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REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: **21/52147**

NOT REPORTABLE
OF INTEREST TO OTHER JUDGES
NOT REVISED
13/09/23

In the matter between:

NTOKOZO PATRICK XULU

Plaintiff

and

THE MINISTER OF POLICE

First Defendant

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Second Defendant

Summary – Claim for unlawful arrest and detention – Plaintiff was the victim of an attempted robbery and killed his assailant in self-defence – Detained for more than two years awaiting trial – Police suppressed his self-defence claim from the prosecution and the Magistrate – Court finds the police’s conduct in suppressing the plaintiff’s defence

was the cause of his subsequent detention as it materially influenced the decision of the prosecution and the Magistrate in their handling of the matter – Court finds that a Magistrate would be materially influenced by defence of accused seeking bail was a victim of a violent crime and acted to preserve his own life – Legal causation influenced by policy considerations involved in the police arresting the victim of a robbery and failure to treat the plaintiff as a victim and failed to mention he was a victim to the prosecution and the Magistrate – Quantum: the plaintiff was arrested and detained shortly after suffering a traumatic robbery, instead of receiving the protection one would hope for from the police as a victim after an attempted robbery, instead he was detained as a criminal - Initial arrest found to be unlawful as the police failed to investigate the plaintiff's claim of self-defence – Police's discretion when deciding to arrest the plaintiff in these circumstances engaged section 205 of the Constitution and required the police to investigate his defence

JUDGMENT

DE VOS AJ

Introduction

- [1] Mr Xulu claims damages for his arrest, detention and prosecution. Mr Xulu was detained for 813 days. He relies on the *actio iniuriarum* and seeks non-patrimonial damages. The Court is to determine both liability and quantum.
- [2] Mr Xulu was the victim of an attempted robbery outside his home in Berea. Mr Rodriguez was the robber. Mr Xulu, twice, unsuccessfully tried to repel Mr Rodriguez. After his attempts failed, Mr Xulu shot and killed Mr Rodriguez in self-defence. Mr Xulu was charged with the murder of Mr Rodriguez and was detained for just over two years before he was acquitted. Mr Xulu claims damages for these two years in detention.
- [3] Mr Xulu was detained by the first defendant ("the police") for only two days. I find, for reasons I set out below, that Mr Xulu's arrest and detention by the police was unlawful. However, that accounts only for 2 of the 813 days of Mr Xulu's claim.
- [4] The vast majority of Mr Xulu's time spent in detention was after his first court appearance. I will refer to this period after his first court appearance until his release as his subsequent detention. Mr Xulu's subsequent detention was at the behest of the second defendant ("the prosecution"). Mr Xulu's case is that even though his subsequent detention was at the hands of the prosecution, certain acts and omissions by the police rendered his subsequent detention unlawful.

- [5] The central controversy in this case is whether the police caused, legally and factually, the subsequent detention as a result of their unlawful conduct. It is a controversy which Cameron J said “has long intrigued and troubled litigants and the courts.”¹
- [6] Mr Xulu’s claim is that the police knew he acted in self-defence. He told them so, repeatedly. Yet, the police omitted to inform the prosecution that Mr Xulu had killed Mr Rodriguez in self-defence. Mr Xulu’s case is that the police withheld the fact that Mr Xulu was the victim of an attempted robbery from the prosecution.
- [7] Mr. Xulu’s claim of self-defence negates mens rea and is a complete justification for the charge of murder. However, the prosecution, being kept in the dark by the police as to Mr Xulu’s defence, charged Mr Xulu and persisted in the prosecution. The prosecution were kept unawares they were charging someone who claimed he had been the victim of an attack and had acted to protect his own life.
- [8] Whilst the case is correctly framed as one of delict, it engages the value of separation of powers. The executive and the judiciary are separate and ought not to be held accountable for the conduct of the other. The executive ought not to be accountable for the conduct of the judiciary, and the judiciary must not attract liability for the conduct of the executive. Whilst an arrest is affected by the executive through police officers, the subsequent detention is at the behest of the judiciary. Once a police officer hands over an arrested person to an officer of the Court, it is the judiciary, and not the executive, who is primarily responsible.²
- [9] Initially, our courts upheld the separation of powers principle in an absolutist fashion.³ The position was what happened at Court and thereafter could not be placed before the doorstep of the police.⁴ In *Sekhoto*⁵ the Supreme Court of Appeal held that once an accused is brought to trial, it is the presiding officer’s responsibility

¹ De Klerk v Minister of Police [2019] ZACC 32; 2020 (1) SACR 1 (CC); 2019 (12) BCLR 1425 (CC) (“De Klerk”) para 104

² De Klerk para 69

³ See, for example, the approach in *Isaacs v Minister van Wet en Orde* 1996 (1) SACR 314 (A)

⁴ De Klerk para 7

⁵ *Minister of Safety and Security v Sekhoto* 2011 (5) SA 367 (SCA) para 14

to ensure that the accused's fair trial rights are not undermined.⁶ However, the water-tight separation required reconsideration. The facts of *Tyokwana*⁷ illustrate the need for a more nuanced approach. Mr Tyokwana was wrongfully arrested. He pleaded guilty to the charges against him and was detained pending his sentencing. It later emerged his plea was made under duress. It also became clear during his trial that the arresting officer had committed unconscionable crimes of assault against the accused. On top of this, the officer had lied to and misled the Court, including at the accused's bail hearing.⁸ *Tyokwana* illustrates one of the instances where the conduct of the executive so fundamentally affects the subsequent conduct of the judiciary that the executive must be liable, notwithstanding the persuasive separation of powers considerations.⁹

[10] Mr. Xulu contends that this is such a case. He relies on *Tyokwana* and cases that have followed in a similar vein to contend his subsequent detention was tainted by the unlawful conduct of the police. Having identified the central controversy, I set out the context within which this controversy must be considered.

Context

[11] Mr. Xulu's persistent refrain during his testimony was, "I told them, but no one would listen to me. I was the victim of the crime, but they treated me like I was the criminal". The evidence, initially, did not support this refrain of Mr Xulu.

[12] The arresting officer, Sgt Motena, testified that he was called out to attend to a shooting incident on the corner of Lily and Abel Street in Berea. When he arrived at the crime scene, onlookers told him the shooter left in a maroon car with registration number [...]. Having jotted down the number, Sgt. Motena started to patrol the area. In less than 20 minutes, Sgt. Motena saw a maroon car that matched the registration number. Sgt Motena spoke to the driver of the car: Mr Xulu. Mr Xulu, off the bat, said he had shot someone on the corner of Lily and Abel. Mr. Xulu showed Sgt. Motena the gun. Sgt Motena arrested Mr Xulu as he was driving in the car that

⁶ De Klerk para 7

⁷ *Minister of Safety and Security v Tyokwana* [2014] ZASCA 130; 2015 (1) SACR 597 (SCA) ("Tyokwana")

⁸ The summary of the case appears in De Klerk para 52

⁹ De Klerk para 75

left the scene of the shooting, admitted to the shooting and had the gun on him. Sgt. Motena arrested Mr Xulu on a charge of attempted murder. At this stage of the proceedings, Mr Xulu's claim that he was the victim seemed fanciful.

