



**IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE DIVISION, MTHATHA]**

CASE NO: 2094/2021

In the matter between:

KHOLISILE JOSEPH NOMPETSHENI

PLAINTIFF

and

MINISTER OF POLICE

1ST DEFENDANT

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

2ND DEFENDANT

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES

3RD DEFENDANT

JUDGMENT

CENGANI-MBAKAZA AJ

Introduction

[1] The Plaintiff issued a combined summons against all Defendants, for damages arising from an unlawful arrest and detention by a member of the South African Police Service. According to the Plaintiff, the claim for damages is based on delict. Consequently, the Plaintiff claims payment for the following damages:

- (a) A sum of R5 000 000.00 for unlawful arrest and detention, impairment of dignity, loss of freedom, deprivation of his movement, pain, suffering and psychological trauma.
- (b) The Plaintiff seeks to have an amount of R800 000.00, for loss of income, from the first, second and third Defendants, jointly and severally, the one paying each other to be absolved.
- (c) Lastly, the Plaintiff demands a payment of R5 000 000.00 for malicious prosecution from the first, second and third Defendants, jointly and severally, the one paying each other to be absolved.

[2] At the close of the Plaintiff's case, the Defendants brought an application for absolution from the instance in terms of Rule 39 (6) of the Uniform Rules of Court. In this judgment, I consider it necessary to give a blow-by-blow account of the events that culminated into this application for absolution from the instance.

The Pleadings

[3] In respect of claim A¹, the Plaintiff alleges that on or around 11 August 2019, at Mtyu Administrative Area in Ngqeleni, the first Defendant unreasonably, unlawfully and without a warrant, arrested him [the Plaintiff]. It is common cause that the Plaintiff's claim is premised on vicarious liability. It is specifically averred that the wrongful acts were committed by the employees of the first Defendant during the course of their employment and whilst in execution of his duties.

[4] As far as claim B² is concerned, the Plaintiff asserts that the Defendants, or one or more of them, knew or anticipated that their conduct would prevent him from generating advantageous income when they committed the acts of unlawful arrest and detention and further prosecution against him. The Plaintiff further asserts that since the time of his arrest, he has experienced financial loss and loss of income, because

¹ Updated index to Pleadings page 7, At para 5

² Page 12-13 of the updated index bundle, At para 17-18

of the reputational damage, he will likely continue to experience significant financial loss in the near future.

[5] In relation to claim C³, the Plaintiff avers that the prosecutor instigated criminal proceedings against him without reasonable and/ or probable cause and in doing so acted with malice or *animo iniurandi*.

[6] On 11 November 2021, the Defendants filed a plea and made a bold denial of events as pleaded. This necessitated the Defendants to file an amended plea. In the amended plea the Defendants admit that the Plaintiff was arrested without a warrant. In amplification thereto, the 1st Defendant avers that police officers opened a case docket to expedite an arrest emanating from rape charges of a nine-year-old girl, and that the offence is the one mentioned in Schedule 1. It is further pleaded that the arrest was effected in accordance with the provisions of Section 40 (1) (b) of the Criminal Procedure Act.⁴

[7] The Defendants further deny liability for damages arising from loss of income due to reputational damage against the Plaintiff.

[8] In respect of Claim C, the Defendants specifically plead that the prosecutor continued to pursue the prosecution of the Plaintiff based on the statements made by the state witness. In amplification, the merits pleaded are identical to those pleaded in the first claim.

[9] In a pre-trial conference held on 11 May 2022, the parties agreed that the Plaintiff bears a duty to begin, and each party bear the onus of proof on such aspects where the onus lies with them.⁵ The parties further agreed that there will be no need for separation between the merits and quantum. The trial proceeded on the said basis.

³ Updated index at page 16 of the particulars of claim, At para 29.

⁴ Act 51 of 1977(the Criminal Procedure)

⁵ Rule 39(13) reads, " Where the onus of adducing evidence on one or more of the issues is on the plaintiff and that of adducing evidence on any other issue is on the defendant, the plaintiff shall first call his evidence on any issues in respect which the onus is upon him and may then close his case.

Plaintiff's case

[10] Prior to his arrest, the Plaintiff, a general labourer, was employed by Xelisile Construction Company, to repair water pipes. The Plaintiff's salary was R4700, 00 per month.

[11] On 11 August 2019, two police officers arrived at his home. He was instructed to go to a police vehicle. The police drove with him and two minor relatives of his, by the names of S [...] and P [...] ('the two minor children') to Ntlaza Hospital. Upon their arrival at Ntlaza hospital, the two minor children and one police officer entered the hospital grounds whilst he was left with one police officer in the car.

