

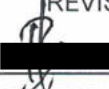
REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: **22/24189**

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


BL MANENTSA

13/11/2024

In the matter between:

PHELELANI SOKHELA

Plaintiff

and

MINISTER OF POLICE

First Defendant

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES

Second Defendant

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Third Defendant

JUDGMENT

MANENTSA AJ

INTRODUCTION

- [1] This is an action in which the Plaintiff, Mr Phelelani Sokhela, brings three claims against the Defendants pursuant to his arrest and detention on 20 February 2021 and further detention at Modderbee Correctional Facility until 31 March 2022.
- [2] The First Claim is in respect of the unlawful arrest and detention. The Plaintiff claims damages in the amount of R10 million for the alleged unlawful arrest, impairment of dignity, unlawful detention, loss of freedom, deprivation of his freedom of movement, pain, suffering and psychological trauma.¹
- [3] The Second Claim is for malicious prosecution in terms of which the Plaintiff claims damages in the total amount of R2 million.²
- [4] The Third Claim is for alleged loss of income in that as a result of the unlawful arrest, detention and malicious prosecution, the Plaintiff lost his job and claims damages in the amount of R3 million.³
- [5] At the commencement of the trial, the Court was advised that the Plaintiff does not intend to pursue the Third Claim. The claim was accordingly abandoned.
- [6] The trial commenced with the hearing of evidence in respect of the remaining two claims: namely the First Claim for alleged unlawful arrest and detention and the Second Claim for alleged malicious prosecution.
- [7] After hearing the testimony of the Plaintiff over two days, the Plaintiff closed his case without calling further witnesses.
- [8] The Defendants applied for absolution from the instance in respect of the Second Claim, namely the claim for malicious prosecution. The Defendants' basis for applying for absolution from the instance in terms of Rule 39(6) is that the onus of proof in respect of this claim rests with the Plaintiff who has failed to discharge that onus and absolution from the instance would be competent.

¹ Amended POC CL2B-4 para 16

² Amended POC CL2B-5 para 24

³ Amended POC CL2B-6 paras 28 - 30

- [9] This judgment is in respect of the application for absolution from the instance in terms of Uniform Rule 39(6) in respect of the Second Claim.

CLAIM FOR MALICIOUS PROSECUTION

- [10] The Plaintiff alleges that following his arrest on 20 February 2021, one or more police officers in collaboration with members of the NPA unknown to the Plaintiff instigated or caused to be instituted malicious criminal proceedings on or about 23 February 2021 against the Plaintiff without reasonable and probable cause in the Springs Magistrates Court under case number RC1/20/21 and case docket with reference number Kwa-Thema GAS 222/02/2021 for alleged offence of Rape.
- [11] The prosecution was instituted without reasonable and probable cause.
- [12] The said police officials acted within the course and scope of their employment with the First Defendant and the said members of the NPA acted within the scope of their employment of the NPA and/or with the Second Defendant who carries ultimate legal responsibility.
- [13] The prosecution has failed in that after several postponements of the case, and on 31 March 2022 the matter was withdrawn by the Magistrate.
- [14] As a result of the foregoing, the Plaintiff suffered damages in the total amount of R2 million comprising of:
1. costs reasonably expended to defend the prosecution, R300,000 (apportioned estimate) and;
 2. damages for contumelia, deprivation of freedom, trauma, impairment of dignity in the amount of R1,700,000.
- [15] The Defendants admit that the Plaintiff was prosecuted on allegations of rape under Kwa-Thema Cas 222/02/2021 at Kwa Thema Regional Court under Case Number RC 1/20/21 on the 23 February 2021. However, the Defendants plead that:

1. *In terms of section 42 of the National Prosecuting Authority Act 32 of 1998 no person is liable in respect of anything done in good faith under the said Act.*
2. *All functions performed by the relevant public prosecutor concerning the criminal prosecution in the Plaintiff's case were performed in good faith. The relevant prosecutor acted neither with animus iniuriandi nor maliciously.*⁴

[16] The issue of malice was placed squarely at the centre of the defence to the claim of malicious prosecution.