[13] However, as the evidence developed, the scales tipped. The scene of the shooting was just outside Mr. Xulu's home. Mr Xulu had just arrived home from work. His home is right opposite Berea Park. His neighbourhood is notoriously dangerous. He had on him his wallet, and the keys to his car were still on him. He was still inside his car when he was attacked by two assailants who had come from Berea Park. The first assailant opened the passenger door to the backseat, jumped in the car and threatened Mr Xulu with a knife. Simultaneously, a second assailant, who we now know to be Mr Rodriguez, appeared at Mr Xulu's window. Mr Xulu opened the car door against Mr Rodriguez in an attempt to push him away. Mr Rodriguez stumbled backwards. Mr Rodriguez, undeterred, regained his balance and again approached Mr Xulu's window.

[14] Mr. Xulu was trapped in the car, one assailant behind him in the car, and Mr. Rodriguez returning to his window. Mr Xulu fired two warning shots in the air, again seeking to repel his attackers. The first assailant fled after the warning shots. Mr Rodriguez, however, reached for something in the front of his belt, which Mr Xulu presumed to be a gun. Mr Xulu, having tried twice to repel his attacker, fired in the direction of Mr Rodriguez. The shots wounded Mr Rodriguez. Mr Rodriguez subsequently died from his injuries.

[15] The Court wished it had a full name for Mr Rodriguez and has asked the parties for the full name. Unfortunately, the Court has only been provided with his first name, Rodriguez. I will refer to him in this judgment as Mr Rodriguez.

[16] Mr Xulu, shocked and having just survived an attack, drove away in the direction of the Hillbrow Police Station to report the incident. When the maps were studied, it became objectively clear that Mr Xulu had turned from the scene of the crime directly towards the Hillbrow police station. Had he sought to flee the scene of the crime, he did a terrible job of it. If Mr Xulu wanted to flee he should have gone entirely in the different direction: he should have turned right from the scene of the crime if he wanted to avoid the police, but he turned left towards the police station. Had Mr Xulu not been arrested and continued on this path, he would have reached

the police station. Mr Xulu was arrested whilst he was on his way to tell the police at the Hillbrow police station that he had shot someone in self-defence.

[17] Mr. Xulu's version of events was accepted during his murder trial. His explanation of where the incident occurred - outside his home - was verified by the police. His explanation of the attack and the warning shots he fired were confirmed by objective evidence in the form of cartridge cases found at the scene of the crime. In addition, his explanation of how he had shot Mr Rodriguez whilst he was sitting in his car and with the second assailant standing at the car window was also confirmed by the police's own ballistics report. The ballistics report confirmed the trajectory of the bullet was in line with someone sitting down and shooting at someone at a higher angle. Mr Xulu was acquitted.

[18] Mr Xulu's acquittal came after he had spent two years in Johannesburg Prison waiting for his day in Court. Mr Xulu was arrested on 11 November 2018 and only released on 1 February 2021.

[19] These facts are of contextual value only. The question before the Court is not whether Mr Xulu acted in self-defence. The criminal Court has already dealt with that issue. The relevant question, now, is whether Mr. Xulu's arrest, detention and prosecution were lawful based on the evidence known at the time – not based on the facts as we know them now. Mr Xulu's justification of self-defence is relevant to the extent he claims he informed the police that he acted in self-defence, and the police failed to inform the prosecution.

[20] It is not Mr Xulu's defence which is relevant; rather, it is Mr Xulu's disclosure of his defence which is central.

Mr Xulu's disclosure of his defence

[21] Mr Xulu testified that, at the time of his arrest and throughout his detention, he told the police of his justification of self-defence. He says he explained he was the victim to the arresting officer, Sgt Motena, as he was arrested. He says he explained he was being attacked and acted in self-defence to the investigating officer, Cst Mokgopo, at the cells before he was charged. He says he repeated it in Johannesburg Prison, where he was detained, to anyone who would listen. Despite this constant refrain, the police did not tell the prosecution.

[22] Sgt Motena denied that Mr Xulu informed him he had acted in self-defence at the time of his arrest. Similarly, Cst Mokgopo, the charging officer, denied that Mr Xulu informed him of the defence.

[23] The police's denial collapses when regard is had to the objective evidence. The Court was presented with a letter sent from the Unit Commander at the Crime Investigation Services Hillbrow. The Commander wrote to the Head of the Forensic Science Laboratory on 21 November 2018. This is a week after Mr. Xulu's arrest. The Commander writes that -

“EXHIBITS FOR ANALYSIS: MURDER: HILLBROW CAS 365/11/2018

On 11 November 2018 at 21:00, it is alleged that an unknown suspect tried to hijack a car and was shot in the act.

On 11 November 2018 at 22:30 Cst, Motlhatlo arrived at the scene where a forensic investigation was carried out. The following exhibits were confiscated and marked as follows: Exhibits A1 – A3 : 3 cartridge cases”.

[24] The Commander is providing a cover letter for the cartridge cases being sent for analysis to the ballistics department. The context in which the cases must be investigated is that of "an unknown suspect trying to hijack a car and was shot in the act." The CAS number of 365/11/2018 is that of Mr Xulu's murder docket.

[25] From this letter, we know that as of 21 November 2018, the Unit Commander knew that Mr Xulu claimed he shot a suspect who was trying to hijack him. The letter establishes objectively that the police, at a minimum, the Commander of the Unit, knew of Mr. Xulu's defence from as early as a week after Mr. Xulu's arrest.

[26] Mr. Xulu's counsel asked Sgt Motena and Cst Mokgopa how the Unit Commander knew of Mr Xulu's defence: their responses were singularly unimpressive. The question was evaded, and their memories failed them. Mostly, they could not provide any explanation for how Mr. Xulu's defence made its way into a letter so soon after his arrest if Mr Xulu did not disclose his defence to the police. The only reasonable inference that can be drawn from the letter is that Mr Xulu must have informed the police of his defence. There is no other explanation presented to the Court.

[27] The letter is not only objective, it is also contemporaneous. It indicates that Mr Xulu must have disclosed his defence. In addition, it lends objective support to Mr Xulu's version that he disclosed his defence from the outset.

[28] The Court also considers the probabilities. It is improbable that Mr Xulu, having acted in self-defence, would not tell the police of his defence. Generally, it is highly improbable that someone would not explain they acted in self-defence. On these particular facts, this becomes weightier as Mr Xulu was arrested on his way to explain what happened to the police. The location where Mr. Xulu was arrested supports this version.

[29] The police's version is so improbable that it borders on implausible.

[30] The Court finds the responses from the officers in this regard as unreliable and prefers Mr Xulu's version that he did disclose his defence.

