

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

CASE NO: 29/2020

In the matter between:

PELO KOLOMAN

FIRST PLAINTIFF

XOLISA LINKS

SECOND PLAINTIFF

And

MINISTER OF POLICE

FIRST DEFENDANT

**NATIONAL DIRECTOR OF PUBLIC
PROSECUTIONS**

SECOND DEFENDANT

JUDGMENT

Noncembu J

[1] The plaintiffs, Pelo Koloman and Xolisa Links, lodged the current action against the defendants claiming damages suffered as sequelae to their unlawful arrest, detention and malicious prosecution at the instance of the defendants' employees, acting in the course and scope of their employment to the defendants. The matter proceeded on both merits and quantum.

[2] It is common cause that on 29 December 2018 the plaintiffs were arrested on allegations of kidnapping and attempted murder at or near Kashe in Mdantsane and were detained until their release on 17 January 2019 after a formal bail application that proceeded on an unopposed basis.

[3] The plaintiffs allege that the arrest and detention were wrongful and unlawful in that the arresting officers, *inter alia*, invoked same for purposes not contemplated by the legislator; acted without information that the plaintiffs committed the alleged crimes; failed to consider alternative and less dramatic means of securing the plaintiffs' attendance at court and less invasive means to bring them to court other than immediate detention; and failed to exercise a discretion to arrest in a fair and balanced manner. They further allege that the defendants instigated prosecution by laying false charges against them, thus prosecuting them for malicious purposes without any reasonable and probable cause.

[4] In their amended particulars of claim, the plaintiffs claim a total amount of R1 000 000.00 in respect of each plaintiff for the aforementioned heads against the two defendants jointly and severally, the one paying the other to be absolved.

[5] The defendants, on the other hand allege that the arrest was lawful in that the arresting officer, who was a peace officer, reasonably suspected that the plaintiffs had committed an offence referred to in Schedule 1 of the Criminal Procedure Act, and for purposes contemplated in section 50 of the said Act (to bring the plaintiffs to court). They contend further, that they had reasonable and probable cause to prosecute the plaintiffs as they were suspected of kidnapping and attempted murder, having been arrested in a vehicle which had a complainant who was injured in the boot.

[6] The claim for malicious prosecution is formulated as follows in the amended particulars of claim:

'15.1 On the 28th of December 2018 the said members of the South African Police Services set the law in motion against the plaintiffs by laying false charges of kidnapping and attempted murder against the plaintiffs when they:

15.1.1 had no reasonable or probable cause for doing so;

15.1.2 were actuated by malice; and

15.1.3 had no evidence whatsoever that the plaintiffs had been involved in such crimes;

15.1.4 On 20 September 2019, and at Mdantsane Magistrate's Court the charges against the plaintiffs were withdrawn, having spent 19 days in unlawful detention.

15.1.5. The conduct of the members of the first defendant interfered intentionally;

15.1.6 in depriving the liberty of the plaintiff;

15.1.7 with the freedom and security of the plaintiff when ignored the information at hand for a successful prosecution but ought to refuse bail.'

15.2 On 3 January 2018 the Public Prosecutor set the law in motion against the plaintiffs when they:

15.2.1 had no reasonable or probable cause for doing so;

15.2.2 were actuated by malice;

15.2.3 had no evidence whatsoever that the plaintiffs had been involved in such crimes, and

15.2.4 Prosecution failed

16. As a result the plaintiffs suffered General damages in respect of *contumelia*, as they were mocked, humiliated and insulted by police officers from the place of scene in the full view of the public and they were portrayed as violent criminals in the sum of R500 000.00;

17. As a result of malicious prosecution plaintiffs suffered damages in the sum of R500 000.00.'

[7] By way of oral evidence, the plaintiffs called three witnesses; one Aphiwe Tini who was an eyewitness to the incident and the two plaintiffs who testified in support of their case.

[8] The crux of their evidence is that the two plaintiffs together with one Smoyi, had accompanied Aphiwe Tini (Aphiwe) to Highway, Mdantsane, to conduct investigations pertaining to Aphiwe's cell phone which had been robbed next to Shoprite at Highway earlier on the day in question. Whilst they were still making enquiries at Shoprite, they received a telephone call to the effect that somebody had been apprehended by taxi drivers for an alleged robbery and was being assaulted

near Boxer stores. The call was from Xolisa's elder brother. They proceeded to the said place.

