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

Case Number: 22/19815

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO
22 July 2025

In the matter between:

L[...] N[...]

Plaintiff

and

MINISTER OF POLICE

1st Defendant

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

2nd Defendant

JUDGMENT

Mahlangu AJ

Introduction

[1] The second defendant applies for absolution from the instance under Rule 39(6) of the Uniform Rules following the close of the plaintiff's case. For clarity,

parties retain their original designations. The plaintiff opposes the application. Both merits and quantum were agreed to be heard together.

[2] The application is based on the claim that, after the plaintiff's evidence, no prima facie case exists against the Director of Public Prosecutions, the second defendant.

Background

[3] The plaintiff, Mr L[...] N[...], has initiated action proceedings against the first defendant, the Minister of Police, and the second defendant, the Director of Public Prosecutions (DPP), seeking compensation for damages arising from his alleged unlawful arrest, detention, and malicious prosecution by agents of the Defendants.

[4] The defendants denied responsibility for the alleged unlawful arrest and detention. They further stated in their pleadings that the plaintiff was neither detained nor maliciously prosecuted. The plaintiff supported his claim with testimony from a single witness, himself, while the defendants did not present any witnesses. According to the plaintiff, on 14 January 2021, at or near Enconchoyini Primary School in Johannesburg, Gauteng, he was arrested without a warrant by police officers who were acting within the scope of their employment with the first defendant, on a charge of rape.

[5] The plaintiff testified that bail was not granted, and he was held at Boksburg Correctional Centre for 184 days, from 18 January to 26 July 2021, until the charge against him was withdrawn. Prior to the withdrawal of the charge, he attended court several times as the case was remanded, remaining in custody throughout.

[6] The plaintiff stated that he was detained on the same day as his arrest in conditions he regarded as inconsistent with human dignity and self-respect and remained in detention until 26 July 2021 when the charges were withdrawn. After this date, he reported no further contact from the police officers.

[7] The defendants denied liability for unlawful arrest and detention and further denied in their pleadings that the plaintiff was detained or maliciously prosecuted.

[8] After the plaintiff's case closed, the second defendant applied for absolution from the instance under Rule 39(6), which allows the defendant or counsel to address the court, followed by a reply from the plaintiff or counsel, and a final response from the defendant on new matters raised.

[9] The basis of the application was an error in the particulars of claim, which was explained in chambers. The error concerned a statement indicating that the alleged wrongful arrest pertained to a false charge of possession of a dangerous weapon, whereas the actual charge was rape. Both counsels acknowledged this error. The plaintiff's counsel, Advocate T.V Tshifhango, was given the opportunity for her client to consider amending the particulars to accurately reference the charge of rape instead of the alleged possession of a dangerous weapon.

[10] The plaintiff, via counsel, declined to amend the summons. I agree as it is irrelevant whether the withdrawn charge was for possession of a dangerous weapon or rape – the withdrawal's effect is the same. Prima facie, the plaintiff has shown he was wrongfully detained for 184 days on an unstainable charge. Accordingly, the application for absolution from the instance fails.

Evidence

[11] The plaintiff, aged 40, lives in Thokoza, Polopark with his children's mother since 2005. He has five children: B[...] (7); Z[...] (4); L[...] (2); A[...] (17) and I[...] (13). Currently, B [...], L [...] and Z [...] live with him, while A [...] resides in Turffontein and I [...] in rural areas.

[12] He is not employed full-time but does occasional piece work. At the time of his arrest, he was working, but after the charges was withdrawn and he was released, his job had been filled by someone else. He brought a civil action against the defendant for wrongful arrest and prosecution.

[13] He testified that his community sees him as a criminal despite never being convicted.

[14] During cross-examination, it was put to the plaintiff that the charges had not been withdrawn but rather that the case had been struck from the roll. Subsequent questions addressed matters that are not pertinent to the determination of this application for absolution.

[15] He testified that he was accused of raping a child called I[...]. He was summoned to a community meeting at a school and he was treated with death by being set on fire because petrol and tyres were bought for that purpose. His partner was in labour for the birth of one their children on 14 January 2021 and expected the baby to be born the following day. Whilst the community meeting, the police arrived, and he denied the charge against him. He was arrested and before being taken to Thokoza police station, he was taken to hospital where a person known as Xolisa Taliwe told the police, upon being asked, he was the person who committed rape. He was detained from 18 January 2021.

[16] At Thokoza police stations, his fingerprints were taken, and he was made to sign the warning statement.

The issue for determination

[17] The issue for determination is whether the application for absolution by the second defendant can be sustained under these circumstances.

The legal principles

[18] The test for absolution from the instance as stated in *Gordon Lloyd Page & Associates v Rivera*¹ is not whether the evidence established what would finally be required to be established, but whether there is evidence upon which a court,

¹ 2001 (1) SA 88 (SCA) at 92 G

applying its mind reasonably to such evidence, could or might (not should, or ought to) find in favour for the plaintiff. This is the law in our Republic.

