**IN THE HIGH COURT OF SOUTH AFRICA**

**(EASTERN CAPE DIVISION, MTHATHA)**

**CASE NO: 1191/2022**

In the matter between:

**MZUKISENI JILINGISI** Plaintiff

and

**MINISTER OF POLICE** 1st Defendant

**NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS** 2nd Defendant

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JUDGMENT

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**RUSI J**

[1] On 07 November 2020 Mr Nguye Winas Ngcora was found murdered at his home. He was last seen on 06 November 2020 when he and other members of the community, including the plaintiff, left a burial association meeting that was held in Matyengqina Locality.

[2] On 26 January 2021, one Samkelo Mqetheba (Mqetheba) was arrested in connection with the murder of Mr Ngcora (the deceased). The plaintiff was arrested on 29 May 2021, five months later, at Matheko Locality by the members of the first defendant in connection with the same incident. When he was arrested, he was attending a funeral service of a fellow member of his community. He was subsequently detained at the Bityi police station and was caused to appear in the Bityi Magistrates' Court on 01 June 2021 where he was charged with murder together with Mqetheba. On his first appearance in court, his application for release on bail was postponed. He was eventually granted bail on 24 June 2021. Charges against him were withdrawn by the prosecutor in the employ of the second defendant on 09 December 2021 due to insufficient evidence to secure a conviction against him.

[3] He now holds the first defendant liable for damages in the amount of R 1000 000.00, for contumelia resulting from his arrest and subsequent detention from 29 May 2021 to 24 June 2021, alleging that they were unlawful.

[4] Against the second defendant, the plaintiff claims damages in the sum of R1 800 000.00 as and for damages resulting from his prosecution from his first appearance in court until 09 December 2021. He alleges that his prosecution was malicious. The plaintiff's claims are resisted by the first and second defendants.

*The pleadings*

[5] The plaintiff pleaded that when the members of the first defendant arrested and detained him without a warrant on 29 May 2021, they acted unlawfully in that they had no reasonable suspicion that he had committed an offence listed in Schedule 1 of the Criminal Procedure Act 51 of 1977 (the CPA). They arrested him based on false allegations which he disputed from the onset, and his arrest was not with the

intention of bringing him before a court of law. He was arrested in full view of the members of the public while he was attending a funeral service of a member of his community.

[6] He pleaded, in the alternative, that in deciding to arrest him the arresting officer failed to properly exercise her discretion and acted without having due regard to all the circumstances of the case.

[7] Regarding his detention after his arrest, the plaintiff pleaded that his arrestor failed to properly exercise her discretion by considering other alternative ways of securing his attendance in court; and she failed to provide the prosecutor with sufficient bail information timeously. As a result of this failure, the plaintiff was further detained after his first appearance in the Bityi court as his bail was opposed, and it was only granted on 24 June 2021.

[8] The plaintiff asserts that his arrest and detention interfered with his right to liberty, were injurious to him, they impaired his dignity, embarrassed and humiliated him; and caused him too much grief. As regards the conditions in which he was detained, he pleaded that he was placed in an overcrowded cell with no privacy. It had appalling ablution facilities and had a bad smell. He was caused to sleep on a mattress on a wet cement floor. He was raped by one of the inmates and his sleep was disturbed at night as the cell light was on throughout the night.

[9] Against the second defendant the plaintiff further pleaded that he was maliciously prosecuted by her members in pursuit of the unlawful actions of the members of the first defendant. In this regard, he alleged that the prosecutor who prosecuted him in the Bityi court set the law in motion in circumstances where he had no reasonable belief in the truth of the charge that he preferred against him. He had no reasonable and probable cause to prosecute him; he directed his will to

prosecuting him without reasonable grounds for believing that he committed the offence that he was charged with; and those charges were withdrawn after several appearances in court due to insufficient evidence.

[10] In defence to the plaintiff's claim, the first defendant pleaded that his arrest and detention were justified in terms of section 40(1)(b) and section 50(1)(a)[1] of the CPA, in that he was reasonably suspected of committing murder, an offence listed in Schedule 1 of the same Act.

[11] The second defendant's defence is that the members of the first defendant opened a criminal case docket against the plaintiff based on reasonable suspicion that he had committed murder, and he was accordingly caused to appear before a court of law. His continued detention after his appearance in the Bityi court was in keeping with the provisions of section 50 of the CPA and the fact that he was charged with a serious offence.

[12] In disputing the allegation of malice on the part of her members, the second defendant pleaded that when her members were presented with the docket by the members of the first defendant, it contained statements of witnesses made on oath in which they implicated the plaintiff in the murder of the deceased. The prosecutor who enrolled the case in the district court had reasonable belief in the truth of the charges against him based on the evidence contained in the docket. The prosecution of the plaintiff was in line with the National Prosecuting Authority's policy and the CPA.

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[1] Section 50(1)(*a*) reads: 'Any person who is arrested with or without warrant for allegedly committing an offence, or for any other reason, shall as soon as possible be brought to a police station or, in the case of an arrest by warrant, to any other place which is expressly mentioned in the warrant.'

[13] In a further pre-trial minute signed by the parties on 28 August 2024, they agreed that in arresting the plaintiff the investigating officer of the case acted on Mqetheba's confession in which he implicated the plaintiff in the commission of murder, as well as oral information that was given to her by witnesses. Subsequent to his arrest on 29 May 2021, the plaintiff was brought to court for his first appearance on 01 June 2021. He remained in detention for 23 days. The parties further agreed that in enrolling the matter in the Bityi court, the prosecutor in the employ of the second defendant set the law in motion and opposed the plaintiff's release on bail, whereupon he was only released on 24 June 2021.

*The trial*

[14] The trial of this matter proceeded only on the issue of liability following an order that I granted, by agreement between the parties, separating the merits of the plaintiff's claim from quantum of damages.

[15] The plaintiff bore the onus to prove his claim of malicious prosecution against the second defendant. Since the first defendant admitted the plaintiff's arrest and detention, it bore the onus to justify them. At the trial of the case, the plaintiff accepted the duty to being leading evidence since he had to prove his claim against the second defendant.

