

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, BHISHO)**

CASE NO: 597/2010

**Heard on: 17 November 2015
Delivered on: 28 April 2016**

In the matter between:

LUBAMBO MOYAKHE

Plaintiff

and

**MINISTER OF POLICE OF THE GOVERNMENT
OF SOUTH AFRICA**

First Defendant

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS Second Defendant

**MINISTER OF JUSTICE AND CONSTITUTIONAL
DEVELOPMENT**

Third Defendant

JUDGMENT

MAKAULA J:

[1] The plaintiff issued summons against the defendants for a claim of unlawful arrest and detention and malicious prosecution. On 4 August 2014 the plaintiff withdrew the claim for unlawful arrest tendering the costs incurred by the defendants. The matter proceeded before me in respect of malicious prosecution.

[2] The plaintiff alleges in his particulars of claim that he was arrested on 5 July 2009 and appeared in court on 8 July 2009. The relevant paragraph reads:

“upon appearing before the magistrate for the first time, the said police (officer(s) acting in concert with the prosecutor at the time proceeded to unlawfully, wrongfully and without any justifiable and/or probable cause, oppose the granting of bail in respect of plaintiff as a consequence of which plaintiff was unlawfully detained until 2 July 2010 when charges were withdrawn against (359 nights), due to insufficient evidence.” (sic)

[3] The defendants denied that the plaintiff was maliciously prosecuted.

[4] The parties agreed in the Rule 37 minute and sought an order before me that the issue of liability be determined separately from the issue of quantum in terms of Uniform Rule 33(4). I granted the order.

[5] The plaintiff testified that he was arrested on 5 July 2009 on the allegations of rape and murder (*the offences*). The police officer who arrested him referred to him as Lubabalo. The plaintiff showed him his identity document and told him that he was Lubambo and not Lubabalo. Initially the

investigating officer told him that he was arresting him for rape and assault of Nomthandazo Tikolo (*the deceased*). He ordered him to take off the clothes he was wearing and detained him. The plaintiff covered himself with a blanket. After a while, the investigating officer came back to the police cells and informed the plaintiff that the charge he was facing was no longer assault but murder.

[6] The following morning the investigating officer fetched him from the police cells. He took him to his home. The investigating officer took from the plaintiff's home a 'hood', 2 jackets and a pair of jeans. On the third day, he was charged and taken to court. A day after the plaintiff's appearance in court, the plaintiff was taken to a clinic where blood samples were taken from him.

[7] Subsequent to that, the plaintiff applied for bail. Bail was refused by the magistrate. The plaintiff appeared in court on regular basis. Various reasons would be advanced for the continued postponement of his case ranging from that the court was waiting for his blood results, the docket was missing, the court was awaiting the decision of the Director of Public Prosecutions etc. The case against him was eventually withdrawn on 2 July 2010.

[8] The plaintiff testified that it was apparent that his arrest had no legal or factual basis. The plaintiff testified further that at the time of his arrest, he was the Secretary of South African National Civic Organisation (SANCO), a

Deacon in his church in charge of youth affairs and also a member of a School Governing Body (SGB).

[9] Under cross-examination, the plaintiff stated that he heard that the deceased, before her death, had made a written statement which implicated him. Plaintiff further heard that a certain Tikolo who implicated him in the commission of the offences died subsequent to the plaintiff's arrest.

[10] The plaintiff confirmed that Unathi Delihlazo's statement corroborated the statement submitted by the deceased which implicated him.

[11] The plaintiff conceded under cross-examination that his arrest was lawful but at the same time alleging that it was malicious because the police officers should have investigated his alibi first before arresting and refusing that he be granted bail.

[12] The plaintiff testified further that when bail was refused, he did not appeal because his legal aid representative had advised him that a fresh bail application would have to be made. It transpired that no fresh bail application was brought.

[13] Bulumko Msele testified that he represented the plaintiff during the time he applied for bail in Dimbaza magistrates' court. The plaintiff was charged with rape and murder. Various reasons were advanced by the investigating officer for opposing bail, chief of which were:

13.1 that the state had a strong case against the plaintiff;

13.2 that there was plaintiff's jacket which had blood stains.

[14] He further testified that he advised the plaintiff not to appeal against the refusal of bail and should await the DNA results. The case of the plaintiff was taken over by a colleague in the legal aid office.

[15] Mr Sishuba applied for absolution from the instance arguing that the plaintiff had failed to make out a *prima facie* case in respect of malicious prosecution.