[12] A police officer informed him that he was a subject of a rape charge. He categorically denied the allegation. They were then taken home.

[13] On the following day, an investigating officer by the name of Qolomashe took him to the police station. From the police station he was taken to Wellington prison. At the prison, two buccal swabs were taken from him.

[14] Although he could not remember his first appearance in court, he was however certain that he occasionally attended court proceedings. During his appearances in court, the Magistrate informed him of his right to apply for bail but he relinquished his right on several occasions.

[15] The Plaintiff described his incarceration in prison as appalling. According to him he was kept in a cramped cell that could hold no more than seventy-four inmates. He had a fight with another inmate that left him with a broken jaw. He was visibly upset when he testified about his mother who passed away while he was in prison. The Plaintiff claimed that he was never told how she died.

The defendant, if absolution from the instance is not granted, shall, if he does not disclose his case, thereupon call his evidence on all issues in respect of which such onus is upon him."

Cross-examination

[16] During cross examination, the following facts were never placed in dispute, that:

- the victim is the Plaintiff's niece.
- the alleged child victim positively identified the Plaintiff as the person who raped her.
- the two minor children made statements which implicate the Plaintiff to the commission of the offence.
- the victim was allegedly raped on 11 August 2019.
- the doctor who examined the victim on 12 August 2019, noted bruising in the vagina, a bleeding hymen and blood stains in the underwear.

[17] In addition, Plaintiff made various crucial concessions:

- he elected not to bring a bail application.
- the victim's statement reveals that he raped her whilst they were at the forest to collect livestock.
- he had gone to the forest to retrieve livestock but denied being in the presence of the victim or that he sexually assaulted her.
- given the evidence implicating him as a perpetrator of the crime, his arrest and detention were justified.
- considering the nature of the case and the evidence against him, the State was justified to prosecute him.
- his criminal case is still pending at Ngqeleni Regional Court, his next date of appearance was scheduled for 23 June 2023.

[18] With this evidence, the Plaintiff closed his case.

Absolution from instance

[19] Following the conclusion of the Plaintiff's case, the Defendants' counsel informed the court of his preparedness to request the dismissal of the Plaintiff's

claims.⁶ The Plaintiff's counsel, on the other hand, sought an indulgence to prepare and address the court at a later instance. Both parties were amenable to submitting written heads of argument and made an undertaking that there would be no need for further addresses thereafter.

[20] The law relating to absolution from the instance is well settled. The test for absolution to be applied by a trial court at the end of a Plaintiff's case was formulated in *Claude Neon Lights (SA) Ltd v Daniel*⁷ in these terms:

“... (W) hen absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff.”

[21] Sufficient evidence is sometimes referred to as ‘*prima facie* evidence’, ‘*prima facie* proof’ or a ‘*prima facie* case’. *Prima facie* evidence is evidence which requires an answer from the other party, and in the absence of an answer from the other side, it can become ‘*conclusive proof*’ and he (on whom lies the burden of proof completely discharges the burden of proof)⁸. The Plaintiff has to establish all the elements relating to a claim to survive absolution because without such evidence no court could find for the plaintiff.⁹ The court is not compelled to make a credibility determination at this point unless the witnesses have visibly broken down and it is obvious that what they have said is not true.”¹⁰

⁶ Rule 39(6) of the Uniform Rules provides that at the closure of the case for the Plaintiff, the Defendant may apply for absolution from the instance, in which event the Defendant or an Advocate on his behalf may address the court and the Plaintiff or an Advocate on his behalf may reply. The Defendant or his Advocate may thereupon reply on any matter arising out the address of the Plaintiff or his Advocate.

⁷ 1976 (4) SA 403 (A) at 409G – H, see Also (*Gascoyne v Paul and Hunter* 1917 TPD 170 at 173; *Ruto Flour Mills (Pty) Ltd v Adelson* (2) 1958 (4) SA 307 (T) G

⁸ *Marine and Trade Insurance Co (Ltd) Van der Schyff* 1972 (1) SA 26 (A) At para 39-40

⁹ *Osmar Tyres and Spares CC V adt Security Pty(Ltd)* [2020] 3 All SA 73 SCA At para 26; *Marine & Trade Insurance Co Ltd v Van der Schyff* 1972 (1) SA 26 (A) at 37G - 38A; *Schmidt Bewysreg* 4th ed at 91 - 2).

