**IN THE HIGH COURT OF SOUTH AFRICA**

**KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case No: AR 621/19

In the matter between:

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| **ELLIOT DELANI GCUMISA** | **FIRST APPELLANT** |
| **ELLIOT DELANI GCUMISA** | |
| **obo CEBISILE GCUMISA** | **SECOND APPELLANT** |
| **SITHULILE MSOMI** | **THIRD APPELLANT** |

and

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| **MINISTER OF POLICE** | **RESPONDENT** |

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**ORDER**

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**On appeal from:** Pinetown Magistrates' Court (A Kirsten sitting as court of first instance):

1. The appeal is upheld with costs.
2. The orders of the learned magistrate are set aside and substituted with the following:

'1. Judgment is granted in favour of the plaintiffs as follows:

(a) First plaintiff is awarded damages as follows:

(i) For unlawful search in the sum of R40 000;

(ii) For unlawful arrest and detention in the sum of R60 000;

(iii) For malicious prosecution in the sum of R80 000;

(iv) For assault in the sum of R25 000.

(b) Second plaintiff is awarded damages as follows:

For unlawful arrest and detention in the sum of R30 000.

(c) Third plaintiff is awarded damages as follows:

For unlawful arrest and detention in the sum of R30 000.

2. Interest on the above-mentioned amounts, calculated at the legal rate as from 14 days after the judgment date, to wit, 12 August 2019, to date of final payment.

3. Cost of suit together with interest thereon, calculated at the legal rate as from 14 days after allocator to date of payment'.

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**JUDGMENT**

**Delivered on:**

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**Mngadi J (Balton J concurring):**

[1] The three appellants appeal against the judgment of the magistrate of Pinetown (Ms A Kirsten) in a delictual claim for damages. The first appellant instituted an action for damages in which he claimed the following: R50 000 for the unlawful search of his residence, R100 000 for his unlawful arrest and detention, R100 000 for assault, and R100 000 for malicious prosecution. The second and third appellant each claimed R50 000 for their unlawful arrest and detention. The leaned magistrate heard the matter. She awarded damages of R5 000 each to the second and third appellants. She awarded R25 000 to the first appellant for the assault. She ordered the awards to bear interest from the date of judgment, and ordered each party to bear their own costs. The appeal is directed at, in the case of the first appellant, the failure to award damages for the unlawful search, for his unlawful arrest and detention, and for malicious prosecution. In the case of second and the third appellants, the appeal is against the quantum awarded. The respondent abides by the decision of this court.

[2] The three appellants are members of a family. The second appellant is the seven (7) year old biological daughter of the first appellant. The third appellant is the partner of the first appellant. The respondent is the Minister of Police, sued in his representative capacity as the employer of the members of the South African Police Service.

[3] The claims of the appellants arose out of an incident, which took place on 10 March 2009. The appellants adduced evidence from the first and third appellants as well as from Mr Wanda Mbhele(Mbhele). The respondent adduced evidence from Sergeant Sabelo Mathonsi (Mathonsi) and Sergeant Duduzi Nzama (Nzama). Mathonsi at the time of the incident used the surname of Nkosi.

[4] The evidence of the witnesses presented the conflicting versions of the parties. Documentary evidence in the form of a doctor's medical examination report (J88) relating to the first appellant, police witness statements of both Mathonsi and Nzama, extracts from the Occurrence Book (OB) and the cell register of the police stations covering the dates and times in question, the copy of the cover page of the police docket, and extracts from the investigation diary in the police docket formed part of the evidence.

[5] I prefer for purposes of this judgment to summarize firstly the evidence of Mathonsi and Nzama. Mathonsi testified as follows. He was at the material time a police officer attached to the Canine Police Dog Unit. He was based at the Umhlali Police Station, but they operated throughout the Durban area and its surrounding areas. On 10 March 2009 he was on duty and he was in a police uniform. He received information from his commanding officer, Captain Dlamini (Dlamini), of a man in unlawful possession of a firearm. The man was in the Marianhill area and was a member of the Community Policing Forum (CPF). Dlamini had received the information from the Crime Intelligence Unit, and set up the operation . The operation involved a number of police officers and a number of police vehicles. The members of the Crime Intelligence Unit were to point out the residence of the man with a firearm. They proceeded to Marianhill and the Crime Intelligence members pointed out the house. He and Nzama approached the house, while other police officers provided cover outside the house. He knocked on the door. The first appellant opened the door. He and Nzama

