. They ordered the suspects to lie on the ground, searched the motor vehicle in which they found a prison warder's uniform. They took the suspects in different motor vehicles for questioning at Duncan Village police station. The suspects were not under arrest but were merely taken for questioning, he said. Taking them all for questioning was as a result of his experience from previous incidents in which he was involved. They contacted members of serious and violent crimes unit. At Duncan Village they took them into a hall and this is when members of the serious and violent crimes arrived. They handed the suspects over to them. Marais was not there when Raats took warning statements from the suspects. He never saw Raats anytime thereafter.

[53] Under cross examination by Mr Mgidlana, Marais could not confirm whether Raats did go to the police cells as alleged by the second plaintiff. However, Marais conceded under cross examination that he was not the arresting officer but Raats was. Marais further confirmed in cross examination that Ngozi was in the driver's seat of the motor vehicle and in possession of its keys but stated that this aspect was not of any importance to him. Marais further stated that they had to arrest all the suspects in fear of arresting only one person and lose the whole case.

[54] Quite bizarrely, Marais did not ask any questions to the suspects and did not ask anything about the prison warder's clothing found in the motor vehicle. Brief as it was, Marais's evidence did not go to the heart of the problem to enable the court to understand the circumstances surrounding the arrest, what was in the mind of the arresting officer when he effected the arrest, what information came to his or her mind at the time of the arrest, what assessment did he make of the information at his disposal and whether he made any evaluation thereof. Without prying deeply into

the above intricate questions and proffer some answers, it would be difficult for the defendant to justify the arrest and ward off the allegation of unlawfulness thereof.

Submissions by Counsel

[55] Both counsel made substantive submissions in court to justify their clients' respective versions on 16 July 2019. However, the matter could not be argued to finality on the said date due to hour. The matter was postponed to 17 July 2019 when Ms Msizi was still addressing the court. On the following day Ms Msizi was not available to carry on with her submissions due to family commitments. The court was advised that she was in hospital attending to her sick mother. The matter had to be stood down to enable her to address the problem. When it became clear that she could not be available, it was agreed between counsel, and so it was ordered by the court, that matter should be rolled over to 18 July 2019. It was agreed that in the event that Ms Msizi was unavailable to argue the matter on 18 July 2019, his instructing attorney, Mr Claudius, would take over and argue the matter.

[56] On 18 July 2019 when Ms Msizi was unavailable to argue the matter, Mr Claudius indeed took over and argued the matter. In his address to the court, he submitted that Ms Msizi had prepared written heads of argument to which he would refer from time to time during his argument. Ms Msizi's unwavering efforts to ensure that the matter proceeded to finality despite the hardship of running in and out of hospital to save a precious life is much appreciated. Her efforts are a rare show of dedication which deserve to be applauded if not emulated.

Discussion

[57] An arresting officer exercising powers of arrest and detention without a warrant in terms of section 40 (1) of the Criminal Procedure Act[2], (the Act), is not involved in a chess game. The exercise of police powers in terms of section 40 of the Act are circumscribed and the circumstances under which an arrest can be effected in terms of the aforesaid section is not something akin to the hackneyed political jargon which says, 'the ends justify the means'. To the contrary it is the means employed during

[2] *Act 51 of 1977*

the arrest which must justify the arrest itself. What is key in determining whether the arrest was lawful or not is what was in the mind of the arresting officer at the time of the arrest. This is a subjective enquiry. Whether the arresting officer entertained a reasonable suspicion or not is the sole factor for consideration in determining the lawfulness of the arrest.

[58] It is not in dispute that the plaintiffs' arrest in this case was without a warrant and that in effecting the arrest the police invoked the provisions of section 40 (1) (e) of the Act. It is apposite to mention that not much is said in our reported cases about the arrest in terms of section 40 (1) (e) of the Act. It is trite that section 40 (1) (e) applies to those crimes that are created by section 36 and 37 of the General Law Amendment Act 62 of 1955. Section 40 (1) (e) provides:

> "40 (1) A peace officer may without warrant arrest any person—
> (a) – (d) …
> (e) who is found in possession of anything which the peace officer reasonably suspects to be stolen property or property dishonestly obtained, and whom the peace officer reasonably suspects of having committed an offence with respect to such thing."

[59] In assessing the lawfulness or otherwise of an arrest in terms of section 40 (1) (e), the court must determine whether all the jurisdictional facts have been satisfied. Such jurisdictional facts are that: (a) the arrester must be a peace officer, (b) the arrester must entertain a suspicion, (c) that the property in the possession of the arrestee is stolen or was dishonestly obtained, and (d) the suspicion must rest on reasonable grounds.

[60] It is common cause that the arrester, Raats, in this case is a peace officer as defined in section 1 of the Act. It is also common cause that Raats and Marais found the plaintiffs among the persons who were in the vicinity of the motor vehicle. The question that arises is whether only one or all of the suspects who were eventually arrested by Marais and Raats were in possession of the stolen motor vehicle.

[61] Possession is defined in the Concise Oxford Dictionary[3] as:

> "The act or fact of possessing something; the holding or having something as one's own or in one's control…"

[62] Deducible from the above definition are two composite elements which characterise the act of possession. These are: 'holding something' and 'exercising control' over something. One can only be said to be in possession of something only if one exercises control over it.

[63] The offence of being 'found in possession of' property or goods suspected to be stolen as an offence is a statutory offence and found its expression in our law in section 36 of the General Law Amendment Act 62 of 1955, ("the Act"). Section 36 provides:

> "Failure to give a satisfactory account of possession of goods. Any person who is found in possession of any goods, other than stock or produce as defined in section one of the Stock Theft Act, 1959 (Act 57 of 1959), in regard to which there is reasonable suspicion they have been stolen and is unable to give a satisfactory account of such possession, shall be guilty of an offence and liable on conviction to the penalties which may be imposed on a conviction of theft."

[64] Quintessentially, the offence of possession of suspected stolen property comprises three distinct elements. These are:

(a) Possession of goods,

(b) Existence of a reasonable suspicion that the goods are stolen,

(c) Absence of a reasonable explanation, given at least at trial.

[65] The meaning of the phrase 'to be found in possession of' is not defined in the Act but has been fully explored in our law. The word 'Possession' has permeated all the branches of the law both in our criminal and civil jurisdictions but its meaning has always

[3] *Sixth edition, Volume 2, Oxford University Press*

been shrouded in obscurity and has been a source of much confusion. In addressing the question of being 'found in possession', the court in *State v Langa*[4], remarked:

> "The expression 'found in possession' has, within the meaning of s 36 as well as s 2 of the Stock Theft Act 57 of 1959, been defined in numerous cases. In *Tsotisie*'s case, *supra*, De Villiers J expressed himself as follows at 240C-E:
>
> 'In my view although an accused need not have actual physical detention of the stock or produce found, *he must be in such control of it at the time that it can be said that he was caught in possession*. I do not think that for the purposes of the section an accused can be said to have been "found in possession" if the stock is found under the direct control of someone else, but it can be proved that the latter held it as agent for the accused. The agent in such a case would be "found in possession" and his explanation that he was holding the stock or produce for someone else, without any suspicion, will, if not shown to be false, probably be a satisfactory account.'
>
> Furthermore, as was shown in *S v Wilson* 1962 (2) SA 619 (A), it is not imperative that the accused should have been actually present when the stolen stock or article is first found. *It is all a question of fact whether the accused has surrendered control of the goods.* In *R v Hassen* 1956 (4) SA 41 (N) the accused had stored some goods with a third party at the latter's house. There were also some other goods found in the accused's room but at the time the goods were found he was in jail. The Court held that he was not in direct control of the goods in either situation."