¹⁰ See the discussion in *Van Loggerenberg, Erasmus; Superior Court Practice (Jutastat (e-publications, RS 20, 2022), at d1-530 to D1-531*

[22] The court should always take into account that the Defendant has not yet given evidence and testified. Thus, the court should not dismiss the Plaintiff's evidence unless it is glaringly incredible.¹¹

The parties 'contentions

[23] Counsel for the Defendants contends that absolution from the instance is at this stage justified because the arresting officer admits that they acted in terms of Section 40(1) (b) of the Criminal Procedure. He argues that nothing was presented to gainsay this point and further Plaintiff failed to prove the elements of malicious prosecution. The Defendants submit further that no basis was laid on why the third Defendant was sued.

[24] On the other hand, counsel for the Plaintiff argues that the application for absolution from the instance should be dismissed on the basis that the Defendants who bear the onus to prove that arrest and subsequent detention were lawful, presented no evidence to justify this conduct. It is contended on behalf of the Plaintiff that the offence of which the Plaintiff was arrested of falls under Schedule 6 and not Schedule 1 and therefore this requires that a warrant of arrest be first obtained before arrest.¹² Therefore, so the argument continues, the police exercised their discretion to arrest incorrectly. It is further contended that the second and the third Defendant allowed the Plaintiff to remain in custody whilst there was no evidence to convict him. From the date of the arrest until the 5th of December 2022, there were no DNA results from the docket. The second Defendant should have requested that the Plaintiff be released from custody. Alternatively, the third Defendant should have safeguarded the Plaintiff's right to liberty by simply striking the matter off the roll, so he argues.

Applicable Law and Evaluation

[25] To settle the arguments raised it is appropriate, to begin with what the parties must prove on each of the three claims. I now proceed to deal with arrest and

¹¹ *Supreme Service Station v Fox and Goodman (Pty)(Ltd) 1971 (1) ZLR*

¹² Para 34 Plaintiff's heads of argument

detention. It is well settled that police bear the onus to justify arrest and detention.¹³ In *Minister of Law and Order v Hurley & Another*¹⁴, the court remarked as follows,

“An arrest constitutes an interference with the liberty of an individual concerned and it therefore seems to be fair and just to require that the person who arrested or caused the arrest of another person should bear the onus of proving that his action was justified in law”

[26] It is common cause that the arresting officer arrested the Plaintiff without a warrant. Section 40(1)(b) of the Criminal Procedure Act reads,

“A peace officer may without a warrant, arrest any person whom he reasonably suspects of having committed an offence referred to in Schedule I, other than offence of escaping from custody”

[27] The jurisdictional facts for section 40(1)(b) defence were encapsulated in *Duncan v Minister of Law and Order*¹⁵ as follows:

- (i) The arrester must be a peace officer;
- (ii) The arrester must entertain a suspicion;
- (iii) The suspicion must be that the arrestee committed an offence referred to in Schedule 1; and
- (iv) The suspicion must rest on reasonable grounds

[28] In *Mabona and Another v Minister of Law and Order and Others*¹⁶, Jones J remarked:

“.....It seems to me that in evaluating his information a reasonable man would bear in mind that the section authorizes drastic police action. It authorises an arrest on the strength of a suspicion and without the need to swear a warrant, i.e., something which otherwise would be an invasion of private rights and personal liberty. The reasonable man will therefore analyse and assess the quality of information at his disposal critically and he will not accept it lightly or without checking it where it can be checked. It is only after an examination of this kind that he

¹³ *Minister of Police and Another v Du Plessis* 2014(1) SACR 217 (SCA), At paras14-17

¹⁴ 1986 (3) SA 568 A AT 589 E-F

¹⁵ 1986 (2) SA 805 (A)

¹⁶ 1988 (2) SA 654 (SE) 658 G-J

will allow himself to entertain a suspicion which will justify an arrest. This is not to say that the information at his disposal must be of sufficiently high quality and cogency to engender in him a conviction that the suspect is in fact guilty. The Section requires suspicion but not certainty. However, the suspicion must be based on solid grounds. Otherwise, it will be flighty or arbitrary and not a reasonable suspicion.”

[29] In the case under consideration, it has been proved that sergeant Qolomashe was a peace officer, he entertained a suspicion that the Plaintiff committed a rape of a minor child. In terms of the Criminal Procedure Act rape falls under schedules 1 and 6 of the Act. Regrettably, counsel for the Plaintiff overlooked this aspect.