introduced themselves, and explained the purpose of their visit. He and Nzama entered into the house, and the first appellant allowed them. The house was a one-roomed structure. The first appellant was alone in the house. The first appellant gave them permission to search the house. He started by searching under a couch. The couch had legs and it was about 5 cm from the ground. He found a firearm under the couch. The firearm was not completely concealed. The first appellant was standing in the room, watching. The firearm was a small firearm. It had a magazine in it and five rounds of live ammunition. The appellant told him that he got the firearm from a member of the public who was misbehaving with it. The first appellant did not have a licence or permission to possess a firearm. He arrested the first appellant. He retained the firearm as an exhibit. He took the appellant to the Marianhill Police Station. He charged him for the unlawful possession of a firearm and detained him in the police cells. The first appellant did not have any injuries.

[6] Mathonsi denied that the first appellant was not at home when the police arrived. He denied that the police found the second and the third appellants in the house. He denied that the police called the first appellant to come to the house. He denied that the police arrested the second and the third appellants and told the first appellant that they would only release the second appellant and the third appellant after the first appellant has come to them. He denied that they arrested the second and third appellants and took them to Marianhill Police Station. He denied that they assaulted the first appellant. He testified that he told Dlamini that he found the firearm. He confirmed that, as stated in his police statement, the firearm was a Luga pistol PA83 with serial number BA1283, with one magazine and five rounds of 9 mm calibre ammunition. The statement records that when the first appellant was asked about the firearm, he did not answer but kept quiet. Mathonsi said that he notes that the first appellant, in the morning of 11 March 2009, was taken to court and due to the injuries was sent to hospital, but he insisted that the first appellant had no injuries when he arrested him and when he placed him in the cells at about 02h00 on 11 March 2009. He said that the OB and the cell register contained entries that the first appellant did not have any injuries. He admitted that some injuries on the J88 appear to have been caused

by handcuffs. He said that he removed the handcuffs from the first appellant when he detained him in the police cells. He could not deny that the first appellant was treated in the Westville prison hospital from 11 March 2009 to 19 March 2009. He denied that he was falsely linking the firearm to the first appellant because they had assaulted the first appellant, while demanding that he produced a firearm. He denied that they took any property belonging to the first appellant including a watch, a V360 Motorola cell phone, a pair of boxing gloves, a teddy bear and a sum of R10 000 cash.

[7] Nzama corroborated the version of Mathonsi. He testified that while Mathonsi was searching the house, he does not know whether the first appellant was standing or was seated. He said that they arrived at the first appellant's house at about 00h30. He does not remember where Mathonsi started searching in the house. He remembers Mathonsi saying that he has found a firearm under the sofa. He saw the firearm but he cannot remember its colour. The first appellant, when asked about the firearm, kept quiet.

[8] The copy of the outside cover of the docket shows that the first appellant was found not guilty and discharged on 10 September 2009. A copy of the notice of constitutional rights shows that it was completed at 02h00 on 11 March 2009. The copy of the docket further shows that the offence was allegedly committed at 00h30 on 11 March 2009. The charges were for the unlawful possession of a firearm and ammunition. The OB entry made at 2h20 records the arrest of the first appellant. Entries in the OB and cell register visitations show that the first appellant had no injuries and that there were no complaints from those detained in the cells. The entries show that it was at 03h20 when Mathonsi placed the first appellant in the cells. At 08h00, the first appellant was booked out and taken to court. The copy of the outside cover of CAS 228.03.2009, which case was for the assault and theft against the police, indicates that the State declined to prosecute.

