

SOUTH AFRICA / JUDGMENT

Ngcobo and Another v Minister of Police (4755/2017) [2023]

ZAKZPHC 123; - (20 October 2023)

[2023] ZAKZPHC 123

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Mngadi

CASE / FILE NUMBER

4755/2017

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IN

THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL

DIVISION, PIETERMARITZBURG

CASE

No: 4755/2017

In

the matter between:

THEMBELANI
NGCOBO FIRST
PLAINTIFF
BHEKUYISE
SHANGE SECOND
PLAINTIFF

and

THE
MINISTER OF POLICE DEFENDANT
ORDER

1. The

defendant is found liable for the damages to each of the two plaintiffs for the unlawful arrest and detention and malicious

prosecution up to the date of their release on 18 March 2016.

2. The

quantum of damages for each plaintiff is postponed sine die for later determination.

3. The

defendant is ordered to pay costs including costs of two counsel

JUDGMENT

Mngadi J:

- [1] The two plaintiffs in the action for the arrest, detention, prosecution, conviction and serving sentence of imprisonment claim damages from the defendant. The first plaintiff claims R3 million for loss of earnings and R10 million general damages. The second plaintiff claims R10 million general damages.
- [2] The first plaintiff is Thembelani Ngcobo an adult male born on 3 April 1989. The second plaintiff is Bhekuyise Shange an adult male born on 10 January 1991. The defendant is the Minister of Police, the National Minister of State responsible for the South African Police Services.
- [3] The plaintiffs, as a course of action, state that on 19 December 2010 they were without reasonable and probable cause nor belief in their guilt wrongfully, maliciously arrested and detained by members of the South African Police Services for murder and rape. Consequent to their arrest and detention the police opposed the release of the plaintiffs on bail and release on bail was refused. The plaintiff claim that as result contrived confession evidence by the police they were prosecuted, convicted and sentenced. The plaintiffs claim that the police owed a duty of care to them to honestly convey to the prosecutor and the judicial officers involved in the case that the plaintiffs' confession was induced by assault on their part which they failed to do, which resulted in the plaintiffs remaining in custody from the date of arrest until 10 October 2013 when their conviction and sentence on appeal was set aside and they were released.
- [4] Further, the plaintiff stated that the members of the police wrongfully and maliciously set the law in motion by laying a charge of murder and rape against the plaintiffs when they had no reasonable cause for doing so nor did they have any reasonable belief in the guilt of the plaintiff. The result of laying the charge was that the state prosecuted the plaintiffs on the charge of murder and rape, they were acquitted on the rape charge and convicted on the murder charge. It resulted in the plaintiffs sentenced to life imprisonment.
- [5] The issues at the commencement of the trial were in terms of Rule 33(4) separated. The issue of liability including causation to be tried separately and the issue of quantum postponed for later determination. The parties agreed that the criminal trial record is handed in and the evidence adduced in the criminal trial is correctly recorded and that evidence be taken as evidence adduced before this court. The plaintiffs in this court testified

and each plaintiff called one witness. The first plaintiff called as a witness his mother Bahlaleleni Ngcobo. The second plaintiff called Mqobeni Mkhulisi who testified that he was present on the day second plaintiff was arrested. The defendant after the plaintiffs closed their case applied for absolution from the instance, an application opposed by the plaintiffs. The court after hearing arguments refused the application. The defendant called nine (9) witnesses, namely; Zwelibanzi John Ntsele, Mandlenkosi Alfred Mlangeni, Sithembiso Glen Mthembu, Zwelihle Thomas Madlala, Jack Velaphi Mncwabe, Victor Mduduzi Nene, Zamokuhle Raymond Dlamini, B[....] K[....] M[....] and Nkosinathi Dennis Kunene. .

- [6] The evidence took the form generally of the events in the evening of 17 December 2010 at the motel up to the home of K[....]; the apprehension of the first plaintiff the following morning; events at the scene where the body of the deceased was found; the arrest of second plaintiff; detention and interrogation of first plaintiff; arrest detention and interrogation of second plaintiff; trial and conviction of both plaintiffs. It being common cause that the plaintiffs were arrested 18 December 2010 and detained. They were not released on bail pending trial, the police opposed the release of the plaintiff on bail. The plaintiffs were prosecuted and convicted on 10 October 2013 and sentenced to life imprisonment. The plaintiffs served sentence of imprisonment until 18 March 2016 when the Full Court upheld their appeal against conviction, and they were released.
- [7] It has proved to be challenging to capture the evidence presented at the criminal trial on the basis of which the plaintiffs were convicted and sentenced and to summarise evidence presented in the civil action since the evidence in a large measure overlap. The versions of the witnesses are captured in their police statements (those that made statements); their evidence in the criminal trial as transcribed and their evidence in these civil proceedings.
- [8] The evidence exhibited some discrepancies and may be due to fading memories due to lapse of time but the defendants witnesses appeared to be biased against the plaintiffs claiming repeatedly that the plaintiffs confessed which claimed confessions are not in their police statements and they were not presented as evidence in the criminal proceedings. In the criminal trial Nene and Dlamini testified that they went to the home of first plaintiff from the scene to look for him and they did not find him. Unlike in the civil action, Nene did not tell the criminal court that he pursued first plaintiff with the members of the community until he apprehended him and took him to the scene. In this court Dlamini testified that he did not go to the home of first plaintiff that morning, he remained in the scene guarding it. But by and large the matter must be decided on the evidence presented in the criminal trial. However, it must be pointed out that the evidence regarding what happened at the scene was contradictory but, in my view, it is not necessary to deal with the contradictions in detail. It is clear from the evidence that the emotions were high, there was a large unruly violent armed crowd baying for blood.

- [9] The record of the criminal trial indicated that the criminal trial wherein the plaintiffs were accused 1 and accused 3 respectively commenced on 20 August 2012 before Potgieter AJ. The accused were Thembelani Brian Sgodo Ngcobo (Accused 1), Sphamandla Mkhize (Accused 2) and Bhekumuzi Christopher Shange (Accused 3). The indictment indicated that accused 1 and accused 3 were aged 19 years and accused 2 was 20 years old. The accused were indicted on three (3) crimes, namely; Assault with intent to do Grievous Bodily Harm (count 1 against accused 1 only); Rape in contravention of s3 of the Sexual Offences and Related Matters Amendment Act 30 of 2007 read with the provisions of s51 and schedule 2 of the Criminal Law amendment act 105 of 1997 (Count 2) and Murder read with the provisions of s51 and Schedule 2 of the Criminal law Amendment Act 105 of 1997(Count 3).
- [10] The summary of substantial facts provided by the state as its opening address alleged that on Friday 17 September 2010, B[...] K[...] M[...] (K[...]) together with some friends went to Mortel Store where they had some drinks. K[...] had an altercation with one of accused 1's friends. She was ordered to leave the store. On her way home, accused 1 followed her. He attacked her and stabbed her on the shoulder and thumb, and he left her. Later, the same night, accused 1 returned to Mortel store and met accused 2 and 3. They decided to go and look for K[...] at her home to stab her.
- [11] It further alleged as follows. The deceased who was K[...]’s sister was at her home. The accused gained entry to her room and held her. The accused stabbed and took her by force to show them where K[...] was. On the road, the accused took turns raping the deceased. They then stabbed the deceased and slit her from her vagina to the chest causing her entrails to spill out. She died at the scene from stab wounds on the lungs and heart.
- [12] Each accused during the trial had his own counsel representing him. The state, at the commencement of the trial withdrew all charges against accused 2. The remaining accused both pleaded not guilty to all the charges. In respect of count 1, the first plaintiff stated that he acted in self-defence when he caused injuries to K[...]. Both the plaintiffs denied all the allegations against them in respect of the rape and Murder charges.
- [13] The Prosecution as part of its opening address stated that the state as a first witness will call K[...]. K[...] will testify that she is the sister of the deceased. During the evening of 17 December 2010, she was at a Local shop with certain friends. Where she encountered a group of men, which included accused 1. There was an argument emanating from the proposition of one of her female friends by one of the males. There was drinking and dancing going on at the shop. She left the shop for home when she was followed by accused 1, who stabbed her. She later encountered accused 1 at her home; she knew accused 1 prior to the incident. During the later part of that night, she and her family decided that the deceased was missing from their home.

- [14] The prosecution, as part of its opening address indicated that it intended to prove in a trial-within-a trial the admissibility of warning statements made by the two accused to commissioned police officers.
- [15] The state then lead evidence of K[...]. She testified that the deceased was her sister and she lived with her in the same homestead. She testified as summarised by the prosecutor in the opening address. She said Remember a boyfriend of her other sibling proposed love to one of her companions. She confronted him. Then one of her companions said they must leave. They arrived at about 8pm and it was then at about 12 midnight. They went out. She left her companions standing on the road and she told them that they would catch up with her. She then felt something stabbing her. It was the first plaintiff stabbing her. She struggled with him over the knife. He stabbed her on the right-hand upper arm. The knife cut her on her thumb. They struggled over the knife, the first plaintiff left her, and he proceeded downwards towards the Sikhakhane residence.
- [15] K[...] testified that she called one of her companions Fasi. She told her that she had been stabbed. They went to Themba Ndlovu's home, Themba was one of the people in her company. She phoned her mother to come and fetch her. She met her mother on her way home. Her mother was with the first plaintiff. They arrived at home. Her grandmother went to the deceased to fetch a candle to use for a source of light. In the meantime, she used her cell phone torch to light. She identified the first plaintiff, and she asked him what he wanted there because he stabbed her. The first plaintiff said how did he stab her because he was helping. She said earlier when she met her mother who was with first plaintiff, she thought first plaintiff was her brother, and it was dark.
- [16] K[...] under cross-examination stated that she was intoxicated and she said she not know how much liquor she had consumed. She said she and the plaintiff were related by surname. She had known him for two months. She had no problem with him. She said she did not know whether it was safe to walk alone at night, and she left her three companions and walked alone because it was already late at night. She said the injury on her thumb was not bleeding, it was a scratch. She said she did not know why the doctor did not note injury in the medical examination report (J88). She walked with her mother and the person she said it was first plaintiff to her home for about 5 minutes. When she told her mother that first plaintiff was the person who stabbed her, her mother did not respond. When she met her mother and the first plaintiff, they were talking to each other.
- [17] K[...] denied what was put to her to be the first plaintiffs' version, that during the evening she pushed one Muzi and the first plaintiff asked her why she pushed Muzi, and she replied by referring to the first plaintiff as a thug (Skhotheni) and this caused an altercation between them, and they had to be separated. She denied that later the first plaintiff went out to answer a phone, and whilst he was answering the phone, she and other people confronted him and repeated that he was a thug. She denied that she struck him with a beer bottle on his head and the bottle broke, that they struggled over the broken bottle, and she was injured during the struggle. She denied that Muzi and Siphesihle came outside, and she left

with her companions. It was put to her that it was the last time, the first plaintiff saw her that night, he was not in the company of her mother, he was never at her home. She said what also caused her not to initially identify the accused, was because he had taken off the jacket he was earlier wearing, and he wrapped it around his waist.