[16] The plaintiff was the only witness in his case. Sgt Ndlebe testified on behalf of the first defendant as the police officer who arrested the plaintiff. The second defendant adduced the evidence of the public prosecutors who were seized with the docket at different stages of the plaintiff's appearance in court until 09 December 2021 when charges against him were withdrawn. Documents that were discovered by and between the parties, namely the contents of the police docket and the record

of proceedings in the Bityi court and Mthatha Regional Court were also adduced in evidence.

*(a) The plaintiff's evidence*

[17] The plaintiff testified that he was a member of the same burial association as the deceased, but he did not know him before the murder, nor did he know that he was the burial association's treasurer. In as much as he attended the association's meeting on the day of the deceased's murder, he did not see him but heard that he was present at the meeting. According to the plaintiff, the deceased may have been one of the persons with whom he traveled in the vehicle that conveyed them from the venue of the meeting to their various destinations in Matheko Locality. He confirmed having summoned Mqetheba to fetch him and other attendees of the burial society meeting.

[18] On the day of his arrest, he was seated at the podium of the funeral service venue and dressed in his church regalia when four police officers approached him, manhandled him; and removed him from the podium. The police drove him towards the gate of the premises where the funeral service was taking place and put him in their vehicle. He was taken to the Bityi police station where he was charged with murder and subsequently detained. He denied that one police officer asked him aside at the venue of the funeral service and advised him of his arrest and reasons therefor in the presence of his bother.

[19] He was caused to appear in the Bityi court on 31 May 2021. His fellow church members and in-laws were present in court on his first appearance, and this caused him much grief. At his first appearance his release on bail was opposed and he was remanded in custody until he was granted bail on 24 June 2021. From this point, he attended proceedings in relation to his case alongside Mqetheba until he was told on

09 December 2021 that charges against him were withdrawn. He was caused to continue appearing in Bityi court since first appearance despite the fact that there was no evidence linking him to the murder of the deceased. As a result of the charges that he faced in court he was excommunicated as a member of his church.

[20] Explaining why he was arrested five months after the murder of the deceased, the plaintiff testified that he only came back from Lusikisiki where he worked in November 2021. He denied what was put to him that Sgt Ndlebe decided to arrest him because he evaded his arrest. He testified that he only heard once from his child while he was at work in Lusikisiki that the police were looking for him. This was during November 2020 when he was close to coming back home. He did not submit himself to the police on arrival at his home because he believed that he had no obligation to do so, and since they were the ones who were looking for him it was their duty to come to him.

[21] On behalf of the second defendant, it was put to the plaintiff that when he first appeared in the Bityi court, he was not prosecuted but his case was 'enrolled as a pre-trial procedure'. Furthermore, the prosecutor who enrolled it had reasonable belief in the truth of the charges against him based on the evidence contained in the docket which included a confession made by Mqetheba in which he implicated him. Regarding the prosecution's decision to oppose bail, it was put to the plaintiff that his bail was opposed 'as is required by law'.

*(b) The first defendant's evidence*

[22] Sgt Ndlebe testified that she attended the murder scene on 07 November 2020 where she found the body of the deceased with several stab wounds which suggested that he was hacked. She was with Sgt Lukrozo of the fingerprints unit who uplifted fingerprints from the scene. During further investigation of the case, she received

oral information from the members of the community that she interviewed that the plaintiff was one of the people who were last seen with the deceased. This was when they boarded a vehicle driven by Mqetheba who transported them from Matyengqina where they had attended a burial association meeting. It was indicated to her that at the association's meeting, members were paying in monthly subscriptions, and the deceased was the association's treasurer. She did not record her interviews with members of the public as she was merely looking for a lead to the killers of the deceased.

[23] She began looking for the plaintiff and Mqetheba. In so doing she visited the plaintiff's home on two occasions but did not find him. On the second occasion she found a young child. She paused her search for the plaintiff when she did not succeed in finding him. Meanwhile, she pursued Mqetheba as the one who drove the vehicle that conveyed people from the meeting of the burial association, including the plaintiff and the deceased. Mqetheba was eventually linked to the murder by his fingerprints that were lifted from the scene of the murder and this led to his arrest. There were other fingerprints that Sgt Lukrozo uplifted from the scene, but they were never compared and identified.

[24] During her questioning of Mqetheba, he told her that it was the plaintiff who proposed that they should go to the deceased's house in order to take the burial association money that he kept. In the confession that he subsequently made, Mqetheba stated that he and the plaintiff armed themselves with bush knives and on arrival at the home of the deceased, they removed the windowpane through which they entered the house. Once in the house, they tied the deceased to a chair and demanded money and when he did not produce the money they hacked him with their weapons.

[25] Armed with Mqetheba's confession, she revived her search for the plaintiff as her suspicion that he too was involved in the murder of the deceased had hardened. She went to the plaintiff's home where she was told by his wife that he went away on 06 November 2020. She contacted the plaintiff telephonically and requested him to meet with her in connection with the murder of the deceased. He told her that he was in Flagstaff to look for employment. When she requested him to meet her at the police station in Flagstaff, he told her that he would not speak to an unknown person. He kept on avoiding to meet with her and failed to give her directions to where he lived in Flagstaff stating that he was unfamiliar with the place.

[26] She suspended her search for plaintiff until 29 May 2021 when she received a tip off that he would be attending the funeral service in Matheko Locality. On arrival at the homestead where the funeral was held the plaintiff was pointed out to her by her informer. He was standing at the entrance of the tent and wore trousers, a T-shirt, and a jacket. He was not the religious minister presiding at the funeral. Even though she found the plaintiff five months after the murder, she arrested and detained him because it was difficult for her to find him and she feared that if he was released, it would be difficult to find him. This was the basis on which she opposed his release on bail.

[27] Sgt Ndlebe further testified that when she arrested the plaintiff on 29 May 2021, she had only obtained Mqetheba's warning statement and confession. She obtained further witness statements after she arrested the plaintiff. In her view, Mqetheba's confession and the oral information she gathered from the members of the community were sufficient to ground her suspicion which led to the plaintiff's arrest. The grounds for her suspicion were that the plaintiff was a member of the burial association; he was the one who summoned Mqetheba's vehicle to fetch him and the rest of the persons which included the deceased from the meeting of the

burial association; he was one of the persons who were last seen with the deceased; and he was implicated by Mqetheba in a confession.

[28] She adduced no evidence regarding her involvement in court proceedings when the plaintiff appeared in court for the first time. When she left the Bityi police station sometime after the arrest of the plaintiff, there had not been a comparison of the further fingerprints that were lifted at the scene.