[31] The Court is comforted that even if this factual finding is incorrect, Cst Mogkope conceded during cross-examination that he did, in fact, receive such a report of Mr Xulu's defence:

“MR VAN ROOYEN: Yes, so my question is how does this person [the Commander] know, but you do not know, and the arresting officer does not know?

MR MOKGOPE: This is the officer who attended the scene of which I got this report at a later stage.”

[32] Cst Mokgope's version is that another officer provided him with the report. Cst Mokgope denies Mr Xulu disclosed his defence, but concedes that another officer reported the defence to him. Even on Cst Mogkope's version, Cst Mokgope was aware of Mr Xulu's defence.

[33] Despite Mr Xulu's disclosure of his defence to the police, they omitted to inform the prosecution.

The police's omission

[34] It is common cause that the police did not disclose Mr Xulu's defence to the prosecution. Cst Mokgopa, the investigating officer who engaged with the prosecution, stated he never informed the prosecutor of Mr Xulu's defence.

[35] Cst Mokgopa, the investigating officer, was asked if he should not have informed the prosecution of Mr Xulu's defence. Cst Mokgopa's astonishing answer was that even if he had been told of Mr Xulu's defence, "it was not his job to explain it to the prosecution". Cst Mokgopa's stance is at odds with our law.

[36] The Constitutional Court in *Carmichele*¹⁰ held that the police have a clear duty to bring to the attention of the prosecution any factors known to them relevant to the exercise of the Magistrate's discretion to determine bail. Even before *Carmichele*, our courts have acknowledged that the duty of a policeman who has arrested a person for the purpose of having them prosecuted is to give a fair and honest statement of the relevant facts to the prosecutor, leaving it to the latter to decide whether to prosecute or not.¹¹ The obligation of the police to disclose all relevant facts to the prosecutor is to be regarded as a duty that remains for as long as the information withheld is relevant to the detention.¹²

[37] The police, as state officials, have a public law duty to safeguard the constitutional rights of the members of society.¹³ In *Woji*, the Court held that a policeman in the employ of the State had a public law duty not to violate Mr Wojji's right to freedom, and this included the duty to place all relevant and readily available facts before the Magistrate.¹⁴ Where there are no facts to justify the further detention of a person, the investigating officer should place it before the prosecutor of the case, and the law cast an obligation on the police official to do so.¹⁵ The police are to give a fair and honest statement of the relevant facts to the prosecutor, leaving it to the latter to decide whether to prosecute or not.¹⁶

[38] Cst Makgopa failed in this public law duty.

[39] In this case, Mr. Xulu said he told the police, but they never told the prosecutors, who then never told the Magistrate. And so the chain of silence was kept, and Mr Xulu's defence was never presented to the prosecution. The prosecutor decided to prosecute Mr. Xulu without being provided with the vital piece of information that Mr. Xulu had a complete justification for the charge of murder.

¹⁰ *Carmichele v Minister of Safety and Security and another* 2001 (4) SA 938 (CC) para 63

¹¹ *Tyokwana* para 40, relying on *Prinsloo and another v Newman* 1975 (1) SA 481 (A) at 492G and 495A

¹² *Mahlangu and Another v Minister of Police* (CCT 88/20) [2021] ZACC 10; 2021 (7) BCLR 698 (CC); 2021 (2) SACR 595 (CC) (14 May 2021) ("Mahlangu")

¹³ *Mahlangu* para 38

¹⁴ *Woji* para 28

¹⁵ *Botha v Minister of Safety and Security, January v Minister of Safety and Security* 2012 (1) SACR 305 (ECP) quoted with approval in *Mahlangu* para 40

¹⁶ *Tyokwana* para 40 quoted with approval in *Mahlangu* para 41

[40] The Court is satisfied that Mr Xulu disclosed the defence to the police, and the police failed to disclose it to the prosecution in breach of its public duty. The question, then, is whether the police's conduct caused the subsequent detention.

Causation for subsequent detention

[41] A delict comprises wrongful, culpable conduct by one person that factually causes harm to another person that is not too remote.¹⁷ The harm Mr Xulu complains of is the deprivation of his liberty – a significant personality interest.¹⁸ He alleges that it was the wrongful conduct of the police that caused the harm – the subsequent detention.

[42] The question is whether the harm associated with his subsequent detention can be attributed to the police's conduct. This implicates the causation requirement in the context of alleged unlawful detention. Whilst there is a subtle relationship between causation and unlawfulness in cases like this, the main focus will be one of causation.¹⁹ The Court must determine whether the police's omission caused or materially contributed to the harm.²⁰

[43] The existing case law on this point is factually distinguishable, as in those cases, the factual causation was clear. In *De Klerk* and *Ndlovu*²¹ the initial arrest was unlawful²² and there was no bail hearing as the accused was taken to a reception court. In *Tyokwana*, the guilty plea was extracted by torture, and were it not for the torture, there would have been no guilty plea, no finding of guilt and no detention pending sentence. In *Woji*, had the arresting officer not lied about identifying the accused in CCTV footage, there would have been no basis to link the accused to the crime at all and no basis for the charge. In all these cases, the conduct of the arresting officer was the clear factual cause of the accused's subsequent detention.

¹⁷ De Klerk para 13

¹⁸ De Klerk para 13

¹⁹ De Klerk para 16

²⁰ *Minister of Police v Skosana* 1977 (1) SA 31 (A) at 34F-G

²¹ *Minister of Safety and Security v Ndlovu* 2013 (1) SACR 339 (SCA) (“Ndlovu”)

²² De Klerk para 24 - 25

- [44] The same cannot be assumed in the present case. Even if the police had informed the prosecution and the Magistrate that Mr Xulu relied on self-defence, it is not automatic, nor can it be taken for granted, that Mr Xulu would not have been charged or that he would have certainly received bail. Mr Xulu had killed a person. Whilst he had a defence, it cannot be assumed that he would have received bail, even if his defence had been disclosed.
- [45] Despite the factual difference in the cases that arose prior to this matter, the Constitutional Court in *Mahlangu* provides guidance. *Mahlangu* identifies the test as whether the wrongful and culpable conduct of the police had materially influenced the decision of the Court to remand the person in question in custody.²³
- [46] The core of this test is whether the Magistrate was placed in a position to properly apply their mind to the issue of bail or whether the police's conduct materially influenced the Magistrate's ability to apply their mind. The core of this test has been stated in different formats by our Courts.
- [47] In *Ndlovu* and *De Klerk*, it was the mechanical remand of a reception court which indicated the absence of a Magistrate being able to apply their minds to the issue of bail. The Court held that where a remand court undertakes a deliberative evaluation of whether an arrested person should be detained, police liability for wrongfully arresting that person is truncated. Not so where there is none.²⁴
- [48] Similarly, where the Magistrate had been provided with false information, our courts have held that the police's conduct caused the subsequent detention. In *Ndlovu*, the Magistrate was falsely informed that Mr Ndlovu did not have a permanent address. In *Woji*, the Magistrate was falsely told Mr Wojji could be seen on a video committing the crime. In *Mahlangu* and in *Tyokwana*, a confession extracted through torture was presented to the Magistrate when considering bail. In all these cases, the Court said it was the police's unlawful conduct preventing the Magistrate from properly applying their minds, which satisfied the element of causation.