[9] On their arrival there they saw the victim (a young man) who was being assaulted by taxi drivers with bricks, hammers and sjamborks. Aphiwe identified the victim as one of the people who had robbed him of his cell phone. He enquired about his cell phone from the victim, who was visibly injured at the time. The victim said that the phone, together with the taxi drivers' money, were with his friend who lives in NU 1 Mdantsane, who had run away.

[10] After the taxi drivers had finished assaulting the victim, it was suggested that he be taken to NU 1 to get the robbed items from the aforementioned friend. He was loaded in the boot of a Toyota Conquest which was driven by one of the taxi drivers. Another taxi driver boarded the vehicle as a front seat passenger. Phelo (first plaintiff), Aphiwe, Smoyi and Lwethu boarded at the back seat of the vehicle. Xolisa (second plaintiff) followed in his brother's vehicle, which also had other passengers.

[11] The two vehicles proceeded to NU 1 where on arrival, they were informed that the victim's friend had not been seen in over two months. According to Phelo, along the way they were conversing with the victim who even asked him for water, because the vehicle boot was open.

[12] When no assistance was received at NU 1, the victim asked that he be taken to his home at NU 4 where they found his brother. According to Phelo, the victim told his brother that he had robbed the car occupants and asked him for money to pay them so that they could release him. The brother said that he did not have money and neither did their mother as they were tired of always bailing him out whenever he got himself into trouble.

[13] Realising that they were not going to get their phone or any payment for it, the witnesses requested to be dropped off at Khashe so that they could walk home as it was closer to their home and it was dark. At that point Xolisa moved from his brother's vehicle, swapping seats with Lwethu in the Toyota Conquest. It is not clear from the evidence why this switch was necessary. According to Phelo he had

requested him to make the swop because he needed someone to converse with in the vehicle. Xolisa on the other hand gave a different reason for the swop.

[14] As the Conquest was approaching Khashe it was stopped by police officers who forcefully removed the occupants from the vehicle whilst hurling insults and assaulting them. The victim in the boot told the police that he had been assaulted by taxi drivers at Highway. This however, fell on deaf ears as the police simply arrested the witnesses without even telling them what charges they were facing. They took their pictures, threatening to post them on social media. They did not give them a chance to explain what had happened nor did they explain their constitutional rights to them.

[15] The car occupants were taken to Mdantsane police station where they were made to sign certain documents. When it was established that Aphiwe and the other occupants were minor children, they were released in the care of their guardians.

[16] The plaintiffs were taken to the police cells where they were welcomed by a strong stench coming from filthy toilets. They were given dirty blankets which were infested with teaks. The cell was very dirty and they were detained with hardened criminals who threatened and intimidated them.

[17] On 31 December 2018 they were taken to court where the matter was postponed until 3 January 2019 for bail application. They were thereafter detained at Westville Correctional Centre where they were kept with hardened criminals, slept on steel bed frames with no mattresses and given dirty blankets. On 3 January the matter was postponed until 17 January 2019 when they were released from detention. They continued attending court until 20 September 2019, when the charges against them were withdrawn.

[18] The plaintiffs denied that their rights were explained to them or what the charges were that they were arrested for when the defendants' version was put to them. However, during further questioning it became apparent that they were given their constitutional warnings which they confirmed signing for, although alleging that they did not know what they were signing at the time.

[19] The defendants led the evidence of four witnesses, Warrant Officer Mngoma (Mngona) and Constable Fani (Fani) who were the arresting officers, Warrant Officer Kwenene (Kwenene), the investigating officer and Ms Notyawa who was the prosecutor in Madantsane Magistrate's Court where the plaintiffs appeared.

[20] Mngoma and Fani were on duty with other officers when they received information via radio control around 6pm, pertaining to a red Toyota Conquest which was involved in a kidnapping and attempted murder. Around 9 pm that same evening they were near Khashe when they spotted and stopped a vehicle fitting the said description. They asked the occupants, amongst whom were the plaintiffs, to alight from the vehicle and the occupants cooperated. At the boot of the vehicle there was a man who was badly injured and having a broken leg. They asked this person what happened to him and he said that he was assaulted by the occupants of the vehicle. At the back seat of the vehicle they found blood as well as weapons they believed had been used to assault the victim.