[66] The act of 'Possession' as a legal construct presages not only a physical component of holding the thing but also signifies a mental element in the form of an intention to keep the thing unto oneself or as one's own, albeit temporarily. In *Makeleni v S*[5] the full bench of this division seized an opportunity to revisit and contextualise the elements of 'Possession' when the court remarked:

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[4] *1998 (1) SACR 1 (T)*
[5] *(CA&R 51/18) [2019] ZAECGHC 53 (26 March 2019). (Per Van Zyl DJP)*

> "7…Possession is a legal concept that has developed in the context of the different branches of the law. It has been the source of much confusion. Criminal possession appears to be no different. The word **"possess"** is not defined in the Act. As a legal concept possession consists of two core elements, the exercise of physical control **(corpus)** over an article with the intention **(animus)** to do so. The concept of possession in a criminal context is no different and it is accordingly the exercise of a required degree of control over an object together with the intent to do so. (S v Adams 1986 (4) SA 882 (A) at 890 G – H).

[67] Can, in the light of the above definition, it be said then that all the suspects were in physical possession of the motor vehicle? And can it be said that all of them had the requisite intention to possess the motor vehicle? These are complex questions that cannot be answered without recourse to evidence. Undisputed evidence of the first plaintiff which is corroborated by the second plaintiff is that at the time the police arrived at the scene Ngozi was in the driver's seat of the motor vehicle and also had its keys in his possession. The second plaintiff was sitting on the front passenger seat. Ngozi had admitted to being the driver of the deceased's motor vehicle. This much of the evidence was not gainsaid by the defendants during trial. It, in fact, forms part of the common cause facts. Marais also conceded to this as much under cross examination. As to the reason for arresting all the suspects, he said that they had to arrest all the suspects in fear of arresting only one person and lose the whole case. This is in line with the plaintiffs' version that the police officers asked them nothing before arresting them.

[68] No evidence was led at trial nor can it be inferred from the proved facts that the suspects jointly possessed the motor vehicle with Ngozi. Joint possession of the motor vehicle can only be inferred if the facts proved leave no room for any other reasonable inference[6] than that each of the suspects had a common purpose with Ngozi to rob the motor vehicle and had physical control of the motor vehicle. Any of the suspects who did not have physical control of the motor vehicle cannot be said to be a joint possessor.

[69] In the absence of direct evidence that the plaintiffs had physical control of the motor vehicle and so the evidence to satisfy the *animus* requirement in order to infer joint

[6] *See R v Blom, 1939 AD 188 at 202-203*

possession, the first defendant's case becomes untenable. In *Makeleni*, at paragraph 9, Van Zyl DJP said:

> "9) Control is a question of fact and dependant on the circumstances of each case. Control of an object or article may be direct, that is by the exercise of actual physical control over it, or in the absence thereof, control may be exercised indirectly by the ability to exercise control over the object, for example, the exercising of control over access to the place where the article is kept. (S v Adams at 890 G –H)."

[70] At paragraphs 9 and 10, the learned Deputy Judge President said:

> "(10) The mental element of **animus** in turn requires not only knowledge of the existence of the object, but also an awareness of the exercise of control over it.
>
> (11) A person may be the sole possessor of an object or he may jointly possess it with other persons if they simultaneously have the required **animus** for possession…"

[71] To be found guilty of the offence of possession of suspected stolen property a person charged must not only know that the property had been stolen but must also have the requisite *animus*. The accused's knowledge or belief as to the nature of the goods is always crucial and has been a constant source of interpretive problems.

[72] The position is the same in many jurisdictions where the offence of possession is also created by statute. It also comprises both the *corpus* and the *animus* element. In Canadian Criminal Code the offence is defined as:

> **"354**. (1) Every one commits an offence who has in his possession any property or thing or any proceeds of any property or thing knowing that all or part of the property or thing or of the proceeds was obtained by or derived directly or indirectly from:
>
> (a) the commission in Canada of an offence punishable by indictment; or

(b) an act or omission anywhere that, if it had occurred in Canada, would have constituted an offence punishable by indictment."

[73] In Canada a person is charged with misdemeanour or felony if such an individual has accepted possession of goods or property and knew they were stolen, depending on the value of the stolen goods. With certain exceptions, if the individual did not know the goods were stolen, then the goods are returned to the owner and the individual is not prosecuted. In the Canadian case of *R v Hall*[7], Boreham J remarked:

> "Belief… is something short of knowledge. It may be said to be the state of mind of a person who says to himself, "I cannot say I know for certain that these goods are stolen, but there can be no other reasonable conclusion in the light of all the circumstances, in the light of all that I have heard and seen".

[74] In England and Wales the offence is created by section 22(1) of the Theft Act, 1968 which provides:

> "A person handles stolen goods if (otherwise than in the course of stealing), knowing or believing them to be stolen goods he dishonestly receives the goods, or dishonestly undertakes or assists in their retention, removal, disposal or realisation by or for the benefit of another person, or if he arranges to do so."

In Northern Ireland the offence is created by section 21(1) of the Theft Act (Northern Ireland) 1969. In the Republic of Ireland it is created by section 17(1) of the Criminal Justice (Theft and Fraud Offences) Act, 2001 and is called 'handling stolen property.'

[75] In the United States it is called Receipt of Stolen Property and a federal crime under 18 U.S.C. $ 2315. It is defined as 'knowingly receiving, concealing, or disposing of stolen property with a value of at least…' The offence of receiving stolen property and possession of stolen property are treated as separate offences in some jurisdictions. The distinguishing element is when the person knew that the

[7] *[1985] 81 Cr App R 260,*

property was stolen. If the person knew that the property was stolen at the time he received it, the crime is receiving stolen property. If the person did not know the property was stolen at the time she received it but found out after receiving possession, the crime is possession of stolen property.

[76] It is not the first defendant's case (both in pleadings and at trial) that before arresting the plaintiffs they required their explanation as regards their possession of the motor vehicle. The only information at the disposal of both Raats and Marais at the time was that there was a motor vehicle that was missing together with its owner. Marais's evidence is that he received a message from tracker at about 10:40 on 30 July 2013 that a motor vehicle was missing together with its owner. At the time Marais and Raats followed the signal to Douglas Smith highway, they had two things in mind, namely; a missing motor vehicle and a missing person. On their arrival they simply ordered the suspects to lie down, searched them and ordered them to the police vehicle without asking them anything. This much of the plaintiffs' evidence is corroborated by Marais's.

[77] Evidence following the arrest of the plaintiffs in the form of SAPS 14A and the Occurrence Book (OB) point out the reason for the plaintiffs' arrest as possession of a suspected stolen vehicle. Discernible from the above facts is that at least up to 31 July 2013 the police had no information about the murder of the deceased and the kidnapping of the deceased. The case opened against the suspects at that stage was that of possession of suspected stolen vehicle.

[78] It is trite that when arresting a suspect without a warrant the arresting officer exercises a discretion[8]. The discretion is whether or not to arrest, the test being whether a reasonable and careful man in the position of Raats, possessed of the same information, would have considered that there were good and sufficient grounds for suspecting that the plaintiffs were guilty of the offence of possession of a suspected stolen vehicle. In the exercise of their discretion the police officers effecting an arrest in terms of section 40 (1) must always act reasonably. The reasonable exercise of a discretion in our law, and so in other jurisdictions, has a

[8] *See Duncan v Minister of Law and Order (1986) SA (2) 805 (AD); Minister of Law and Order V Sekhoto*

long history. It was aptly described by Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*[9] as follows:

> "It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting unreasonably." Similarly, there may be something so absurd that no sensible person could even dream that it lay within the powers of the authority. Warrington LJ in *Short v Pool Corporation* (1) gave the example of the red–haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable it might almost be described as being done in bad faith; and in fact all these things run into one another."

