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

CASE NO.: 5011/2018

In the matter between:

COLLEN FODO

Plaintiff

and

MINISTER OF POLICE

1ST Defendant

NATIONAL COMMISSIONER OF POLICE

2nd Defendant

NATIONAL PROSECUTING AUTHORITY

3RD Defendant

JUDGMENT

ZONO AJ:

Introduction

- [1] The plaintiff claims damages from the defendants. Plaintiff's claim is two pronged. The first claim is against the first and second defendant for damages arising out of the alleged unlawful or malicious arrest and detention which took place on the 12th October 2010. The second claim is for malicious prosecution against the third defendant which allegedly occurred in the period between the 15th October 2010 when he first appeared in court to 5th July 2017 when he was found not guilty by the Regional Court. The plaintiff avers that the Prosecuting Authority subjected him to prosecution when it clearly had no *prima facie* against him.
- [2] The matter is fully defended by the defendants; in so doing they delivered their respective pleas. The first and second defendant place reliance on the provisions of section 40(1) (b) of Criminal Procedure Act 51 of 1977 in that the members of South African Public Service reasonably suspected that the plaintiff committed a schedule (1) one offence. The third defendant disputes that its members acted with malice and that they had no *prima facie* case against the plaintiff. The third defendant avers further that there was sufficient evidence in the docket justifying prosecution of the plaintiff.
- [3] At the commencement of the trial parties confirmed their agreement during the pre-trial conference that there shall be no separation of issues. The issue of liability was agreed to be dealt with together with the issue of quantum. The matter proceeded on the basis that both issues of liability and quantum should be dealt with together. Plaintiff bears a duty to begin.

Evidence

- [4] The plaintiff testified that he is a small scale farmer, farming *inter alia*, with pigs. On the 10th October 2010 the plaintiff received a call asking him to arrive at his pigsty as it is about fifty (50) meters from his home. He took his stick and firearm with him. On his way to his pigsty the plaintiff heard two sounds of a gunshot and some noise of the people saying catch the thieves. On his arrival the plaintiff noticed a bakkie with two pigs loaded at the back thereof. He further observed that the members of community were assaulting a group

of six (6) youngmen with sticks and schamboks. He knew two of the six youngmen as they were sons of the local sub-headman whom he knows very well.

[5] Community members advised the plaintiff that the youngmen are the same thieves they had always been advising him about as they were apparently assaulting them. The plaintiff intervened and when the situation calmed down he called the sub-headman to immediately come to the scene and thereafter called the police and they quickly arrived and he explained what happened. Two policeman arrived, one of whom was Xuza and they suggested that the two pigs to be taken back to the pigsty.

[6] On the 11th October 2010 the plaintiff went to the police station to check the progress of his case where he was advised that Mr Khawule is handling his case and Khawule would advise him of the progress. To the plaintiff's surprise the police officers arrived at his home to arrest him on the 12th October 2010 at 09:50 for the alleged attempted murder, assault where bush knife and schamboks were used. They requested plaintiff's firearm and licence. The names of the police officers were Vuyokazi Madalane and Madolo. They then instructed the plaintiff to board the police van to Ngangelizwe Police Station where they ultimately detained the plaintiff. The plaintiff appeared in court on the 15th October 2010 when he was granted bail. The plaintiff seeks to assail his detention on the basis that he is the one who was a victim of theft of his pigs and he had been reporting those incidents to the police.

[7] In addition to the attempted murder the plaintiff testified that he was prosecuted for robbery with aggravating circumstances of car keys and phones. He holds the view that his prosecution was malicious. He says so because there was no evidence in the docket that showed that he committed an offence of robbery. The plaintiff contended that he was ultimately acquitted. The plaintiff testified that at the scene, the phones and car keys were given to the sub-headman by his sons. The plaintiff categorically testified that he is not impugning or assailing his prosecution in respect of attempted murder, but he takes an issue with his prosecution only in respect of robbery.

After plaintiff's evidence the plaintiff closed its case, paving way for the defendants.