[21] They asked the occupants' names and they were told. They questioned the occupants about the injured man in the boot but the occupants did not respond. They then placed them under arrest and explained their constitutional rights. The victim was taken by an ambulance to Cecilia Mkhivane hospital and the occupants were taken to the police station where Const Fani made them sign for their section 14A notices, copies of which he gave to them after explaining the charges and their constitutional rights. Fani established that some of the occupants were child offenders, he contacted their parents and they were released into the custody of their parents.

[22] The plaintiffs and the taxi drivers were taken to the cell by Fani together with the cell commander. This was after they had inspected the cells and satisfied themselves that they were in a clean condition. Fani denied that the blankets given to the plaintiff were dirty and infested with ticks, stating that there was a company which was responsible for cleaning the blankets and that the cells were cleaned regularly. He also denied that the cells were overcrowded, stating that there were no

more than 10 detainees charged with similar offences where the plaintiffs were detained.

[23] Warrant Officer Kwenene was assigned as the investigating officer in the criminal matter against the plaintiffs. He was on standby duties on the night in question when he was informed of a person who had been taken to Cecilia Makhiwane hospital after he was found in a vehicle having been badly injured. He went to the hospital where he met the victim/complainant by the name of Zamuxolo Mvuyo being treated by the doctors. Noticing that the victim was in pains, he did not continue with interview.

[24] He interviewed the victim on 30 December 2018 and he obtained a statement where the victim informed him that he was assaulted by taxi drivers at Highway, and taken in a boot of a vehicle whilst being threatened that he was going to be killed at Greenacker dam. According to the victim's statement, at some stage whilst he was in this vehicle some youngsters boarded the car and it looked like they were given a lift.

[25] The docket was sent to court on 31 December 2018 and he only received it for the first time from his commander on 8 January 2019 with instructions that he must prepare for a bail application to be held on 17 January 2019. He did the necessary investigations by verifying the plaintiffs' addresses and checking whether they had any previous convictions and pending cases. After verifying that they had none, he advised the prosecutor not to oppose bail. Consequently, the plaintiffs were granted bail on 17 January 2019. According to Kwenene the plaintiffs were charged with schedule 6 offences therefore it was not up to him to release them on bail.

[27] Ms Notyawa testified on behalf of the second defendant. She testified that the matter was first received by the channelling court on 31 December 2018, where it was screened by the regional court prosecutor (RCPP) for the merits and prospects of success. Once the RCPP was satisfied of the merits of the case, charges were formulated as kidnaping, attempted murder and robbery with aggravating circumstances, and the matter was transferred to the bail court for a schedule 6 bail application to be held on 3 January 2019. Notyawa received the docket the said date (3 January), perused it to satisfy herself of the merits and the schedule of the

formulated charges. This she did by considering the statements in the docket, which included that of the complainant.

[28] The plaintiffs were represented by a legal aid attorney on the day in question. By agreement between the parties the matter was postponed until 17 January 2019 for a formal bail application. The postponement was to enable the investigating officer to conduct the necessary investigations in preparation for bail, as well due to a congested court roll. On 17 January 2019 the plaintiffs were represented by Miss Masiso, a private attorney. At this hearing the bail application proceeded on an unopposed basis and the plaintiffs were granted bail. Notyawa did not deal with the matter after the bail application but according to the docket the matter was provisionally withdrawn in September 2019 for further investigations.

[29] The issues for determination by this court are; (a) whether or not the arrest of the plaintiffs was justifiable in law and therefore lawful; (b) Whether their detention was justifiable; and (c) and whether or not the plaintiffs have established the requirements for malicious prosecution.

Requirements for a lawful arrest without a warrant

[30] In their justification of the arrest, the defendants allege that the arrest was in terms of section 40(1) (b) read with section 50 of the Criminal Procedure Act¹ (CPA) in that there was a reasonable suspicion that the plaintiffs had committed a schedule 1 offence. They allege further, that the purpose of the arrest was to bring the plaintiffs to justice, which was done because the plaintiffs were taken to court on 31 December 2018.

[31] Section 40(1) (b) of the CPA provides –

‘A peace officer may without warrant arrest any person –

...

whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escape from lawful custody.’

¹ Act 51 of 1977.