[79] Once the jurisdictional requirements are satisfied, the arresting officer can exercise his or her discretion to arrest as long as his conduct is within the ambit of the law and the Constitution. In *Duncan v Minister of Law and Order*[10] the then Appellate Division (which is now the Supreme Court of Appeal) remarked:

> "If the jurisdictional requirements are satisfied, the peace officer may invoke the power conferred by the subsection; i.e, he [or she] may arrest the suspect. In other words, he [or she] then has a discretion as to whether or not to exercise that power (cf *Holgate-Mohamed v Duke* [1948] 1 All SA ER 1054 (HL) at 1057). No doubt the discretion must

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[9] Association Provincial Picture Houses Ltd v Wednesbury Corporation [1947] 1 KB 223 (CA) at 229; Also reported as (1947) 2 All E.R. (C.A.) at p. 683
[10] At 818 G-J

be properly exercised. But the grounds on which the exercise of such a discretion can be questioned are narrowly circumscribed.'

[80] The above sentiments were echoed by the Supreme Court of Appeal in *Minister of Safety & Security v Sekhoto and Another*[11] when the court remarked:

> [28] Once the jurisdictional facts for an arrest, whether in terms of any paragraph of s 40 (1) or in terms of s 43 are present, a discretion arises. The question whether there are any constraints on the exercise of discretionary powers is essentially a matter of construction of the empowering statute in a manner that is consistent with the Constitution. In other words, once the required jurisdictional facts are present the discretion whether or not to arrest arises. The officer, it should be emphasized, is not obliged to effect an arrest. This was made clear by this court in relation to s 43 in *Groenewald v Minister of Justice*."

[81] In this case it can barely be said that Raats entertained a reasonable suspicion for the following reasons. It is clear from the testimony of all the witnesses that when Marais and Raats arrested the plaintiffs their primary enquiry was a missing motor vehicle. On their arrival at the scene Ngozi was in the driver's seat of the motor vehicle and was in possession of its keys. When they asked who the driver of the motor vehicle was, Ngozi admitted that he was. Both the first and the second plaintiff also testified that they told the police that Ngozi was the driver. Discernible from the above evidence is that Ngozi was not only in possession of the motor vehicle but by virtue of possession of its keys was in control thereof. This then excludes any possibility that anyone of them other than Ngozi might have been in possession of the motor vehicle[12].

[82] One difficulty that this court would have experienced in ascertaining the reasonableness of the suspicion entertained by Raats is that Raats did not testify. He was said to have passed on. This is, however, assuaged by Marais who was Raat's senior and was present when the arrest was effected when he testified and

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[11] *2011 (1) SACR 315 SCA*
[12] *See Nel v Minister of Police (CA62/2017) [2018] ZAECGHC1 (23 January 2018)*

failed to proffer explanation of what might have been in Raat's mind when he effected the arrest. What is common cause is that apart from asking who the driver of the motor vehicle was, the arresting officer, and so Marais, asked no further questions to ascertain how Ngozi came in possession of the motor vehicle and also what linked the other suspects to such possession. They did not ask where the owner of the motor vehicle was. This they did, the discovery of a prison warder's uniform in the boot of the motor vehicle notwithstanding. Marais's testimony was conspicuously silent on this aspect and so was Raat's written statement.

[83] In the light of the above it cannot be said that the arresting officer had knowledge at the time of the arrest of such facts which would in the absence of any further facts or evidence, constitute proof of the commission by the arrestee of the offence of possession of a suspected stolen vehicle. It seems to me that when they arrested the suspects, Marais and Raats simply painted them with the same brush and concluded to arrest them all at once.

[84] What might have possibly linked the first plaintiff to the commission of an offence is the bag (with the deceased clothing) which was left at his home by Ngozi and which was later recovered by the police. This was well after the arrest. Ungainsayable evidence before this court is that the police were alerted to this bag by the first plaintiff long after they were arrested and this does not absolve the first respondent from liability for unlawful arrest. It is trite that what matters in ascertaining the reasonableness of a suspicion is what was in the mind of the arresting officer at the time of the arrest and not any time thereafter. The test is an objective one[13] and what is required is that the suspicion, and not certainty, must be based on solid grounds.

[85] Having regard to the above, the first defendant can hardly escape liability for unlawful arrest. It follows without saying that following the unlawful arrest of the plaintiffs, their detention was also unlawful. The right to freedom and security of a person, in a constitutional sense, includes the right not to be deprived of freedom

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[13] See S v Nel and another 1980 (4) SA 28E, at 33H; Also Mabona & another v Minister of Law and Order & others (1988) (2) SA 654 (SE) at 658E, at 658H

arbitrarily or without just cause and should be jealously guarded. In *Thandani v Minister of Law and Order*[14] the court said:

> "…the liberty of the individual is one of the fundamental rights of a man in a free society which should be jealously guarded at all times and there is a duty on our courts to preserve this right against infringement".

[86] In *Zealand v Minister of Justice and Constitutional Development and Another*[15] the Constitutional Court said:

> "[24] There is another more important reason why this court should rule in the applicant's favour. The Constitution enshrines the right to freedom and security of the person, including the right not to be deprived of freedom arbitrarily or without just cause, as well as the founding value of freedom. Accordingly, it was sufficient for this case for the applicant simply to plead that he was unlawfully detained. This he did. The respondents then bore the burden to justify the deprivation of liberty, whatever form it may have taken.
>
> [25] This is not something new in our law. It has long been firmly established in our common law that every interference with physical liberty is *prima facie* unlawful. Thus, once the claimant establishes that an interference has occurred, the burden falls upon the person causing that interference to establish a ground of justification. In *Minister van Wet en Orde v Matshoba,* the Supreme Court of appeal again affirmed that principle, and then went on to consider exactly what must be averred by an applicant complaining of unlawful detention. In the absence of any significant South African authority, Grosskopf JA found the law concerning the *rei vindicatio* a useful analogy. The simple averment of the plaintiff's ownership and the fact that his or her property is held by the defendant was sufficient in such cases. This led that court to conclude that, since the common-law right to personal freedom was far more

[14] *1991 (1) SA 702 (E) at 707B*
[15] *2008 (4) SA 458 at 468 (CC)*

fundamental than ownership, it must be sufficient for a plaintiff who is in detention simply to plead that he or she is being held by the defendant. There can be no doubt that this reasoning applies with equal, if not greater, force under the Constitution."

[87] The right to freedom and security is enshrined in the Constitution[16] and is inviolable[17]. Its violation cannot be taken lightly by the courts. The first defendant bore the onus to satisfy the court that the conduct of its employees in arresting the plaintiffs was justified in law[18] and thus the arrest and detention were lawful. In my view the first defendant has failed to discharge the onus and the arrest is, therefore, unlawful.

[88] It is not in dispute that the plaintiffs were detained immediately upon their arrest. The number of days the plaintiffs spent in police custody is also not in dispute. The dispute is whether the detention itself was unlawful. In his testimony which is corroborated by the second plaintiff, the first plaintiff stated that they were arrested on 30 July 2013 and were released only in the afternoon on 15 August 2013. Effectively, they spent 16 days in police detention before they were released. They were not given bail and the postponements were at the instance of the state. Each time they appeared before court, their case was postponed until they were released on bail on 15 August 2013.