[17] It is trite that to succeed with a malicious prosecution claim the Plaintiff must allege and prove that:

1. The Defendants set the law in motion (instituted or instigated the proceedings);
2. The Defendant acted without reasonable and probable cause;
3. The Defendant acted with malice (or *animo iniuriarum*); and
4. That the prosecution failed.⁵

[18] The Plaintiff bears the onus of proof to establish each of these elements.⁶

[19] In the present case, the Defendants contend that the Plaintiff has failed to discharge the onus of proof in respect of the element of malice. Accordingly, the Defendants apply for absolution from the instance.

APPLICABLE LEGAL PRINCIPLES IN AN APPLICATION FOR ABSOLUTION FROM THE INSTANCE

[20] The test to be applied when absolution from the instance is sought at the close of the Plaintiff's case is whether there is evidence upon which a court, applying

⁴ Plea CL2C1-5 paras 20.1 to 20.3

⁵ See *Mohamed Amin v Jogendra Kumar Bannejee* 1947 AC 322 (PC) 330; *Minister of Justice and Constitutional Development v Moleko* [2008] 3 All SA 47 (SCA) para 8; *Rudolph v Minister of Safety and Security* 2009 (5) SA 94 (SCA) para 16.

⁶ *Minister of Safety and Security v Lincoln* [2020] 3 All SA 341 (SCA); 2020 (2) SACR 262 (SCA).

its mind reasonably to such evidence, could or might (not should, or ought to), find for the Plaintiff.⁷ There must be relevant evidence relating to all of the elements of the claim.⁸

THE PLAINTIFF'S TESTIMONY

[21] The Plaintiff's evidence was that after his arrest at Kwa-Thema Police Station he was transported to the Springs SAPS holding cells. On 23 February 2021, he made his first appearance at the Springs' Magistrate's Court. He was not released. On 24 March 2021, he appeared at the Magistrate's Court for his bail application. The formal bail application was denied.⁹ The Plaintiff's case was remanded several times until 31 March 2022 when the charges were withdrawn for lack of evidence.

[22] The court was directed to the records of the charge sheet,¹⁰ which showed that the same prosecutor, Mr GS Lungu had been tasked with prosecuting the case from 1 March 2021 until 24 March 2021. From 5 May 2021 the assigned prosecutors, Ms Phahlamohlaka and Ms Nxumalo, prosecuted the case until it was withdrawn in March 2022.

[23] The argument submitted on behalf of the Plaintiff at the hearing of the application for absolution from the instance was that the information before these prosecutors did not change from the date of the failed bail application until the withdrawal of the charges. In the circumstances, the prosecutors simply sought the remand of the case without applying their minds to the available evidence and ought to have arrived at a decision to withdraw the charges earlier than March 2022.

[24] The Defendants specifically directed the application for absolution at the lack of *prima facie* evidence on the element of malice on the part of the National Prosecuting Authority.

⁷ Levco Investments (Pty) Ltd v Standard Bank of South Africa Ltd 1983 (4) SA 921 (A) at 928 B; Swanee's Boerdery (Edms) Bpk (in liquidation) v Trust Bank of Africa Ltd 1986 (2) SA 850 (A); Jacobs v Minister of Justice and Correctional Services 2022 (2) SACR 569 (SCA) at para 8.

⁸ Marine & Trade Insurance Co v Van der Schyff 1972 (1) SA 26 (A) at 39 – 40.

⁹ CL 3E-12

¹⁰ CL p 3E- 1-17.

[25] The Defendants relied on the judgment of *NDPP v Mdhlovu*¹¹ to advance the submission that the NPA had no intention to prosecute the Plaintiff with the consciousness of wrongfulness in the prosecution.¹² The argument on behalf of the Defendants was that the evidence in the present case does not establish that the NPA commenced and continued with the prosecution believing that it was a wrongful prosecution.