[32] It is well established in our law that for the jurisdictional requirements for an arrest to be met under the said provision the arrestor must be a peace officer, who entertains a suspicion that the suspect committed an offence referred to in Schedule 1 and that the suspicion must rest on reasonable grounds.² The learned Judge in *Duncan v Minister of Law and Order*³ stated further in this regard; 'If the jurisdictional requirements are satisfied, the peace officer may invoke the power conferred by the subsection; ie, he [or she] may arrest the suspect. In other words, he [or she] then has a discretion as to whether or not to exercise that power (cf *Holgate-Mohamed v Duke* [1948] 1 All SA ER 1054 (HL) at 1057). No doubt the discretion must be properly exercised. But the grounds on which the exercise of such a discretion can be questioned are narrowly circumscribed.'

[33] That the arresting officer in the present matter was a peace officer and that he entertained a suspicion cannot be questioned. The question, however, is whether or not such a suspicion was based on reasonable grounds.

[34] Reasonable grounds are interpreted objectively and must be of such a nature that a reasonable person would have had a suspicion.⁴

[35] The test in this regard was set out in *Mabona v Minister of Law and Order*⁵ where the Court stated the following:

'The reasonable man will therefore analyse and assess the quality of the information at his disposal critically and will not accept it lightly without checking it where it can be checked. It is only after an examination of this kind that he 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 a sufficiently high quality and cogency to engender in him a conviction that the suspect is in fact guilty. The section requires suspicion and not certainty. However, the suspicion must be based on reasonable grounds'

² see *Duncan v Minister of Law and Order* 1986 SA (2) 805 (AD) at 818 G-J).

³ *Ibid.*

⁴ R v Heerden 1958 (3) SA 150 (T).

⁵ 1988 (2) SA 654 SEC.

[36] The evidence of the arresting officers in the present matter is that they had information that a vehicle fitting the description in which the plaintiffs were occupants had committed an offence of kidnapping and attempted murder. On spotting the vehicle in question they found a victim who was in the boot of the vehicle who was badly injured and having a broken leg. They found blood in the vehicle in question as well as weapons believed to have been used to assault the victim.

[37] On their version, when they questioned the victim he informed them that he had been assaulted by the occupants of the vehicle. Even without this information, in my view the evidence that they found in the vehicle, that is, of the injured person in the boot the vehicle, the blood at the back seat where the plaintiffs were seated as well as the weapons, considered objectively, were sufficient to create a reasonable suspicion on any reasonable person in a similar position. Mngoma also stated in his evidence in court, correctly so in my view, that they could not rely on the version of the suspects in order to formulate their case against them.

[38] Even so, on their own version, the plaintiffs' case that they were given a lift in the vehicle in question on the said evening is not sustainable. The common thread in their evidence in court was that they went along with the taxi drivers in the Toyota Conquest because they wanted Aphiwe's phone which the victim had robbed earlier on that day. In his evidence in chief Pelo stated that when they were at the victim's home in NU 4, the victim told his brother that he had robbed those people and *he needed money to pay them so that they would release him*. (Emphasis intended) The only self-manifest interpretation in this regard, coupled with the fact that the victim was held in the boot of the car, is that he was being held against his will. *Prima facie*, and on their version alone, the plaintiffs were actively involved in a kidnapping.

[39] They left a police station within the vicinity of where the victim was assaulted. Instead of reporting the matter to the police they decided to act as police officers by investigating the matter themselves in circumstances where they could readily see that the victim was badly injured. Once more on their own version, a 4-pound hammer, bricks and sjamboks were amongst the weapons used to assault the victim.

The version of the police in this regard is that the victim told them that he was being taken to Greenacker dam where he was going to be killed.

[40] The arresting officers therefore cannot be faulted in forming a suspicion that the plaintiffs had committed the offenses in question, which offenses no doubt fall under schedule one. I am therefore satisfied that their suspicion was based on reasonable grounds.

[41] As to whether the police had properly exercised their discretion in arresting the plaintiffs is a fact-based question. The grounds upon which the exercise of such a discretion can be questioned are narrowly circumscribed.⁶

[42] The evidence of the defendants in this regard, in line with their amended plea, was that the plaintiffs were arrested at night for serious offences falling under schedule 6. As such their release was a factor which could only be considered by a court in a formal bail application. Furthermore, their addresses and whether or not they had previous convictions and/ or pending cases, had not been verified.