[18] The state then requested that a trial-within-a-trial be held concerning the admissibility of the statements made by both

plaintiffs. It stated that the statements are confessions they were made to commissioned police officers, made by the first and second plaintiffs freely and voluntarily, without having unduly influenced thereto and whilst both they were in their sound and sober senses.

[19] The first witness was Mandlenkosi Alfred Mlangeni. He testified that he was a Colonel in the South African Police Service stationed at Plessislaer with a service of thirty- two (32) years. On 18 December 2010 on a Saturday, he was the officer on standby duty. He had to be called out to attend for each and every serious crime committed in his patrol area. The areas are Plessislaer and Taylor's Holt Police Station areas. On 18 December 2010 he attended the scene in this case. He arrived at the scene, and he observed, and he preserved some evidence, marked whatever he could mark and pointed out to the photographer. He interviewed police officers he found at the scene and other identified witnesses. He interviewed and took a statement from K[...]. He generally oversees the proceedings on the scene on the day in question. The next day he was called after he was told that some people had been caught and they were suspected to be involved in the commission of the crime. He was requested to take down warning statements from those persons. He was requested by Warrant Officer Mthembu. He was requested to interview al the suspects and obtain their warning statements. He did question all three suspects and he obtained statements from the three of them. He took a statement from second plaintiff (Bhekuyise Shange) who also was arrested on 20 December 2010 after he was off the investigation.

[20] Colonel Mlangeni testified that on 19 December 2010 on Sunday he met first plaintiff in his private office at Plessislaer Police Station. In the office, it was only him and the first plaintiff. Prior to taking down the warning statement, he used a prescribed pro forma with guidelines questions to be asked and to fill up and that is what he did. The first plaintiff introduced himself to him. He asked his name and address. He identified himself to the first plaintiff completing the pro forma and he warned him of his rights. All the questions that he asked and the answers he gave, he recorded them down. He identified the pro forma he used, and it was marked as exhibit 'E'. He communicated with first plaintiff and in the course interpreted from English to Zulu. Question 8 which he filled out after he had made a statement it asked: 'were you in any way threatened, assaulted or influenced to make the statement' and the first plaintiff's response was 'no, it was my own free choice'. He said he was satisfied that first plaintiff made the statement freely and voluntarily and in his sound and sober senses. He read the statement back to the first plaintiff. The Prosecutor asked Colonel Mlangeni that although it was not part of the document handed in as an exhibit, did he establish if the first plaintiff had any injuries, he said he did, he had some injuries and

the first plaintiff told him how he sustained the injuries.

- [21] Mlangeni under cross-examination testified that he had been a lieutenant colonel for five (5) years. He had during that period taken many confessions, may be 100 or 50. The scene of crime was about 35 minutes from Plessislaer Police Station. He had been investigating cases for thirty (30) years. When on 18 December 2010 he left the scene of crime he had a suspect in mind in the assault and a person suggested as a suspect on the charge of murder. He observed the injuries on the deceased body when he attended the scene. The injuries were multiple stab wounds and a deep cut from vagina through the stomach to the chest, it was a very horrific scene. As depicted on the photo in the photo album. He could see that the body had been dragged and there were blood drops where the body was lying, there were blood spots for a long distance leading to a house, which indicated to him that the person was taken from the house to the spot where she was found murdered. W/O Mthembu was also at the scene on the day he attended the scene. On 19 Dec 2010 W/O Mthembu phoned him. He stated that suspects apprehended by the community are sensitive cases and the community may harm the suspects. He said the first plaintiff and the two, three persons were apprehended by the community; and assaulted by the community. He said three suspects he had to interview were first plaintiff, Mkhize and Ntshele. He said W/O Mthembu informed him that some suspects had been caught by the community and they were detained at the Plessislaer Police Station, he was requested to attend to interview them and obtain warning statement because it was sensitive matter. He was not aware at the time that admissions were going to be made. The suspects were brought to him to be questioned. He interviewed the suspects one

by one. He completed the warning statements from first plaintiff at 16h20. He did not record the injuries on first plaintiff because the first plaintiff was from a doctor. He was not involved deep in the investigation, his duty was to take the warning statement and ascertain that against the people who were arrested there was a prima facie case against them, otherwise they had to release them. It is possible that he ordered the first plaintiff be taken to the doctor DNA samples to be taken. He knew W/O Mthembu as a detective based at Taylors' Halt Police Station.

- [22] Mlangeni confirmed OB entry Plessislaer Police Station serial no [...] at 09:30 indicates that W/O Mthembu booked out first plaintiff Siphokuhle Mkhize and Sihle Ntshele. Entry 1857 records that suspects back at 5pm. He said he did not note the movements of the suspects during the course of the day. He admitted that he also obtained warning statements from Siphokuhle Mkhize and from Siphesihle Innocent Ntshele, he did not know in which order he obtained statements from them, but he obtained statements one after the other. He confirmed that he completed Ntshele's statement consisting of two and a half pages at 17h30, and the one from Mkhize consisting of four pages at 17h40. It was put to him that the short intervals indicate that the suspects were not properly warned of their constitutional rights.

[23] Colonel Mlangeni denied that he told the accused that he must use the opportunity to study in prison and that since he was pleading guilty there would be no problems in court. He denied that the first plaintiff told him that he knew nothing about the commission of the crimes, and there he signed a document the Lieutenant Colonel had not written in his presence, and that he never went through the pro forma with him. He confirmed that he was aware that the community assaulted the first plaintiff and he saw open fresh wounds in him. He said the first plaintiff did not tell him that police officers assaulted him. When it was put to Mlangeni that a commissioned officer recording a confession has to be independent from the matter to ensure accuracy and reliability of what is recorded, the court intervened suggesting that was not law. The Colonel stated that although he was involved in the investigation, he would not deny a person an opportunity to tell him whatever he wanted to tell him. He said although he had knowledge

of the case, he was not prohibited from taking a warning statement from the first plaintiff and primary concern was to safeguard the interest of justice if wrong people were arrested, he should have done something about, but if he is happy that the right people were arrested, he can also say okay carry-on guys and charge them. He said he commenced taking statement intending statement to take a warning statement, not intending to take a confession. When asked why he would be requested to take a warning statement, he said he did not know what the accused would say. When Mlangeni was asked why when what the first plaintiff started telling him took the form of a confession he did not stop and refer the first plaintiff to a commissioned officer to take a confession he said if a person wants to tell a story, it is not for him to stop him, it is for the court to decide. He said at times it helps the accused, the prosecutor to take a guilty plea, if the accused is pleading guilty, he must be afforded that opportunity for the court to know what the accused has to say. He said it was not his duty to second guess whatever he tells him, as long as it is not under duress. Mlangeni when asked that the community assaulted the first plaintiff suspecting him of the murder, why he did not ensure that first plaintiff was not confessing in fear of the community, he said he did not know why the community assaulted

first plaintiff, the community did well by not killing him. Mlangeni said he explained to the first plaintiff that he was a commissioned officer.

[24] The next witness in the trial-within-a trial was Jack Velaphi Mncwabe. He testified that he was a captain at the SAPS stationed at Taylor's Halt at the time. He had 24 years' experience in the police force. He was the head of the detectives at Taylor's Halt Police Station. He was not on duty on 18 December 2010. He commenced duties on 20 December 2010. He obtained a warning statement from the second plaintiff on 21 December 2010. W/O Mthembu under his command requested him to take a statement from the second plaintiff. He completed taking a warning statement at 19:33. W/O Mthembu had requested him to do that at 4pm, at that time they detained their suspects at Plessislaer. Entry 2097 indicates the booking out of Shange on the OB by him at 18:40. Entry 2012 shows the time 19:55 when he booked back Shange into the cells. He took Shange to an office at Plessislaer to interview him. He

interviewed him in IsiZulu. He went through the document Exh"G".