[89] On their first appearance on 1 August 2019 at about 14h15 Ngozi had already admitted to the killing of the deceased and had already pointed out where he dumped the deceased's corpse after killing him. The reason they appeared in court only at 14h15 is that they were waiting for Ngozi's return from the pointing out. This was corroborated by Mancoba in his testimony. It was strenuously argued by Mr Mgidlana that the police should have conducted thorough investigation before further detaining the plaintiffs on 31 July 2013 as Ngozi had already admitted that he killed

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[16] Section 12 (1) (a) of the Constitution provides that everyone a right to freedom and security, which right includes a right not to be deprived of freedom arbitrarily or without just cause. The right to freedom is more explicitly protected in section 35 (1) (f) of the Constitution which provides that everyone who is arrested for allegedly committing an offence has a right to be 'released from detention if the interest of justice permit, subject to reasonable conditions'.

[17] Minister of Safety and Security & another v Marius Schuster & another (114/2018) [2018] ZASCA 112 (13 September 2018) at para 21

[18] Minister of Law and Order and Others v Hurley and Another 1986 (3) SA 568 (A) at 568E -F

the deceased alone. Thus, there was no point in further detaining them. I agree with Mr Mgidlana.

[90] The more it became clear that the defendants' liability is inescapable, the more the defendants clung to their contention that any further postponements after the plaintiffs' first appearance in court were at the instance of the court over which neither the first nor the second rdefendant had control. Mr Mgidlana argued that this can only be the case if all facts have been placed before the court and in *casu* nothing was placed before the court to enable it to exercise its discretion properly. I think there is logic in Mr Mgidlana's submission.

[91] Mr Mhlontlo in his testimony attempted to suggest that on their first appearance at the reception court, the issue of bail could not be considered due to the seriousness of the offences with which the accused were charged as it was their first appearance. At the reception court only issues like the accused's legal representation, further investigation relative to the accused profiles, their previous cases and addresses are dealt with. I do not agree with Mr Mhlontlo as at the time they appeared before court, it was clear to him, after having studied the information contained in the case docket which comprised statements of witnesses, recovery statement made by Ngozi and other material, that the plaintiffs were not implicated in the commission of any of the offences charged. How serious is the offence committed by an innocent person who should not have been brought before court in the first place is just unfathomable.

[92] Why the plaintiffs were remanded in custody in the light of the information at the disposal of the both the investigating officer and the public prosecutor is inexplicable and remains a mystery. At the very least the plaintiffs could have been released after their first appearance and as soon as it became clear to the investigating officer and the public prosecutor that they were not guilty of the offences with which they were charged.

[93] Section 50 (1) *(c)* of the Act provides that an arrested person against whom a charge has been brought and who has not been granted bail by the police must be brought before a lower court as soon as reasonably possible but not later than 48 hours after the arrest. It is now settled that the purpose of arrest is to bring the

suspect to court for trial. In this case they were not and the fact that it was only a few hours after the stipulated 48 hours expired is, in my view, immaterial. In *Tsose v Minister of Justice and others*[19], Schreiner JA held:

> "An arrest is, of course, in general a harsher method of initiating a prosecution, than citation by way of summons. But if circumstances exist which make it lawful under a statutory provision to arrest the person as a means of bringing him to court, such arrest is not unlawful even if it was made because the arrestor believes that the arrest will be more harassing than summons. For just as the best motive will not cure an otherwise illegal arrest, so the worst motive will not render an otherwise legal arrest illegal. What I have said must not be understood as conveying approval of the use of arrest where there is no urgency, and the person to be charged has a fixed and known address. In such a case it is generally desirable that summons should be used. But there is no rule of law that require the milder method of bringing a person into court to be used whenever it will be equally effective."

[94] The trick of hiding behind the reception courts theory is as untenable as the arrest itself. The use of reception courts, which have been abrogated, as an excuse to extend the detention of and to deny the accused persons their right to their personal liberty can no longer be tolerated. It is incumbent upon the police officers when the accused appear before court to place all facts before the court to enable the court to properly exercise its discretion. The magistrate presiding over the reception court does not enjoy a lesser discretionary authority and is not immune from criticism if he or she failed to exercise his or her discretion to release an accused person deserving to be released on bail if the interests of justice so require. *In Minister of Safety & Security v Ndlovu*[20], the Supreme Court of Appeal held that the post-appearance detention of the accused was unlawful.

[95] The facts in *Ndlovu* are similar to the facts of the case at hand. In *Ndlovu* the accused was unlawfully arrested on 21 October 2008 and brought before a magistrate in a "reception court" on 23 October 2008. As in this matter, it was common cause that the reception court in question did not consider bail and

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[19] *1951 (3) AS 10 A at 17F-H*
[20] *(788/11) [2012] ZASCA 189 (30 November 2012)*

instead, the accused was automatically remanded in detention for about a week. At paragraph 13, Petse JA reasoned:

> "[13] It is opportune to say something about the so-called 'reception court', which has since ceased to exist. This is a 'court' which at that time was solely dedicated to dealing with accused persons at their first appearance in court. All cases before it were postponed as a matter of course and as a rule it never entertained any bail applications. Neither did it embark on a judicial evaluation to determine whether it was in the interests of justice to grant bail nor, in this case, did it afford the respondent an opportunity to address it on the question of his eligibility to be released on bail."

At paragraph 16, the learned Judge of Appeal referred to *Minister of Law and Order v Kader*[21] in which the Supreme Court of Appeal held that '…*it is the function of the judicial officer to guard against the accused being detained on insubstantial or improper grounds and, in any event, to ensure that his detention is not unduly extended.*'

[96] Ostensibly determined by the first defendant's quest to be absolved from liability for the plaintiffs' unlawful detention post their first appearance in court, Ms Msizi sought to infer that their appearance in court created a new intervention that was beyond the realm of the first defendant and referred the court to *Isaacs*[22]. In *Isaacs* the court held that 'where a person has been unlawfully arrested, his or her detention thereafter is unlawful until such time as a magistrate, exercising a judicial function, decides to order the continued detention of the person arrested'.

[97] I do not agree with Ms Msizi that the post appearance remand by the magistrate in this case constituted a *novus actus interveniens* (fresh intervening event) and had an effect of breaking the chain of causation that started with the arrest. For the determination of causation the 'but-for test' (*condition sine qua non*)[23] finds application. The first question to be asked is whether the negligent act in question

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[21] *[1990] ZASCA 111;1991 (1) at 41 (A)*
[22] *Isaacs v Minister van Wet en Orde [1995] ZASCA 152; 1996 (1) SACR 314 (A).*
[23] *International Shipping Co (Pty) Ltd v Bentely [1990] (1) SA 680 (A) at 700F-H*

caused or materially contributed to the harm giving rise to the plaintiffs' claim[24]. If it did not, then no legal liability can arise. If it did, then the second question of whether the negligent act or omission is linked to the harm sufficiently[25] becomes relevant. In *Smith* (note 25 below) the court reasoned that the plaintiff is not required to establish the causal link with certainty.

[98] In *De Klerk v Minister of Police*[26] Theron J (writing for the majority)[27] formulated the specific requirements for a claim 'under the *actio iniuriarum* for unlawful arrest and detention' as follows:

> "(a) the plaintiff must establish that their liberty has been interfered with;
>
> (b) the plaintiff must establish that this interference occurred intentionally. In claims for unlawful arrest, a plaintiff need only show that the defendant acted intentionally in depriving their liberty and not that the defendant knew that it was wrongful to do so;
>
> (c) the deprivation of liberty must be wrongful, with the onus falling on the defendant to show why it is not; and
>
> (d) the plaintiff must establish that the conduct of the defendant must have
> caused, both legally and factually, the harm for which compensation is sought (foot notes omitted)."