*(c) The second defendant's evidence*

[29] Mr Stokwe and Mr Komanisi testified as the prosecutors who were seized with the docket and arraigned the plaintiff in the Bityi district court and Mthatha regional court, respectively.

[30] Mr Stokwe testified that he was the one who received the docket of the case against the plaintiff on his first appearance in the Bityi court. Contained in the docket was a sworn statement of Sgt Ndlebe who visited the scene of crime in which she detailed her observations at the scene; a photo album of the scene depicting the naked body of the deceased with stab wounds and tied to a chair; a fingerprint analysis report in respect of Mqetheba; a confession made by Mqetheba in which he implicated the plaintiff; a sworn statement by Mqetheba as a witness and Sergeant Ndlebe's arrest statement in which she detailed how she went about searching for the plaintiff and how she arrested him.

[31] Guided by the National Prosecuting Authority Policy Manual (revised in June 2013), he scrutinized the plaintiff's docket in order to determine if there was prima facie evidence warranting its enrolment. Upon considering this evidence, he was satisfied that it established all the elements of the offence of murder. Therefore, he decided to enroll the case against the plaintiff among cases that were to appear in the Bityi court on that day.

[32] When he made the decision to enroll the case against the plaintiff, he was fully aware that Mqetheba's confession would not be admissible against him. In his view, since he was not assessing the plaintiff's guilt beyond reasonable doubt at that stage, further investigation of the case would augment the deficiency in the prosecution's case against him. He had a hope that the case against the plaintiff 'would crystalize' upon further investigation.

[33] He handed the docket to the public prosecutor who would appear in court on that day to present the charges against the plaintiff. It was that prosecutor who would make a decision regarding the release of the plaintiff on bail, and that prosecutor decided to oppose the plaintiff's release on bail. According to Mr Stokwe, the plaintiff's release on bail was justifiably opposed because of the seriousness of the offence and the difficulty that the investigating officer had in arresting him.

[34] Mr Stokwe conceded that the confession of Mqetheba was not objective evidence which the National Prosecuting Authority policy manual requires as a basis for the decision to enroll a case against an accused. He further conceded that none of the statements that were contained in the docket implicated the plaintiff but stated that there was evidence which 'circumstantially pointed to the involvement of the plaintiff' in the murder of the deceased. This formed the basis for the reasonable belief he had in the truth of the allegations against the plaintiff.

[35] From the Bityi court, the plaintiff's case was transferred to the Regional Court in Mthatha. The plaintiff's prosecution, said Mr Stokwe, only began when the charges were put to him in the Regional Court, and it could only fail if the plaintiff was acquitted not when charges were withdrawn. The rest of the evidence regarding what took place when the case against the plaintiff was enrolled in the regional court was adduced by Mr Komanisi.

[36] Mr Komanisi testified that the plaintiff's case was enrolled in the regional court for the first time on 18 October 2021. It was his duty to make a decision whether or not to continue the prosecution of the plaintiff and Mqetheba by enrolling the case for trial in that court. He had a duty to review the initial decision that his colleague took of prosecuting the plaintiff in the Bityi court. At that time, he had only received the record of proceedings and charge sheet from the Bityi court and not the police docket.

[37] When he saw that the plaintiff and Mqetheba were both on bail he enrolled the case on 18 October 2021 due to its seriousness but simultaneously requested that the docket be brought to him for his consideration. When he enrolled the case without recourse to the docket, he did not believe that the plaintiff and Mqetheba would be prejudiced since they were on bail. He did this fully aware of the fact that the case would be postponed to another date and the plaintiff and Mqetheba would be obliged to attend proceedings on the next date. Mr Komanisi further testified that if the plaintiff and his co-accused were in custody when he had to decide whether to enroll their case or not, he would never have enrolled it without the police docket.

[38] The case had already been adjourned to 22 October 2021 when the docket was brought to him later on 18 October 2021 by a person other than the investigating officer. At the time, it still contained the same evidence that was at the disposal of Mr Stokwe when he enrolled the case in the Bityi court. Upon his consideration of the conspectus of the evidence contained in the docket, he was not satisfied that there was sufficient evidence implicating the plaintiff since he was implicated by Mqetheba in a confession that was inadmissible evidence against him. To that end he immediately telephonically contacted Sgt Madikazi who was the investigating officer of the case at the time in order to discuss the patent insufficiency of evidence against the plaintiff but he received no tangible response to his queries.

[39] He concomitantly made an entry in the investigation diary enquiring from Sgt Madikazi whether there was any comparison of the fingerprints lifted at the scene with the plaintiff's fingerprints. This entry is dated 18 October 2021, being the date on which he received the docket. He required this information as confirmation outside Mqetheba's confession of the role played by the plaintiff in the commission on the murder.

[40] While no feedback was received from Sgt Madikazi regarding a comparison of the plaintiff's fingerprints, the case was postponed on 22 October 2021 to 19 November 2021 for further investigation. On this latter date he spoke with the investigating officer again regarding the need for the comparison of the plaintiff's fingerprints with the ones that were lifted from the scene of the murder. He still received no feedback from the investigating officer regarding this aspect of investigation. The case was further postponed to 09 December 2021 for consultation by the prosecution and defence with their respective witnesses. He only made the decision to withdraw the charges against the plaintiff on 09 December 2021 due to insufficient evidence implicating him.

[41] According to Mr Komanisi, there was a prima facie case against the plaintiff when his colleague, Mr Stokwe enrolled the case in the Bityi court. He denied that there could not have been reasonable belief in the guilt of the plaintiff at that stage. However, he explained that it would have been necessary for Mr Stokwe to issue instructions to the investigating officer for further investigation since there no full investigation at that initial stage of the prosecution.

[42] Mr Komanisi further testified that the same evidence on which Mr Stokwe relied when he first enrolled the case against the plaintiff in the Bityi court was the same evidence that he considered for the purposes of taking the matter to trial in the Regional Court. He conceded that when Mr Stokwe enrolled the case, the law was

set in motion against the plaintiff and that at the time he gave evidence in the present proceedings, no prosecution was reinstated again against the plaintiff.