- [25] He stated that he first introduced himself as Captain Mncwabe from Taylor's Halt. He informed him of the charges, he was facing and where and when the offences took place. Shange elected to make a statement, he recorded the statement, and he read it back to him. The last page indicated that he asked Shange whether he was attacked or threatened, and he said No. His understanding was that the second plaintiff made the statement to him freely and voluntarily. He was satisfied that second plaintiff understood all his rights as set out in para 3.1 to 3.7 of the document. The second plaintiff did not report any assault on him. He said he had not had anything to do with investigation up to that stage. He said the docket of his subordinates pass through his hand and it is so that the docket in this matter he would have had course to peruse during the course of the investigation.
- [26] Mncwabe in cross-examination testified that he read to the second plaintiff the document in Zulu. He testified that he obtained the details of the crimes committed from W/O Mthembu. The document is in the first person, but he satisfied himself that the second plaintiff understood and agreed. He said he explained to the second plaintiff the contents of paragraphs that he had a right to remain silent, not to say anything or to make any confession nor admission. He said he did explain the difference between an admission and a confession, he said he informed the second plaintiff that he had a right to get a legal representative should he foresee that there might be an injustice or unfairness to him in this matter. It was 19h30 but he explained that a legal representative could be arranged for him. When the version of the second plaintiff that he was held at Taylor's Halt and there severely beaten by police officers and thereafter brought to Plessislaer and brought to his office, that in this office he was busy writing after completing writing on the document, he ordered him to place his signature on the document, he said the second plaintiff was lying. He denied that he told second plaintiff that if he did not sign, he knew what was in there for him.
- [27] Mncwabe stated that he last saw W/O Mthembu on 20th and they were still busy with investigation. The following day he saw Mthembu again at the police station and Mthembu gave him feedback that they eventually arrested the second plaintiff, Mthembu also told him about a certain knife allegedly thrown in the toilet. He said Mthembu requested him to take a statement from the second plaintiff only after they have established as to what happened to the knife. He stated that later on at about 16h00 Mthembu came back to him and informed him that he could not find the knife, but he should proceed to take the statement from the second plaintiff. He confirmed he heard of the arrest by the community, the finding of a mutilated body of the deceased, the arrest of the other suspects, he admitted that he was pressure on the police to solve the crime and bring to book the people who committed the crime. Mncwabe testified that after he finished taking the statement from the second plaintiff, he took his fingerprints. Mncwabe said the second plaintiff could not tell him at what time the incident took place. He used a pro forma in the first person of the person who is making a statement, not a form used by the person taking a statement.

- [28] The third witness by the state in the trial within a trial is Sthembiso Glen Mthembu (Mthembu). Mthembu testified that he was detective warrant officer stationed at Taylor's Halt Police station. He testified as follows. On 18 December 2010 at about 9 AM, he attended the scene. He found first plaintiff at the scene having been apprehended by members of the community. The community members were violent and threatening to kill the first plaintiff. He intervened, but the first plaintiff had already been injured and bleeding from his head. Mlangeni had left the scene with K[...]. He later placed first plaintiff in the police van and secretly told Constable Z.R Dlamini to drive away. He did not explain anything to the first plaintiff since there was no time and he was protecting him from the members of the community.
- [29] Mthembu testified that at about 11 pm he saw the first plaintiff again at Taylor's Halts police station. The OB entry 1756 he made recorded that he detained first plaintiff at 10h40, detained with Siphelele Mkhize for murder under GAS 116/12/2010 and it refers to SAP 14A Q4736741 and 4736740 as their constitutional rights. It recorded Thembelani Ngcobo got injuries on head when the community assaulted him. He said Constable R.Z Dlamini explained the constitutional rights. He testified that he also explained to the first plaintiff his constitutional rights and the reason for the arrest at Taylor's Halt police station, but they were not booked in at Taylor's Halt. He said he explained the accused constitutional rights and he told him that he was arresting him for the murder charge. He said he first introduced himself as the police officer, told him that he was putting him under arrest on a charge of murder, inform him of a of the rights of legal representation, that he had a right to consult with his own legal practitioner, if he did not have one, he can be afforded one by the state. He said he also explained to him that whatever he says or tells him will be used as evidence against him in court. He also informed him of his rights to a bail application. He then told him that he would be taken to Plessislaer Police station for the reason because he was injured, and he needed medical attention.
- [30] Mthembu testified that on 19 December 2010 at 9:20 per OB [...] he booked out first plaintiff, Siphelele Mkhize and Sihle Ntshela. He booked them to take to the Doctor for their blood samples to be taken. He took them to Doctor Soni at St Annes Hospital. He took them to the doctor. He returned from the doctor and booked them back into the cells. He testified that on the morning of 19 December 2010, he told Mlangeni that he had these suspects, and he would like him to obtain a statement from them. He did not arrange the time with Mlangeni. He intended to tell him when the suspects were brought back to St Annes Hospital. He did not inform him, but it was his weekend to be on standby duties. He arrived with the suspects as per entry 18h57 at 16h55 that reads "suspects back and charged by W/O Mthembu Thembelani Ngcobo-Taylor's Halt CAS 116/12/2010. By charging him, it refers to his fingerprints being taken. He stated that he did not assault the first plaintiff, and nobody assaulted first plaintiff in his presence. It was the last time he interacted with the first plaintiff on that day.

- [31] Mthembu testified that he arrested the second plaintiff. He arrested the second plaintiff where he stayed. He explained his constitutional rights when he arrested him. He arrested the second plaintiff on 20 December 2010. He introduced himself and that he was investigating the murder. He informed him of his rights of legal representation and that he had a right to have his own legal representative of his own choice. If he did not have one, he could make an application in court to be afforded a state attorney. He told him that he must bear in mind that whatever he is discussing with him might be used against him as evidence in court and he informed him of his right to a bail application. That took place at Taylor's Halt police station, and he did not know at what time, but in the morning between quarter pass seven to eight. He also took him to Doctor Soni to his Surgery. It was between ten and eleven. The doctor attended to him at 14h00. He then took the second plaintiff back to Plessislaer and detained him.
- [32] Mthembu testified that after he detained the second plaintiff, he went to Captain Mncwabe under whose command he was. He requested the docket. He informed him that there was one more person he had arrested, and he wanted to add him in the docket. It was entry 1981 with time 18h00 stating that the suspect is detained by Detective constable Madlala of SAPS Taylor's Halt. Bhekumuzi Shange GAS 116/12/2010 murder. His rights were explained and understood, and then SAP14 A Q4736777 is the constitutional rights warning. He testified that on 21 December 2010 Captain Mncwabe obtained a warning statement from the second plaintiff. He arranged for Captain Mncwabe to obtain the warning statement. He arranged commissioned officers to take warning statements because the offences were serious and, in such cases, they are not allowed to take such statements from the suspects. The second plaintiff wanted to say something, and it is where he had to tell him no, stop, you can convey that to the right person. He testified that he did not assault the second plaintiff and there was no police officer that assaulted him in his presence.
- [33] Mr. Mthembu in cross-examination testified that he had experience of 22 years' service, thirteen (13) years of which as a detective. Mthembu testified after the first plaintiff was removed from the scene, he wanted him taken to Plessislaer Police station because at Taylor's Halt they did not have cells in which to keep a suspect overnight and he also wanted him to be seen by a Doctor. He said there were about 15 members of the community armed with bricks and sjamboks. Persons were shouting that the first plaintiff be released to them for them to kill him. He said the first plaintiff could not be taken straight to the doctor because the procedure for arrested persons is first go to a police station to make a note or letter to say the person is under arrest so if he is taken to the doctor or hospital, he would be guarded by the police. It is to fill occurrence book and write out SAP 70. He agreed with an OB entry of Plessislaer that first plaintiff was detained at 10h40 and taken to Edendale hospital at 10h45, entry 1757. He said he would not deny that the notice of constitutional of first plaintiff by Constable Dlamini was done at 9h30 at Plessislaer Mthembu testified that he was not an investigating officer, but he was part of the investigation team and

Col Mlangeni was in charge of the team. He proceeded to Taylors Halt, and he opened a police docket. He said he saw the first plaintiff

bleeding at the scene with an open wound, he instructed Dlamini to quickly take him to the police station because they had to take him down to Plessislaer and to hospital. His intervention with the first plaintiff on 18 December 2010 at Plessislaer was purely to inform him of his rights and he played no further part on the day. He only informs the first plaintiff that he was going to take him to hospital. The first plaintiff was then detained to the cells. He found the first plaintiff in the charge office; he was bleeding, wearing shorts and having no shirt. He booked the first plaintiff into the cells at 10h40 as per the OB entry.

[34] Mthembu admitted that there was no evidence linking the first plaintiff to the incident up to the date of trial. He said the first plaintiff was detained so that he would be investigated as to how true are the allegations that the community were saying against him. Mthembu admitted that at that stage he had no statement by K[...] filed in the docket. He admitted that when he detained the first plaintiff, he had no leads that he was involved in the murder. He said he has no comment on why the right to remain silent was not explained to the first plaintiff at Taylor's Halts police station. Mthembu said although he was with the first plaintiff at Taylor's Halt and he told him all what he wanted to tell him, there is nothing stopping him to going to Plessislaer and repeat to first plaintiff what he had told him at Taylor's Halt. Mthembu said that he did not investigate the first plaintiff at Plessislaer Police station, he investigated him at Taylors Halt when he arrived. Mthembu when asked whether at the stage he asked Col. Mlangeni to take a statement from first plaintiff, had first plaintiff told him anything necessitating the taking of a statement by the commissioned officer, he said first plaintiff did not tell him what he wanted to say excerpt to indicate that he wanted to say something. He confirmed that Col Mlangeni did not know that the first plaintiff was going to incriminate himself.

[35] Mthembu testified that he got the impression that the second plaintiff wanted to make a statement, and he handed the book over to Capt. Mncwabe. He arrested the second plaintiff on the 20th of December 2010 at 8h00 at his home. He took him to Taylor's Halt. He first asked the second plaintiff what he knew about the incident. The interaction took about an hour. He then at about 15h00 took him to Doctor Soni. Between 106 clock and 15h 00, he was with the second plaintiff in his office at Taylors Halt trying to contact other colleagues to assist to remove what second plaintiff said he had. He did not book him into the register of the second plaintiff. He agreed with OB entry 2097 indicating that he was detained at 18h00 and his notice of rights is timed at 18:40, although the second appellant made a detailed statement to him, he still saw it necessary to hand over or confirm Mncwabe that the second plaintiff wished to make a statement that he must proceed to take a statement. He confirmed that he did not advise the second plaintiff of his right to remain silent. He said he did not do so because he was still to refer plaintiffs to Col Mlangeni and Capt. Mncwabe where the said rights would be explained thoroughly and properly to them. Mthembu asked why he only warned second plaintiff of his constitutional rights after he had questioned and obtained

information from him, he said he would not have placed second plaintiff under arrest before he could give him the reason why he should do so. He said he did not book in second plaintiff at Taylor's Holt because he was still asking him questions about the offences, he would not have reached a stage to book him in

before he would at least get what he was looking for. He denied that he and Madlala who arrived in the home of the second plaintiff with other police officers assaulted him.