ANALYSIS

[26] The information that was available to the NPA when it commenced the prosecution was (i) the A1 statement from the complainant, the mother of the minor children detailing the alleged rape of her minor children and (ii) the J88 Form being the medical report of tests conducted on the minor children on the date of the rape revealing serious injuries of tears, bruises and bleeding in the minors' bodies.¹³ This is the information that the NPA relied on to commence the prosecution.

[27] There was a delay of close to one year before the decision was finally taken by the senior public prosecutor, Ms Jordaan to withdraw charges against the Plaintiff. The delay was occasioned by the fact that the NPA was awaiting DNA results which arrived on 18 January 2022. The NPA sought to obtain DNA evidence as the primary evidence to be relied upon in the prosecution because there was some concern about the testimony of the youngest child who was 4 years old and was not able to express the distinction between the truth and lies when interviewed by a forensic social worker on 21 April 2021.¹⁴

[28] In the meanwhile, the Plaintiff was remanded in custody at Modderbee Correctional Facility having been denied bail.

[29] As correctly pointed out by the Defendants' counsel, in reliance to the *Mdhlovu* judgment, *animus iniuriandi* is an essential element of the *actio iniuriarum* on which a malicious prosecution claim is based. In waiting for the DNA test results

¹¹ 2024 (2) SACR 331 (SCA)

¹² At para 31.

¹³ CL 3D-7 to 3D-18

¹⁴ CL3D-72 to 3D-75

before making a decision on whether to proceed or withdraw the prosecution, the NPA could not be regarded as having demonstrated an intention to injure the Plaintiff.

- [30] The Plaintiff conceded under cross-examination that the prosecutors were simply executing their duties in prosecuting and could not have harboured hate towards him.
- [31] There was sufficient evidence, from the beginning of the prosecution until the decision to withdraw the charges to establish a reasonable and probable cause to prosecute the Plaintiff.
- [32] The Plaintiff sought to make an argument that the prosecutors were also aware of the fact that the complainant, the mother of the minor children, had accused two other persons of raping the minor children on two other occasions. The investigating officer in those cases, Mr Nyaila, was the same investigating officer in the Plaintiff's case. But the existence of those previous cases is irrelevant in determining reasonable and probable cause to prosecute the Plaintiff. As already mentioned, there was sufficient and reliable information before the prosecutors to institute the prosecution. The existence of the previous cases is also irrelevant in determining whether there was malice in persisting with the prosecution of the Plaintiff.
- [33] The Court finds that the Plaintiff has failed to discharge the onus on proving the element of malice. The requirement in law is that all elements of the claim must be proved. The prosecutors acted in the interests of the community at all times by awaiting the DNA tests before taking the decision on whether to proceed with or withdraw the prosecution.¹⁵
- [34] The Plaintiff's contention that the NPA could have exercised its powers under section 6 of the Criminal Procedure Act 51 of 1977 to withdraw charges against the Plaintiff whilst awaiting the DNA test results is without merit. Such an exercise of power would have been reckless and not in the interests of the community, especially in a case involving the alleged rape of two minor children.

¹⁵ Patel v NDPP and Others 2018 (2) SACR 420 (KZD) at para 27.

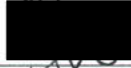
CONCLUSION

[35] In the circumstances the Court finds that the Plaintiff has failed to discharge the onus in respect of the claim for malicious prosecution. The Defendants' application for absolution from the instance must succeed.

ORDER

[36] The following order is made in respect of the Plaintiffs' second claim:

1. The Defendants' application for absolution from the instance is granted;
2. The Plaintiff's claim for malicious prosecution is dismissed with costs, on scale B of Rule 69.

BL MANENTSA AJ

Date of hearing:

11 November 2024

Date of Judgement:

13 November 2024

For the Plaintiff:

Adv K Mvubu

Instructed by:

Njuze Attorneys

For the Defendants:

Adv Phathela

Instructed by:

The State Attorney