[9] The first appellant testified as follows. He was self-employed, operating a tuck- shop and making burglar guards. He was residing with the second and third appellants. He was a member of the Community Policing Forum (CPF). He had gone with a complainant to resolve a domestic violence matter. He later received

a call from his wife's cell phone. The caller, a man, asked him to return to his home. The caller said that he was a police officer. He told the caller that he would come to the police station in the morning. The caller said that if he did not come, they would take his wife and his child. He then hurried home. He again received a call and the caller said that they have taken his wife and his child to the police station. He went to the home of Wanda Mbhele, where he woke up Mbhele and asked him to transport him to the police station. Mbhele agreed and they got into the motor vehicle. He then asked Mbhele to drive via his house. When they approached his house, he saw that the doors were open. He saw six men sitting under a tree next to the gate. He alighted from the vehicle. He went past the men and greeted them. The men did not respond. He headed for the house. The men then grabbed him before he reached the house. They held him and handcuffed him behind his back. One of them said through a radio 'you can now take them back because we have caught him'. The men sat him down. He saw a number of police vehicles approaching. They searched Mbhele, and his vehicle, and thereafter chased Mbhele away. He saw the second and third appellants getting out of one of the police vehicles. The second appellant had covered herself with a blanket.

[10] The first appellant testified that the police officers demanded that he produce a firearm. He told them that he did not possess a firearm. They said that he would have to buy one to give it to them. They started to assault him, and he cried for help. They continued to assault him, and thereafter placed him under arrest. They continued to demand that he produce a firearm. They said that they were taking him to the police station. They arrived with him at the police station but parked the vehicle on the premises. One policeman got out to find out about an isolated spot where they could take the first appellant as he was refusing to produce the firearm. He came back and said that he knew the spot. They took him past Marianridge to the spots ground where they took him out of the vehicle. They questioned him about the firearm. He denied any knowledge of a firearm. They then again assaulted him. They hit him in his face, on his chest and his body whilst he was handcuffed. They were kicking him and hitting with clenched fists. He asked them not to kill him and apologized to them. They said that he must produce a firearm. He agreed to produce a firearm although he did not have

the firearm. They stopped assaulting him, and took him to the police station. He was placed in the cells at the Marianhill Police Station. After about two hours, he was booked out and was taken to Kwandengezi Police Station cells. In the morning, he was taken to the magistrates' court.

[11] The first appellant testified that when his case was called, the magistrate saw that he was walking with difficulty. He asked him about it. He told the magistrate that the police assaulted him. The magistrate told him that he would order that he be taken to Westville Prison hospital to receive medical treatment, and he was duly taken there. The doctor examined him and he received medical treatment. He remained in hospital until 19 March 2009. His attorney arranged a bail hearing, and he was released on bail. He went to open a charge of assault and theft against the police. He was given a J88 medical form for completion. The doctor completed it after he examined him and he took it back to the police station. He continued to enquire about the progress in his case, and was told that a police officer cannot simply be arrested like civilian people. The case against him was heard. The court found him not guilty and he was discharged. He and his witnesses did not testify. The police, when they were assaulting him, said that he was stubborn because he was a boxer. They had seen photos of him in the house.

[12] The first appellant under cross-examination testified that his property consists of two two-roomed structures, one of which has a spare room attached. In the one structure there is a bedroom and a kitchen. In the bedroom, there is a big couch. He often sits on the couch. He had a metal box where he kept money in. He was a member of the CPF. He knew the police officers at Marianhill Police Station. He did not know the police officers who arrested and assaulted him. He denied the version of Mathonsi and Nzama. He said he that was not educated. He signed the documents which he was asked to sign. He was scared that the police would again beat him up. He told other members of the CPF what had happened. The treatment he received at the hands of the police caused him to quit as a member of the CPF. In the morning at the police station, he told a police officer (he was not sure whether it was Khumalo) that he had sustained injuries when the police assaulted him.

[13] The J88 medical examination report of the first appellant indicates that it was completed on 19 March 2009. It records that the first appellant was born on 9 October 1967. He was 170 cm in height, with a weight of 68,6 kg. Under clinical findings, the following is recoded:

'1. Severe headache and pain when palpating head.

2. Tender bilateral cheekbones with swelling.

3. Lower lip swollen and lacerated (3-4 cm).

4. Chest and upper sides very tender & coughingbecomes painful.

5. Left back of thigh is tender and painful.

6. Parallel pink and scabbed bruises of right and left wrists regions, very tender when prodding the area'.

The doctor in conclusion noted 'consistent with forceful blunt trauma'.

