

REPUBLIC OF SOUTH AFRICA



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

(1) REPORTABLE:NO
(2) OF INTEREST TO OTHER JUDGES:NO
(3) REVISED: YES/NO

Case Number: 16408/2022

22 August 2024

In the matter between:

DUMISANI NHLAPO/KHUMALO

Plaintiff

and

MINISTER OF POLICE

First Defendant

**MINISTER OF JUSTICE AND CORRECTIONAL
SERVICES**

Second Defendant

**NATIONAL DIRECTOR OF PUBLIC
PROSECUTIONS**

Third Defendant

JUDGMENT

BOTSI-THULARE AJ

- ***Introduction***

[1] This is an interlocutory application, in the form of absolution from the instance in terms of Rule 39(6) of the Uniform Rules of Court (the Rules) by the applicants,

the defendants in the main action. The main action concerns a claim for damages instituted by the plaintiff against the defendants.

- ***Facts and background***

- [2] The plaintiff issued summons against the defendants for damages arising from alleged unlawful arrest and detention by members of the South African Police Services (SAPS) as well as malicious prosecution. The plaintiff alleges that he suffered damages because of the alleged unlawful arrest and detention. In this regard, he contends that he suffered general damages in the amount of R 3 000 000.00. Regarding the allegation of malicious prosecution, the plaintiff claims that he suffered general damages in the amount of R 1 000 000.00.
- [3] The plaintiff testified that he was arrested and detained on 21 July 2019 based on unverified rumours for commission of a crime made to the police by a member of community. He was then charged under Katlehong case docket with reference number 142/07/2019 for car hijacking. He further testified that following his arrest he was detained for two days at the holding cells at Katlehong Police Station. He was thereafter taken to the Boksburg Prison where he was detained until he was released on 27 March 2020 when the matter was withdrawn by the magistrate.
- [4] During his period of detention bail was still pending and had not proceeded at the instance of the NPA and/or the second defendant who carries ultimate legal responsibility. He further testified that he was assaulted but failed to present the court with a medical report, even when he alleges to have had an opportunity to see a medical doctor within three days of what he alleged was repeated and intense assault on his body and face.
- [5] During his cross examination he conceded that he was arrested as a result of a having pointed out as an accomplice by accused persons who were implicated and arrested as offenders in car hijacking, robbery and attempted murder cases that were committed against various complainants, which he stated under oath were all together about 11 ('eleven') number of dockets, which number could not be confirmed, but probably is the case as there were a number of dockets opened brought before court by the defendants that show that the plaintiff was implicated in these dockets which in reality were opened before the date of the plaintiff's

arrest and detention.

- [6] At the close of the plaintiff's case, the defendants applied for absolution from the instance on the basis that there was no evidence that the plaintiff's arrest and detention was unlawful.

- ***Absolution from instance***

- [7] An absolution from the instance application is generally brought at the end of the plaintiff's case. In this regard, rule 39(6) of the Rules provides as follows:

"At the close of the case for the plaintiff, the defendant may apply for absolution from the instance, in which case the defendant or one advocate on his behalf may address the court and the plaintiff or one advocate on his behalf may reply. The defendant or his advocate may thereupon reply on any matter arising out of the address of the plaintiff or his advocate."

- [8] The test to apply in considering an application for absolution is not that the evidence led by the plaintiff established a case that would be sustained if the case was to proceed to its conclusion. The essential inquiry in determining whether to grant absolution from the instance is whether there is evidence upon which a court, when applying its mind reasonably, could or might find for the plaintiff. In other words, a court would not grant absolution from the instance in a case where the plaintiff has, at the end of his or her case, presented an answerable case or prima facie case.

- [9] The test for absolution was set out in *Claude Neon Lights (SA) Ltd v Daniel*¹ as follows:

"(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."

- [10] The test was affirmed by the Supreme Court of Appeal in *Gordon Lloyd*

¹ 1976 4 SA 403 A at 410G

- ***Issues to be determined***

[11] The primary issue in dispute in this matter is whether on the merits the plaintiff has proven a *prima facie* case of unlawful arrest and detention as well as malicious prosecution against the defendants. The plaintiff bears the onus of proof regarding this.

[12] The plaintiff, as a single witness, elected to close his case after leading his evidence, and the defendant as it was entitled to do, sought absolution from the instance on the basis that the plaintiff has failed to make out a *prima facie* case of his claim of unlawful arrest, detention and malicious prosecution by the defendants.

[13] A '*prima facie* case' is sometimes referred to as sufficient evidence and/or '*prima facie* evidence'. *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*'.³ It is used to refer to the probative value of the proponent's case after discharging its burden of proof, but before the opponent has rebutted it. If left without rebuttal, the proponent's *prima facie* case may, depending on the circumstances, be held to be conclusive.⁴

[14] The plaintiff therefore was required to establish all the elements relating to his claim of unlawful arrest, detention and malicious prosecution to survive absolution.⁵ This 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.⁶ It is therefore in my view appropriate, to begin with what the parties must prove on each of the three claims. I deal first with the

² *Gordon Lloyd Association v Rivera and Another* 2001 (1) SA 88 (SCA) at 92E-93A.

³ *Marine and Trade Insurance Co (Ltd) Van der Schyff* 1972 (1) SA 26 (A) at para 39-40

⁴ *S v Alex Carriers (Pty) Ltd* 1985 (3) SA 79 (T) at 88I-89D; *Ex parte Minister of Justice: In re: R v Jacobson and Levy* 1931 AD 466 at 478-9; *S v Boesak* 2001 (1) SACR 1 (CC) at para 24; *Gordon Lloyd Page & Associates v Rivera* 2001 (1) SA 88 (SCA) para 2.