[99] In relation to the issue of intervening event, the learned Judge of the Constitutional Court reasoned that:

> "[76] A reasonable arresting officer in the circumstances may well have foreseen the possibility that, pursuant to an unlawful arrest, the arrested person would routinely be remanded in custody after their first

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[24] Minister of Police v Skosana 1977 (1) SA 31 (A); [1977] 1 All SA 219 (A) at 34F-G: Also Lee v Minister for Correctional Services 2013 (2) SA 144 (CC) at para 47; Opelt v Department of Health, Western Cape 2016 (1) 325 (CC); ZA v Smith 2015 (4) SA 574 (SCA)
[25] Minister of Law and Order v Ebrahim [1994] ZASCA 163 (Ebrahim II); Woji v Minister of Police 2015 (1) SACR 409 (SCA); [2015] 1 All SA 68 (SCA) at 32
[26] [2019] ZACC 32 at para 14
[27] With Basson AJ, Dlodlo AJ, Khampepe J and Petse AJ concurring

appearance. Here, however, the arresting officer had actual, subjective foresight that the proceedings in the "reception court" would occur as they did and that the applicant would not be considered for bail at all and accordingly suffer the harm that he did." (footnotes omitted)

[100] The above reasoning by the learned Judge contradicted the reasoning of the majority of the Supreme Court of Appeal[28] which found that the police cannot be found liable for detention of the plaintiffs after they appeared before the magistrate. It vindicated the decision of the minority which held that the respondent should be liable for the entire period of detention on the basis that the lawfulness of the detention after his first court appearance is not essential for establishing liability.[29]

[101] In support of the above proposition, the learned Judge at paragraphs 79 and 80 referred to passages by renowned authors, Professor Burchell and Professor Snyman when she said:

"[79] Professor Burchell is of the view that an intervening event does not necessarily break the causal chain where it was subjectively foreseen, even though it is otherwise considered as abnormal. Burchell explains that "[a]n abnormal event which would otherwise rank as a *novus actus* does not so rank if it was actually foreseen (or was reasonably foreseeable in negligence cases) or planned by the accused"[30].

[80] Professor Snyman puts it as follows:

All the . . . rules relating to a novus actus are subject to the qualification that if X planned the unusual turn of events or foresaw it, it cannot amount to a novus actus. This accords with the rule of the adequate causation test . . . that, in determining whether an act tends to lead to a certain result,

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[28]In De Klerk v Minister of Police [28] (329/17) [2018] ZASCA 45 (28 March 2018) (Per Shongwe JA)
[29] At para 8
[30] Burchell Principles of Criminal Law Fourth Edition (Juta, Cape Town 2013) at p 101 (citing S v Stavast 1964 (3) SA 617 (T) and S v Goosen 1989 (4) SA 1013 (A)).

one should take into account not only the circumstances ascertainable by the sensible person, but also the additional circumstances known to X."[31]

[102] In conclusion the learned Judge found the police liable for the post appearance detention of the accused when she said that in that case 'there was prior wrongful, negligent conduct by the arresting officer that factually caused the applicant to suffer harm.'[32] The above finding gave rise to at least two dissenting judgments and one concurring judgment from the same court. In the second judgment Froneman J (with Goliath and Mhlantla JJ concurring) reasoned that because there is no duty on the arresting officer to do anything at the first appearance of an arrested person, the omission by the arresting officer in this case cannot be wrongful. The arresting officer cannot then be liable for the applicant's subsequent detention[33].

[103] At paragraph 144 the learned Judge remarked:

> "There is no binding precedent from this Court on the issue of the police's liability for the continued detention of a criminal suspect after a first court appearance."

[104] In the third judgment the Chief Justice, Mogoeng CJ, also did not agree with the majority judgment and concurred with Froneman J. At para 173 the learned Chief Justice agreed with the majority in the Supreme Court of Appeal that the accused appearance in court created a *novus actus interveniens* when he reasoned:

> "[173] It must be emphasised that on the accused person's first appearance, the Judiciary or court is under a weighty obligation to understand and satisfy itself that there is justification for the past and continued detention of a suspect or else release her if the interests of justice so dictate. This personal liberty-inclined obligation cannot be passed on to another arm of the State - it remains under the exclusive domain of the Judiciary. It is a constitutionally-imposed new intervening act that must always break the chain of possible abuse, arbitrariness,

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[31] Snyman Criminal Law Sixth Edition (Lexis Nexis, South Africa 2014) at p 93-4 (citing In re S v Grotjohn 1970 2 SA 355 (A)).
[32] At para 19
[33] At para

> illegality or error in the arrest or detention of an accused person, and by extension of legal causation. The duty to fulfil that obligation cannot be shared with the Police just because they would have initiated the chain of events that culminated in the suspect being brought to court which then ordered a further detention in flagrant disregard for its obligations in terms of section 35(1)(e) and (f) of the Constitution.

[105] At paragraph 185 the learned Chief Justice concluded:

> "[185] For these reasons, I am satisfied that the constitutional obligations imposed on the Court are an automatic *novus actus interveniens*."

[106] In his concurring judgment, Cameron J agreed with the majority decision that the police were liable for the entire period of Mr De Klerk's detention. At paragraph 112 of his judgment, the learned Judge remarked:

> "In these circumstances, in wrongfully arresting the applicant and sending him without more for processing to that particular court, with no effort to ensure that he was processed differently, and thus afforded the opportunity to apply for bail, the police officer who unlawfully arrested the applicant is as much responsible for the wrong done by his further detention as if, were she being sued for personal injury inflicted by a negligently driven motor car, she had culpably caused him to fall into its path."

I agree with Cameron J's analysis and finding and so with the majority judgment. In my view, it reflects the correct legal position.

[107] The doctrine of judicial precedence (the *stare decisis rule*) imposes a duty on subsequent courts to be bound by and follow the decision of the majority of a court before them[34]. The decision of the minority, no matter how persuasive it may be, is

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[34] Patmar Explorations (Pty) Ltd v Limpopo Development Tribunal (1250/2016) [2018] ZACC 19 (16 March 2018) at paras 3 and 4; Also Ex parte Minister of Safety & Security: In re S v Walters [2002] ZACC 6; 2002 (4) SA 613 (CC) 646; 2002 7 BCLR 663 (CC) paras 53-61; Afrox Healthcare Bpk v Strydom [2002] ZASCA 73; 2002 (6) SA 21 (SCA) 38F–40F; [2002] 4 All SA 125 (SCA); Camps Bay

not authoritative and is, thus, not binding. It is only the *ratio decidendi* of the majority decision that is binding. I am, thus, bound to follow the majority decision of the court of the last instance, which is in this case the Constitutional Court.

[108] In my view police officers have, in keeping with public policy considerations, a public law duty to assist a detained person by advising him or her of his or her right to bail on his first appearance and inform the court of circumstances that militate in favour of granting a detained person bail[35] to ensure that their right to a fair trial enshrined in the Constitution is not infringed. This is the basic tenet of the rule of law which the fair trial principle is heir to. It should be adhered to at all times. By their failure to uphold their public law duty, police officers make themselves, and so their employer, vulnerable to delictual liability on the ground of causation which could have been avoided had they acted lawfully and within the bounds conferred upon them by the law and the Constitution.

[109] There is nothing more a magistrate who is not privy to police investigation and is therefore bereft of the intricate details of the case could do if no information was placed before him upon which he could have reasonably exercised his discretion. A magistrate can only exercise a discretion properly if he or she is possessed of information which would place him or her in a better position to do so by the police and the prosecutors. I am of the view that the police should have foreseen that their unlawful conduct would result in the continued detention of the plaintiffs and liability for their lack of foresight in those circumstances cannot be avoided.