[16] Uniform Rule 39(6) provides that a defendant may at the close of the case for the plaintiff apply for absolution from the instance. The test applicable is akin to the test applied in criminal cases in terms of Section 174 of the Criminal Procedure Act¹ which provides:

“Accused may be discharged at close of case for prosecution

174 If, at the close of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any offence of which he may be convicted on the charge, it may return a verdict of not guilty.”

[17] In *Claude Neon Lights (SA) Ltd v Daniel*², Miller AJA said the following about the test for absolution from the instance:

¹ Act 51 of 1977

² 1976 (4) SA 403 (A) at 409G-H

“ . . . when 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 the 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 (*Gascoyne v Paul and Hunter*, 1917 TPD 170 at page 173; *Ruto Flour Mills (Pty) Ltd v Adelson* (2), 1958(4) SA 307 (T).”

[18] In *Minister of Safety & Security NO & Another v Schubach*³, Zondi JA restated the requirements for a successful claim for malicious prosecution as set out in *Minister of Justice & Constitutional Development v Moleko*⁴ as follows:

- “(a) that the defendants set the law in motion (instigated or instituted the proceedings);
- (b) that the defendants acted without reasonable and probable cause;
- (c) that the defendants acted with malice (or *amino injuriandi*); and
- (d) that the prosecution has failed. ”

[19] The requirements in (a) and (d) above have been established by the plaintiff. The plaintiff had to allege and prove that the defendants instituted the proceedings without reasonable and probable cause as required in (b) above. Reasonable and probable cause means an honest belief founded on reasonable grounds that the institution of proceedings is justified. The concept involves both a subjective and an objective element.⁵ Similarly in *Beckenstrater v Rottcher & Theunissen*⁶, Schreiner JA said the following:

“When it is alleged that a defendant had no reasonable cause for prosecuting, I understand this to mean that he did not have such information as would lead a

³ [2015] JOL 32615 (SCA) para 11

⁴ 2008 (3) ALLSA 47 SCA

⁵ *Prinsloo & Another v Newman* 1975 (1) SA 481 (A) at 495H

⁶ 1955 (1) SA 129(A) at 136A-B

reasonable man to conclude that the plaintiff had probably been guilty of the offence charged; if, despite his having such information, the defendant is shown not to have believed in the plaintiff's guilt, a subject element comes into play and disproves the existence, for the defendant, of reasonable and probable cause."

[20] In the instant matter it has been conceded by the plaintiff that the defendants had in their possession a statement from the deceased which implicated him and also a corroborating statement from one Unathi Delihlazo. Furthermore, the plaintiff has admitted that Tikolo who had since passed away implicated him in the commission of the offences. Based on these and other admissions by the plaintiff, I cannot find that the plaintiff has established *prima facie* evidence that the defendants acted without reasonable and probable in preferring the charges against him. On the admissions, especially the statements which implicated the plaintiff, it cannot be said that the defendants were not justified in instituting the proceedings.

[21] Dealing with the requirement that the defendants must have been actuated by malice as stated in (c) above, Wessels JA in *Moaki v Reckitt & Colman (Africa) Ltd & Another*⁷ said the following:

"Where relief is claimed by this *actio* the plaintiff must allege and prove that the defendant intended to injure (either *dolus directus* or *indirectus*). Save to the extent that it might afford evidence of the defendant's true intention or might possibly be taken into account in fixing the *quantum* or damages, the motive of the defendant is not of any legal relevance."

⁷ 1968 (3) SA 98 (A) 104B-C

[22] I agree with this statement and cannot find that the plaintiff has established a basis upon which a reasonable person could find that the defendants were malicious in prosecuting the plaintiff.

[23] I am unable on the face of the evidence presented by the plaintiff to find that he has established *prima facie* evidence upon which a reasonable person could find for him on the malicious prosecution claim.

Consequently, the following order shall issue:

(a) Absolution from the instance is granted with costs.

M MAKAULA

JUDGE OF THE HIGH COURT

Appearances:

Plaintiff:	Adv Mapoma <i>instructed by</i>
	Messrs Magqabi Seth Zitha Attorneys
	c/o Sigabi & Associates
	5 Arthur Street
	KING WILLIAM'S TOWN

1st, 2nd & 3rd Defendants: Adv Sishuba *instructed by*
State Attorney
c/o Shared Legal Services
32 Alexandra Road
KING WILLIAM'S TOWN