[14] Wanda Mbhele testified as follows. On 10 March 2009 at about 22h45, he was sleeping at his home. The first appellant waked him up and told him that the police have taken his wife and child away from his home in connection with the possession of a firearm. He asked him to transport him to the Marianhill Police Station. He agreed to the assist the first appellant. They got into the vehicle to go to the police station. The first appellant asked him to start at his home. They drove to the house of the first appellant, where they found six men sitting in the yard. The men held the first appellant and handcuffed him. Two of the men came to him. They searched him after they ordered him to get out of the vehicle. They also searched the vehicle. One police officer in uniform asked him whether he was the person who brought the first appellant. They instructed him to drive away. He saw a number of police vehicles parked near the residence. He saw the third appellant and the child alighting from a police vehicle. The police vehicle had dogs in it. He reversed into the main road and drove away.

[15] The third appellant testified that at 22h15 on 10 March 2009, police arrived at the residence. The first appellant is her partner and they have children. The first appellant was not present as he was attending to a complaint as a CPF member. The police knocked on the door and she opened the door. The police

instructed her to open the burglar guard. They wanted to get into the house. About six police officers entered the house. Others proceeded to the bedroom and others remained in dining room. They searched the house. They asked for the first appellant. Others opened the fridge. One took her V360 Motorola cell phone and watch, which was on the TV. He put the watch into his pocket. He tried to use the cell phone to call the first appellant but it had no airtime. He then asked her to give him her cell phone. She gave him the cell phone. They called the first appellant and asked him where was he. They told her that they would take her with them because the appellant was not there so that the first appellant will come to them. They said that they had been there for more than five minutes. They took her and the child and put them in a police vehicle. They drove them to the Marianhill Police Station. They parked the van on the police station premises and kept them in the police van.

[16] The third appellant testified that after about an hour later, one police officer returned to the vehicle. He said that they have found the criminal - referring to the first appellant. They took her and the child back to the residence. When she arrived and got out of the policer van, she saw the first appellant being taken to a small room. The police were kicking and hitting the first appellant. Wanda Mbhele was in the yard with police officers who were searching him. The child cried when she heard the first appellant crying for help. One police officer insulted her and told her to keep the child quiet. She took the child to her parental home. When she returned, there was nobody. She found that some of her property was missing in the house. Her cell phone and watch were not returned. It was her first time being arrested and she was very scared. The child was traumatized and struggled with her schoolwork for some time. She would also not sleep well.

[17] The third appellant under cross-examination stated that the police did not show her any firearm recovered from the house. She was the only person in the house. If the police had found a firearm, they would have questioned her about it and not called the first appellant. She w as put in a van with a dog's cage. She heard the first appellant crying for help in the small room.

[18] The learned magistrate, after analysing and evaluating the evidence, found that:

(a) The first appellant was not present at the time when the police arrived.

(b) The second and the third appellants were present when the police arrived.

(c) The firearm was recovered from the residence of the appellants.

She concluded that the arrest and detention of the first appellant was lawful. This finding led her to the conclusion that the search of the premises and the consequent prosecution of the first appellant were not unlawful.

[19] It is primarily the function of the trial court to take make factual findings. The factual findings must be supported by evidence. Factual findings not supported by evidence are assailable on appeal. See *S v Hadebe & others* 1997 (2) SACR 641 (SCA) at 645e-f; *Rex v Dhlumayo & another* 1948 (2) SA 677 (A) at 690. The learned magistrate's findings relating to the presence of the first appellant in the residence when the police arrived, indicates that she accepted the version of the appellants, and rejected the version of the respondent's witnesses. The police claimed to have obtained permission to search the house from the first appellant. Once it is found that the first appellant was not present, it follows that the search of the house was done without permission, and it was not authorized by a warrant of search. Therefore, it was an unlawful search.

[20] Further, the police claimed that they found the firearm with ammunition under the couch in the presence of the first appellant. Once it is found that the first appellant was not present at the house, it follows that there was no evidence on the basis of which it could be found that the firearm was found in the residence of the first appellant. With no evidence connecting the first appellant to the firearm, his arrest and detention was without a probable cause and it had no basis in law. It was an unlawful arrest and detention.