[110] The onus to prove that the arrest was justified and lawful rests with the first defendant. In *Minister of Law and Order and Others v Hurley and Another*[36] the court stated that *"An arrest constitutes an interference with the liberty of the individual concerned, and it therefore seems to be fair and just to require that the person who arrested or caused the arrest of another person should bear the onus of proving that his action was justified in law."* The first defendant has failed to

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Ratepayers' and Residents' Association v Harrison [2010] ZACC 19; 2011 (4) SA 42 (CC); 2011 (2) BCLR 121 (CC) para 28.

[35] *See Woji at para 28*
[36] *1986 (3) SA 568 (A) at 568E -F*,

discharge the onus.

[111] In sum, it does not avail of the first defendant to hide behind the veil of judicial discretion in an attempt to ward off a claim for unlawful detention post the plaintiffs' appearance in court, if its employees did not place all facts favourable to the accused before the magistrate in order to facilitate their release on bail. What matters is whether the police, through their unlawful conduct, have caused the detention to continue. In this case the first respondent's employees could have and should have been aware as early as when Ngozi made a statement exonerating the plaintiffs that there was no need to keep them in detention. Had they been entirely honest, they should have disclosed to the court that their case against the plaintiffs was next to nil to enable the court to exercise its discretion in an appropriate manner. It is after all the presiding officer's responsibility to ensure that the accused's rights to a fair trial under section 35 (1) (e)-(f) of the Constitution are not violated.

[112] In the circumstances such as the above the first respondent should naturally be held liable for the post appearance detention of the plaintiffs. There is absolutely no justification in law why the first defendant can escape liability for the wrongs committed by its employees. Their conduct is reprehensible. The remand orders issued by the magistrate cannot, in my view, render lawful the unlawful detention of the plaintiffs'[37]. This then leaves only one cat in the bag in so far as the merits are concerned which is the liability of the second defendant for malicious prosecution as claimed by the plaintiffs.

[113] Section 179 of the Constitution establishes a "single national prosecuting

authority . . . structured in terms of an Act of Parliament".[38] In giving effect to the above constitutional provision, section 2 of the National Prosecuting Authority Act ("NPA Act")[39] provides for a "single national prosecuting authority as envisaged in

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[37] *Minister of Safety and Security & another v Marius Schuster & another (114/2018) [2018] ZASCA 112 (13 September 2018) at para 26*

[38] *Section 179(1) provides:*

"There is a single national prosecuting authority in the Republic, structured in terms of an Act of Parliament, and consisting of—

(a) a National Director of Public Prosecutions, who is the head of the prosecuting authority, and is appointed by the President, as head of the national executive; and

(b) Directors of Public Prosecutions and prosecutors as determined by an Act of Parliament."

[39] *32 of 1998 (NPA Act).*

section 179 of the Constitution". Section 20(1)(a) of the NPA Act makes the power to prosecute an exclusive domain of the National Prosecuting Authority (NPA) which power is exercised on behalf of the people of the Republic.[40]

[114] The above provisions of the NPA Act notwithstanding, the power to prosecute may be exercised by private persons under certain circumstances such as when the Director of Public Prosecutions has declined to prosecute.[41]

[115] In dealing with the plaintiffs' second cause of action which is malicious prosecution, it is apposite to set out the way the plaintiffs' claim for malicious prosecution against the second respondent is couched in paragraph 10 of the particulars of claim of both plaintiffs. The plaintiffs' claim is set out thus:

"10

On 1 August 2013 the said members of the South African Police Services (sic) acting in concert with Public Prosecutors at Mthatha Magistrate's Court, set the law in motion against plaintiff by laying false charges against them when they:

10.1 had no reasonable and probable cause for doing so and;
10.2 were actuated by malice and
10.3 had no evidence whatsoever that the Plaintiff had been involved in a crime."

[116] The jurisdictional facts for a successful prosecution is set out in *Minister of Justice and Constitutional Development & others v Moleko*[42] as follows:

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[40] Section 20(1) of the NPA Act provides:
"The power, as contemplated in section 179(2) and all other relevant sections of the Constitution, to—
(a) institute and conduct criminal proceedings on behalf of the State;
(b) carry out any necessary functions incidental to instituting and conducting such criminal proceedings; and
(c) discontinue criminal proceedings,
vests in the prosecuting authority and shall, for all purposes, be exercised on behalf of the Republic."
41 In the event that the Director of Public Prosecutions declines to prosecute an alleged offence, a private person with a substantial and peculiar interest in a matter may apply to the NPA for a certificate nolle prosequi (refusal to prosecute) in terms of section 7(1)(a) of the Criminal Procedure Act. This certificate is required for a private person to institute a private prosecution, however instituting a private prosecution is prohibitively expensive.
[42] 2008 (3) All SA 47 (SCA) at para 8

"(a) the defendant set the law in motion;

(b) the defendant acted without reasonable and probable cause;

(c) the defendant acted with malice, and;

(d) the prosecution failed.

[117] In deciding to prosecute, a prosecutor exercises a discretion on the basis of the information placed before him by the investigating officer as contained in the case docket. The information before the prosecutor forms a body of evidence upon which the state shall infer whether a *prima facie* case has been established against an accused or not and upon which the prosecution shall rely for a successful conviction. The discretion must, however, be judicially exercised. In *S v Lubaxa*[43] the court summarised the relevant principles as follows:

> "Clearly a person ought not to be prosecuted in the absence of a minimum of evidence upon which he might be convicted, merely in the expectation that at some stage he might incriminate himself. That is recognised by the common-law principle that there should be reasonable and probable cause to believe that the accused is guilty of an offence before a prosecution is initiated and the constitutional protection afforded to dignity and personal freedom (s 10 and s 12) seems to reinforce it. It ought to follow that if a prosecution is not to be commenced without that minimum of evidence, so too should it cease when the evidence finally falls below that threshold."[44]

[118] Whilst the courts have been slow in limiting or interfering with the legitimate exercise of prosecutorial authority, a prosecuting authority's discretion to prosecute is not immune from judicial scrutiny[45]. In my view the court ought not fold its arms and not intervene in cases where the exercise of a prosecutorial authority is substantially compromised either by improper motives or by improper exercise thereof in cases where there is no reasonable and probable cause to believe that the

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[43] *2001 (2) SACR 703 (SCA) (2001 (4) SA 1251; [2002] 2 All SA 107) para 19*
[44] *At para 19*
[45] *National Director of Public Prosecutions v Zuma [2009] ZASCA 1; 2009 (1) SACR 361 (SCA) (2009 (2) SA 277; 2009 (4) BCLR 393; [2008] 1 All SA 197) para 37*

accused is guilty of an offence before the prosecution is initiated. For the successful formulation of charges against an accused, the prosecutorial authority must satisfy themselves of the existence of a *prima facie* case worthy of consideration before an accused is hauled before a court of law.