[43] The following remarks by Harms DP in *Sekhoto*⁷ are apposite:

‘... in some instances a special onus rests on a suspect before bail may be granted and the accused has in any event a duty to disclose certain facts, including prior convictions, to the court. It is sufficient to say that if a peace officer were to be permitted to arrest only once he is satisfied that the suspect might not otherwise attend the trial then that statutory structure would be entirely frustrated. To suggest that such a constraint upon the power to arrest is to be found in the statute by inference is untenable.

[44] While the purpose of arrest is to bring the suspect to trial the arrestor has a limited role in that process. He or she is not called upon to determine whether the suspect ought to be detained pending a trial. That is the role of the court (or in some cases a senior officer). The purpose of the arrest is no more than to bring the suspect before the court (or the senior officer) so as to enable that role to be performed. It seems to me to follow that the enquiry to

⁶ See *Duncan supra*.

⁷ *Minister of Safety and Security v Sekhoto* 2011 (1) SACR 315 (SCA) at paras 43 -44.

be made by the peace officer is not how best to bring the suspect to trial: the enquiry is only whether the case is one in which that decision ought properly to be made by a court (or the senior officer). Whether his decision on that question is rational naturally depends upon the particular facts but it is clear that in cases of serious crime – and those listed in Schedule 1 are serious, not only because the Legislature thought so – a peace officer could seldom be criticized for arresting a suspect for that purpose. ...’ (Emphasis intended.

[44] It seems to me that the challenge mounted by the plaintiffs regarding their arrest having been for purposes not intended by the legislator is premised on what the Supreme Court of Appeal (SCA) in *Sekhoto*⁸ referred to as a fifth jurisdictional requirement for an arrest. After a full discussion of the history and the applicable constitutional principles in this regard, the Court dispelled this view, asserting it as a conflation of the jurisdictional facts with discretion.

[45] The Court nevertheless emphasized that it remains a general requirement that any discretion be exercised in good faith, rationally and not arbitrarily. Amplifying this aspect, the court stated: ‘This would mean that peace officers are entitled to exercise their discretion as they see fit, provided that they stay within the bounds of rationality. The standard is not breached because an officer exercises the discretion in a manner other than that deemed optimal by the court. A number of choices may be open to him, all of which may fall within the range of rationality. The standard is not perfection, or even the optimum, judged from the vantage of hindsight and so long as the discretion is exercised within this range, the standard is not breached.’

[46] The arresting officer made it clear in his evidence in court, as was also stated in the defendants’ amended plea, that the purpose of arresting the plaintiffs was to bring them to court. That is exactly what happened as the plaintiffs were taken to court at the earliest opportunity and within 48 hours of their arrest. It can therefore not be said that the arrest of the plaintiffs was for purposes other than those intended by the legislator. There is nothing in the evidence before court to suggest that the

⁸ Supra

arresting officers had any ulterior motive in arresting the plaintiffs than taking him them to court.

[47] This is further fortified by the fact that when it was established that some of the vehicle occupants were minor children, their parents were contacted, and they were released into their custody.

[48] No criticism therefore, can be levelled against the arresting officers for the manner in which they exercised their discretion. Furthermore, it has to be borne in mind that, as was said in *Tsose v Minister of Justice*⁹ 'there is no rule of law that requires the milder method of bringing a person into court to be used whenever it would be equally effective'. The submission that the discretion was exercised in an improper manner can therefore has no merit and cannot be sustained.

[49] Sufficient evidence was placed before court on why it was necessary for the plaintiffs to be detained prior to their appearance in court. The investigating officer gave evidence that on the statement he had obtained from the complainant, the plaintiffs were facing charges contemplated in schedule 6 of the CPA, and as such they could only be released after a formal bail application was conducted in court. The said statement which was submitted as exhibit "B" in these proceedings reflects that there were two male occupants who were seated at the back seat of the vehicle who, though having never assaulted the complainant, told him to keep quiet as they were taking him to Greenacker dam where they were going to kill him.¹⁰

[50] As already indicated above, *prima facie*, an offence of kidnapping was committed. The common cause evidence before this court is that the plaintiffs, with some youths who were later released into the care of their parents, were the back seat passengers of the vehicle in question.

[51] The same statement also refers to a cell phone of the complainant which was grabbed when he was assaulted at Highway, hence on the investigating officer's

⁹ 1951 (3) SA 10 (A) at 17H.

¹⁰ See paragraph 8 of exhibit "B".

evidence, there was also a charge of robbery with aggravating circumstances preferred against the vehicle occupants who included the plaintiffs.