[19] This implied that a plaintiff has to make out a *prima facie* case – in the sense that there is evidence relating to all the elements of the claims to survive absolution, because without such evidence no court could find for the plaintiff.² Differently put, the Court will be required in such cases to assess whether a *prima facie* case has been made for the plaintiff.³ In deciding on an application for absolution from the instance, whether the evidence is sufficient enough to find for the plaintiff, the Court is not called upon to make a determination on a witnesses' credibility.⁴

[20] The test has from time to time been formulated in different terms, especially it has been said that the court must consider whether there is “evidence upon which a reasonable man might find for the “plaintiff” – a test which had its origin in jury trials when the “reasonable man” was a reasonable member of the jury. Such a formulation tends to cloud the issue. The court ought not to be concerned with what someone else might think; it should rather be concerned with its own judgment and not that of another “reasonable” person or court. Having said this, absolution at the end of a plaintiff's case, in the ordinary course of events, will nevertheless be granted sparingly but when the occasion arises, a court should order it in the interests of justice.⁵

[21] If the test is applied, it is incumbent upon the plaintiff to have delivered evidence relating to all the elements of the claim. In deciding whether absolution should be granted, it is not required of a court to critically look at all evidence, as would be required of a court at the end of a trial to deliver judgment.

² Marine & Trade Insurance Co Ltd v Van der Schyff 1972 (1) SA 26 (A) 37G- 38A; Schmidt-Bewysreg 4th ed 91-92.

³ Sinqobile Equestrian Security Services (Pty) Ltd v Marks Koko Latha [2023] ZANWHC 12 (6 February 2023) para 41-42; Gordon Lloyd Page & Associates v Riveria and Another 2001 (1) SA 88 (SCA) para 2.

⁴ Sinqobile Equestrian (n3 above) para 45.

⁵ Gordon Lloyd Page (n1 above) para 2.

[22] Pete et al⁶ state that absolution from the instance should not be granted lightly by the courts and should not only be granted in circumstances where the plaintiff's case is so weak that no reasonable court could find for the plaintiff.

[23] It has been stated by the SCA in the *Minister of Justice and Constitutional Development & Others v Moleko*⁷ that in order to succeed with a claim for malicious prosecution, a claimant must allege and prove the four requirements that: (i) the defendants set the law in motion (instituted the proceedings); (ii) the defendants set the law in motion (instituted the proceedings); (iii) the defendants acted with "malice" or *amino injuriandi*; and (iv) the prosecution has failed.

[24] If a *prima facie* case has been made, the defendant will be required to meet the case, and if there is none, then the Court will grant absolution from the instance.⁸ Each case will, of course, depend on its own facts. The plaintiff bears the onus to prove its case.

Considerations:

Setting the law in motion

[25] The law is set in motion when a criminal complaint is formally reported to the South African Police Services (SAPS), which would initiate an investigation and leading to charged being brought against the suspect, and the police begin to actively investigate it. The act of reporting a crime is the primary important act that start the legal process. Criminal proceedings are instituted on behalf of the state against the suspect, as stated in the Moleko case.

[26] *In casu*, prosecutors can be said to have set the law in motion as they, in criminal proceedings on behalf of the state, make decisions about whether to prosecute or not, and their decision to file charges begins the legal process.

⁶ (Civil Procedure, A Practical Guide, 2nd Ed. 2012)

⁷ 2008 3 ALL SA 47 (SCA).

⁸

[27] It was not disputed that the plaintiff was arrested on a charged of rape on the 14th of January 2021. A docker was opened at the police station under CAS no. 102/01/2021. He was subsequently detained at the Thokoza SAPS cells until the 18th of January 2021, when he appeared before the Palmridge Magistrates Court for his first appearance. He was denied bail and further detained at Boksburg until the 26th of July 2021, when the charges against him were withdrawn. I agree with the counsel for the plaintiff that the law was set in motion, and this requirement has been satisfied.

The Defendant acted without reasonable and probable cause

[28] It is common cause that every time the plaintiff reached the court, he was not informed what was happening. He had only been informed that his case had been remanded and then was taken to Boksburg Prison. It is the plaintiff's testimony that when he went back to court for further appearances, approximately four to six times, he was not told what was going on or why his case was being remanded. He was told that the case was being remanded for further investigations. He was not told the reasons for said investigations or what needed to be investigated further. The plaintiff testified that he was not granted bail, and no reasons were advanced.

[29] It was further concerning that plaintiff was detained for further investigations when the J88 medico-legal report was already prepared and finalised on 14 January 2021 at 14h50. The plaintiff testified that it was not until the 26th of July 2021 that his matter was withdrawn, though the plaintiff was not told the reasons for the withdrawal.