⁵ *Osmar Tyres and Spares CC v adt Security (Pty) Ltd* [2020] 3 All SA 73 SCA at para 26

⁶ *Supreme Service Station v Fox and Goodman (Pty) Ltd* 1971 (1) ZLR

alleged unlawful arrest and detention.

- ***Law Applicable***

Unlawful arrest and detention

[15] It is well settled that police bear the onus to justify arrest and detention.⁷ In *Minister of Law and Order v Hurley & Another* the court observed:

“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”⁸

[16] It is common cause that the arresting officer arrested the Plaintiff without a warrant. In this regard, section 40(1)(b) of the Criminal Procedure Act provides that 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.

[17] The jurisdictional facts for section 40(1)(b) defence were summarised in *Duncan v Minister of Law and Order*.⁹ They are: (1) The arrester must be a peace officer; (2) The arrester must entertain a suspicion; (3) The suspicion must be that the arrestee committed an offence referred to in Schedule 1; and (4) The suspicion must rest on reasonable grounds

[18] In *Mabona and Another v Minister of Law and Order and Others* the court 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

⁷ *Minister of Police and Another v Du Plessis* 2014(1) SACR 217 (SCA) at para 14-17.

⁸ 1986 (3) SA 568 AAT 589 E-F

⁹ 1986 (2) SA 805 (A)

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 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.”¹⁰

- ***Analysis of the Law***

[19] In this matter, it has been proved that the plaintiff was arrested by members of SAPS who were on official duty. Further, they entertained a suspicion that the plaintiff was involved in car hijacking, robbery and attempted murder cases that were committed against various complainants. In terms of the Criminal Procedure Act 55 of 1977 (Criminal Procedure Act) the abovementioned crimes fall under schedules 1 and 6 of the Criminal Procedure Act.

[20] The evidence presented demonstrates that the police in effecting the arrest had reasonably suspected that the plaintiff had committed the crimes alleged. The evidence demonstrate that he was pointed out as an accomplice by the other 3 accused who, when apprehended confessed to the crimes as committed. On this basis, it is therefore 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.

[21] 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.¹¹ The question therefore is whether members of the SAPS’ 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.

[22] The Supreme Court of Appeal in *Minister of Safety and Security v Sekhoto* held:

“... 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

¹⁰ 1988 (2) SA 654 (SE) 658 G-J

¹¹ *Masethla v President of the RSA* 2008 (1) SA 566 (CC) at para 23

adopted in *Duncan* (at 819 B-D) as being applicable to attacks on the exercise of discretion under Section 40(1) (b).¹²

[23] In this matter, it has already been determined that car hijacking, robbery and attempted murder fall under both schedule 1 and 6 of the Criminal Procedure Act. It is therefore unfounded for the plaintiff to claim that members of the SAPS improperly exercised their discretion by arresting the plaintiff without first obtaining a warrant for his arrest. In my view, this assertion is not supported by law.

[24] On the claim of unlawful detention, 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.¹³ Having said that, the evidence in this matter demonstrate that the issue of arrest and subsequent detention of the plaintiff are intertwined. I have already concluded that the conduct of the member of the SAPS caused no harm in arresting the plaintiff, it then follows that detention was justified.

Malicious Prosecution

[25] With regard to the claim of malicious prosecution, the plaintiff is required to adduce *prima facie* evidence to prove on a balance of probabilities that the third defendant, set the law in motion; the instigation of the proceedings was without probable cause; it was perpetuated by malice; and the prosecution failed.

[26] The third defendant admits having set the law in motion but denies other elements of the claim. The question before this court was therefore whether the instigation of the proceedings was without probable cause; perpetuated by malice and, followed by failed prosecution of the plaintiff.

[27] In *Minister of Police v Ayanda Marula*, 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.¹⁴ The Supreme Court of Appeal

¹² 2011 (1) SACR 315 (SCA) at para 46.

¹³ *M R v Minister of Safety and Security* 2016 (2) SACR 540(CC) at para 39.

¹⁴ *Minister of Police v Marula* [2022] ZAECKMHC 112 (29 November 2022) at para 36

in *Minister of Safety and Security v Tyokwana* dealt with the requirement of animus (malice) and remarked that a plaintiff is required to prove that the defendant intentionally pursued their prosecution despite knowing that there are no reasonable grounds for doing so.¹⁵

[28] In this matter, the plaintiff presented no *prima facie* evidence that the third defendant directed her will to prosecute despite a lack of reasonable and probable grounds to do so. It is clear from the evidence that the plaintiff did not deny the contention that the matter was postponed on numerous occasions as a result of the plaintiff's own attorneys protracted application for recusal of the magistrate. I conclude that the evidence presented proves no malice on the part of the third defendant.

[29] Further, 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 matter has been re-enrolled and pending before another court. The last element for a claim for a malicious prosecution is therefore lacking. This claim must therefore fail.

- ***Reasons for Order***

[30] It has already been established that the plaintiff was charged with a schedule 6 offences. The plaintiff's detention after his first appearance in court was dependent on the Magistrate's orders.¹⁶ On perusal of the plaintiff's particulars of claim, and oral evidence that was presented I could not find the basis upon which the second defendant was sued.

[31] 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 bail. Accordingly, having applied my mind to the evidence presented by the plaintiff, I am not persuaded that I

¹⁵ 2015 (1) SACR 597 (SCA) at para 15.

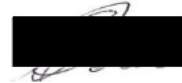
¹⁶ *Minister of Police and Another v Zweni* [2018] ZASCA 97 (1 June 2018)

could find in his favour in respect of all claims.

- **Order**

[32] 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.
2. The Plaintiff is ordered to pay costs.



MD BOTSI-THULARE AJ
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

APPEARANCES

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