²³ *Mahlangu* para 33 referring to *Woji* para 27

²⁴ *De Klerk* para 106 (Cameron J)

[49] I draw from the reasoning of the Supreme Court of Appeal in *Tyokwana*, which held that the peculiar facts of the case must be considered and held that –

“Due to Kani and Muller's failure to inform the prosecutor and/or the Magistrate of the true facts, the latter was not given a proper opportunity to apply their minds to the question of whether or the respondent should be remanded in custody or be granted bail. Had the prosecutor and the Magistrate been apprised of all relevant facts and circumstances, it is inconceivable that the prosecutor would have permitted the prosecution to proceed or that the Magistrate would have refused bail.²⁵

[50] A Magistrate can only properly apply their minds if they have been apprised of all relevant facts and circumstances. In *Woji*, the Court determined causation with regard to 'what the relevant magistrate on the probabilities would have done' had the officers revealed all the relevant information and not misled the Court.²⁶

[51] The theme that arises in these cases is that the substantial question is whether the police's conduct prevented the Magistrate from applying their minds in a way that materially influenced the decision to grant bail or not.

[52] I adopt the test of whether the conduct of the police materially influenced the judiciary to also apply to the stage of when the prosecutor decided to charge Mr Xulu. Applied to this case, the question is whether the police's failure to inform the Mr. Xulu's defence materially influenced the decision to charge him.

Prosecutor and the charge

[53] There is a host of factors which would have played a role in the mind of the prosecutor in deciding to charge Mr Xulu. Mr Xulu's defence, however, would certainly have been relevant to the prosecutor's decision to charge Mr Xulu. The Court was informed by the prosecutor, Ms. Msomi, that had she been informed of the defence, she would have certainly approached the matter differently and asked for a further investigation:

“MS MSOMI: So if there was a statement under oath saying that the accused was being robbed at the time I would have taken, I would probably have taken a different decision.

²⁵ *Tyokwana* para 39(e)

²⁶ *Woji* para 32

[54] The evidence before the Court is that had the prosecution been aware of the defence, their approach would have been different. The existence of a complete defence would be a material consideration in the mind of a prosecutor. The defence changes the nature of Mr. Xulu's involvement in the shooting from that of a criminal to that of a victim. Mr Xulu's defence would have certainly had a material influence in the mind of the prosecutor in deciding to charge Mr Xulu with murder.

[55] The Court finds that the failure of the police to inform the prosecution was not only a breach of their public duty to provide the prosecution with all relevant facts but also materially influenced the decision to charge Mr Xulu.

The Magistrate and bail

[56] The Court has no real evidence of what happened at the bail hearing. None of the parties could give evidence in this regard. The bail affidavit is not before the Court. Nobody can assist the Court as to what transpired at the bail hearing.

[57] Mr Xulu testified that he had instructed his attorney to request bail, but he was only taken to the cells and to Court – and did not hear the application. Mr Xulu, at some stage, changed lawyers, but as he was detained in the cells, he had limited access to information during this period. This is similar to the facts in *Mahlangu*.

[58] The Court, however, knows that it is not for the taking that if Mr Xulu's defence was presented to the bail court, he would have automatically been granted bail. The Court cannot determine this with any exactness. However, the Court knows the bail court would have considered that Mr Xulu has a family, that his address is confirmed, that he has employment, that he has no prior record and that he holds a valid South African identity document. Mr Xulu was the provider for three children. One with chronic medical needs that required monthly hospital visits. The gun used by Mr Xulu was licensed. Mr Xulu did not flee the scene of the crime – when he had an opportunity to do so. On the contrary, he drove to the police station. He cooperated with the police in the arrest and immediately presented them with the gun. All these would've bode well for Mr. Xulu's bail application.

[59] However, Mr Xulu need not prove that he would have certainly been released on bail, only that the police's conduct materially influenced the decision of the Magistrate when deciding bail. It would certainly make a material difference to a

Magistrate when confronted with the fact that the person seeking bail was a victim of a violent crime and acted to preserve his own life, as opposed to a cold-blooded killer.

[60] The police's conduct prevented the Magistrate from properly applying their mind to the issue of bail. The police did not provide the Magistrate with all relevant information and excluded certain relevant information that would certainly have had a bearing on the Magistrate's consideration of the matter. The Court does not conclude that the Magistrate would have certainly released Mr Xulu on bail. That, however, is not the test. The test is whether the defence if disclosed, would have materially influenced the Magistrate's decision.

[61] The Court is comforted that this approach aligns with the mandate of the Constitution. Section 35(1)(d) protects arrested persons from unlawful detention by requiring court oversight of such detention within 48 hours. The substantive element of this right is limited when the police excludes relevant information from the Magistrate's consideration. The right becomes hollow if a Magistrate cannot apply their mind to vital evidence being suppressed by the police. The Court's oversight becomes performative, rather than substantive, if relevant and vital facts are not disclosed to the Court.

[62] Similarly, section 12(1)(a) of the Constitution protects against the right of freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily and without just cause. This right also has limited substance if a Magistrate is not informed of the relevant facts. Substantively, a detention is arbitrary if a Magistrate is prevented from properly considering the relevant facts as a result of the police's unlawful conduct.

[63] In this case, the Magistrate was never placed in a position to properly exercise their constitutional duties. The Magistrate's ability to exercise a genuine judicial discretion²⁷ was missing in this case.

[64] In addition, the Court must have regard to all relevant factors²⁸ when considering whether there was factual causation. The police not only omitted to inform the

²⁷ De Klerk para 73

prosecution of Mr Xulu's defence, but they also presented an affidavit by Mr Ayanda Sampson as evidence when it was not evidence under oath.

[65] Mr Ayanda Sampson was allegedly an eyewitness to the shooting. An affidavit deposed to by Mr Sampson was the only evidence presented against Mr Xulu. The affidavit is, however, not evidence of what it purports to be. The affidavit indicates that it was commissioned by Sgt Motena – the arresting officer in this matter. The exchange with Sgt Motena in relation to the statement was as follows –

MR VAN ROOYEN: Okay. Then, sir, I want to ask you something else. Did you ever speak, speak to Ayanda Samson?

INTERPRETER: Who?

MR VAN ROOYEN: Ayanda Samson.

MR MOTENA: [No audible answer].

MR VAN ROOYEN: Were you ever in his presence?

MR MOTENA: No.

MR VAN ROOYEN: Never?

MR MOTENA: I do not know that person.