- [8] Vuyokazi Madalane (Madalane) was called to give evidence on behalf of the first and second defendants. She was employed for 27 years as a Police Officer. On the 11th October 2010, when she reported for duty she was a Warrant Officer. She received a docket and attended at the scene. On arrival at the scene Ms Madalane noticed a white bakkie parked outside a certain homestead with a bullet hole on the right hand side. She observed some blood on the ground. She then visited the victims at the hospital. Her evidence revealed that she was not alone, she was in the company of other police officers. Some statements were apparently taken from the victims. However, she categorically stated that she took a statement from one victim, Thabile Sibangela.
- [9] On the 12th October 2010, She, together with other police officers went to plaintiff's home. The plaintiff initially denied them access into his home, but they ultimately entered. After introductions, Ms Madalane advised the plaintiff that he was under arrest for six (6) counts of attempted murder and robbery that took place. On 10th October 2010. The plaintiff was arrested and detained at Ngangelizwe Police Station. She testified that witness statements clearly established that the plaintiff hacked the victims with a bush-knife and the victims were seriously injured.
- [10] During cross-examination Ms Madalane stated that she arrested the plaintiff on charges of attempted murder and robbery. At the time of the arrest, she had two statements by the police officers and a witness that placed the plaintiff at the scene. She took the statement from the witness. The witness from whom the statement was taken knows the plaintiff as they are from the same area. Ms Madalane could glean from the statements that the plaintiff seriously injured and robbed the victims of the car keys, phones and a watch. The first and second defendant closed its case after this witness (Madalane).

[11] The third defendant opened its case and called the evidence of the public prosecutor, Mr Kenneth Kawunda Zongo. He testified that he had been a Prosecutor for 22 years and is now based in the Mthatha Regional Court. He was a Prosecutor in the plaintiff's case at the Regional Court. Upon receipt of the docket, Mr Zongo observed that there were five (5) statements and a completed J88 (with its accompanying affidavit) in the docket. He perused the docket and came to a conclusion that the plaintiff had a case to answer. Everything was in order and the docket qualified to be in the Regional Court. He also observed that there was a warning statement in which the plaintiff expressed that he would make his statement in court. He thereafter consulted with all the witnesses including the one who personally knows the plaintiff, who stated that they were in the motor vehicle drinking liquor when plaintiff came and shot him on the foot and he ran to hide under the motor vehicle. The car keys, cell phone and an amount of R1500.00 was taken.

[12] Mr Zongo denied that the prosecution was malicious and that he acted without reasonable and probable cause when instituting the criminal proceedings. A prima facie case had been established in the docket as the victims were seriously injured and one witness statement implicated the plaintiff in the charge of robbery. This captures the essence of Mr Zongo's evidence.

Unlawful Arrest and Detention

[13] During the trial of this matter Mr Sintwa, Counsel for the Plaintiff wisely conceded that the second defendant, the National Commissioner, SAPS was misjoined as he is not an executive authority¹. Only the executive authority must be cited and joined as a nominal defendant in the case of litigation against an organ of state or Department. He further submitted that the plaintiff seeks no relief against the second defendant. Therefore, no order should be granted against the second defendant.

¹ Section 2(2) of State Liability Act 20 of 1957 as amended.

[14] It is trite that the onus vests on a defendant to justify an arrest². In *Hurley*³ Rabie CJ Observed thus:

“An arrest constitutes an interference with the liberty of the individual concerned, and it therefore seems 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.”

In this case it is the first defendant who must prove that the arrest of the plaintiff was justified in law. Every arrest is *prima facie* unlawful⁴.

[15] Section 12(1) of the Constitution provides thus:

“Everyone has the right of freedom and security of the person, which includes the right-

- (a) not to be deprived of freedom arbitrarily and without just cause,*
- (b))not to be detained without trial.”*

[16] An arrest of an individual constitutes an interference with the individual's right to freedom⁵. An individual's right to freedom can be limited. It can be limited if the limitation is strictly in terms of the law of general application⁶

[17] In an attempt to discharge that onus the first defendant relies on the provisions of section 40(1)(b) of the Criminal Procedure Act 51 of 1977 as amended which is worded thus:

“40(a) A peace officer may without warrant of arrest any person-
(a).....

² *Minister of Safety and Security v Sekhoto* 2011(1) SACR 315 SCA; 2011(5) SA 367 SCA Para 7.

³ *Minister of law and order v Hurley* 1986 (3) SA 568 (A) at 589 E-F.

⁴ *Zealand v Minister of justice and Constitutional Development* 2008(2) SACR (1) (CC) Para 82.