[21] The finding by the learned magistrate that the first appellant was not present at the residence at the time the police are allege to have found the firearm, leads to an unavoidable conclusion that the police charged the first appellant with false charges. They initiated and pursued the prosecution on charges that were false and which they knew to be false. It constitutes malicious

prosecution on the part of the police. The requirements for malicious prosecution were recently restated in *Minister of Safety and Security v Lincoln* 2020 (2) SACR 262 (SCA) at p270 para20, the plaintiff must establish that the defendant set the law in motion (instituted or instigated the proceedings); acted without reasonable and probable cause; and acted with malice(animus injuriandi), and that the prosecution failed. In the result, the first appellant proved the unlawful search of his house, his unlawful arrest and detention and malicious prosecution. See *Beckenstrater v Rottcher and Theunissen* 1955 (1) SA 129 (A) at 136A; *Minister of Justice and Constitutional Development v Moleko* 2008 (3) All SA 47 (SCA) para 63-64. In *De Klerk v Minister of Police* 2020 (1) SACR 1(CC) the police were liable for unlawful detention after remand where the magistrate failed to consider his release on bail wherein further detention beyond date of first appearance was not unexpected, and unconnectedly caused by extraneous factors.

[22] There is no appeal against the learned magistrate's finding on the assault of the first appellant. There is also no appeal against the award of damages in the amount of R25 000 for the assault. The second and the third appellants appeal against the award of damages of R5 000 each for their unlawful arrest and detention.

[23] It is trite that the award of damages'... is in the discretion of the trial court but that [the] court must exercise its discretion reasonably'. *(Dikoko v Mokhatla* [2006] ZACC 10; 2006 (6) SA 235 (CC) para 57.) The appeal court may interfere with the award made by the trial court if

'... the trial court had misdirected itself with regard to material facts or in its approach to the assessment, or having considered all the facts and circumstances of the case, the trial court's assessment of damages is markedly different to that of the appellate court.. .'. *(Dikoko (supra)* para 57; see also *Minister of Safety and Security v Augustine & others* (2017] ZASCA 59; 2017 (2) SACR 332 (SCA) paras 25-26; *Minister of Police v Dlwathi* (2016] ZASCA 6 para 8.)

In assessing quantum, it is acknowledged to clearly be a difficult task, and not an exact science. See *Sandler v Wholesale Coal Suppliers Ltd* 1941 AD 194 at 199.

[24] Visser and Potgieter *Law of Damages* 3 ed at 545-8 states the following

factors that generally play a role in the assessment of damages: ' the circumstances under which the deprivation of liberty took place; the presence or absence of improper motive or 'malice' on the part of the defendant; the harsh conduct of the defendant; the duration and nature(e.g. solitary confinement or humiliating nature) of the deprivation of liberty; the status, standing, age and health and disability of the plaintiff; the extent of the publicity given to deprivation of liberty; the presence or absence of an apology or satisfactory explanation of the events by the defendant; awards in previous comparable cases; the fact that in addition to physical freedom, other personality interests such as honour and good as well as constitutionally protected fundamental rights have been infringed; the high value of the right to physical liberty; the effect of inflation; the fact that the plaintiff contributed to his or her misfortune; the effect an award may have on the public purse; and, according to some, the view that *actio iniuriarum* also has a punitive function.'

It is useful but dangerous to consider and rely on awards made in previous comparable cases as a useful guide bearing in mind that determination of non-patrimonial damages lies in the discretion of the court. See *Minister of Safety and Security v Seymour* 2006 (6) SA 320 (SCA) para 17.

[25] In a constitutional state, the award of damages seeks to restore the dignity and respect to the injured person. The compensation is required to be fair and just. It is in the interest of the public that awards, in a country with limited resources, be kept within bounds. Each case must be decided on its own unique facts. See *Viviers v Jentile* [201OJ JOL 26564 (GNP) at 7. In most cases, a single continuous incident may involve an unlawful search, unlawful arrest and detention, assault and malicious prosecution. It results in some interconnectivity and overlap, which must be considered to avoid duplication in the awards. See *Southern Insurance Association v Bailey NO* 1984 (1) SA 98(A) at 113E-F; *Minister of Safety and Security v Tyulu* 2009 (2) SACR 282 (SCA); *Minister of Safety and Security v Seymour (supra); Rudolf & others v Minister of Safety and Security & another* [2009] ZASCA 39; 2009 (2) SACR 271 (SCA) paras 26-29.