[30] Gleaning from the information that was discovered, the witnesses’ statements, the medical report and very illuminating concessions made by Plaintiff, it is justified to infer on a balance of probabilities that the arrest was based on solid grounds. I therefore, find that the jurisdictional facts for arrest were satisfied.

[31] It is well settled that once the jurisdictional facts for an arrest are present, discretion arises. The general requirement is that any discretion must be exercised in good faith, rationally and not arbitrarily.¹⁷ The point of determination is whether sergeant Qolomashe’s exercise of discretion was within the confines of the enabling legislation. It must be borne in mind that a party who attacks the exercise of discretion where the jurisdictional facts are present bears the onus of proof. The Supreme Court of Appeal in *Minister of Safety and Security v Sekhoto*¹⁸ held:

“Para [46]... once the jurisdictional facts have been established it is for the plaintiff to prove that the discretion was exercised in an improper manner. This approach was adopted in Duncan (at 819 B-D) as being applicable to attacks on the exercise of discretion under Section 40(1) (b).

Para [47], All this and more has already been stated by Hefer JA in Dempsey. I do recognise that the context was somewhat different and that he was dealing with motion proceedings and not trials.

¹⁷ *Masethla v President of the RSA* 2008 (1) SA 566 (CC) At para 23; *The Minister of Safety and Security v Sekhoto* 2011 (1) SACR 315 (SCA)

¹⁸ 2011 (1) SACR 315 (SCA)

Para [48], As to the general principles, he said:

Once the jurisdictional fact is proved by showing that the functionary in fact formed the required opinion, the arrest is brought within the ambit of the enabling legislation and is thus justified. And if it is alleged that the opinion was improperly formed, it is for the party who makes the allegations to prove it.”

[32] In the present matter, it has already been determined that a rape charge falls under schedules 1 and 6 of the Criminal Procedure Act. It is unfounded for counsel to claim that sergeant Qolomashe improperly exercised his discretion by applying an incorrect schedule and arrested the Plaintiff without first obtaining a warrant for his arrest. Plainly, this assertion is not supported by law.

[33] Moreover, the Plaintiff led no *prima facie* evidence to prove that sergeant Qolomashe had an ulterior motive or failed to act logically or arbitrarily in the exercise of his discretion during the arrest. It is quite discernible from the Plaintiff’s testimony that the arresting officer followed the correct procedures¹⁹ and his intention was merely to bring the Plaintiff to justice.

[34] It is well established that an arrest and detention are separate legal processes, so much so that while the arrest may be lawful; the detention may be unlawful; the fact that both result in someone being deprived of her or his liberty does not make them one legal process.²⁰ Gleaning from the pleadings the issue of arrest and subsequent detention of the Plaintiff are intertwined. I have already concluded that the conduct of the police caused no harm in arresting the Plaintiff, it then follows that detention was justified.²¹

¹⁹ *Procedure after arrest: Section 50 of the Criminal Procedure Act provides:* (1) (a) Any person who is arrested with or without a warrant for allegedly committing an offence, or for any other reason, shall as soon as possible be brought to a police station or, in the case of an arrest by a warrant, to any other place which is expressly mentioned in the warrant’. Section 35 of the Constitution provides (1) Everyone who is arrested for allegedly committing an offence has the right-(1)(d) to be brought before a court as soon as reasonable possible but not later than –(i) 48 hours after arrest....’

²⁰ *M R v Minister of Safety and Security* 2016 (2) SACR 540(CC) at para 39

²¹ *Jacobs v Minister of Safety and Security* 2013 JDR 209 (ECG)

[35] No evidence was laid by the Plaintiff in respect of loss of income subsequent to his arrest and detention except for what is contained in the particulars of claim. The only evidence found before the court was that he was working at a construction company and receiving R4700. 00 a month. It is therefore insignificant to dwell much on this point and safe to conclude that I might not find in his favour on the relief sought.

Malicious Prosecution

[36] To avoid a ruling of absolution from the instance, the Plaintiff is required to adduce *prima facie* evidence to prove on a balance of probabilities that the second Defendant, set the law in motion; the instigation of the proceedings was without probable cause; it was perpetuated by malice; and the prosecution failed.

[37] It is well established that ‘setting the law in motion’ requires the ‘active involvement’ of the Defendant in pursuing the prosecution of the Plaintiff.²² The second Defendant admits having set the law in motion but denies other elements of the claim.