[36] Zamokwakhe Raymond Dlamini testified as follows. He was a constable stationed at Taylor's Halt Police station with eight

(8) years' experience. On 18 December 2010 at 5:30 he attended the scene at Mafakatini. He was the first police officer to arrive at the scene. He and Cost Nene proceeded to the home of the first plaintiff, but they did not find him. Sibongiseni Mbhele phoned him and told him that community members had apprehended the first plaintiff. He then proceeded to the scene, and he saw the first plaintiff with blood on his head. The members of the community some were carrying sticks and sjamboks. The first plaintiff was taken to the van. He then, as instructed by W/O Mthembu drove away with the first plaintiff. He booked the first plaintiff to Taylor's Halt. W/O Mthembu arrived and read to the first plaintiff his constitutional rights. He then took the first plaintiff to Plessislarer. W/O Mthembu followed them in another vehicle. He at Plessislaer read to the first plaintiff his constitutional right from SAP 14

(a) and it was at 09:30. As per entry 1757 at 10:45 he booked out the first plaintiff and he booked him to Edendale Hospital. He returned and booked into the cells the first plaintiff at 15:50 as per entry 1771. He stated under cross-examination that after W/O Mthembu read to the first plaintiff his rights, he was then placed in a police vehicle, and he took him to Plessislaer. He did not in the absence of W/O Mthembu at Taylor's Holt investigate the first plaintiff. He said W/O Mthembu read to first plaintiff the constitutional rights from the e-pocket book he had no c_ that W/O Mthembu stated that he explained the constitutional rights from memory Dlamini testified that the SAP 70 form was complete at Plessislaer SAPS after he had completed the SAP 14A notice of rights. He agreed that as result of assaults, the first plaintiff at the scene could not stand and he had to sit on the ground. He insisted, contrary to Mthembu's evidence, that Nene and Madlala were not there at Plessislaer Police Station.

[37] Victor Mduduzi Nene testified as follows. He was a constable stationed at Taylor's Holt SAPS. He worked nightshift on 17 December

2010. On the morning of 18 December 2010, he attended the scene of crime at Mafakatini. His evidence relating to the presence of the body and the community at the scene and the first plaintiff brought to the scene agrees with the evidence of the other police officers. He denied that he went to Plessislaer Police station stating that from the scene he went home. He denied that he assaulted the first plaintiff at any stage. Thomas Madlala testified as follows. He stated that on 19 December 2010 he booked out the first plaintiff to doctor Soni. He denied that he was at Plessislaer Police station on 18 December 2010. He denied that on 2018 December 2010 he and Nene assaulted the first plaintiff in the presence of W/O

Mthembu. He returned with first plaintiff from doctor Soni and he with W/O Mthembu booked back into cells the first plaintiff.

[38] Doctor Soni testified that on 19 December 2010 at about 12h52 he examined the first plaintiff and he completed the prescribed medical examination form(J88). He found the following injuries, 5cm laceration on the left parietal area that had been sutured, a 2.5 cm laceration on right parietal area on left hand and forearm; 5cm sutured wound on the left thumb; 3cm sutured wound central aspect of the left palm, index and middle fingers, The back of ears and left part of the head had dried blood. The doctor stated and recorded what he was told by first plaintiff 'allegedly assaulted by many people from community, assaulted with a gun, sticks and kicked. Attended and sutured at Edendale Hospital. The doctor testified that the first plaintiff was not wearing any shoes nor anything on top and he was wearing shorts.

[39] The first plaintiff testified as follows. He in the evening of 17 December 2010 was at Mortel Store. He was drinking with his friends, the second plaintiff and Siphesihle Mkhize, Sihle, Ntshela and others. He knew K[...] by sight. He saw her in the store, but he did not see her arriving. One female in the company of K[...] approached him and his friends and they asked to share liquor with them. He told her that he would not share liquor with her because they had all contributed in buying the liquor. That passed. Whilst they were dancing with the females, K[...] called them thugs (Skhothenis) she said after she had pushed away the second plaintiff. She also advanced to him and pushed him. She asked him who was he to dance with her female companions. His friends came and they took him away. He went with his friends, and they continued drinking on their table. Siphesihle drew his attention to his phone which was ringing. He went out to answer the phone away from the noise. He went about 20 meters away. He then saw a group of males and females coming from the store towards him and K[...] (who was light in complexion) was in the group). K[...] approached and confronted him. He asked the person he was on the call with to hold. K[...] asked him whether he was still

denying that he was a Skhotheni. He asked what she really wanted from him. She struck him with a beer bottle on the head. The bottle broke. They struggled over a piece of the broken bottle. It cut him on the left thumb. He assumed during that struggle K[...] was cut on her shoulder area. (Court recorded two scars on the back portion of the thumb, three to five millimeters long). Muzi Shange, his younger brother Sphe and Siphokuhle Ngcobo came from the direction of the shop running. He was now in possession of the broken bottle. K[...] apologized to him. He chased her away. He went back to continue drinking. He received a message from the owner of the store he was working for, telling him to go and sleep to prepare to do orders the next morning. Before he could leave, Siphelale Ngcobo, his younger brother requested him to give him RS0.00 because he wanted to continue drinking.

- [40] The first plaintiff testified that he then left, Siphelele and his friends went with him. Those who accompanied him were Siphelele, Siphesihle and the second plaintiff. He arrived at his home, which was about three minutes away, he took the R50.00 and he gave it to Siphesihle. Siphelele and the other companions remained there for a short while, and they left, and he went to sleep. He and Siphelele occupied the room he slept in.
- [41] The first plaintiff testified that he woke up in the morning. Few members of the community arrived and accused him of killing the deceased and they started to assault him. He ran away. They were about seven or eight. They were carrying sticks and one Madonsela of the community forum was carrying a firearm. He heard a siren from a police van, and he ran towards where it was coming from. Another group of community members apprehended him before he could reach a police van. They caught him because that group approached from the direction he was running to. He was further assaulted, but with sticks whilst on the ground and stamped on. In his home, he was assaulted with sticks, and he blocked the blows with his arms and hands. He asked to be taken to the scene. One boy stabbed him in his left hand. He was also hit on the head. He sustained wounds on the back of his head. He was bleeding from the wounds. He was taken to the scene where there was the body of the deceased. He found that there were police at the scene. It was said he must see what he had done. He requested to see the dead person because he did not know her. He removed the covering. He was being assaulted and told to eat the body. He fell onto the body. The police intervened.
- [42] The first plaintiff testified that hearing people saying he must be beaten to death, he asked Ntshela, a police officer to ask if there is a person who saw him killing the deceased to come forward. Ntshela took a police force loudspeaker and asked that anyone who saw the first plaintiff killing the deceased must come forward. No one came forward. Ntshela said to K[...] why was she now not coming forward because she said it is the first plaintiff and his companions who killed the deceased. K[...] said she did not say it is them who killed the deceased, but she said she suspected them, he was then taken into a police van. He said his knees were weak, W/O Mthembu and Ntshela assisted him to the police van. (The Ntshela he pointed out in court it turned out his name is Zamokwakhe Raymond Dlamini).
- [43] The first plaintiff testified that he was taken to Taylor's Halt police station. He was given forms he signed, and he was told those were his rights. He was informed of the charges, of the right to a legal practitioner and the right to remain silent. He was then transported to Plessislaer Police station. W/O Mthembu did come to him whilst he was at Taylor's Holt Police Station. Mthembu hurled insults to him. Again, at Plessislaer Police Station, his constitutional right was read to him, and he was put in the cells. He signed the document notice of rights; he understood the rights explained to him. In the morning, Victor Nene woke him up. He was with Madlala. Nene beat him with a fist before taking him out of the cell. Madlala beat him with an open hand. They took him to a room wherein was W/O Mthembu. Mthembu was sitting on a chair with a table in front of him. He had papers before him on which he was writing. He said Mthembu told him that he was not there to

fight with him, but it will be a problem if he makes a fool of him. Nene and Madlala stood behind him. His hands were handcuffed on the back. Mthembu read to him what he said it was a statement of his co accused stating that they went to a room, took out a female they assaulted, raped and killed her. He told Mthembu that he did not know anything about that. Nene and Madlala when he denied hit him. Nene hit him on the head with a butt of a firearm on the left-hand side in the middle of his head on the left- and right-hand sides. Nene was not directly behind him, but he was on his right and he could see when he assaulted him. To stop the police from assaulting him, he agreed with whatever they read to him. He told Nene that in fact Nene knew that he did not even know where the deceased stayed. Nene said he was fooling them around.

- [44] The first plaintiff testified that he was then taken to Edendale Hospital. The wounds were stitched at the hospital on the rib area, left thumb and the pointing finger. He was given some painkillers. He was taken back to Plessislaer Police Station and placed back into the cells. The following day Mthembu and Madlala booked him out and he was taken to doctor Soni. He was with Siphokuhle Mkhize and Siphesihle Ntshela. Mthembu told him to study whilst in prison, and not to make a fool of them by denying everything when in court. When doctor Soni examined him both Madlala and Mthembu were present. He told the doctor, as he was busy examining him, that there are the police officers who assaulted him, and they assaulted him with a firearm. After the examination, they went back to Plessislaer Police Station where they found Col. Mlangeni in the charge office. W/O Mthembu took him Col Mlangeni. Mthembu gave Mlangeni some papers after he told him to Mlangeni. Col. Mlangeni took him to his office. He told him that now that he had admitted to the offences, if he goes to prison, he must behave so that he would not stay for too long, and he must study. He told Mlangeni that he was assaulted, and he did not know anything about the offences. Mlangeni said he was not there to listen to his stories. He brought him there to sign, he was in a hurry to go to Boston. He then signed the papers as mentioned by Mlangeni. He was taken back and placed in the cells. He did not get an opportunity to read the document. He signed before Mlangeni and it

was not explained to him.