MR VAN ROOYEN: Okay. But you commissioned an affidavit for that person, ja, his statement. You commissioned his statement. Am I right?

MR MOTENA: Yes, I commissioned it.

MR VAN ROOYEN: So, he must have signed in front of you before you could commission it. Am I right?

MR MOTENA: May you please repeat the question?

MR VAN ROOYEN: So, you commissioned this statement of Ayanda Samson. Am I right?

MR MOTENA: Yes.

MR VAN ROOYEN: Okay. You are not answering my question. Did Mr. Samson sign that statement in front of you?

MR MOTENA: I do not know that person, that Samson guy.

[66] Yet the police presented it as evidence to the Court. It was the only "evidence" which contradicted Mr Xulu's version that he had acted in self-defence. Were it not for this statement improperly presented as evidence, Mr. Xulu's version of self-defence would have been, even at the stage of bail, undisputed.

²⁸ De Klerk para 75

[67] The statement of Ayanda Sampson is incomprehensible. Mr Sampson's statement is that Mr Xulu shot his gun in the air whilst Mr Sampson was playing cards. They kept playing cards, and Mr. Xulu remained in the vicinity. When Mr Rodriguez then joined them – Mr Xulu shot at Mr Rodriguez from across the street. The statement, it turns out, is not only incomprehensible but also not evidence.

[68] There is another component which Mr. Xulu relies on to ground liability for the police. There is an aspect of delay in this matter. The trial was delayed by an entire month because that is the period it took the police to take the ballistics exhibits to the ballistics division for analysis. The trial was then delayed by a further five months as the investigating officer failed to file the ballistics report in the docket. The ballistics report was prepared on 23 April 2019 but was only placed in the docket on 9 October 2019. The mere act of moving evidence from his desk to the appropriate division and docket took Cst Mokgopa six months. Not only did the investigating officer fail to inform the prosecutor that Mr Xulu was the victim of a robbery and had acted in self-defence, but he also delayed the finalisation of the matter by six months.

[69] The investigating officer also failed dismally in conducting an investigation. The totality of attempts made to investigate the matter by Cst Mokgope was to confirm Mr Xulu's address. Cst Mokgope made vague, generalised allegations that he would usually check street cameras and speak to informants. No specifics of whether this was done in this case or what steps were taken were given.

[70] In *Ndlovu*, the Supreme Court of Appeal held that -

“Quite clearly had the police conscientiously performed their duties given the respondent's freedom was at stake they would have realised that the respondent had a fixed address and was thus not a flight risk.”²⁹

[71] Similarly in this case, the Court concludes the police failed to conscientiously perform their duties.

[72] The Court concludes that the police's conduct, viewed cumulatively, materially influenced the Magistrate's decision regarding bail. The police's conduct consists of their omission – their failure to inform the Magistrate of Mr Xulu's defence, combined

²⁹ *Ndlovu* para 15

with their commission – presenting the statement of Mr Sampson as evidence when it was not, as having materially influenced the Magistrate's decision regarding bail. Added to this is the police dragging their feet – which extended Mr Xulu's detention excessively, as well as the shoddy police investigation. These all indicate that the police did not place the Magistrate in a position to properly apply their mind in a way that substantively would give effect to sections 35 and 12 of the Constitution.

[73] There is another component to this which the Court must consider, being that of onus. In *Mahlangu*, the Supreme Court of Appeal held that the onus shifted to the applicant and required Mr Mahlangu to show why he did not apply for bail. The Constitutional Court held that this was an error and improperly removed the onus from the State. The onus remains with the state. This Court has nothing before it, no argument and no facts, from the police which seeks to justify this subsequent detention. The defendants have not met their onus to justify the detention of the plaintiff.

Legal causation

[74] The Court must then consider whether the police's conduct is the legal cause of Mr Xulu's subsequent detention. I rely extensively on the judgment of Theron J in *De Klerk* the Constitutional Court for this aspect. Legal causation is concerned with the remoteness of damage. This entails an enquiry into whether the wrongful act is sufficiently closely linked to the harm for legal liability to ensue.³⁰ The function of legal causation is to ensure that liability on the part of the wrongdoer does not extend indeterminately.³¹

³⁰ *De Klerk* para 25, *mCubed International (Pty) Ltd v Singer N.O.* [2009] ZASCA 6; 2009 (4) SA 471 (SCA) (*mCubed*) at para 22; *Lee* above n 23 at para 38; and *Bentley* above n 23 at 700H. See also *Country Cloud Trading CC v MEC: Department of Infrastructure Development* [2013] ZASCA 161; 2014 (2) SA 214 (SCA) at para 27. See the explanation advanced by Nkabinde J in *Lee* above n 23 at para 38:

"The point of departure is to have clarity on what causation is. This element of liability gives rise to two distinct enquiries. The first is a factual enquiry into whether the negligent act or omission caused the harm giving rise to the claim. If it did not, then that is the end of the matter. If it did, the second enquiry, a juridical problem, arises. The question is then whether the negligent act or omission is linked to the harm sufficiently closely or directly for legal liability to ensue or whether the harm is too remote. This is termed legal causation."

³¹ *De Klerk* para 26, *Minister of Safety and Security v Scott* [2014] ZASCA 84; 2014 (6) SA 1 (SCA) (*Scott*) at para 37

[75] Legal causation plays the role of a safety valve to ensure that only conduct that most right-minded people will regard the imposition of liability in a particular case as untenable despite the presence of all other elements of delictual liability.³² Legal causation is informed by public policy. This results in a limited overlap between wrongfulness and causation.³³ Accordingly, even where conduct is found “on the basis of public policy consideration to be wrongful, harm factually caused by that conduct may, for other reasons of public policy, be found to be too remote for the imposition of delictual liability.”³⁴ The test requires the Court to have regard to the traditional criteria such as reasonable foreseeability, adequate causation, whether a *novus actus interveniens* intrudes and directness. These traditional criteria remain subsidiary determinants to the broader considerations of public policy, reasonableness, fairness and justice.³⁵ These considerations must be infused with constitutional values.³⁶

[76] It weighs with the Court that the Supreme Court of Appeal in *Woji* held that the police presented false evidence to the Court at remand; the Court held that the police officer had failed in his public duty to put all relevant information before the Magistrate in the bail application.³⁷ This made the police’s omission wrongful in the context of delict.³⁸ As for legal causation, the Court held that –

“[I]t is also clear that [the police officer’s] wrongful conduct was sufficiently closely connected to the harm for liability to follow, hence it also constituted the legal cause of that loss.”³⁹

³² De Klerk para 27, *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* [2008] ZASCA 134; 2009 (2) SA 150 (SCA) para 31; and Scott above n 30 at para 37. See also *Home Talk Developments (Pty) Ltd v Ekurhuleni Metropolitan Municipality* [2017] ZASCA 77; 2018 (1) SA 391 (SCA) at para 45; and *South African Hang and Paragliding Association v Bewick* [2015] ZASCA 34; 2015 (3) SA 449 (SCA) at para 37.