[52] Relying on the same statement, Ms Notyawa, the prosecutor who testified before this court, was satisfied that there were reasonable prospects of success in the case against the plaintiffs, hence she proceeded with the prosecution in the matter on the grounds that the offences in question fell under schedule 6.

[53] Ms Notyawa explained the manner in which the proceedings took place in court from the first time that she dealt with the matter, the necessity for the postponements in order to, *inter alia*, prepare for a bail application, and most importantly, that the plaintiffs were legally represented when the proceedings were postponed during her involvement with the matter.

[54] Her evidence in this regard was supported by court records reflecting that all the necessary information was placed before the magistrate when the matter was remanded.

[55] Given the above evidence, I am of the view that the defendants have established that this was not a case where the investigating officer had a discretion to release the plaintiffs prior to their appearance in court as that was a factor to be established by court after various considerations, including the interests of justice. Furthermore, the further detention of the plaintiffs after their first appearance in court was sanctioned by the court after all the relevant information was placed before it. I can therefore find no merit to the submission that the investigating officer and /or the prosecutor had a malicious intent in this regard.

Malicious prosecution

[56] The requirements for malicious prosecution are trite. They are that; (a) the defendants must have set the law in motion; (b) they must have acted without reasonable and probable cause; (c) they must have acted with malice or animus *injuriandi*; and (d) the prosecution must have failed.

[57] It is also trite that it is incumbent upon the plaintiff to allege and prove the above requirements, in particular, that the defendant acted maliciously and without reasonable and probable cause, on a balance of probabilities in order to satisfy the jurisdictional requirements for malicious prosecution.¹¹

[58] In their amended particulars of claim the plaintiffs have alleged that both the members of the first defendant as well as the public prosecutor on behalf of the second defendant, set the law in motion by laying false charges against the plaintiffs in circumstances where there was no reasonable and probable cause, and were actuated by malice.

[59] In *Relyant Trading (Pty) Ltd v Shongwe and Another*¹² the Supreme Court of Appeal stated the following in regard to the requirement of “malice” or *animus iniuriandi*: -

‘Although the expression ‘malice’ is used, it means, in the context of the *actio iniuriarum*, *animus iniuriandi*. In *Moaki v Reckitt & Colman (Africa) Ltd & another*, Wessels JA said:

“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 of damages, the motive of the defendant is not of any legal relevance”.

[60] Making reference to this passage in the *Relyant Trading* matter, Van Heerden JA, in *Minister for Justice and Constitutional Development v Moleko*,¹³ stated the following: -

‘*Animus injuriandi* includes not only the intention to injure, but also consciousness of wrongfulness:

“In this regard *animus injuriandi* (intention) means that the defendant directed his will to prosecuting the plaintiff (and thus infringing his personality), in the awareness that reasonable grounds for the prosecution were possibly absent,

¹¹ *Mabona v Minister of Law and Order* 1988 2 SA 654 (SE) 658E. See also *Gellman v Minister of Safety and Security* 2008 1 SACR 446 (W) para72; *Le Roux v Minister of Safety and Security* 2009 4 SA 491 (KZP) 498 para 24; *Visagie v Minister of Safety and Security* 2009 ZAEHC 2 paras 20-23.

¹² [2007] 1 All SA 375

¹³ *Minister of Justice and Constitutional Development v Moleko* [2008] 3 All SA 47 (SCA) paras 63-64.

in other words, that his conduct was (possibly) wrongful (consciousness of wrongfulness). It follows from this that the defendant will go free where reasonable grounds for the prosecution were lacking, but the defendant honestly believed that the plaintiff was guilty. In such a case the second element of *dolus*, namely consciousness of wrongfulness, and therefore, *animus injuriandi*, will be lacking. His mistake therefore excludes the existence of *animus injuriandi*.”

The defendant must thus not only have been aware of what he or she was doing in instituting or initiating the prosecution, but must at least have foreseen the possibility that he or she was acting wrongfully, but nevertheless continued to act, reckless as to the consequences of his or her conduct (*dolus eventualis*). Negligence on the part of the defendant (or, I would say, even gross negligence) will not suffice.¹⁴

[62] It is significant to note that apart from making allegations in their pleadings, the plaintiffs tendered no evidence before court to suggest, or from which it could be inferred that the police or the state prosecutor, acted with *animus injuriandi* when they instigated the prosecution against them.