- [45] The first plaintiff denied that after leaving the shop, he went to K[...]'s home and he was with K[...]'s mother. He said he did not know K[...]'s mother, and he did not know the whereabouts of K[...]'s home. The first plaintiff testified that whilst on 18 December 2010, he was at the scene; Siphokuhle Mkhize was fetched from his home and brought to the scene. They were both placed in the police van. He did not know how Siphesihle Ntshela was arrested, he saw him at the police station. He denied there it is Nene who protected him from the community. He said Nene was the first person to assault him. Nene also told Ntshela to release first plaintiff to the community to assault him again. It is Ntshela and Zuma who took him to Hospital. It is only Ntshela who was nice to him, the other police officers believed he was responsible for the offences. He denied that he raped the deceased; he said he did not even know her. He denied that he was at any stage in possession of a

knife.

[46] The first plaintiff under cross-examination testified that he worked at Mortel Store doing counter duties by selling items to customers and he also placed orders and received goods from suppliers. He knew constable Dlamini as Ntshele as he usually visited the store. The store also served as a nightclub during weekends. On 17 December 2010 he had been in town to make orders. He came back at about 17h00; he went home and returned at about 19h00 to the store, he knew Remember and he was at the store that evening. He did not see Remember proposing love to Nokuhle. After his first altercation with K[....], it was about 3 or 4 hours when the second altercation took place. She hit him once with a beer bottle with beer and he grabbed her. He sustained a small open wound above the right eye on the hairline. (The court noted 1.2 cm scar above eyebrow plus /minus 5 to 8 millimetres round indentation wound). He did not receive at any stiches in the wound. When K[....] hit her, she was with five or six companions. He said he held the right hand of K[....] with a broken bottle and bend it towards her which may have caused injury on the right upper arm. K[....] screamed and said 'you have just injured me'. and she apologised to him, and he chased her away telling her to

leave. He said one of those who drank with them was a Mr Khumalo from Mafakatini in a homestead with taxis. He said when he went to his home, his brother Siphелеle, Siphokuhle Mkhize and second plaintiff accompanied him, they left the room after he had gone to bed. When he woke up in the morning, he saw his brother Siphелеle.

[47] The first plaintiff testified that when he fled pursued by members of the community he was wearing a white T-shirt, a J exchange jacket scotch in colour and navy 3-quarter pants and the slops or sandals on his feet. He gave the jacket, the t -shirt and 3 quarter pants to the police on Sunday and they brought him other clothing's, a pair of long pants and a shirt. He confirmed that his constitutional rights were explained to him at Taylor's Halt Police station on the morning of his arrest, which he did not remember who did so.

[48] He testified that Nene and Madlala assaulted him by slapping him when they took him to Mthembu. He said Mthembu told him that he had been told the truth by Siphokuhle Mkhize. He read to him what he said it was said by Mkhize. He read it in sections and asked him whether it was so, if he said it was not so, he was assaulted. He would be assaulted until he agreed with what Mthembu was saying it happened. They were telling him he did the crime of the murder and rape with Siphokuhle. He said because of the assaults, he ended up saying he attempted to rape the deceased, but he could not get on erection.

[49] The first plaintiff was cross examined about what W/O Mthembu said in his statement, but it is not necessary to refer to it because no statement by W/O Mthembu was proved,

[50] The first plaintiff called his brother Sphelele Ngcobo as a defence witness. Siphелеle testified that he was eighteen

(18) years old with Grade 10 level of education. On 17 December 2010, he was at Mortel store. He was drinking liquor with Mthobisi Madlala and Bhekani Zuma. First plaintiff was at the store drinking. He saw first plaintiff quarrelling with K[...] about 4 metres away. He went to them, and he stopped them. He told first plaintiff to leave K[...] and not to talk to her anymore. He heard K[...] calling the first plaintiff a thug. After he separated them, the first plaintiff went, and he sat down, and he continued drinking. Later whilst he was outside standing in the verandah, he saw a group of K[...] and others. In the veranda he was with Mlungi Shange and Siphokuhle Mkhize. The crowd went to where the first plaintiff was. He and his companions also proceeded to where the first plaintiff was. He arrived and he saw the first plaintiff injuring his left hand. They took him back to the store when he arrived the first plaintiff was holding a bottle that K[...] had been carrying in the shop. He testified that the shop owner called and told first plaintiff to go to sleep because tomorrow morning he was going to have to wake up and go to order some stuff for the shop. They then accompanied the first plaintiff to his home about 300 metres away. In the room, the first plaintiff gave him R50.00. They put him to bed, as he was very drunk. They locked the door, and they went away. They went back to Mortel Store, and they continued drinking. He testified that after he finished drinking, he went back to the room he shared with first plaintiff. He found first

plaintiff sleeping. He said when he said we, he is referring to Siphokuhle Mkhize and the Bhekani Zuma and the second plaintiff. When they left, the tavern after finishing drinking each one went to their respective homes. The second plaintiff lived about 200 metres away from the store. They were all at that time pretty drunk.

[51] Sphelele under cross- examination testified that when he arrived at the tavern he found the first plaintiff with Siphokuhle and the second plaintiff. He arrived at about 9 or 10pm. He did not see how the quarrel between first plaintiff and K[...] started. He heard K[...] calling first plaintiff 'Skhotheni' when he arrived to them. He and his companions were out to the veranda to smoke. The first plaintiff had gone out to answer a call. He went to first plaintiff and the group of people because there were noise people swearing. He accompanied first plaintiff because he was drunk and had been involved in the quarrel and he was injured on his hand. These two companions came along too. He testified that the R50.00 he took he intended to use for transport to Pietermaritzburg the next day. He would go with his mother to buy takkies. They did go to town the next day at seven in the morning. The first plaintiff left to go to the store to buy stock. The first plaintiff got up first and he left whilst he was still sleeping. He asked the first plaintiff for the R50.00 at the store. At the time first plaintiff went to answer the call, he would not walk properly. He said he did not see the second plaintiff carrying a knife that evening. He is not able to say whether Mondli, Thanda, Ntshale and a Mr Khumalo were there because he did not know the other people. He confirmed that he asked for R50.00 for first plaintiff because he wanted to continue drinking. Since he had already spent the monies, his mother gave to him for transport.

- [52] The second plaintiff testified as follows. He went to Mortel store on 17 December 2010 after he was done with his household chores. Sinhie Ntshela arrived, and they drank together. Thereafter the first plaintiff arrived. They were drinking and dancing. K[...] who was drunk, came to him. He was a crowd which converge where first plaintiff was. In the crowd was K[...] and she continued with her talks of 'Skhotheni's as she did inside the tavern. The first plaintiffs brother said they must get back to the store and continue drinking. A person selling on the store called first plaintiff after that they took first plaintiff to his home and put him to bed. It was he, Sphelele Ngcobo and Siphokuhle Mkhize. They chatted with first plaintiff for a while, and he fell asleep. Siphelele closed the door, and they went back to the tavern. The first plaintiff and the other people were drunk.
- [53] He saw the first plaintiff giving money to Siphelele before they left. They did not stay for a long time at the tavern because it was already late. They put their money together and bought liquor. They left the tavern on their separate ways. He testified that on Saturday morning his mother woke him up four o'clock to go to the ploughing the fields. They worked at the field, and they finished about mid-day.
- [54] He testified that on 20 December 2010 Mthembu and Madlala who were with other police officers arrested him. He was at home. They asked whether he was Muzi and he said yes. They started hitting him. They accused him of killing a girl. He told them that he did not know anything about that. They entered the house. They took his T-shirt. They handcuffed him on the back. They put him on their vehicle. They said he would tell the truth. Madlala hit him on his private part. They took him to Taylors' Holt Police station. They put him in a place crowded with people working at the police station. He was then taken to Northdale Hospital and thereafter to Doctor Soni. Dr Soni asked him to undress and examined him: thereafter he was taken to Plessislaer police station. Mncwabe on Tuesday came to him. He took him out of the cells to where a statement was taken down from him. Mncwabe read to him his rights. He said he must sign on the documents. The document with rights was read to him in English and it was explained to him in Zulu. He was also asked to sign exhibit N but it was not explained to him what it was. He said he knew nothing about what was contained in the exhibit N. He said when Mthembu came to arrest him, he said it is alleged that he put the knife in the toilet; he said he was told by his friends. It is Mncwabe who asked to sign the documents not constable Madlala. His level of education is grade 11. Police from his roorri took a t-shirt and his track pants. Mncwabe said to him, if he did not sign the documents, the same thing that happened at his home would happen. He understood that he would be assaulted again.

- [55] He testified that in the store K[...] came and pushed him. Before that females in K[...]’s company asked to share in their drinks, and the first plaintiff told them that is not possible because they all contributed in buying the liquor. He said K[...] also pushed first plaintiff and she said to her friends who were dancing with first plaintiff, why were they dancing with "Skhotheni". After that, he saw Siphелеle telling first plaintiff to leave K[...], and they went to the back and continued drinking.
- [56] He said whilst standing in the veranda with Siphелеle and Siphokuhle smoking, a crowd gathered around first plaintiff. He went to see what was happening. K[...] was talking, first plaintiff was injured. First plaintiff told them that he got injured whilst fighting with K[...]. K[...] apologised to the first plaintiff. They went back to the tavern, and they continued drinking.
- [57] The second plaintiff under cross-examination, he said Siphokuhle Mkhize also came and drank with them, others were on the other side. He is not sure, but it is possible that at some stage Mondli drank with them, just like Thanda Ntshеле as well as a Mr Khumalo. He thinks K[...] pushed him because he was dancing with her friends. He, Siphokuhle Mkhize and Siphелеle went home with first plaintiff. They assisted first plaintiff who was drunk to get home. He thought Sphелеle would use the money to buy liquor, but he did not know whether it was used.
- [58] The second plaintiff stated when he was arrested in the morning at his home, both Madlala and Mthembu assaulted him. Mthembu hit him on his face with open hands. They put him in the house and Madlala assaulted him also by slapping him on the face. In the motor vehicle whilst handcuffed at the back, Madlala squeezed his private part saying he would tell the truth, Madlala was left at Taylor’s Halt Police Station but later he found him at Plessisslaer Polcie station. No rights were explained to him at Taylor’s Holt. He said Dr Soni spoke to him in English and Mthembu interpreted for him. He did not tell the doctor that police assaulted him. He finished to Dr Soni, and he was first taken to his home and thereafter to Plessislaer Police Station. They went to his home to fetch items of clothing he referred to earlier.
- [58] The second plaintiff testified that when they arrived at Plessislaer Police station Madlala booked him into the cells. The following day on 21 December 2021 Mncwabe book him from the cells and book him to the room where statements are taken. They sat on a table and Mncwabe explained his rights to him. He said Mncwabe did not ask him any questions and he did not tell him how he and his co-accused committed the crimes Mncwabe said if he did not do as required what the other police did to him would happen again. He then signed as requested, Exhibit N, which is a document that already had been filled. Mncwabe then told him that what he had signed was a statement wherein he was admitting that he committed the crimes. He learnt when he consulted with counsel of the contents alleged to be his statement. He was asked why the police officers would in his statement accuse for committing the crimes, he said police officers know how trials are conducted.