³³ *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* [2008] ZASCA 134; 2009 (2) SA 150 (SCA) para 31

³⁴ De Klerk para 28

³⁵ De Klerk paras 29 - 30

³⁶ De Klerk para 31

³⁷ De Klerk para 42; *Woji* at para 28

³⁸ De Klerk para 24, *Woji* at para 28

³⁹ *Woji* at para 32; quoted with approval in De Klerk para 42

[77] The Court came to this conclusion by considering how the remand decision was materially influenced by a wrongful omission by the arresting officer.⁴⁰ In this case, there is both a wrongful omission and a commission at play. In addition, the constitutional value at play – in particular, the importance of the right to liberty in our constitutional framework and the safeguards contained in sections 35 and 12 of the Constitution must be considered.

[78] The Court can think of no policy considerations which should prevent the Court from finding the police as the legal cause for Mr Xulu's detention in circumstances where the police arrested the victim of a robbery and failed to treat him as a victim – and worse – they failed to mention he was a victim to the prosecution and the Magistrate.

[79] The Court concludes that there is a sufficiently close enough link between Mr Xulu's subsequent detention and his initial unlawful arrest. The Court also concludes that policy considerations and constitutional values require the Court to consider the police's omission to disclose his defence as the legal cause of Mr Xulu's further detention. In particular, when this is viewed in combination with the police presented to the prosecution as evidence, the statement under oath by Ayanda Sampson, when it was not evidence.

[80] In my view, Mr Xulu has shown that the circumstances in which the police instigated and persisted with his prosecution amounted to an unjustifiable breach of s 12(1)(a) of the Constitution. This is sufficient to establish delictual liability on the part of the first defendant for the full period of Mr Xulu's detention.

[81] The outstanding determination relates to the initial arrest and the malicious prosecution claim.

Arrest and initial detention 11 November 2018 - 13 November 2018

[82] Mr Xulu was arrested on Sunday, 11 November 2018, in terms of section 40(1)(b) of the Criminal Procedure Act, 51 of 1977, without a warrant, by Sgt Motena. The arrest is not disputed. The first defendant bears the onus to prove the arrest was lawful.

⁴⁰ De Klerk para 42

[83] The relevant part of the test is whether Sgt Motena entertained a reasonable suspicion. In order for a suspicion to be reasonable, Cst Motena had to investigate the essentials relevant to the offence. Steps have to be taken to have the suspicion confirmed in order to make it a reasonable suspicion before a peace officer arrests.⁴¹ To test if the suspicion is reasonable is to be tested with reference to "an investigation into the essentials relevant to the particular offence before it can be said that there is a reasonable suspicion that it has been committed."⁴² This requirement is self-evident.⁴³ In *Olivier v Minister of Safety and Security & Another*⁴⁴ the Court remarked that with crimes "where means rea is a requirement, a police officer should at least endeavour to ascertain the mindset of an accused when considering the crime which the accused is suspected of committing."

[84] Cst Motena testified that he did ask Mr Xulu why he had shot Mr Rodriguez. Cst Motena's evidence was that Mr Xulu provided no answer to this question. Mr Xulu disputes Cst Motena's version. Mr Xulu testified that he told Cst Motena that he had shot someone at the corner of Lily and Abel, showed Cst Motena the gun and explained that he had been the victim of an attempted robbery. The Court is confronted with a dispute of fact in this regard.

[85] All the objective evidence supports Mr Xulu's version. The location of the arrest, the limited time lapse between the shooting and the distance between the site of the shooting and where Mr Xulu was arrested all support Mr Xulu's version that he was not fleeing the scene, but on his way to report the issue to the police.

[86] Cst Motena's version is that Mr Xulu immediately stated that he had shot someone, showed him the gun and could even state where the shooting had occurred, on the corner of Lily and Abel. It is improbable that Mr Xulu would explain the location and provide the gun and acknowledge the shooting and not explain why he had shot Mr Rodriguez. It is so unlikely that the Court finds that the probabilities favour the plaintiff.

⁴¹ *Lifa v Minister of Police and Others* (2020/17691) [2022] ZAGPJHC 795; [2023] 1 All SA 132 (GJ) (17 October 2022) para 34

⁴² *Ramakulakusha v Commander, Venda National force* 1989 (2) SA 813 (V) at 836G-837B

⁴³ *Id*

⁴⁴ 2009 (3) SA 434 (W) at 442A-C

- [87] Cst Motena's version is that Mr Xulu seemed shaken and that is perhaps why he did not explain what had happened. The Court considers that Mr Xulu had the presence of mind to drive in the correct direction towards the police station, to tell the police where the incident had occurred and provide the police with the gun. It is improbable that he had remained collected enough to do all of this – but then was too shaken up to tell the police that he had just been the victim of a robbery.
- [88] Mr Xulu was a credible and a reliable witness. He did not embellish – even when the opportunity existed to do so. He stated what he knew and conceded what he did not. The Court accepts his version as it is supported by the objective evidence. Mr Xulu's version is also more probable. The Court finds that Mr Xulu did tell Cst Motena that he had been the victim of an attempted robbery and had shot his assailant in self-defence.
- [89] Where a suspect offers a defence that could easily be checked there and then, the arresting officer's failure to do so could be a strong indication that his suspicion was not reasonable. Sgt Motena's evidence was clear in this regard; he did not consider motive or mens rea as relevant to the decision to arrest Mr Xulu.
- [90] Sgt Motena was under an obligation to investigate exculpatory explanations before he could form a reasonable suspicion for purposes of a lawful arrest.⁴⁵ The failure to investigate a suspect's explanation is a clear dereliction of duty.⁴⁶ Sgt Motena was obliged to pay attention to Mr Xulu's version of events. Had he done so, the objective facts would have confirmed Mr. Xulu's version. Mr Xulu was arrested a block away from the incident, 20 minutes after the shooting. Mr Xulu had not tried to flee the incident. Mr Xulu was arrested almost halfway between the scene and the police station on his way to the police station. Mr Xulu was not running away as one would expect a criminal to do. Mr Xulu immediately said he had shot someone, showed Sgt Motena the gun, complied with every request from Sgt Motena and cooperated in his own arrest. This conduct is consistent with someone who has just acted in self-defence and wished to report the incident in which they were a victim to the police.

⁴⁵ *Sibuqashe v Minister of Police* 2015 JDR 2297 (ECB); *Mabona and Another v Minister of Law and Order and Others* 1988 (2) SA 654 (SE)

⁴⁶ *Id*

[91] Furthermore, where there are witnesses available who profess to be eyewitnesses, an investigating officer should listen to them and analyse and assess critically the quality of their information before arresting a suspect.⁴⁷ There was a crowd at the scene of the shooting. Any of these witnesses could have assisted the investigation. In fact, it is alarming that not one statement was taken. Neither Sgt. Motena nor any other officer conducted this very basic investigation. Sgt. Motena's evidence was that other officers had stayed behind at the scene to speak to eyewitnesses. Yet, no statements were obtained from them.

