Reportable:	Yes/No
Circulate to Judges:	Yes/No
Circulate to Magistrates:	Yes/No

IN THE HIGH COURT OF SOUTH AFRICA (NORTHERN CAPE DIVISION, KIMBERLEY)

CASE NO.: 579/2019
Date heard: 24-04-2023
Date delivered: 07-03-2025

In the matter between:

SEBEELA: ROBERT OATLHOTSE — **1st Plaintiff**

MANAKA: MOSHE MOSES — **2nd Plaintiff**

and

THE MINISTER OF POLICE — **1st Defendant**

NATIONAL DIRECTOR OF PUBLIC PROSECUTION — **2nd Defendant**

CORAM: WILLIAMS J:

JUDGMENT

WILLIAMS J:

1. The plaintiffs, Mr RO Sebeela and Mr MM Manaka issued summons against the 1st defendant, the Minister of Police and the 2nd defendant, the National Director of Public Prosecutions, for damages as a result of wrongful and/or unlawful detention (emanating from an unlawful arrest and detention in inhumane circumstances) from 21 September 2016 until 27 February 2018, and as against the 2nd defendant for damages for wrongful and/or malicious prosecution.

2. It is not in dispute that the plaintiffs were arrested on 9/10 May 2010. They faced charges of alleged theft alternatively possession of stolen goods and unlawful possession of dagga. The charges were at one stage withdrawn and then reinstated with the criminal trial proceeding in the Regional Court, Kimberley from some time during 2013 until the plaintiffs were convicted on the charges and sentenced on 21 September 2016 to 5 years imprisonment on the count of theft and 6 months imprisonment on the count of unlawful possession of dagga. Thereafter the plaintiffs were detained in various correctional facilities until their release on bail pending appeal on 27 February 2018. On 24 August 2018 the court of appeal set aside the convictions and sentences.

3. In its plea the 1st defendant denied that the arrest of the plaintiffs was unlawful and pleaded that a reasonable suspicion existed that a criminal offence was committed as contemplated in s40(1)(b) of the Criminal Procedure Act, 51 of 1977. The 1st defendant also denied any damages suffered as a result of the plaintiff's detention and denied that such damages could in any event be claimed from the 1st defendant.

4. The 2nd defendant denied that the detention of the plaintiffs was unlawful and denied any liability for any damages to the plaintiffs. The 2nd defendant denied that the prosecution of the plaintiffs was unlawful or malicious and pleaded a *prima facie* case against the plaintiffs. The 2nd defendant also denied liability for any damages to the plaintiffs in this regard.

5. The merits and quantum were separated and the trial proceeded before me on the merits only.

6. The plaintiffs presented their evidence first, presumably on the basis that the plaintiffs bore the onus on certain issues.

7. Both plaintiffs testified and at the close of their case, halfway through the last day allotted for the trial, the parties agreed that the matter be postponed. Mr Visagie for the defendants expressed the need for the

record to be transcribed in order for the defendants to consider their positions with regard to the further conduct of the trial.

8. When the matter resumed, Mr Visagie brought an application for absolution from the instance on the basis *inter alia*: that the plaintiffs, during cross-examination, either conceded or admitted by implication that their arrests were lawful; that the fact that the plaintiffs were detained in sub-standard conditions is not a legally valid ground for basing a claim of unlawful detention on; the plaintiffs did not make out *a prima* facie case against the 1st defendant for unlawful arrest and detention; that there was no evidence tendered that the prosecutor, in employ of the 2nd defendant, participated in the arrest or detention of the plaintiffs; and the plaintiffs failed to prove that the 2nd defendant acted without reasonable and probable cause in prosecuting the case against the plaintiffs.

Unlawful detention

9. It is trite that the onus rests on a defendant to justify an arrest. It is incumbent on the 1st defendant to establish the jurisdictional facts for a s40(1)(b) defence which is: (i) the arrestor must be a peace officer, (iii) the arrestor must entertain a suspicion; (iii) the suspicion must be that he suspect committed an offence referred to in schedule 1; and (iv) the suspicion must rest on reasonable grounds (see *Duncan vs Minister of Law and Order* 1986(2) SA 805 (A) at 818 G-H)

10. Whilst it is so that the plaintiffs do not specifically claim damages as a result of the alleged unlawful arrest, their claims for the alleged unlawful detention is stated in the particulars of claim to have emanated (in part) from an unlawful arrest. The argument that certain concessions had been made relating to the arrest (on which I do not intend to make a finding herein), does not shift the onus from the party on which it originally rested (see *Schoeman v Moller* 1949(3) SA 949 (O) at 957).

11. That being said, where the onus rests on the defendant to prove certain issues, absolution from the instance should not be granted at the close of

the plaintiffs case. This position was confirmed by the Supreme Court of Appeal in *Minister of Safety and Security vs Sekhoto and Another* 2011(1) SACR 315 (SCA) at 321, paragraph 8.

12. That being the case absolution from the instance with regard to the claim for unlawful detention must fail.

Malicious prosecution

13. The claim against the 2nd defendant for malicious prosecution rests on a different footing. Here the onus rests on a plaintiff to allege and prove that (i) the defendant set the law in motion; (ii) that the defendant acted without reasonable and probable cause; (iii) that the defendant acted with malice or *animo injuriandi*; and (iv) that the prosecution has failed (see *Minister of Justice and Constitutional Development and others v Moleko* 2009 (2) SACR 585 (SCA) at paragraph 8.

14. In paragraph 20 of the *Moleko* matter, the SCA explains what the requirement of *"absence of reasonable cause "entails:*

"[20] Reasonable and probable cause, in the context of a claim for malicious prosecution, means an honest belief founded on reasonable grounds that the institution of proceedings is justified. The concept therefore involves both a subjective and an objective element

'Not only must the defendant have subjectively had an honest belief in the guilt of the plaintiff, but his belief and conduct must have been objectively reasonable, as would have been exercised by a person using ordinary care and prudence."

15. With regard to the requirement of malice the court in *Moleko* stated the following at paragraphs 63 and 64 thereof:"

[63] 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, 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 of consciousness of wrongfulness, and therefore animus injuriandi, will be lacking. His mistake therefore excludes the existence of animus injuriandi.'*

[64] 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.

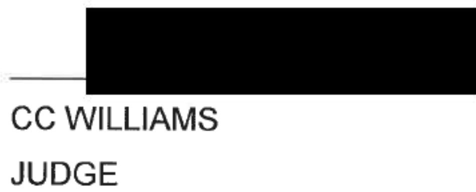
16. It would appear to me that the subjective elements of these two requirements which the plaintiffs have to prove to succeed with their claim for malicious prosecution are peculiarly within the knowledge of the 2nd defendant and if that is so a plaintiff who has made out some case to answer should not lightly be deprived of his remedy without first hearing what the defendant has to say. A defendant who might be afraid to go into the box should not be permitted to shelter behind the procedure of absolution from the instance

(See *Supreme Service Station (PVT) Ltd. v Fox and Goodridge (PVT) Ltd* 1971 (4) SA 90 (RA) at 93).

16. Absolution from the instance in this regard should also be refused.

The following order is made;

The application for absolution from the instance is refused.



CC WILLIAMS

JUDGE

For Plaintiffs:	Adv Mputle Fout Attorneys c/o Thomas Kouter Attorneys
For Defendants:	Mr P Visagie Office of the State Attorney