[30] In the circumstances, it is evident that the prosecutor's conduct was unreasonable and without just cause as he/she knew or ought to have known that there was no tangible case to show on against the plaintiff then, when the docket was handed down to whoever, but he/she proceeded anyway. The plaintiff has satisfied this requirement.

That the Defendant acted with malice

[31] It must be noted that “*animus injuriandi*” includes not only the intention to injure, but also the consciousness of wrongfulness. The plaintiff’s version was that it was malicious for members of the second defendant to have kept him in detention without bail while the case was still under investigation. It has not been pleaded why the plaintiff could not be granted bail. Has the prosecutor not acted with malice, the plaintiff would not have been detained at the Boksburg Prison for approximately 184 (one hundred and eighty-four) days only for the charged against him to be withdrawn on the 26TH of July 2021.

[32] I am of the view that the ***abandonment of amending all those paragraphs***, including ***11.1.3***, does not in any way, manner or form recuse or exclude the second defendant from liability for having acted with malice. It is further the court’s view that none of those paragraphs suggest that the plaintiff has failed to satisfy any of the requirements for malicious prosecution.

[33] It was malicious for the prosecution to have kept the plaintiff in detention with no bail while the matter was still under investigation. I agree with the plaintiff that the prosecution acted with malice for having the case remanded for further investigation when he knew that the J88 medico-legal report had been completed and submitted to the police the day the plaintiff had been arrested. It is also noteworthy to mention that all this evidence was also presented in the plaintiff’s evidence-in-chief.

[34] The court agrees with the plaintiff that the prosecutor acted with malice when they failed to grant the plaintiff bail and further recommended that the plaintiff be detained pending finalisation of the matter.

[35] Furthermore, it is the court’s view that the plaintiff did prove *animus injuriandi* on the part of the second defendant. The second defendant clearly intended not to investigate this matter to finality and was fully aware of the consequences of his actions, injuring the dignity and the well-being of the plaintiff, being detained in those inhumane conditions. He was aware that in all probability, those inhumane conditions would affect the plaintiff negatively. Despite this knowledge, the second defendant decided to remand the case for more months without making any of the

enquiries, thus acting in a manner that showed recklessness as to the possible consequences of his conduct.

The prosecution has failed

[36] It is not in dispute that the plaintiff's charges were withdrawn on the 26th of July 2021, almost four years ago. The plaintiff testified that he has not appeared in court again since the charges were withdrawn in July 2021 and has never been contacted to come and appear in court. The plaintiff submits that the charged sheet depicting the plaintiff's withdrawal of charges with a stamp date 26 July 2021 as well as an entry of "withdrawal" towards the bottom of the charge sheet, is a document that was discovered by the defendants.

[37] I agree with the plaintiff that he has satisfied this requirement.

[38] In the instant case, it is common cause that the plaintiff was arrested and charged with rape of a child. The second defendant does not deny this. It is also common cause that the case was remanded on several occasions at the instance of the second defendant. The error committed in crafting the particulars of claim about being falsely accused of possession of a dangerous weapon as opposed to rape offer no shield to the second defendant. The court is, in fact, surprised that at the commencement of the proceedings, the parties agreed that the plaintiff bore the onus to lead evidence first. It should have been the other way around. The first defendant ought to have started first to show that the arrest was justified under the circumstances.

[39] The fact of the matter is that the plaintiff was unlawfully arrested, detained and ultimately maliciously prosecuted irrespective of the charge he faced. Whether it is a charge of rape or possession of a dangerous weapon, at the end of the day, what remains is the fact that the plaintiff was unlawfully arrested, detained and maliciously prosecuted.

[40] There was overwhelming evidence which was adduced by the plaintiff in his evidence-in-chief, which was not rebutted by the first and second defendants and no

witnesses were called, even though the counsel for the first and second defendant under cross-examination promised the court to call witnesses, but none were called.

[41] The second defendant does not persuade the court that no prima facie evidence was led against it. Instead, the record shows that the case was remanded on several occasions for further investigations until it was withdrawn. There has not been any further investigations until it was withdrawn. There has not been any further prosecution of the matter since the plaintiff was released from custody. Accordingly, both defendants must show by way of evidence why the court should not find for the plaintiff at the end of his case.

Conclusion

[42] Having considered the submissions by the second defendant's counsel, I am not convinced that a good case has been made for a favourable consideration of the application for absolution from the instance. Consequently, the application must fail.

Order

[43] Having considered the papers and the submissions by both counsel, the following order is made: -

- a. The second defendant's application for absolution from the instance is dismissed.
- b. The costs will be determined at the end of the trial.

**K MAHLANGU
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG**

For the Plaintiff:

Adv T.I Tshifhango instructed by N.J Belcher Attorneys

For the Defendants:

Adv R.C Netsianda instructed by The State Attorney South Africa

Date of hearing/trial: 13 April 2025

Plaintiff's Heads of Argument: 24 April 2025

Defendants' Heads of Argument: 24 April 2025

Date of Judgment: 22 July 2025