[92] In *Lapane v Minister of Police and Another*⁴⁸ The Court found that the arresting officer had not considered the reasonableness of the suspect's explanation and had not tried to evaluate its authenticity. It found that the arresting officer had failed to show that he had reasonable grounds for suspicion justifying arrest and had acted overhastily and imprudently. In this regard, it is stated as follows:

“The case law is clear that, in arresting, it is not only the arresting officer's mindset and his objective approach that count; he must also look at the explanations given by the arrestee. He must strike a balance between the two.”⁴⁹

[93] The Court held that -

“What is meant by s 13 of the SAPS Act is that all police officers must act in accordance with the requirements of the Constitution and in doing so must have regard to, particularly, the fundamental rights of every person they are dealing with in the course of their duties. In *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) (1997 (7) BCLR 851; [1997] ZACC 6) in para 60 Ackermann J (writing for the majority opinion) stated:

'Notwithstanding these differences, it seems to me that there is no reason in principle why appropriate relief should not include an award of damages, where such an award is necessary to protect and enforce chap 3 rights. Such awards are made to compensate persons who have suffered loss as a result of the breach of a statutory right if, on a proper construction of the statute in question, it was the Legislature's intention that such damages should be payable, and it would be strange if damages could not be claimed for, at least, loss occasioned by the breach of a right vested in the claimant by the supreme law.'"⁵⁰

⁴⁷ *Sithebe v Minister of Police* 2014 JDR 1882 (GJ) at 191

⁴⁸ 2015 (2) SACR 138 (LT)

⁴⁹ *Id* at paras 28 - 29

⁵⁰ *Id* at paras 28 - 29

- [94] The Court held that there is a constitutional duty on the police officers and public prosecutor(s) handling the case to ascertain the reasons for any further detention of the suspect, and the prosecutor has to place such reasons or lack thereof before Court.⁵¹
- [95] Sgt Motena failed to consider Mr Xulu's defence, let alone investigate it. The investigation would not have been burdensome. Sgt Motena also failed to bear in mind that the provisions he sought to invoke authorised drastic invasive action.⁵²
- [96] The Court is aware that the police are not required to have a fully completed investigation at the time of arrest. The Supreme Court of Appeal in *Biyela*⁵³ held that the suspicion need not be based on information that would subsequently be admissible in a court of law. The standard of reasonable suspicion was very low. It had to be more than a hunch; it should not be an unparticularised suspicion. It had to be based on specific and articulable facts or information.
- [97] Mr Xulu's complaint in this matter, however, is far removed from demanding a full investigation. His complaint is that he was the victim. Yet the police discarded his version entirely and locked him up. It is not a request to have done a full blown investigation, but a request that his defence be considered – and inherent in that is a consideration of him as the victim of a violent crime. The fact that Mr Xulu's defence is that of self-defence, means he claims he was the victim of a crime, which triggers certain duties of the police and engages Mr Xulu's rights.
- [98] The case law cited above clearly shows what the police's duties are in forming a reasonable suspicion. These existing duties apply as a matter of course. However, on the facts of this case there was an additional component to Mr Xulu's rights, as he claimed to have been the victim of a crime. A person who claims to be the victim of a crime has the right to be protected by the police and for the police to investigate the crime.

⁵¹ *Emordi and Another v FBS Security Services (Pty) Ltd and Others* 2021 (2) SACR 451 (WCC) para 64 and 107

⁵² *Powell NO And Others v Van der Merwe NO and Others* 2005 (5) SA 62 (SCA) para 38

⁵³ *Biyela v Minister of Police* 2023 (1) SACR 235 (SCA) paras 33 – 34, and 37 – 38

[99] Section 205(3) of the Constitution provides that the police are to prevent, combat and investigate crime. Mr Xulu not only had the right all arrested persons can claim prior to arrest, but, in addition, had the right to have the police investigate his claim that he had been the victim of a crime. Mr Xulu's defence provided a complete justification that the police were under a duty to investigate prior to arrest, but it also triggered the police's duty to investigate his claim that he was the victim of a violent crime. The police turned a blind eye to Mr Xulu's claim that he was a victim and failed in their duties to treat him as one.

[100] The police is under a duty to take reasonable steps measures in terms of what is available to them to investigate a crime.⁵⁴ In the circumstances of this case, there was nothing to prevent the police from investigating Mr Xulu's claim. Mr Xulu presented no flight risk and had co-operated with the police. A consideration of Mr Xulu's claim would have required very little from the police. The witnesses were one block away from the location where Mr Xulu was arrested. The evidence before the Court was that the police were taking statements from the crowd at the scene of the shooting. The cartridge cases were found on the street next to where Mr Xulu's car was parked. It would have been very easy to determine that the scene of the crime was in fact just outside Mr Xulu's home. None of these steps are extravagant. These steps would not have been time consuming or costly. However, they did require a consideration of Mr Xulu as a victim and not a suppression of his version.

[101] The police did none of this and in this way failed in complying with their duties under section 205 of the Constitution. Instead, the police arrested Mr Xulu. Not only was Cst Motena's suspicion not reasonable as he excluded Mr Xulu's version entirely, but also as Cst Motena failed in his duties to investigate Mr Xulu's claim that he had been the victim of a robbery. For all these reasons, the initial arrest and police detention⁵⁵ were unlawful.

Quantum

⁵⁴ AK v Minister of Police (CCT 94/20) [2022] ZACC 14; 2022 (11) BCLR 1307 (CC); 2023 (1) SACR 113 (CC); 2023 (2) SA 321 (CC) (5 April 2022) para 86

⁵⁵ Tyokwana at 600G

[102]The Court must not award damages to enrich Mr. Xulu, and it must do so to deter and prevent future infringements of fundamental rights by organs of the State. Damages are a gesture of goodwill to the applicant, and they do not rectify the wrong that took place. Money is a crude solatium for a deprivation that "in truth can never be restored and there is no empirical measure for the loss."⁵⁶

[103]The relevant factors the Court must consider are (a) the circumstances under which the deprivation of liberty took place, (b) the conduct of the defendants, and (c) the nature and duration of the deprivation.

[104]Mr Xulu was arrested on his way to the police station to inform them that he had just been the victim of an attempted robbery and shot someone in self-defence. He was arrested despite trying to explain this to the police. The police then presented the statement of Mr Sampson as evidence when it was not and suppressed Mr Xulu's defence to the charge against him. The police persisted in their reliance on the statement of Mr Sampson and at no stage informed the prosecution of this defence.