[43] I put questions to Mr Komanisi for the purposes of elucidating the evidence adduced regarding entries made in the investigation diary by the respective prosecutors and investigators who were seized with the docket at different points in time. He testified that from when the confession of Mqetheba was filed in the docket on 28 January 2021, the involvement of the plaintiff in the commission of the murder was never queried by the prosecutor who was then seized with the docket in the Bityi court. This position prevailed on 04 February 2021 until 26 August 2021, and when he received the docket and queried the plaintiff's involvement in the commission of the offence, the investigating officer of the case did not comply with his instructions.

*The parties' submissions*

[44] On behalf of the plaintiff, Mr *Sintwa* submitted that Sgt Ndlebe ought to have verified the assertions made by Mqetheba in the confession which formed the basis of her suspicion that the plaintiff was involved in the murder of the deceased. To the extent that she did not, her suspicion was not reasonable. Regarding Sgt Ndlebe's failure to exercise her discretion in arresting the plaintiff, Mr *Sintwa* submitted that she arrested the plaintiff on the strength of an instruction that the prosecutor gave that the second suspect must be arrested.

[45] Mr *Sintwa* went on to submit that the plaintiff's detention had no rational basis since there was no evidence linking him to the murder. On the issue of malicious prosecution, he submitted that the second defendant had no reasonable and probable cause to prosecute the plaintiff at the various stages where he was prosecuted.

[46] Mr *Mdeyide* submitted that based on the objective facts that Sgt Ndlebe had gathered at the scene of the murder, the oral information obtained regarding the murder and Mqetheba's confession, her suspicion that the plaintiff was involved in the murder was founded on reasonable grounds. It was his submission further that the plaintiff failed to establish that Sgt Ndlebe improperly exercised her discretion in arresting and detaining him. Regarding the plaintiff's detention after his court appearance, Mr *Mdeyide* submitted that his further detention was in the hands of the second defendant and subject to the authority of the court.

[47] Ms *Ncalo* took the view that in enrolling the case against the plaintiff, the prosecutors acted without malice as they had sufficient evidence to do so. She further submitted that because no verdict was returned by the court, namely an acquittal, it cannot be said that the prosecution was terminated in favour of the plaintiff. According to Ms *Ncalo*, the withdrawal of the charges against the plaintiff did not terminate the prosecution.

*The Law*

[48] A person may only be arrested and detained without a warrant authorizing his arrest in circumscribed instances, which the CPA sets out in section 40. Relevant to the present case are the provisions of section 40(1)(b) in terms of which a warrantless arrest may be made by a peace officer who entertains a suspicion based on reasonable grounds that the person to be arrested committed an offence listed in Schedule 1 of the CPA.[2]

[49] In *Shaaban Bin Hussien and Others v Chong Fook Kam and Another*,[3] Lord Devlin described 'suspicion' this way:

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

[3] *Shaaban Bin Hussien and Others v Chong Fook Kam and Another* [1969] 3 All ER 1626 (PC) at 1630.

'Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking; "I suspect but I cannot prove". Suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is the end.'

[50] Not any suspicion will suffice for justifying a person's arrest and detention. The suspicion must be reasonable and the test for such reasonableness is objective. The test for the reasonableness of the grounds of suspicion on which the arrest is effected, was enunciated in *Mabona and Another v Minister of Law and Order and Others*,[4] where the court stated:

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

[51] The decision to arrest entails the exercise of a discretion. Once the jurisdictional facts for an arrest, whether in terms of any paragraph of s 40(1) or in terms of s 43 of the CPA, are present, a discretion arises, and the peace officer is not obliged to arrest.[5] That discretion must be exercised after taking all the prevailing circumstances into consideration.[6]

[52] A police officer a police officer effecting an arrest is equally enjoined to apply his or her mind to the circumstances relating to a person's detention and this includes

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[4] *Mabona and Another v Minister of Law and Order and Others* 1988 (2) SA 654 (SE) at 658G-H.
[5] *Minister of Safety and Security v Sekhotho* 2011 (1) SACR 315 (SCA), para 28 (*Sekhotho*).
[6] *Biyela v Minister of Police* (1017/2020) [2022] ZASCA 36; 2023 (1) SACR 235 (SCA) (1 April 2022), para 36 *(Biyela).*

applying his or her mind to the question whether detention is at all necessary.[7] This is in keeping with the fact that the arrest and detention are two separate legal acts even though they both result in the restriction of a person's liberty.[8] Therefore, even where an arrest may be lawful, it does not automatically follow that the detention will also be lawful.

[53] It is settled law that the authority of the police to detain the suspect after arrest endures until his first appearance in court, whereafter his further detention is dependent on the decision made by the court in the exercise of its discretion.[9]

[54] Furthermore, a legal duty rests on the arresting police officer to inform the public prosecutor of the existence of information which would justify the further detention. Similarly, where there are no facts which justify the further detention of a person, this should be placed by the investigator before the prosecutor of the case. This information, which must have been established by the police officer, will enable the public prosecutor and eventually the magistrate to make an informed decision whether or not there is any legal justification for the further detention of the person.[10]

[55] Malicious prosecution consists in the wrongful and intentional assault on the dignity of a person comprehending also his or her good name and privacy.[11] In order to succeed in her claim based on malicious prosecution, the plaintiff must allege and prove that *(a)* the defendants set the law in motion (instigated or instituted the proceedings); *(b)* the defendants acted without reasonable and probable cause; *(c)*

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[7] *Mvu v Minister of Safety and Security* 2009 (6) SA 82 (GSJ) at 90A; *Hofmeyer v Minister of Justice and Another* 1992 (3) SA 108 (C).
[8] *Mahlongwana v Kwatinidubu Town Committee* 1991 (1) SACR 669 (E) at 675d-f.
[9] *Sekhoto* para 42; *Minister of Safety and Security v Tyokwana* [2014] ZASCA 130; 2015 (1) SACR 597 (SCA), para 38 (*Tyokwana*).
[10] *Botha v Minister of Safety and Security and Others, January v Minister of Safety Security and Others* (575/2009; 576/2009) [2011] ZAECPEHC 12 (2 April 2011), para 30.
[11] *Relyant Trading (Pty) Ltd. v Shongwe and Another* (472/05) [2006] ZASCA 162; [2007] 1 All SA 375 (SCA) (26 September 2006), para 5 (*Relyant*).

the defendants acted with 'malice' (or *animo injuriandi*); and *(d)* that the prosecution has failed.[12]

[56] With these legal principles in mind, I turn to consider whether or not the first and second defendants ought to be held liable for plaintiff's claim.