[26] The second and third appellants were removed from their home in the middle of the night. Their removal was done by a group of police officers. They

were detained in a police van with a dog's cage in it. They had done nothing necessitating their removal.

They were not accused of having committed any offence. They were removed to force the first appellant to submit himself to the police. The third appellant was insulted and called names by the police. They witnessed the ill treatment meted out to someone who was a father figure to them. The second appellant was a seven (7) year old child. The police exposed her to their unbecoming behaviour. Their night was disrupted. The police have no authority to interfere with a person who is not suspected of having committed a crime. The learned magistrate did not set out the basis for the determination of the award of R5 000 for the second and third appellants. She took into consideration that they were detained for about an hour, and that they were kept in a police van. In my view, what happened to the second and third appellants is more than that. They were put through a traumatic experience. In *MR v Minister of Safety and Security & another* 2016 (2) SACR 540 (CC) para 57, the court held that an arrest is an invasive curtailment of a person's freedom, which is a traumatic experience. The incident left them with unforgettable memories relating to police behaviour. Having considered awards made in previous similar cases, in my view, the award made by the learned magistrate falls short of a fair compensation. In my view, an award of R30 000 each for the second and the third appellant is a balanced, fair and just compensation for their arrest and detention.

[27] The police invaded and subjected to a search the first appellant's residence. The invasion and the search of the residence was as a result of information obtained by the police. The police in an organized operation involving a senior police officer carried out the operation. The residence was searched without the consent of the first appellant or of the person in charge of the residence at the time. In my view, the fact that the intention of the police was to put an end to the circulation of an unlawfully possessed firearm would have counted in favour of the police. However, one cannot discount that this started the unlawful arrest and detention of the first appellant as well as his assault and the malicious prosecution. It also led to the unlawful arrest and detention of the second and third appellants. In my view, the invasion of a private residence at

odd hours is a serious invasion of the privacy of a person, which should be jealously guarded. In *Minister of Police v Samanithan* [2020] ZAECGHC 62 damages were awarded for two unlawful searches conducted by the police in the sums of R45 000 and R40 000 respectively.

Having considered the facts of the case and awards made in previous similar cases, in my view, a balanced, fair and just award is an amount of R40 000 for the unlawful search.

[28] The unlawful arrest and detention of the first appellant commenced at about 24h00. It ended the following day when the magistrate ordered the further detention of the first appellant. However, the further detention was initiated by and was at the instance of the police. The initial arrest and detention of the first appellant was to enable the police to interrogate and torture the first appellant. It resulted in the first appellant being severely assaulted. In his injured state, the first appellant was detained in the police cells. The arrest and detention was a serious invasion of the first appellant's personal rights. It was motivated by an ulterior motive. It was perpetrated by the police who are supposed to uphold the law. Other police officers colluded with the police officers who were carrying out the unlawful arrest and detention by failing to take note that the first appellant was injured and to assist him. They failed him, and were it not for the intervention by the magistrate, no medical assistance would have been rendered to the first appellant. The police, rather than to be ashamed of what they had done to the first appellant, pursued a false charge against him. In *Minister of Police v Hattingh* [2020) ZAECGHC 79 an award of damages in the sum of R50 000 for unlawful detention lasting two hours was upheld on appeal. In *Van Alphen v Minister of Safety and Security* [2011] ZAKZDHC 25 damages in the sum of R70 000 were awarded where the matter was on the court roll for six months before the charges were withdrawn. In *Rautenbach v Minister of Safety and Security & others* [2013) ZAGPPHC 387 damages in the amount of R150 000 were awarded where the matter was on the court roll for six months before the charges were withdrawn. Having considered awards made in similar cases, the balanced, fair and just compensation for the unlawful arrest and detention of the first appellant is the sum of R60 000.