[38] In *Minister of Police v Ayanda Marula*²³, the court remarked that malice and lack of probable cause are two distinct elements, both of which must be proved, and neither of which may exist without the other. The court further referred to *Minister of Safety and Security v Tyokwana*²⁴, where the Supreme Court of Appeal dealt with the requirement of animus (malice). In terms of *Tyokwana*, a Plaintiff is required to prove that the Defendant intentionally pursued their prosecution despite knowing that there are no reasonable grounds for doing so. The court held:

“If no reasonable grounds exist, but the defendant honestly believes that either that the plaintiff is guilty, or that reasonable grounds are present, the second element of animus iniurandi, namely consciousness of wrongfulness, will be lacking.”

²² *Minister of Safety and Security v Lincoln* [2020] 3 All SA 341 (SCA) At para 20, *Minister of Police v Marula* Case No: CA 89/2021, At para 25

²³ *supra*

²⁴ [2014] ZASCA 130; 2015 (1) SACR 597 (SCA) At para 15

[39] A Practical Guide to the Ethical Code of Conduct of Members of the National Prosecuting Authority²⁵ sets out the role that prosecutors should play in conducting criminal proceedings on behalf of the state. In terms of the Code²⁶, the prosecutor will proceed only when a case is well founded upon evidence which is reasonable believed to be reliable and admissible and will not continue to prosecute in the absence of such evidence.

[40] In the present matter, the Plaintiff presented no *prima facie* evidence that the prosecution directed her will to prosecute despite a lack of reasonable and probable grounds to do so. Instead, when the docket contents were made known to him in cross-examination, he conceded that the actions of the prosecutor were justified. It must be remembered that as per the discovered documents, the victim consistently implicated the Plaintiff on a rape charge to her younger sister, the schoolteacher, her mother and the police officer. When the doctor examined the victim on the following day of the alleged incident, he noted visible injuries in her genitals. The Plaintiff never denied the docket contents but simply averred that he was not involved in the commission of a rape charge. I conclude that the evidence presented proves no malice on the part of the second Defendant.

[41] The fact that the matter was struck off the roll at some stage cannot be equated to failed prosecution. It is common cause that the rape charge is pending before a criminal court based on the decision of a prosecutor to pursue the charges against the Plaintiff. The last element for a claim for a malicious prosecution is also lacking.

Claim against the Minister of Justice and Correctional Services. (third Defendant)

[42] It has already been established that the Plaintiff was charged with a schedule 6 offence. The Plaintiff's detention after his first appearance in court was dependent

²⁵ *National Director of Public Prosecutors Ethics- A Practical Guide to the Ethical Code of Members of the National Prosecuting Authority [March 2004],*

²⁶ *Para 1.1.1. (c)*

on the Magistrate's orders.²⁷ On perusal of the Plaintiff's particulars of claim, and oral evidence that was presented I could not find the basis upon which the third Defendant was sued. This is also a disquieting feature in the manner in which the Plaintiff's case was presented. In his heads of argument, counsel for the Plaintiff seems to suggest that the Magistrate should have removed the matter from the roll due to lack of DNA evidence. Counsel's focus appears to be on the quantity of evidence that the prosecutor had when she presented the Plaintiff before a Magistrate. He seems to overlook the fact that the quality of evidence at the prosecutor's disposal was enough to withstand the appearance of the Plaintiff before the Magistrate.

[43] In terms of bail legislation, the court was required to detain the Plaintiff unless he presented evidence to show the existence of exceptional circumstances which in the interest of justice justifies his release on bail²⁸. The Plaintiff testified that he relinquished his right to apply for bail on more than one occasion until the matter was struck off roll due to the absence of witnesses. In summation, the Plaintiff presented no evidence to prove that the magistrate who presided in his case when it was placed on the criminal court's roll behaved in an unlawful manner. Having applied my mind to the evidence presented by the Plaintiff, I am not persuaded that I could find in his favour in respect of all claims.

Order

[44] In the result I make the following order:

- 1. The Application for absolution from the instance is granted in respect of all claims against the Defendants. The Plaintiff's claims are dismissed.**
- 2. The Plaintiff is ordered to pay costs.**

²⁷ *Minister of Police and Another v Sipho Zweni*, (842/2017) [2018] ZASCA 97(1 June 2018 (not reportable))

²⁸ Section 60 (11)(a) of the Criminal Procedure Act 51 of 1977

N CENGANI-MBAKAZA

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

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DATE HEARD: 29 May and 21 June 2023

DATE DELIVERED: The judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 18 July 2023 at 10:00