*Discussion*

[57] Whether Sgt Ndlebe could entertain a reasonable suspicion about the plaintiff's involvement in the murder of the deceased based on the confession made by Mqetheba in which he implicated the plaintiff, was strenuously contested between the parties.

[58] It is so that in terms of section 219 of the CPA no confession made by any person shall be admissible as evidence against another person. A distinction must, however, be drawn between the threshold of the quality of the facts required for the purposes of the reasonable suspicion that is required to justify an arrest, and that of the quality of facts required to stand as evidence for the purposes of determining the guilt of the accused in a court of law.

[59] If it is accepted, as it ought to be, from the plethora of case law, that the standard of the facts required to give rise to a suspicion that forms the basis of an arrest is set low, it can hardly be argued that the question of admissibility of a confession made by a suspect who is arrested first is a factor to be considered by the police officer when making a decision to arrest further suspects. The SCA in *Biyela v Minister of Police*[13] held that the suspicion held by the arresting officer need not be based on information that would subsequently be admissible in a court of law.

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[12] *Minister for Justice & Constitutional Development v Moleko* 2009(2) SACR 585 (SCA), para 8; see also *Minister of Safety and Security v Lincoln* 2020 (2) SACR 262 (SCA).
[13] *Biyela*, para 33.

[60] Sgt Ndlebe did not require direct and admissible evidence implicating the plaintiff in order for her to arrest him. What was required were facts on which a reasonable police officer faced with such facts, would entertain a suspicion that the plaintiff was involved in the murder of the deceased. This is not to say she was absolved from the duty of verifying the facts which gave no clear indication of the plaintiff's involvement in the commission of the crime where this could practically be done.

[61] I may add that the fact that the fingerprints analysis results that Sgt Ndlebe had in her possession only linked Mqetheba was no bar in her considering the arrest of the plaintiff in the light of the facts that she had so far gathered pertaining to murder of the deceased which included Mqetheba's confession. I make the finding that Sgt Ndlebe's suspicion after the confession of Mqetheba was based on reasonable grounds.

[62] With this said, the question that follows is whether Sgt Ndlebe was obliged to arrest the plaintiff, or whether, as alleged by the plaintiff, she could employ other less drastic ways of securing his attendance in court? The onus was on the plaintiff to establish that his arrestor did not exercise her discretion properly in arresting him.[14]

*The arrestor's exercise of discretion*

[63] According to Sgt Ndlebe, she decided to arrest the plaintiff, albeit five months after the murder, because he evaded the police for that entire period. This was not pleaded by the first defendant in answer to the plaintiff's allegation that his arrestor did not properly exercise her discretion in arresting him. This fact notwithstanding,

[14] *Minister of Safety and Security v Sekhoto and Another* 2011 (1) SACR 315 (SCA); [2011] 2 All SA 157 (SCA); 2011 (5) SA 367 (SCA); (131/10) [2010] ZASCA 141 (19 November 2010), para 49 (*Sekhotho*).

this aspect was fully ventilated by the parties during the trial, there is therefore no prejudice to the plaintiff if this Court considers this fact despite the fact that it was not pleaded.[15]

[64] When the plaintiff was confronted with the first defendant's assertion that he evaded the police and that this was the reason why it took about five months for him to be arrested, he proffered a bare denial. In the end, he stated that when he heard from her child on one occasion that he was sought by the police, he deliberately refrained from going to the police on the ground that they were the ones looking for him, therefore, they ought to have come to him.

[65] In as much as the plaintiff was not legally bound to present himself to Sgt Ndlebe, his assertion that he was under no obligation to do so even when he learned from his child, that he was sought by the police, must be taken as an implicit admission by him that he had resolved to avoid meeting Sgt Ndlebe for the purposes of questioning regarding the death of the deceased. But this would not absolve Sgt Ndlebe from applying her mind to whether it was necessary at that stage and in those circumstances to arrest the plaintiff.

[66] On Sgt Ndlebe's own showing, apart from the fingerprints that linked Mqetheba to the murder, there were fingerprints that were lifted at the scene of the murder which had not been identified. It was her further testimony that she had intended to obtain the plaintiff's fingerprints in order to have them compared with the unidentified fingerprints. Section 36C of the CPA empowers any police official to take fingerprints and body prints for investigation purposes. This section provides as follows:

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[15] *Minister of Safety and Security v Slabbert* (668/2009) [2009] ZASCA 163; [2010] 2 All SA 474 (SCA) (30 November 2009), para 12.

'**36C.** (1) Any police official may without warrant take fingerprints or bodyprints of a person or a group of persons, if there are reasonable grounds to—
(*a*) suspect that the person or that one or more of the persons in that group has committed an offence referred to in Schedule 1; and
(*b*) believe that the prints or the results of an examination thereof, will be of value in the investigation by excluding or including one or more of those persons as possible perpetrators of the offence.
(2) Prints taken in terms of this section may—
(*a*) be examined for the purposes of the investigation of the relevant offence or caused to be so examined; and
(*b*) be subjected to a comparative search.'

[67] The above quoted provisions of section 36C of the CPA which are an investigative aid are also intended to eliminate innocent persons from the identified suspects of a crime.

[68] It is indeed so that the court will not interfere with a bona fide exercise of discretion by a public officer.[16] The offence for which the plaintiff was arrested is undeniably a serious one which would ordinarily justify a decision by the peace officer to arrest the suspect as opposed to using less drastic measures to bring him/her to court.[17] A disconcerting feature of the first defendant's evidence is that no investigation of the case was undertaken after Mqetheba's confession dated 28 January 2021 until a time after the arrest of the plaintiff.

[69] In as much as Sgt Ndlebe could, as a result of Mqetheba's confession, reasonably entertain a suspicion that the plaintiff was involved in the murder of the deceased, she was not obliged to resort to an arrest as a means of bringing him to court. These are the reasons why. There was no direct evidence of the persons who

[16] *Sekhotho*, paras 28 and 34.
[17] *Sekhotho*, para 44.

killed the deceased. She was fully aware of the fact that it was by means of the fingerprint comparison that Mqetheba was linked to the murder. In the sworn statement that Mqetheba made on an unspecified date as a witness, he mentioned that at Matyengqina, where he went to fetch the burial association members at the plaintiff's request, he found six persons which included the plaintiff and the deceased. In the confession in which he later implicated the plaintiff he stated that one Mabhakamfula Siphika and an old woman from his locality were among the six people he conveyed in his vehicle from Matyengqina. It appears from the confession that Mabhakamfula Siphika was the one who summoned Mqetheba to fetch them from there.