[119] The test for 'absence of reasonable and probable cause' was set out in *Beckenstrater v Rottcher and Theunissen*[46] as follows:

> "When it is alleged that a defendant had no reasonable cause for prosecuting, I understand this to mean that he did not have such information as would lead a reasonable man to conclude that the plaintiff had probably been guilty of the offence charged, if, despite his having such information, the defendant is shown not to have believed in the plaintiff's guilt, a subjective element comes into play and disproves the existence, for the defendant, of reasonable and probable cause…"

The test has 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.[47]

[120] It is not in dispute in this matter that the prosecuting authority preferred criminal charges against the plaintiffs. What is in dispute is the existence of a reasonable and probable cause. Mr Mhlontlo in his evidence said there was, whilst the plaintiffs on the other hand sought to convince the court that there was not. This saddles the court with an onerous task of evaluating evidence adduced before it before coming to a conclusion of whether reasonable and probable cause existed or not. In evaluating evidence the following was stated in *Stellenbosch Farmers' Winery Group Ltd & Another v Martell ET Cie and Others*[48]:

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[46] *1955 (1) SA 129 (AD) at 136 A-B*
[47] *See Minister of Safety and Security NO v Schubach ZASCA 216 (1 December 2014); J Neethling, JM Potgieter & PJ Visser Neethling's Law of Personality (2 ed, 2005) at 176*
[48] *2003 (1) SA 11 (SCA) Nienaber JA 14I-J – 15A-D*

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

[121] On evidence presented, it can hardly be believed that before taking the decision to prosecute the plaintiffs, Mhlontlo's predecessors had a reason to believe that the plaintiffs were guilty of an offence. Evidently, Mhlontlo is not the one who took the decision to prosecute as such decision was taken elsewhere before he took over the matter. Quite evidently, at the time the decision to prosecute was taken,

there was nothing that linked the plaintiffs to the commission of the offence. There was, thus, no *prima facie* case established against the plaintiffs upon which a decision to prosecute could have been taken.

[122] On Mhlontlo's own version when he received the case docket it contained a confession and statements implicating only Ngozi in all the offences committed. There was nothing implicating the plaintiffs and all those with whom they were arrested but only Ngozi. Mhlontlo, however, did not believe that '*this can be an act of a single man*' and this dangerous speculation poisoned his mind. It might have also poisoned the thinking apparatus of those who took the decision to prosecute. Mhlonto's suspicion is controverted by evidence that was presented before him and was not reasonable in the circumstances. Mhlontlo failed to disabuse himself of the ulterior motives and ignored the facts of the case before him. There was simply no nexus between the plaintiffs' conduct and the offences charged and on this point prosecuting the plaintiffs was a non-starter.

[123] In my view the prosecuting authority did not apply their mind properly when scrutinizing the police docket and did not do their job well in instituting prosecution against the plaintiffs. They took the decision to prosecute in circumstances where there was not a shred of evidence linking the plaintiffs to the commission of the offences charged and where no *prima facie* case had been established. In so doing they shirked their responsibility and opened the second defendant up for a civil claim of malicious prosecution. Withdrawing charges against the plaintiffs was an afterthought in circumstances where prosecution should have been avoided by, *inter alia*, proper application of the mind on the facts presented. The second respondent's liability for malicious prosecution in the above circumstances is as inevitable as for the arrest and detention itself.

[124] In conclusion the respondents are liable for damages suffered by the plaintiffs consequent upon their unlawful arrest and detention and as well as for their malicious prosecution. This leaves me with only one aspect falling for determination before the aspect of the costs is considered, which is the quantification of damages suffered by the plaintiffs.

Quantum

[125] The guiding principle in determining the appropriate award in cases of unlawful arrest and detention has been set out by the Supreme Court of Appeal as follows:

> "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 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 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."[49]

[126] Wallis J, in *Minister of Safety and Security & another v Marius Schuster & another*[50], traced the recognition of liability for the infringement of bodily freedom by the servants of the Crown caused by unlawful arrest in South Africa to more than 120 years ago when he said:

> "[20] Unlawful arrest and detention infringes the right to bodily freedom (or *libertas)*, which was already recognized as long ago as 1895 in *The Queen v Sigcau*[51] as follows: '(t)he value of a man's personal liberty is far beyond any estimate in mere money'. Roman law recognized this right, as part of personality rights, as one of significant importance: '*libertas inaestimabilis res est'* (liberty is a thing beyond price).[52]

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[49] *Minister of Safety & Security v Tyulu 2009 (5) SA 85 (SCA) at para 26*
[50] *(114/2018) [2018] ZASCA 112 (13 September 2018)*
[51] *The Queen v Sigcau (1895) 12 SC 283 at 285.*
[52] *D 50 17 106.*

[127] It is trite that any award of damages is in the discretion of the court[53] which usually considers the importance of a right to personal liberty and the seriousness with which any arbitrary deprivation of such liberty is viewed in our law[54]. As there is no mathematical formula for calculating the amount to be awarded to a plaintiff with particular precision, the courts often make use of previous awards. In this regard the cautionary words of Nugent JA in *Minister of Safety and Security v Seymour*[55] always resonate when he remarked:

> "The assessment of awards of general damages with reference to awards made in previous cases is fraught with difficulty. The facts of a particular case need to be looked at as a whole and few cases are directly comparable. They are a useful guide to what other courts have considered to be appropriate but they have no higher value than that".

[128] What seems to be an overriding consideration in the determination of an appropriate award for the unlawful arrest and detention is that the arbitrary deprivation of personal liberty is an infringement of a constitutionally entrenched right which must be viewed in a serious light by the courts.[56]

[129] In assessing damages in a claim for unlawful arrest and detention the court considers what is fair and reasonable[57] to both the plaintiff and the defendant with due regard to public policy. The award is on a case by case basis and the court usually takes into account the exigencies of a particular case and the peculiarities thereof. Striking a balance between a grossly inflated award and a conservative figure is always considered the best approach. In considering the issue of quantification of damages the authors, Visser & Potgieter, in their book, *Law of* Damages, set out the factors which they aver can play a role in the assessment of damages and said:

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[53] Minister of Police v Dhlwati (2004/14) [2016] ZASCA 6 (3044/2017] ZAGPHC 817 and many other cases

[54] See Tyhulu, supra, at 93d-f

[55] [2007] 1 All SA 558 (SCA) at 17:

[56] (cf *May v Union Government, Minister of Safety and Security v Seymour* 2006 (6) SA 320 (SCA) at 325 para 17; *Rudolf and Others v Minister of Safety and another* 2009 (2) SACR 271 (SCA) (2009 (5) SA 94; [2009] *ZASCA 39) paras 26-29).*

[57] Neethling, Potgieter and Visser Neethling's Law of Personality 2 ed (LexisNexis, Durban 2005) at 65, say: "the actio iniuriarum had the character of an actio aestimatoria (action for assessment) – its formula was quantum pecuniam aequum bonum videbitur (the amount of money must be seen to be just and fair)".

> "In deprivation of liberty the amount of satisfaction is in the discretion of the court and calculated *ex* aequo et bona. Factors which can play a role are the circumstances under which the deprivation of liberty took place; the presence or absence of improper motive or 'malice' on the part of the defendant; the harsh conduct of the defendants; the duration and nature (eg solitary confinement or humiliating nature) of the deprivation of liberty; the status, standing, age, health and disability of the plaintiff; the extent of the publicity given to the deprivation of liberty; the presence or absence of an apology or satisfactory explanation of the events by the defendant; awards in previous comparable cases; the fact that in addition to physical freedom, other personality interests such as honour and good name as well as constitutionally protected fundamental rights have been infringed; the high value of the right to physical liberty; the effects of inflation; the fact that the plaintiff contributed to his or her misfortune; the effect an award may have on the public purse; and, according to some, the view that the actio iniuriarum also has a punitive function."[58]

[130] In their amended particulars of claim the plaintiffs claimed an amount of R1000 000.00 each under several heads of damages, computed as follows:

(a) for unlawful arrest and detention against the first defendant - R250 000.00

(b) for unlawful detention against both defendants – R500 000.00

(c) for malicious prosecution – R250 000.00

[131] In relation to quantum, the plaintiffs testified that the police cells in which they were detained at Duncan Village police station were filthy and inhabitable. There was always a stench from the toilet which was closer to where they slept. The blankets were dirty, smelt of urine and looked like they had not been washed for a long time. They slept on thin mats. The food they ate was water boiled and tasteless. They were detained with other people. At Wellington they also shared cells with other people and the condition of the cells was bad. They slept on old type steel beds, two in each. The bed springs were very hard, often protruding and etching on the body.