- [59] The second plaintiff, contrary to what was put to witnesses by his counsel, said he was not beaten by any police officers at Taylor's Halt, he was not taken from the cells to Mncwabe's office by Mthembu and Madlala, that at his home from Doctor Soni he was threatened with violence whilst being booked in at Plessislaer police kept threatening him, at the time he was arrested he was highly intoxicated.
- [60] After the defence closed its case, the court called two witnesses, namely Siphokuhle MKhize and Ntombi Crethina Mthalane.
- [61] Mkhize testified, after he was warned in terms of s204 of the Criminal Procedure Act 51 of 1977, testified as follows. On the evening of 17 December 2010, he was at Mortel store with both plaintiffs. He after considerable period left with his brother Lango to his residence. The next day in the morning community members took him to the scene. He was thereafter placed in a police van.
- [62] Mkhize under cross examination testified that he knew K[...] by sight. He did not witness any altercation between her and the first plaintiff. He knew Sipehelele and he saw him on 17 December 2010 at Mortel Store. He did not at any stage accompany first plaintiff with Sipehelele and second plaintiff to their home. He left the Mortel Store at 23h00.
- [63] Mthalane testified as follows. She testified that she was the mother of the deceased. On 17 Dec 2010 after the soapy Generations, the deceased left her retiring to sleep in her room. K[...] soon thereafter phoned asking her to come and meet her on her way home. She told her that she was at Dombi's residence. She asked K[...]s brother to accompany her, but he refused. She phoned Khetuwe and told her to sleep at Dombi's residence. After a while there was a knock on the door. She asked who it was. The person knocking said he was Sgodo Ngcobo residing at the close proximity to Mortel Store. She asked him what he wanted, he said he wanted to render assistance to her. He also said K[...] is here, she has been slapped and she is in the company of her two friends from Mphophomeni Township. She then walked out of the house. Sgodo exclaimed saying was she also present referring to her as aunt. She told him it was insignificant who she was, he must show her K[...]. She and Sgodo walked off the yard. They walked two paces from the gate, the grandmother was standing at the gate. She asked Sgodo if he was carrying a knife. He denied carrying a knife. He asked her what caused her to think he was carrying a knife. She told him evil spirits possessed her and she would detect if he was carrying a knife. She told him that the knife he was armed with he had used to kill a person and that God will enlighten her as to who is the person he killed with a knife.
- [64] She testified that it was her first time to see that person. She whilst in the company of Sgodo she saw K[...] approaching. She asked Sgodo who is the person approaching because he said K[...] had been stabbed. K[...] walked past. K[...] shouted at her grandmother to alert her that she had been stabbed. She turned around and walked away.

- [65] Sgodo said these vagrants from Mafakathini should not ridicule him; he just wanted to keep an eye on her so that these vagrants could not fool them around. He and Sgodo walked into the house wherein was K[...] and grandmother. The grandmother said to light up the house so that I can establish how extensive are the stab wounds on K[...], but she said the house should not be lighted up. She said so because she was scared. The house was eventually illuminated by cellphone light after she instructed them to do so to see how K[...] was injured. Sgodo also showed his cellphone light. K[...] then said, "mother I thought you are in the company of my brother but instead you are in the company of the person who stabbed me." Then a verbal argument ensued between K[...] and Sgodo and the grandmother ran out of the house. She reprimanded them.
- [66] She testified that the grandmother went out of the house with the sole intention to call the deceased. She returned and said Lindani was not there. Sgodo ran away. She looked out for Sgodo but the grandmother reprimanded not to pursue Sgodo. She returned to the house. She sent her son Sbo to go and look for Lindani in the toilet. He came back and reported that Lindani was not in the toilet. They remained seated until they got some help the next morning. The body of Lindani was recovered on that next morning.
- [67] She testified that the two men who accompanied K[...], she did not know them. She asked who they were, one said he was Nhlanhla Bhengu and the other one was a Ngcobo. They did not enter the premises, they walked past. She said she knew the first plaintiff. She saw him on that day when he came, and he knocked at the door. He introduced himself as Sgodo. She said she has never discussed with K[...] how she got stabbed. She worked far from home. She visited maybe once a month, sometimes she did not find her at that time. She noticed that K[...] was injured at the back of her left shoulder, she did not stop as she walked past because she was busy establishing the identities of her companions. Two cellphones were used to light the house, one by K[...] and the other one by Sgodo. The deceased's room was about 12 meters from the room in which they were. When told that the first plaintiff was never in the home and never spoke to her, she said he was at home because he was wearing black shorts and his jacket tied around his waist.
- [68] The state as its last witness lead evidence of Dhanraj Money who performed a postmortem examination of the deceased. He stated that his chief postmortem findings where there was history of stabs and rape. The findings being multiple clean-cut wounds on the body of the deceased, and that the weapons penetrated the left and right lungs and the heart. The injuries on the body were a linear clean-cut wounds on the body, as follows: 1) two wounds close together outside the external genetalia measuring 2cm x1.5 cm, three wounds on the outside of the right external genetalia measuring 1.5 cm x2cm and 3.5 cm long. A clean cut wound in the mid line of the chest to the abdomen from the level of the fourth coastal cartilage to symphysis pubis measuring 45cm long and the small intestines exposed through the wound, three wounds in the left epigastrium measuring 2cm long each, fifteen cut wounds in the region of the left chest cavity between the clavicle and the fourth coastal cartilage each measuring 2.5 cm, 1.5cm and 1cm, in the left mid clavicular line at the coastal

margin where the ribs end and 2.5 cm wound; two wounds across the interior neck at the level of the thyroid cartilage measuring 12cm and 10cm each; in the interior neck between the chin and the surface of the chest and the clavicle between sternomastoid muscles there were six wounds each measuring 7 cm x 5cm x2 cm. In the left cheek there were seven wounds ranging from 2.5 cm to 1.5 cm each; In the right cheek to the nose were six wounds measuring 3cm to 1cm each; In the right upper parietal a wound measuring 5cm long across; behind the left mastoid bone two wounds measuring 4 cm and 3.5 cm ; across the palm of the 2nd /3rd/4th fingers three wounds each measuring 1.5 cm; three wounds close together around thoracic 8 vertebra measuring 1.5 cm and 2cm each over thoracic one vertebra, in the left buttocks three wounds measuring 3cm/ 2cm/ 3.5 cm ; In the right buttocks two wound measuring 2.5 cm x 3cm. Both lungs and the heart were punctured. The entire abdomen cavity and the pelvic cavity was soiled with dagga particles as if when the abdomen was opened by the long lengthy wound, the dagga particles was scattered into the abdomen. There were no injuries to the internal or external genitalia, which meant there was no medical evidence to confirm forceful sexual penetration. In total, there were forty-nine wounds.

- [69] Zamokwakhe Raymond Dlamini in an affidavit stated that on 18 December 2010 he received a complaint of murder at Mafakatini Location. He proceeded to the scene. He found two suspects that were unknown to him who were already apprehended by the community, their names are Thembelani Ngcobo and Siphosihle Mkhize. Thembelani was assaulted with injuries on the head and body. He introduced himself that he was a police officer and he showed them his appointment certificate, then he told them that they are under arrest for the suspicious murder case. He informed them of their constitutional rights and the then arrested them and detained them at Plessiaslaer SAPS. The investigation Diary of Taylors Holt SAPS CAS 116/12/2010 has an entry dated 18 December 2010 time 06:00 stating "Deceased: Sali Mthalani near MaMbilini Butchery.

Suspect: Unknown at this stage: Witness: No

witness at this stage. Scene of crime: Mafakatini Location below Mambilini Butchery: Date and time: 2010-12-18-at 05:00 Statement of arrest of Cst Dlamini: Filled as per A3: Statement of the informant obtained and filled as per A2: SAPS 70 of Thembelani Ngcobo filled as per B2: Further entries show on 19 Dec 2010: A warning statement was obtained from Thembelani Ngcobo, also from Siphosihle Mkhize, and a statement obtained from Siphosihle Ntshela. On 20 DEC 2010 it is recorded that seized exhibits be sent for DNA analyses purposes.

- [70] Sihie Ntshela was arrested on 18 December 2010 at 20:20 and his statement obtained as AB and released on 20 Dec 2010 at 07:00. On 27 May 2011 the OPP advised that he was unable to make a decision in this matter pending DNA results and requested forensic science lab to expedite results.