[105]The astounding position of the police on the stand was that it was not their job to inform the prosecution of Mr Xulu's defence. It is most certainly their job – it is their public duty to inform the prosecution of all relevant facts. The case law on this is clear and trite. To the date of the hearing of the damages' claim, there was not one glimmer of recognition of the impact of their omission on Mr Xulu's life. The police not only suppressed Mr Xulu's defence, they conducted a wholly inadequate and shoddy investigation and delayed the investigation for months on end with no reasonable explanation for the delay. These factors compound the injustice which Mr. Xulu suffered.

[106]As to the nature and duration of Mr. Xulu's detention, Mr Xulu's detention was delayed for three months as a result of the COVID-19 pandemic. This period is detracted from Mr Xulu's period of detention as it is not immediately clear to the Court that the pandemic would have been foreseeable to the police, and even if it were, there are policy considerations which mitigate against including this period in the calculation of Mr Xulu's detention.

⁵⁶ Mahlangu para 50 quoting with approval *Minister of Safety and Security v Seymour* [2006] ZASCA 71; 2006(6) SA 320 (SCA)

[107] Mr Xulu was therefore detained for a total of 24 months – after the three months caused by the Covid pandemic is deducted.

[108] This was the first time Mr. Xulu had ever been arrested in his life. The arrest and detention shocked and traumatised him. Mr Xulu explained the inadequacy of the food he received, the assaults he suffered at the hands of other inmates and the fear he lived in whilst detained. He was separated from his family, including his youngest daughter, who relied on him for medical attention, for more than two years. He explained to the Court that knowing he was in jail whilst she was denied medical care, which she relied on him to access, broke his spirit. He was moved to Johannesburg Prison, where he lived in constant fear of the gangs. In fact, he escaped a violent fight by hiding under his bed. He still bears a scar on his face as a result of this fight. He was so shocked that he lost consciousness and awoke in hospital. It appears that Mr Xulu suffered a mental breakdown and was hospitalised and treated for this for more than two weeks. He explained he was hungry, scared and cold. He lost more than two years of his life.

[109] It weighs with the Court that Mr. Xulu was arrested and detained shortly after suffering a traumatic robbery. He did not receive the protection one would hope for from the police as a victim after an attempted robbery and instead was detained as a criminal.

[110] The detention must have compounded this trauma. He lost his earning capacity and his family. His wife moved away and on with her life, and he can no longer be a father to his children in the way he was before. His detention destroyed his personal life.

[111] The police did not dispute this evidence.

[112] The Court has regard to the quantum in other cases. In *Mtolo vs the State*⁵⁷ the Court granted an award of R3 367 200 for a period of detention of two years and eight months. Mr. Mtolo suffered a public arrest in the presence of his fellow employees, some of whom lived in the same area in which he resided. He was manhandled by his arrestors and testified that he was embarrassed about what

⁵⁷ *Mtolo v Minister of Police* (10144/2015) [2023] ZAKZPHC 86 (23 August 2023)

occurred and that such conduct impaired his dignity. He felt that his fellow employees would now always regard him as being a criminal. The plaintiff testified further that the conditions under which he was initially detained at the two police stations were, simply put, disgusting.

[113] In *Latha and Another v Minister of Police and Others*⁵⁸ the plaintiff received an award of R 3.5 million after they were detained for six years and 11 months in squalid conditions. Whilst incarcerated, they were viciously assaulted and tortured by members of the police.

[114] In *Zealand v Minister of Justice and Constitutional Development*,⁵⁹ Mr Zealand was detained for four years and ten months, for which he received R 2 million in damages with a present value of R 3.5 million.

[115] It is not a mathematical calculation. It is not appropriate to work out the median per month that our courts have granted and apply that to this matter. Instead, the Court must weigh the impact of damages claims on the State's pocket and the importance of ensuring the vindication of a right as fundamental as that of liberty whilst keeping a sense of what other courts have granted as a framework. The Court must also have regard to the particular facts of this case. The other cases are mentioned as a guide so that the Court treats them like cases alike, even though there will never be a perfect fit.

[116] The Court believes in light of the factors considered above, Mr Xulu was detained for a lengthy period in horrendous conditions when he was, in fact, the victim of a violent crime. The cases above relate to longer periods of detention, but are dissimilar as none of them contended with accused person who was also the victim of an attack. With regard to the particular facts of the case, Mr Xulu is entitled to damages in the amount of R 2.5 million for the period of his subsequent detention.

[117] In relation to the initial detention, Mr Xulu testified that he was given dry bread and juice. He was initially detained in a dirty cell with ten other suspects whom he feared. He could not believe a human being could be kept in such a place. He was

⁵⁸ 2019 (1) SACR 328 (KZP)

⁵⁹ 2008(4) SA 458 (CC)

given dirty blankets with ticks to keep him warm. The first two nights, he did not sleep at all. He feared for his family being without their provider. He could not wash at all during his initial detention. The figures awarded by our courts differ in relation to this type of detention. The Constitutional Court awarded Mr De Klerk received R 300 000 for eight days in detention, in 2019. The Court awards Mr Xulu R 100 000 for his unlawful arrest and his initial detention.

[118] Lastly, in relation to costs, costs should follow the result. Mr Xulu has been successful and is entitled to his costs. The plaintiff seeks the costs of the suit on a punitive scale. The plaintiff's counsel submits that the conduct of the first defendant's functionaries has been dismal. It appears that the first defendant all along had a legible notice of rights but withheld it until the day when the plaintiff was being cross-examined. This clearer copy was then presented as a basis to suggest that the plaintiff had lied under oath when he said he only signed one document. This, however, was not his evidence. His evidence was that he could not see his signature on the illegible copy.

[119] The Court was informed that the plaintiff's team had repeatedly asked for better copies of the papers. To be presented with a better copy, during the plaintiff's cross-examination for the first time, is trial by ambush. The Court's displeasure is noted in its punitive costs order.

[120] The Court has considered the claim of malicious prosecution. For reasons set out above, the prosecution acted on flawed information received from the police. The decision to prosecute was not unreasonable on the facts placed before the prosecution. No argument has been made that the police's conduct also caused the prosecution to be malicious. On this basis, the Court dismisses the malicious prosecution claim.

Order

[121] As a result, the following order is granted:

- a) The first defendant is to pay R 2.6 million for Claim A (wrongful arrest), Claim B (initial detention), and Claim C (subsequent detention)

- b) The first defendant is to pay interest on the aforesaid sum at the mora interest rate of 7% per annum from 1 November 2021 being the date of service of summons to the final date of payment.
- c) The first defendant is to pay interest on the taxed costs from date of allocator by the Taxing Master to date of final payment.
- d) The claim for malicious prosecution, Claim D, is dismissed.
- e) The first defendant is to pay the costs of the suit on the attorney and client scale.

I de Vos
Acting Judge of the High Court

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email.

Counsel for the Plaintiff:	J van Rooyen
Instructed by:	K Ndebele Attorneys
Counsel for the Defendants:	N Sibanyoni
Instructed by:	State Attorney
Date of the hearing:	2 - 6 May, 19, 21, 22 and 23 June 2023
Date of judgment:	13 September 2023