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[58] Visser & Potgieter Law of Damages Third Edition, pages 545-548.; The factors listed by the learned authors were referred to in a decision of this division in Ntshingana v Minister of Safety and Security (unreported judgment dated 14 October 2003 under Eastern Cape Division case number 2001/1639)

Water was dripping from the sinks which they took turns in mopping from the ground and the toilets were dirty. The food was very bad. The conditions at Central police station were quite good, blankets were good and they were reasonably satisfied.

[132] In their testimony the plaintiffs did not exaggerate their plight. Whilst they were handcuffed in full view of the public, they were not assaulted or ill-treated by the police beyond being instructed to do push ups once. According to them the police treated them well. However, the treatment was different at Wellington prison where they were referred to as murderers.

[133] On quantum Mr Mgidlana submitted that both plaintiffs were young with no brush with the law. When they were arrested they were learners and the arrest impacted negatively on them. They were arrested in circumstances where they were innocent citizens and the arrest was a violation of their constitutional rights. It also invaded their right to privacy. Mr Mgidlana further submitted that the all-inclusive amount of R1000 000.00 each was fair and reasonable in the circumstances.

[134] Section 35(2)(e) of the Constitution provides as follows:

> "(2) Everyone who is detained, including every sentenced prisoner, has the right –
>
> a-d ...
>
> (e) to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment."

[135] It was not in dispute that the arrest and detention is an invasion of the plaintiffs' right to liberty and dignity. It is also not in dispute that these rights are enshrined in the Constitution and they should be jealously guarded. All that was disputed by the defendants was the unlawfulness of the arrest and their liability for detention after the plaintiffs' first appearance in court. Such denial was unsustainable in the circumstances of this case as I have already found that the

plaintiffs' arrest and detention were unlawful, and that they were maliciously prosecuted.

[136] What remains for determination is the quantification of damages suffered by each plaintiff. In using previous awards as a benchmark, the courts often adjust such in line with inflation and the time value of money. In this case I have considered previous awards in order to arrive at a fair and reasonable determination of what should satisfy the plaintiffs' much needed solatium.

[137] In my view the amount of R500 000.00 claimed by the plaintiffs for the 16 days they spent in detention is excessive. In fact, I consider awarding the plaintiffs R20 000.00 for each day they spent whilst being detained unlawfully to be fair and reasonable. For a sixteen day detention period, this works up to R320 000.00.

[138] In arriving at the above figure I have taken into account the drastic nature of the infringement in circumstances where there was not a shred of evidence even to arrest the plaintiffs in the first place. At the very least the plaintiffs should have been released from detention after their first appearance, that is, after Ngozi confessed to the killing and pointed out where he single-handedly dumped the corpse. Their continued detention was a callous violation of their rights to personal liberty and dignity. It was demeaning and the award will send a strong signal to the first defendant that the primary responsibility of police officers in a democratic and constitutionally sensitive environment, like ours, is first and foremost the protection of citizens' constitutional rights.

[139] In relation to damages they suffered as a result of their unlawful arrest and detention, the plaintiffs have claimed an amount of R250 000.00 against the first defendant and an amount of R500 000.00 against both defendants for the same damages. I consider this a duplication. Methinks an amount of R150 000.00 is fair and reasonable for each plaintiff. In reducing the award I have taken into account that the police did not assault and illtreat the plaintiffs. They did not commit too much excesses as they are known to always do but limited their role to investigating

the crime reported, albeit substituting the innocent victims for the criminal. They definitely barked a wrong tree but that does not necessitate a higher award.

[140] Turning to the plaintiffs' claim for malicious prosecution, I shudder to understand what happened to the critical examination and evaluation of information that the prosecuting authority used to employ when deciding whether or not to prosecute in a particular case. Prosecutors are learned people and officers of the court who should be studious of every fragment of information they glean from the police docket before making a decision whether to prosecute or decline to do so. They are not an extension of the police and they should act independently and disabuse themselves of willy-nilly believing everything they are told by the investigating officers. As officers of the court, they should be the guardians of human rights and must be sensitive to both the Constitution and the rule of law.

[141] In my view an amount of R110 000.00 will be fair and reasonable to compensate each plaintiff for the stress, traumatic experience and mental anguish they had to endure each time they had to appear before court as a result of their malicious prosecution. In making the above award I have taken the view that the act of malicious prosecution is a single act of embarrassment which does not exacerbate each day the plaintiff appears in court.

[142] In total I consider an all-inclusive award of R580 000.00 to each plaintiff to be fair and reasonable to compensate them for damages they suffered flowing from the above imbroglio. This then leads me to the next topic which is the issue of the costs.

Costs

[143] It is trite that the issue of costs in a suit is pre-eminently in the discretion of the court which must be exercised judiciously[59]. The purpose in awarding costs to a successful litigant is to indemnify such litigant of his or her out of pocket expenses incurred in either instituting or defending an action. In *Texas Co (SA) Ltd v Cape*

[59] *Kruger Bros & Wasenaar v Ruskin 1918 AD 63 AT 69*

Town Municipality[60], a case decided almost a century ago, Innes CJ remarked about the purpose of an award for the costs as follows:

> "[C]osts are awarded to a successful party in order to indemnify him for the expense to which he has been put through having been unjustly compelled either to initiate or to defend litigation as the case may be. Owing to the necessary operation of taxation, such an award is seldom a complete indemnity; but that does not affect the principle on which it is based."

[144] Indeed the general trend by our courts which has become trite is to award the costs to a successful party, save only in exceptional cases where a deviation from the general rule is allowed. The present case does not fall within the ambit of those exceptions and I have no reason to deviate from the general rule. In my view, as the plaintiffs have been successful, there is no reason to deprive them of their entitlement to the award of costs in their favour.

Order

[145] In the result the following order shall issue.

1. The first defendant is liable for damages suffered by the plaintiffs consequent upon their unlawful arrest and detention.

2. The second defendant is liable for damages suffered by the plaintiffs consequent upon their malicious prosecution.

3. The first defendant shall pay the first plaintiff an amount of R470 000.00 for damages suffered consequent upon his unlawful arrest and detention.

4. The first defendant shall pay the second plaintiff an amount of R470 000.00 for damages suffered consequent upon his unlawful arrest and detention.

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[60] *1926 AD 467*

5. The second defendant shall pay the first plaintiff an amount of R110 000.00 for damages suffered consequent upon his malicious prosecution.

6. The second defendant shall pay the second plaintiff an amount of R110 000.00 for damages suffered consequent upon his malicious prosecution.

7. The defendants shall pay the costs jointly and severally the one paying the other to be absolved from liability.

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H. S. TONI
JUDGE OF THE HIGH COURT (ACTING)

Appearances

Counsel for the Plaintiff	:	Adv T. Mgidlana
Instructed by	:	MAGQABI SETH ZITHA EAST LONDON c/ o Nettletons Inc. GRAHAMSTOWN
Counsel for the Respondent	:	Adv N. Msizi
Instructed by	:	STATE ATTORNEY PORT ELIZABETH c/o ENZO ATTORNEYS GRAHAMSTOWN
HEARD ON	:	18 July 2019
DELIVERED ON	:	15 January 2020