- [70] Mthembu on the day the body was found, found a black shoe near the deceased, another shoe not far from the body, a grey pair of jeans with blood stains, a T-shirt blue in color written (SSV Markranstadiot; and in red www soccer Leispzig torn off and t-shirt had blood stains, and he also noticed blood drops leading to the home of the deceased about 100 meters away, and at the entrance to the deceased's home he found a pair of bluish sandals. He also found blood stains inside the room as well as on the mattress and on the mirror.
- [71] Mthembu in his statement of arrest of second plaintiff on 20 Dec 2010 at 07:15 stated that as follows; the second plaintiff came out to him. He introduced himself to the second plaintiff. He asked the second plaintiff for a weapon that was used to kill the deceased. He said the first plaintiff directed him to the second plaintiff and told him that a murder weapon was with him. The second plaintiff then admitted that the murder weapon, an okapi knife, was taken by him after the commission of the offence. He pointed to the toilet where he had thrown the knife. He went and looked at the toilet, which was half-full, and he did not see anything. He went to the room of the second plaintiff. The second plaintiff gave him a blue T-shirt full of bloodstains. The second plaintiff admitted that he stabbed and raped the deceased. He then placed the first plaintiff under arrest, and he explained to him his constitutional rights.
- [72] The defendant in the amended plea admitted that:
1. the plaintiffs were arrested at or near Mafakatini in Pietermaritzburg under case number Taylor's Halt GAS 116/1212010; 2 the plaintiffs were initially detained at Taylor's Halt Police Station and subsequently at Plessislaer Police Station and Pietermaritzburg Correctional Centre; 3. The bail was opposed and was subsequently refused by the Pietermaritzburg magistrate's court.
- [73] The defendant in amplification of its plea pleaded that: 1.the first plaintiff was arrested on 28 December 2010 and the second plaintiff was arrested on 20 December 2010. 2 the plaintiffs arrest and detention were unlawful in accordance with the following provisions of section 40(1)(b) of the Criminal Procedure Act 51 of 1977 (the CPA).
3. the members of the South African Police Service who arrested the plaintiffs were peace officers as defined in the CPA. 4. there was a reasonable suspicious that the plaintiff's had committed the offences of murder alternatively, the offences of murder and rape envisaged in schedule 1 of the CPA. 5. the plaintiffs were convicted in October 2013 and sentenced on 10 October
2013. 6.the defendant and its employees acted at all reasonable times material to the arrest and critical detention of the plaintiff with reasonable and probable cause as the evidence pointed to their complicity in an assault, rape and murder of the deceased, and an assault of the deceased's sister B[....] K[....] Mthlane, arising out of:

- (i) information supplied to the police by members of the community at Mafakatini location, Pietermaritzburg, that the first and second plaintiff participated in the rape and murder of the deceased and in respect of first plaintiff in the assault of the deceased's sister; and
- (ii) by virtue of statements made in the form of affidavits, duly attested by Commissioners of oaths, by
 - (a) the first plaintiff be Luet Col Mlangeni on 19 December 2010; (b) the second plaintiff to Capt J.V Mncwabe on 21 December 2010.
- (iii) by the implication of the second plaintiff in the commission of the crimes against the deceased by the first plaintiff.

[74] The defendant admitted that bail was opposed, inter alia, on a proper legal basis, which included concerns for the safety of each of the plaintiffs at the Mafakatini community intended killing them for the said rape and murder, once bail was denied continued detention was at the specific instance of the Ministry of Justice, not defendant. Further, post - refusal of bail, the continuation of the prosecution of the plaintiff was at the specific instance of the National Director of Public Prosecution and /or the Ministry of Justice, and not the defendant.

[75] K[...] in this court testified that at the tavern she spoke to Remember who was in a relationship with her sister and told him that he could not propose love to one of her companions. She then went out leaving. The first plaintiff when he had outside and attacked her stabbing her with a knife on her upper arm. She held the knife and wrestled over it with first plaintiff. The first plaintiff managed to take the knife and he walked up walking away from the tavern. She went to Themba Ndlovu's nearby house and she phoned her mother to come and meet with her. Her mother after about two hours arrived and she went out to meet with her mother. Her mother was with a male person she thought it was Siboniso her brother. They walked back to her home. They arrived and knocked for grandmother to open for them. Her grandmother opened for them and K[...] put on a cellphone light. She saw that the male person in their company was in fact not Siboniso but the first plaintiff. She asked the first plaintiff what he wanted there because he had injured her. The first plaintiff said he was helping her. They asked where the deceased was. The grandmother went to look for the deceased in her house. She came back and she said the deceased was not in her house. The first plaintiff walked away. She said at the motel she had not quarreled with the first plaintiff, and he had no reason to attack her. Her grandmother

and her mother did not know the first plaintiff, but Siboniso knew the first plaintiff. Both her grandmother and her mother had passed away, but Siboniso was still alive. In my view, the claim by K[...] that the first plaintiff came to her home is not supported by any other evidence. The first plaintiff and other witnesses testified about what caused conflict between the first plaintiff and K[...] at the motel. In my view, it is clear that K[...] either does not know what happened at the motel or she is deliberately not telling the truth. But clearly, the plaintiff's version of what happened at the motel is supported by other evidence, logical and in accord with the

probabilities. K[...]'s evidence that a flipflop found that morning in the gate of her home and a blue jacket found near a manhole not far from the body of the deceased depicted in the photos both belonged to the first plaintiff carries no weight in that it is bald statement denied by the first plaintiff and not supported by any other evidence which also played no role in the arrest of the first plaintiff.

- [76] It is not, for purposes of this judgment, necessary to repeat summaries of the evidence presented before this court of the evidence given in the criminal proceedings except to point out where that evidence appear to be inconsistent to the evidence in the police statements or to the evidence given in the criminal case.
- [77] The only witness who testified before this court but did not testify in the criminal trial is Nkosinathi Dennis Kunene. Kunene testified that he a member of the Forum and an induna's councilor. He was called to the scene. He found the first plaintiff at the scene having been assaulted and not wearing anything on the top part of his body. The community accused the first plaintiff for the killing of the deceased and they wanted to kill the first plaintiff. They pointed at blue t-shirt hanging near a manhole next to a fence. The first plaintiff scared for his life said it was his T-shirt and he had been sent by Manqeale an induna. Manqeale is an induna and a businessperson known for slaughtering people. Manqeale was there and he addressed people to calm. He recognized the blue shirt as a t-shirt that first plaintiff used to wear. He was not used to first plaintiff he hardly knew as a boy in the area. He did not believe that Manqeale had sent the first plaintiff.
- [78] The first plaintiff testified he was at the time 19 years old and in school in grade 11. He worked at the Motel store for Nkululeko Malinga his teacher. His duties entailed placing orders for the store. Malinga phoned him in the evening on 17 December 2010 whilst he was at the Motel and told him to be ready to wake up the following morning to go and placing orders for goods for the store. He then, as detailed in his evidence in the criminal case, left the store to go to his home to sleep. In the morning he woke up and he proceeded to the motel. He did not reach it because he came upon members of the Forum who pursued him accusing him of killing the deceased. He ran back to his home where he was assaulted, and he had to flee again.
- [79] In my view, the evidence establishes that at the time that second plaintiff was arrested by Mthembu on 20 December 2010 no member of the community had made a statement implicating the second plaintiff to any crimes. Mthembu told the second plaintiff that he wanted him to produce a murder weapon because the first plaintiff said the murder weapon was taken by him after the commission of the crime. Mthembu knew or ought to have known that a confession is only admissible against the confessor. He could not use the confession of the first plaintiff as evidence on which to arrest the second plaintiff.
- [80] Further, in my view, the evidence shows that the first plaintiff was not arrested for the assault on K[...]. Dlamini arrested the first plaintiff for the murder and rape. Dlamini when he arrested the first plaintiff did not have any evidence or information that the first plaintiff

had committed the murder and /or rape of the deceased. K[...] advised the police that she suspected the first plaintiff for killing the deceased. She never gave a statement from which reasonable suspicion could be formed that the first plaintiff was involved in the killing of the deceased. Gavin Nene with others pursued the first plaintiff and apprehended him. Nene too had no grounds on which a reasonable suspicion could be made that the first plaintiff was involved in the killing of the deceased. Even if Dlamini placed the first plaintiff in the police van on Mthembu's instruction meaning that Mthembu effected the arrest of the first plaintiff through Dlamini, Mthembu had bases on which a reasonable suspicion could be made that the first plaintiff was involved in the murder of the deceased. The police were well aware of the manner the first plaintiff was apprehended and that he had been assaulted. They were aware too of the threats by the community directed at the first plaintiff. It was irregular for the police to allow the community to interrogate the first plaintiff and they could not rely on anything said by the suspect during such an interrogation.

[81] It is trite that the police officer effecting an arrest must entertain a suspicion that the plaintiff committed a schedule 1 offence. The suspicion must be based on reasonable grounds (s40 (1)(b) of the CPA). See *Minister of Law-and-Order vs Hurley and*

Another 1986 (3) SA 568 A at 589 E-F; *Daman v Minister of Law and Order* 1986(2) SA 805 (A) at 818 G-K; *MR v Minister of Safety and Security* 2016 (2) SACR 540 (CC) para 46, *Minister of Safety and Security v Sikhoto* 2011 (5) SA 367 (A).

[82] The defendant admits that subsequent to the arrest of the plaintiffs and their detention it charged them. The arrest and the charging of the plaintiffs set the law in motion against them. In the case of malicious prosecution based on *actio injuriarum*, in order to succeed in a claim for malicious prosecution a plaintiff must establish that the defendant: - (a) set the law in motion (instigated or instituted the proceedings);

(b) acted without reasonable and probable cause, and (c) acted with malice (*animo injuriandi*); and (d) the prosecution failed. (*Minister*

of Justice and Constitutional Development & Others vs Moleko

[2008] ZASCA 43; 2009 (2) SACR 585 (A); *Woji vs Minister of Police*

[2014] ZASCA 108; 2015 (1) SACR 409 (A).

[83] The defendant admits that it opposed bail and that resulted in the further detention of the plaintiffs. The charge of assault is irrelevant because if first plaintiff was facing only a charge of assault the application for bail would not have been opposed, in particular, for the reason mentioned in the plea. If the defendant did not have what it regarded as evidence against the plaintiffs, it would not have opposed bail. The probability is that it would have released the plaintiffs without charging them. The defendant was not entitled to oppose the release on bail of a suspect against whom there was no evidence because the community was threatening to kill him.