[29] The prosecution of the first appellant was based on false charges. Mathonsi and Nzama colluded with each other to institute a false charge against the first appellant. It was probably a pre-emptive move to frustrate the first appellant's assault and theft charge against them. Other police officers falsely recorded in the prescribed registers that the first appellant had no injuries. This resulted in the first appellant enduring pain for hours without medical assistance. The laying of a false charge against the first appellant constitutes grossly reprehensible conduct on the part of the police. They intended that the first appellant be convicted and sentenced on a false charge. It resulted in the first appellant being held in police custody until about 19 March 2009 when he was released on bail. The detention of the appellant beyond the date of first appearance in court was connected to the false charges laid against him. The police knew or foresaw and reconciled themselves with the detention of the first appellant beyond the date of first appearance in court. The first appellant remained facing the criminal charge which he had to defend until 10 September 2009 when the court found him not guilty and discharged him. The record of the proceedings before the magistrate who noted the first appellant's injuries went missing. The assault and theft charges opened by the first appellant against the police resulted in the prosecutor declining to prosecute. The first appellant, again due to the vigilance of the trial court, was found not guilty and discharged

[30] In the court a quo, Nzama and Mathonsi persisted in supporting the false charges against the first appellant. They showed no remorse and they did not tender any apology. There is nothing, in my view, that can be said in favour of the police. The attitude of the respondent on appeal to abide by the decision of the court is a well-considered decision. It is incumbent on the respondent to properly investigate the role of Mathonsi and Nzama, and other police officers in the matter for an appropriate action to be taken against them. Malicious prosecution for an ulterior motive or based on malice attracts aggravated damages. See *Masisi v Minister of Safety and Security* 2011 (2) SACR 262 (GNP); *EA & others v Minister of Police* [2019] ZAGPJHC 9. Having considered awards made in similar cases, in my view, a balanced, fair and just compensation for the malicious prosecution of the first appellant is the sum of R80 000.

[31] The learned magistrate ordered that interest at the prescribed rate on the awards would accrue from the date of judgment to the date of payment. The second and third appellant contended that the magistrate erred in that she should have ordered that the interest should accrue from the date of summons. The appellants contend that in terms of section 2A(2)(a) of the Prescribed Rate of Interest Act 55 of 1975 (as amended), the default position is that on unliquidated claims, interest runs from the date of service of demand or summons whichever is the earlier. In my view, the provisions of section 2A (2) (a) are subject to the court's discretion. The court has a discretion to fix the date from and the rate at which interest will accrue on damages. There is no default position which is binding to the trial court. There is no basis for indicating that the learned magistrate exercised her discretion improperly in ordering interest to accrue from the date of judgment. The order is made as part of the assessment of damages, which is within the discretion of the trial court. In my view, it was a just decision.

[32] Lastly, the learned magistrate ordered each party to pay their own costs. There are no reasons furnished in the judgment for the order. It may have been motivated by the findings that the first appellant's residence was lawfully searched, that the first appellant was lawfully arrested and detained and that he was not maliciously prosecuted. Those findings, as set out above, are unsustainable. In my view, there is no basis to deviate from the rule that costs follow the result. The appellants, through a claim for damages, were affirming their constitutional rights. It was partly a matter of principle. The conduct of police on the other hand is reprehensible and exhibited malice and falsehood. The appellants are entitled to the costs of suit.

[33] In the result, the order I would make is the following:

1. The appeal is upheld with costs.
2. The orders of the learned magistrate are set aside and substituted with the following:

'1. Judgment is granted in favour of the plaintiffs as follows:

(a) First plaintiff is awarded damages as follows:

(i) For unlawful search in the sum of R40 000;

(ii) For unlawful arrest and detention in the sum of R60 000;

(iii) For malicious prosecution in the sum of R80 000;

(iv) For assault in the sum of R25 000.

(b) Second plaintiff is awarded damages as follows:

For unlawful arrest and detention in the sum of R30 000.

(c) Third plaintiff is awarded damages as follows:

For unlawful arrest and detention in the sum of R30 000.

2. Interest on the above-mentioned amounts, calculated at the legal rate as from 14 days after the judgment date, to wit, 12 August 2019, to date of final payment.

3. Cost of suit together with interest thereon, calculated at the legal rate as from 14 days after allocator to date of payment.'

**MNGADI J**

I agree and it is so ordered.

**BALTON J**

APPEARANCES

Case Number : AR621/19

For the Appellants : T Ndlovu

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| Instructed by | : Messrs Thami Ndlovu and Associates<br>c/o Mathonsi and Associates<br>PIETERMARITZBURG |
| For the respondent | : EK Shezi |
| Instructed by | : State Attorney (KwaZulu-Natal)<br>DURBAN |
| Matter heard | : 4 September 2020 |
| Judgment delivered on | : 18 September 2020 |