[70] After the arrest of Mqetheba and the filing of his confession in the docket, there was no investigation into the identity of the two other persons among the six that he conveyed from Matyengqina. This is despite the fact that according to Sgt Ndlebe, she pursued the plaintiff because he was said to be one of the persons who were last seen with the deceased. Significantly, even though there were unidentified fingerprints that were lifted at the murder scene, no steps were taken, while Sgt Ndlebe was still searching for the plaintiff, to have those fingerprints compared, at least, with those of Mabhakamfula Siphika whom Mqetheba clearly identified in his confession as one of the passengers that he conveyed, and who summoned him to fetch them at Matyengqina.

[71] Heedless of this lacuna in the case against the plaintiff as it was five months after the arrest of Mqetheba, Sgt Ndlebe went ahead and arrested him. Effectively, she failed to use an opportunity to verify the allegations that Mqetheba made in his confession which happened to be the only piece of incriminating evidence she had against the plaintiff, by having recourse to the provisions of section 36C of the CPA. This, in circumstances where, as already mentioned, the docket was left

uninvestigated for a period of five months after Mqetheba's confession. In these circumstances, it does not assist the defendant that Sgt Ndlebe testified that she arrested and detained the plaintiff because it was difficult to find him. Nothing can be more arbitrary! It cannot be said that Sgt Ndlebe duly and honestly applied herself to the matter of the plaintiff's arrest by considering whether the arrest was rational in the circumstances.

[72] I come to the conclusion that Sgt Ndlebe failed to exercise her discretion properly in arresting the plaintiff. This makes the plaintiff's arrest and subsequent detention until his first appearance in court unlawful for want of rational basis. I deal next, with whether a basis has been established to hold the first defendant liable for the further detention of the plaintiff after his appearance in court.

*The post-court appearance detention*

[73] It is common cause that the plaintiff was caused to appear in court on 01 June 2021 on which day his application for bail was postponed and eventually granted on 24 June 2021. It bears mentioning that the record of proceedings of the Bityi court that was discovered between the parties does not entail the proceedings against the plaintiff at his first appearance before the magistrate. Furthermore, among the contents of the police docket discovered there is no record of any information that Sgt Ndlebe provided to the prosecutor concerning her views on the plaintiff's release on bail.

[74] In *De Klerk v Minister of Police*[18], it was held that once the arresting officer brings the suspect to court, the court is primarily responsible for his further status as an accused. The question that arises from this is whether the remand by the

[18] *De Klerk v Minister of Police* (CCT 95/18) [2019] ZACC 32; 2019 (12) BCLR 1425 (CC); 2020 (1) SACR 1 (CC); 2021 (4) SA 585 (CC) (22 August 2019), para 69 (*De Klerk*); see also *Sekhotho*, para 42.

magistrate constituted a new intervening act which broke the chain of causation between the arrest of the plaintiff by Sgt Ndlebe and his further detention after his court appearance. This question was dealt with by Theron J in *De Klerk* when she said the following, with reference to various cases:[19]

'[46] Put differently, assuming that a Magistrate does remand someone lawfully, would it necessarily follow that the police cannot be liable for the subsequent detention factually caused by an unlawful arrest? What difference would it make if the remand was unlawful?

[47] These questions probe the role of the lawfulness of the subsequent detention in assessing the police's liability for an unlawful arrest. For the reasons that appear from an analysis of the contradictory case law below, the liability of the police for detention after court appearance should not be determined solely on the basis of whether the further detention was lawful, although that is a relevant consideration. Instead, liability should be determined in accordance with the principles of legal causation, including constitutionally infused considerations of public policy.

[59] In sum, there are then two Supreme Court of Appeal decisions suggesting that the lawfulness of the subsequent detention determines without more whether the arrestor is liable. There are three going the other way, with an express consideration of legal causation. How is this difference to be resolved?

[60] From the outset, it appears that to the extent that *Ndlovu* and *Tyokwana* assume that legal causation does not need to be established to hold the police liable, they depart from established principle. The Supreme Court of Appeal's minority judgment in this matter explains why. In establishing a delictual claim, a plaintiff needs to prove that the unlawful, wrongful conduct of the *police* (i.e. the arrestor) factually and legally caused the harm (post-court hearing deprivation of liberty). The plaintiff does not need to establish, necessarily, the unlawfulness of the harm (i.e. that the detention after remand was itself unlawful). The plaintiff need only establish that the harm was

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[19] *Isaacs v Minister van Wet en Orde [1995] ZASCA 152; 1996 (1) SACR 314 (A); Minister of Safety and Security v Ndlovu [2012] ZASCA 189; 2013 (1) SACR 339 (SCA); Zealand v Minister for Justice and Constitutional Development and Another 2008 (2) SACR 1 (CC);* and *Tyokwana.*

not too remote from the unlawful arrest. This is not to say that the unlawfulness of the post-court hearing detention is irrelevant. It is crucial if a plaintiff aims to hold the Minister of Justice liable. Furthermore, importantly, it is a relevant consideration in establishing legal causation.

[62] The principles emerging from our jurisprudence can then be summarized as follows. The deprivation of liberty, through arrest and detention, is per se prima facie unlawful. Every deprivation of liberty must not only be effected in a procedurally fair manner but must also be substantively justified by acceptable reasons. Since *Zealand,* a remand order by a Magistrate does not necessarily render subsequent detention lawful. What matters is whether, substantively, there was just cause for the later deprivation of liberty. In determining whether the deprivation of liberty pursuant to a remand order is lawful, regard can be had to the manner in which the remand order was made.'