[84] The only question relating to malicious prosecution is whether the defendant acted without reasonable and probable cause and whether it also acted with malice /or animus injuriandi) The charging and the prosecution of the plaintiffs was founded on the warning statements taken by Col. Mlangeni and Capt. Mncwabe from the first plaintiff and the second plaintiff respectively. The criminal court stated that it was undesirable for police officers involved in the investigation to take confessions from suspects the fact that it is undesirable does not mean it is inadmissible per se, the accused must plant a seed of suspicion in the mind of the court and that easily be done when the accused testifies of assaults and threats and that evidence can reasonably possibly be true, the issue of undesirability relates hand-in-hand with the fact to establish whether there was improper inducement, if the evidence of improper prior inducement is rejected as being wholly untruthful and incapable of credence the undesirable environment on its own cannot constitute sufficient basis to give rise to reasonable doubt as to whether the confession was freely and voluntarily made, police officers have the right in terms of the legislation to take confessions and the courts cannot, under the guise of assessing whether the confessions were freely and voluntarily made without any undue influence being exerted on the accused remove that right, and the utilizing of an interpreter and police officer of the same unit is undesirable and it goes without saying that if the officer and the interpreter is the same person such as the fact in casu the undesirability may even be greater.

The criminal court for its conclusion in the trial-within-a-trial accepted the evidence of the police. It attached no weight to the following factors which were common cause, namely,

- (1) the alleged confessions were the only evidence against the plaintiffs,
- (2) Col Mlangeni, Capt. Mncwabe and W/O Mthembu were members of the same investigation team investigating the case against the plaintiffs Col Mlangeni being the branch commander and W/O Mthembu the investigating officer.
- (3) Col Mlangeni before he took the warning statement from first plaintiff had visited the scene on the day of the arrest of first plaintiff and whilst first plaintiff was at the scene, inspected the scene and interviewed and obtained statements from witness and co- suspects.
- (4) Capt. Mncwabe before he took the warning statement from second plaintiff was briefed by W/O Mthembu the investigating officer.
- (5) Col. Mlangeni, Capt. Mncwabe and W/O Mthembu beforehand knew that what was to be taken from first plaintiff and second plaintiff were confessions but went on to take confessions in the guise of taking warning statements.
- (6) Both Col. Mlangeni and Capt. Mncwabe knew that they were taking confessions but used proforma for taking warning statements and followed a procedure for taking warning statements

- (7) Both Col. Mlangeni and Capt. Mncwabe did not tell the plaintiffs that they were brought to them to make confessions and advise them of the options available to them as to whom they can make confessions.
- (8) Both Col. Mlangeni and Capt. Mncwabe knowing the different procedures for taking warning statements and that for taking confessions opted to follow the procedure for taking warning statements which lacks the additional guarantees found in the procedure for taking confessions
- (9) The provisions of s217 of the Criminal Procedure Act 51 of 1977 regulate the admissibility of confessions not warning statements.
- [85] The defendant obtained confessions from the plaintiffs in the guise of warning statements. This was done because both the commissioned officers involved in the process were part of the investigating team of the charges against plaintiffs. It resulted in confessions taken by unqualified officers in the guise of warning statements. It resulted in the prescribed pro forma for taking confessions not being used and all the safeguards followed in the taking of the confessions not being followed. The required independent impartiality intervention in the process by a justice of the peace was missing. It resulted in a fatally defective process. In the results the statements obtained by both Captain Mncwabe and Col Mlangeni were not worth anything.
- [86] The said statements were obtained in overzealousness to find something against the plaintiffs so that they would be charged and be taken to court. It threw the investigation out of the tracks. The insistence that there be at least a DNA investigation fell on deaf ears. Initially and correctly so, the National! Director of Public Prosecutions insisted that there be DNA investigation results before a decision be taken but apparently, an overzealous prosecutor proceeded with the prosecution of the plaintiffs without the result of the DNA examination. It resulted in the unwary court overlooking the fatal shortcomings in the process and it relied on the warning statements to convict the plaintiffs.
- [87] The warning statements constituted the only evidence against the plaintiffs. It caused them to be detained from the time they were charged by the police, caused them not to be released on bail and caused them to be tried, convicted and sentenced. In the notice of factual and legal causation, there is no doubt that the unlawful arrest of the plaintiffs, the unlawful obtaining of confessions in the guise of warning statements and the presentation of the confessions as evidence resulted in the detention and imprisonment of the plaintiffs until they were released when their appeal against conviction and sentence was upheld.

[88] The police particularly in a constitutional democracy have a responsibility to ensure that in carrying out their duties to combat crime persons are not arbitrary deprived of their freedom or without just cause. In *Thandanani v Minister of Law and Order* 1991 (1) SA 702 (E) it was held "sight must not be lost of the fact that the liberty of the individual is one of the fundamental rights for a person in a free society which should be jealously guarded at all times and there is a duty on over courts to preserve this right

against infringement'. In *Mahlangu and Another v Minister of Police* (CCT88/20) [2021] ZACC 10; 2021(7) BCLR 698 (CC); 2021 (2) SACR 595 CC para (32) the court held 'it follows that in a claim based on interference with the constitutional right not to be deprived of one's physical liberty, all that the plaintiff has to establish is that an interference has occurred. Once this has been established,

the deprivation is prima facie unlawful, and the defendant bears the onus to prove that there was a justification for the interference.

[89] The warning statements constituted conscripted evidence, which was the only evidence against the plaintiffs. Both Lieutenant Col Mlangeni and Capt. Mncwabe were senior experienced officers well aware of the procedure to be followed in taking a confession from the suspects but deliberately flouted the prescribed procedure to serve their own interest. They knew and intended the devastating

consequences caused to the plaintiffs. It is immaterial that they believed the plaintiffs to be guilty of the crimes. They acted in law without reasonable and probable cause and with animus injuriandi.

[90] The plaintiffs sought to establish against the police officers an intention to injure them as opposed to acting without reasonable and probable cause. But acting with intention to injure includes acting without reasonable and probable cause⁴. A wrongdoer proved to have acted with intention may fail in claiming apportionment based on contributory negligence from other wrongdoers and is held solely liable for the total damage caused to the injured party. However, in this case the defendant is not the police officers themselves but their employer. The employer is held liable based on the employer-employee relationship; the fault on the part of the employer is not fault in the form of intention. The employer is held liable for the wrongs committed by its employees in the course of their employment.

[91] The National Prosecuting Authority is the country's prosecuting authority. It has a duty to apply its mind properly before it makes a decision to prosecute. Its duty is more acute where the only evidence against the accused is conscripted evidence. It is incomprehensible that a decision to prosecute the plaintiffs was made based on confessions in the guise of warning statements taken by police officers involved in the investigation of the same crimes against the plaintiffs constituting the only evidence. It acted recklessly to the prejudice of the plaintiffs.

- [92] The trial court is expected to carry out its judicial duties with reasonable skill and care. In the case wherein conscripted evidence constitutes the only evidence against the accused, it is trite that the court must approach such evidence with extreme caution. The trial court relied on confessions in the guise of warning statements taken by police officers involved in the investigation. It was a gross dereliction of its duties. The use of any evidence created by the participation of the accused where otherwise such evidence would not have existed is strictly regulated. See *Magwaza v S* (20169/2014)
- [2015] ZASCA 36; [2015] 211 SA 280 (SCA); 2018 (1) SACR 53 (SCA) 25 March 2015. In *Sea Harvest Corporation (Pty) Ltd & another v Duman Dock Cold Storage (Pty) Ltd & another* 2000 (1) SA 827 (SCA) para 21, it was held that the true criterion for determining negligence is whether in the particular circumstances the conduct complained of falls short of the standard of a reasonable person. In *S vs Kramer & another* 1987 (1) SA 887 (VO) at 894 F- H the court noted by citing *Roberg The Law of Delict* (1984) vol 1 at 346, that: The standard required is not the highest level of competence; it is a degree of skill that is reasonable having regard to 'the general level of skill and diligence possessed and at the time by the members of the branch of the profession to which the precautions belongs.
- [93] It appears that the National Prosecuting Authority and trial court as stated above were negligent in the carrying out of their tasks and their negligence contributed to the further detention of the plaintiffs. It may also happen that there was undue delay in finalizing the prosecution of the plaintiffs and an undue delay in the prosecution of the plaintiffs' appeal, but the defendant has chosen not to plead these issues. It remained content in pleading that the arrest, detention and prosecution of the plaintiffs were neither unlawful nor malicious. The defendant did not seek to join any other party as a joint defendant. It is not for this court to seek other co-defendants for the defendant. The defendant in the plea states that 'upon bail being denied the continued detention of each of First and Second Plaintiffs (in their capacities as First and Third Accused) were at the behest of the NDPP and/or Department and/Ministry of Justice and not the Minister of Police. This portion of the plea, in my view, overlooks the decisive role played by the police in the arrest and detention of the plaintiff, in the manufacturing of the evidence used in opposing the release on bail of the plaintiffs and in the prosecution, conviction and sentencing of the plaintiffs.
- [94] The defendant, in addition, pleaded that the plaintiffs are precluded from claiming damages because despite their conviction being set aside on appeal, they had committed the crimes on which they were convicted. In particular, first plaintiff's conviction for assault has been confirmed and stands; first plaintiff in a written statement admitted to the murder of the deceased and assault of B[....] K[....] M[....] ; second plaintiff admitted his complicity in writing in the rape and murder of the deceased. In my view, the guilt of the accused for crimes is established through criminal prosecution. If the prosecution has failed to still insist that the accused is guilty misses the point.
- [95] In the result, it is ordered as follows:

1. The defendant is found liable for the damages to each of the two plaintiffs for the unlawful arrest and detention and malicious prosecution up to the date of their release on 18 March 2016.
2. The quantum of damages for each plaintiff is postponed sine die for later determination.
3. The defendant is ordered to pay costs including costs of two counsel

Mngadi, J

APPEARANCES

Case Number: 94755/2017

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DURBAN

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Judgment

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