[63] Both witnesses who testified on behalf of the defendants in this regard, ie. the police and Ms Notyawa, stated that in making their decision to either charge the plaintiffs or continue with the prosecution, was based on information they obtained from the complainant’s statement from which they were satisfied that the plaintiffs had committed the offences in question.

[64] In the absence of any evidence from the plaintiffs that the defendants intended to injure them when they acted as they did, the plaintiffs have failed to establish malice on the part of the defendants.

[65] Similarly, with regards to reasonable and probable cause, no evidence was tendered to suggest absence thereof on the part of the defendants.

¹⁴ Footnotes omitted.

[66] Reasonable and probable cause means an honest belief based on reasonable grounds that the institution of the proceedings complained of was justified.¹⁵ There must be sufficient facts known to the defendant from which a reasonable person could have concluded that the plaintiffs had committed the offence in question, and a mere honest belief that the facts amount to an offence irrespective of the legal requirements is insufficient.¹⁶

[67] The defendant is only expected to have taken reasonable measures to discover the facts upon which he or she bases a conclusion that the plaintiff was guilty of an offence: the defendant need not test all the relevant facts.¹⁷ Though the defendant had an honest belief in the charges where there were no reasonable grounds for that belief, there can be no reasonable and probable cause and a mere honest belief in the truth of the facts upon which the accusation is based is not conclusive of the presence of reasonable and probable cause.¹⁸

[68] There may be absence of reasonable and probable cause irrespective of whether there was an honest belief in the guilt of the accused. If the defendant is found to have acted with reasonable and probable cause an action for malicious prosecution will fail, no matter what his or her motive for his instituting the prosecution.

[69] The test for reasonable and probable cause involves both subjective and objective elements. Not only must the defendant have subjectively had an honest belief in the guilt of the plaintiff, but his or her belief and conduct must have been objectively reasonable, as would have been exercised by a person using ordinary care and prudence.¹⁹

[70] The evidence of Warrant Officer Kwenene was that when he went to see the complainant in hospital on the night of the incident, he found him to be still in pain and being attended to by the doctors, as a result he decided to leave him and come

¹⁵ *Beckenstrater v Rottcher & Theunissen* 1955 (1) SA 129 AD 135.

¹⁶ *Ochse v King William's Town Municipality* 1990 (2) SA 855 (E) 857.

¹⁷ *Madnitsky v Rosenberg* 1949 1 PH J5 (W) 13-14.

¹⁸ *Heyns v Venter* 2004 (3) SA 200(T) 211.

¹⁹ *May v Union Government* 1953 (3) SA 899 (N).

back the following day. This shows that his conduct was objectively reasonable as would have been exercised by a person using ordinary care and prudence. He made sure that he interviewed complainant when he was in his sound and sober senses not clouded by pain so that he would obtain all the necessary relevant information.

[71] He testified that he considered the offences against the plaintiffs, that they fell under schedule 6 of the CPA. Likewise, the evidence of Ms Notyawa was that she considered the statement of the complainant, as well as the evidence pertaining to the arrest of the plaintiffs and was satisfied that the plaintiffs had committed the offences in question. The plaintiffs were arrested in the same vehicle where the complainant who was found badly injured, seated in the boot, which vehicle had blood in the back seat and weapons apparently used to assault the plaintiff. On their version the complainant had robbed Aphiwe of a cellphone, and they went with him in the vehicle in question in order to recover the said phone or compensation therefore. It was therefore no coincidence that they were arrested in the said vehicle when it was stopped by the police.

[72] With all of the above taken into consideration, it becomes readily apparent that the defendants had reasonable and probable cause for instituting or continuing with prosecution against the plaintiffs.

[73] Nothing turns on the fact that the charges were withdrawn against the plaintiffs. What is germane is that the plaintiffs have failed to establish the requirements for malicious prosecution, as such their claim in this regard cannot succeed.

Costs

[74] The general rule is that costs should follow the result, and that they are within the discretion of the court. There is no reason why the general rule should be deviated from in the present matter.

Order

[38] Both claims by the plaintiffs are dismissed with costs, on scale B as provided for in terms of Rule 69 of the Uniform Rules of Court.

V P NONCEMBU
JUDGE OF THE HIGH COURT

APPEARANCES

Date of hearing : 24 October 2023; 25 October 2023; 26 October 2023 and 6 November 2023

Date of judgment: 20 June 2024

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