[63] In cases like this, the liability of the police for detention post-court appearance should be determined on an application of the principles of legal causation, having regard to the applicable tests and policy considerations. This may include a consideration of whether the post-appearance detention was lawful. It is these public policy considerations that will serve as a measure of control to ensure that liability is not extended too far. The conduct of the police after an unlawful arrest, especially if the police acted unlawfully after the unlawful arrest of the plaintiff, is to be evaluated and considered in determining legal causation. In addition, every matter must be determined on its own facts – there is no general rule that can be applied dogmatically in order to determine liability.'[20] (footnotes omitted)

[75] Quite evident from the facts of the present case is that Sgt Ndlebe did not provide any insight to the public prosecutor regarding the appropriateness or otherwise of further detention in circumstances where there was a legal duty on her to do so. There is no record in the investigation diary of communication between the prosecutor in the Bityi court and Sgt Ndlebe regarding aspects of investigation of the case against the plaintiff from the time of his arrest until 24 June 2021 when he was released. It is unsurprising that Mr Stokwe was unable to testify regarding the

[20] Id.

question of the plaintiff's release and what took place when the plaintiff made his first appearance in court.

[76] It was Mr Stokwe's evidence that the plaintiff's bail was opposed 'because the offence he was charged with was a serious one.' This is not what the determination of a person's eligibility on bail in terms of section 60 of the CPA entails. In its simplest form, the test is whether interests of justice permit the release of the accused on bail. Various factors are to be considered in making this determination, and the seriousness of the offence, though relevant, is not a decisive factor. In the end, the main purpose of bail is to protect personal freedom as far as possible.[21]

[77] Apart from the fact that there was a lacuna in her case against the plaintiff to the extent that she did not verify the fingerprints that were readily available from the scene of the murder, and there was no other evidence against the plaintiff except the confession, Sgt Ndlebe had been to the homestead of the plaintiff on more than one occasion. By then she would have established that the plaintiff had a family and a fixed place of residence. From her version of how she went about looking for the plaintiff and the information she gathered about his whereabouts, it appears that the plaintiff was always within reach of the police. It was expected that all of this information would be disclosed to the prosecutor and eventually the magistrate. This was not done.

[78] No evidence was adduced by Sgt Ndlebe that it had appeared to her when she opposed the plaintiff's bail that there was a risk that he would interfere with investigations or state witnesses if he was released on bail, or that he would skip the country. That she opposed bail because she feared that it would be difficult to find the plaintiff, can hardly be availing to the first defendant. Sgt Ndlebe's reasons for

[21] *McCarthy v R* 1906 TS 657 at 659*; Minister van Wet en Orde en Andere v Dipper* 1993 (3) SA 591 (A) at 595G.

opposing the plaintiff's bail clearly had nothing to do with fear that the plaintiff would interfere with investigation or state witnesses; or he would evade trial.

[79] All of the aforegoing is compounded by the fact that there is no record of what took place in court upon the plaintiff's first appearance and what submissions were made by the prosecutor before the magistrate concerning his release or further detention. There is no record of reasons why the plaintiff's bail application was postponed on his first appearance. Since the parties agreed in their minute of a further pre-trial conference dated 28 August 2024 that the plaintiff was in detention for 23 days, in the absence of the record of proceedings of the plaintiff's first appearance in court, it must be accepted that the plaintiff's further detention after his first appearance in court began on 01 June 2021 and endured until his release on 24 June 2021.

[80] I make the finding that Sgt Ndlebe's failure in providing the prosecutor, and eventually the court, with the necessary information that would assist in the decision regarding whether or not the plaintiff's further detention was justified in the circumstances, was a wrongful breach of her legal duty. Her culpable conduct is sufficiently closely connected to the continued detention of the plaintiff after his first appearance in court.

*Malicious prosecution*

[81] Ms *Ncalo* seemed to have taken the view that when the plaintiff appeared in the Bityi court he was not prosecuted and that his prosecution began only in the regional court. This view was shared, incorrectly, I might add, by Mr Stokwe who maintained that the plaintiff was not prosecuted when he first appeared in the Bityi court on the charge of murder.

[82] A prosecution begins when the prosecutor decides to pursue criminal charges against the accused after receiving the docket from the police. This much is confirmed by the National Prosecuting Authority policy manual to which Mr Stokwe referred this Court as being what guided his decision to enroll the plaintiff's case. It is rather confounding that Mr Stokwe testified that when he enrolled the plaintiff's case, he was not prosecuting him. The Oxford English Dictionary[22] provides the following definitions of "prosecution" which find relevance in the present context:

"1. The following up, continuation, or pursuit of a course of action etc, with a view to its completion.

2. The institution and conducting of legal proceedings in respect of a criminal charge in court; the institution and conducting of proceedings against a person or in pursuit of a claim. . ."

[83] Mr Stokwe's understanding of what a prosecution entails and when it commences is clearly at odds with this definition and what the prosecutorial policy that governs his duties sets out. To the extent that Ms *Ncalo* persisted with a similar understanding, her view in this regard cannot be sustained.

[84] Central to the plaintiff's claim of malicious prosecution is whether the prosecutors had reasonable and probable cause to prosecute him. A decision to prosecute a plaintiff can only be made after the prosecutor has interrogated the docket in its entirety and applied his/her mind properly. This is in keeping with his/her duty not to act arbitrarily but with objectivity.[23]

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[22] Shorter Oxford English Dictionary, Volume 2, page 2375.

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

[85] The requirement that there must be a reasonable and probable cause to prosecute entails that there must be an honest belief founded on reasonable grounds that the institution of proceedings is justified. In *Beckenstrater v Rottcher and Theunissen*[24] Schreiner JA put it this way:

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

[86] The second defendant can only be absolved from liability for malicious prosecution if Mr Stokwe and Mr Komanisi had a genuine belief founded on reasonable grounds that the plaintiff was guilty.[25] In his testimony, Mr Stokwe conceded that the confession made by Mqetheba could not, on its own, sustain a conviction against the plaintiff as it was inadmissible evidence against him. Despite this understanding, he decided to pursue the charge against the plaintiff with the hope that the deficiency in the evidence that he had at his disposal would be supplemented by an investigation.

[87] Granted, a prosecutor also has the option of requesting further investigation whenever the guilt of the accused is subject to doubt. This will often be the case since at that stage there would not been a full investigation of the case yet. On the face of the entries that were made in the investigation diary when the case was on the Bity court roll, an instruction that was repeatedly issued by the prosecutor was that the investigating officer must arrest 'the second suspect' as soon as possible.

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[24] 1955 (1) SA 129 A 136 A-B.
[25] *Relyant* para 14.

[88] The fact that Mr Stokwe did not enquire from the investigator of the case, as he ought to have done so, regarding the availability of other evidence implicating the plaintiff besides Mqetheba's confession, is not without significance. His omission prevailed for the duration of the existence of the plaintiff's case in the roll of cases that were before the Bityi court prior to its enrolment in the regional court on 18 October 2021. At no stage did he or his colleague in the Bityi court review the second defendant's case against the plaintiff throughout the period of his attendance of proceedings against him in that court.

[89] Although Mr Komanisi confirmed that Mr Stokwe had a duty to raise queries with the investigator of the case considering that the plaintiff was linked to the murder only by Mqetheba's confession, he attempted to explain Mr Stokwe's omission away by stating that he (Mr Stokwe) was not at that stage concerned with the guilt of the plaintiff beyond reasonable doubt. I disagree with this explanation. A *prima facie* case in the context of assessing the existence of reasonable and probable cause will justify a decision to prosecute where it consists of allegations supported by statements and real and/or documentary evidence and is of a nature that if it is proved in a court of law by admissible evidence, it would result in a conviction.[26] In *S v Lubaxa*[27] it was said:

'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 recognized 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 (s10 and s12) 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.'

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[26] *Murray v Minister of Defence* 2009 (3) SA 130 (SCA), para 46.
[27] 2001 *(2)* SACR 703 (SCA), para 19.

[90] To his credit, Mr Komanisi understood when he received the docket on 18 October 2021, that his role was to make a decision whether or not to continue with the prosecution of the plaintiff. Significantly, he observed that no other evidence was submitted in the docket except that which his colleague, Mr Stokwe had at his disposal at the time the case was in the Bityi court roll. For a period of two months nothing was forthcoming from the investigator regarding his query. Charges against the plaintiff were only withdrawn on 09 December 2021. Before this date, the case was postponed, first for the docket, and on subsequent occasions, for further investigation.

[91] When Mr Komanisi received the docket on 18 October 2021 albeit after the case was already adjourned, he would have fully interrogated it for him note that since the time the docket was received by Mr Stokwe in the Bityi court nothing more had been done to investigate the case. When the investigating officer did not bring forth further evidence on 19 November 2021, being the date to which the case was postponed on 22 October 2021 for further investigation, it must have been clear to Mr Komanisi that the prosecution against the plaintiff could not be caused to continue. He ought to have discontinued it, but he did not. The case was postponed further on two occasions. There cannot have been reasonable and probable cause for its continuation.

[92] Although the expression "malice" is used in a claim for malicious prosecution, the plaintiff's remedy lies under actio injuriarum. He had to prove that the second defendant's employees acted with animus injuriandi.[28] In *Moleko*, this requirement of the claim for malicious prosecution was explained as follows:

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[28] *Moaki v Reckitt and Colman (Africa) Ltd and Another* 1968 (3) SA 98 (A) at 103-104; and *Prinsloo and Another v Newman* 1975 (1) SA 481 (A) at 492 A-B.

'The defendant must thus not only have been aware of what he or she was doing in instituting or initiating the prosecution but must at least have foreseen the possibility that he or she was acting wrongfully, but nevertheless continued to act, reckless as to the consequences of his or her conduct (dolus eventualis). Negligence on the part of the defendant (or, I would say, even gross negligence) will not suffice'.[29]

[93] The conduct of Mr Stokwe and Mr Komanisi when they pursued the plaintiff's prosecution at the different stages set out above mirrors this dictum. They not only knew what they were doing in initiating and continuing with the prosecution, respectively, but they foresaw at different stages of the prosecution that they were acting wrongly in prosecuting the plaintiff but nevertheless continued to act, reckless as to the consequences of their conduct. When they did so, they acted with animus injuriandi.

[94] There is one last matter that I must deal with. Mr Stokwe was of the view that the prosecution did not terminate in favour of the plaintiff because he was not acquitted but charges were withdrawn. Accordingly, he said, if new evidence emerged against the plaintiff, he could be prosecuted afresh. Failure of the prosecution means that criminal proceedings were terminated in favour of the plaintiff. This happens when the plaintiff has been acquitted, or the National Director of Public Prosecutions (through the public prosecutor) decides not to proceed with the prosecution. It is so, indeed, that until the termination occurs, no claim for malicious prosecution lies.[30]

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[29] *Moleko*, footnote 11 supra, para 8.

[30] *ELS v Minister of Law and Order and Others* 1993 (1) SA 12 (C) at 15F.

[95] In the present case, nowhere does it appear from the record of proceedings in the regional court on 09 December 2021 that Mr Komanisi withdrew the charges against the plaintiff pending further investigation or provisionally for this reason. On the contrary, Mr Komanisi's evidence was clearly that he withdrew charges against the plaintiff due to insufficiency of evidence against him. I come to the conclusion that the plaintiff has discharged the onus resting on him of proving that he was maliciously prosecuted by the employees of the second defendant.

*Costs*

[96] The general rule is that costs follow the result, unless there are reasons warranting a deviation from this rule. In the present case, there is no reason why I should depart from the general rule. The plaintiff must be awarded his costs as the successful litigant.

*Order*

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

1. The first defendant is held liable for the agreed or proven damages suffered by the plaintiff as a result of his unlawful arrest by its member on 29 May 2021, and subsequent unlawful detention until 24 June 2021.
2. The second defendant is held liable for the proven or agreed damages suffered by the plaintiff as a result of his malicious prosecution by her employees from 01 June to 09 December 2021.
3. The first and second defendants shall pay the plaintiff's costs on scale A referred to in Uniform Rule 67A.
4. The determination of quantum of damages shall stand over for determination at a later stage.

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L RUSI
JUDGE OF THE HIGH COURT

*Appearances:*

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| For the plaintiff: | *S Sintwa* |
| Instructed by: | M. Velembo Attorneys, Mthatha |
| For the first defendant: | *A Mdeyide* |
| Instructed by: | State Attorney, Mthatha |
| For the second defendant: | *Z Ncalo* |
| Instructed by: | State Attorney, Mthatha. |

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|---|---|---|
| Date heard | : | 28 to 29 August 2024<br>09 & 12 September 2024 |
| Date delivered | : | 11 March 2025 |