⁵ *Mbalela v Minister of Police* (1086/2019) [2025] ZAECHMHC 8 (8 February 2025) Para 39-40

⁶ Section 36(1) of the Constitution.

(b)whom he reasonably suspects of having committed an offence referred to in schedule1, other than the offence of escaping from lawful custody.”

[18] As was held in *Duncan*⁷ and quoted with approval in *Sekhoto*⁸ the jurisdictional facts for section 40(1)(b) defence are (i) the arrestor must be a peace officer; (ii) the suspicion must be that the suspect (the arrestee) committed an offence referred to in schedule 1; and (iv) the suspicion must rest on reasonable grounds. There seems to be no dispute about the fact that Ms Madalane, the arresting officer was a peace officer and that she entertains a suspicion that an offence was committed. Both the attempted murder and robbery are schedule 1 offences. I may mention, in parenthesis for what I will discuss hereinafter that attempted murder is also a schedule 5 offence whilst an offence of robbery with aggravating circumstances is also a schedule 6 offence.

[19] The bone of contention is whether the arresting officer entertained a reasonable suspicion or the one that is based on reasonable grounds. Reasonable grounds are interpreted objectively and must be of such a nature that a reasonable person would have a suspicion⁹. The arrester’s grounds must be reasonable from an objective point of view. The section requires suspicion and not certainty¹⁰.

[20] It is apposite to crisply deal with the purpose of arrest. The purpose of arrest is to bring the suspect to or before court or to trial or justice¹¹. Once the arresting officer harbours a suspicion that is based on reasonable grounds, he or she is enjoined to bring the suspect to justice. I set out to deal with what served before the arresting officer before unleashing her power to arrest the plaintiff.

⁷ *Duncan v Minister of law and order* 1986(2) SA 805 (A) at 818 G-H

⁸ *Minister of Safety and Security v Sekhoto* 2011 (1) SACR 315 SCA; 2011 (5) SA 367 (SCA) Para 6

⁹ *R v Van Heerden* 1958 (3) SA 150 (T)

¹⁰ *Mabona v Minister of Law and order* 1988 (2) SA 654 (SEC) at 659 E-H

¹¹ *Tsose v Minister of justice* 1951 (3) SA 10 (A); *Sekhoto (Supra)* Para 42 and 44; *Mbalela v Minister of Police* (1086/2019) [2025] ZAECHC 8 (8 February 2025) Para 40

[21] It is not in dispute that when the arresting officer, Ms Madalane received the police docket there were already two statements therein. The docket was received by the arresting officer on 11th October 2010. The first statement was deposed to by Sergeant Nosilela. The relevant parts of this statement read as follows:

“On the 10-10-2011 at about 22:00 I was on duty doing the night shift. As I was patrolling at Ngangelizwe area together with Constable Xuza we received a call from the radio control that there were six males who were arrested at Bongweni Location while they were stealing the pigs in the pigsty. I and Constable Xuza rushed to the scene. On our arrival we met the headman of Bongweni Mr Sibangela who took us to the scene. On the scene we found a group of people and there were six SA males who were collected together. They were severely beaten. Some had injuries on the head. When I asked the victims what had happened they didn’t talk because of their injuries. At the scene there was also a Toyota Bakkie with registration No B[...]. Inside the Bakkie there were two piglets. I asked from community members what had happened. One SA male by the name of Mr Fodo told me that he is the owner of the pigs which were being loaded by the victims. The brother said that he heard pigs growth. When he looked he saw some SA males loading the pigs to the van. He called the community members and they came and they assaulted victims and arrested them. After that they called the police. The victims were assaulted with the bushknife and stick. We called the ambulance and victims were taken to Nelson Mandela Hospital and the above mentioned Toyota Bakkie was taken by the headman for safe keeping” (sic). I assume that reference in the statement to 10-10-2011 is reference to 10-10-2010.

[22] It is clearly discernible from this statement that the plaintiff was at the scene when the victims were being severely beaten. Infact it is recorded that the plaintiff called the community members and the victims were beaten. What leaves one to wonder is the method or means employed by the plaintiff to

keep the victims in his control until the arrival of community members. The reasons for the victims not to escape when they were apprehended by the plaintiff is not unknown. What we know from plaintiff testimony is that he had in his possession a stick and a firearm. However, a group of six (6) youngmen were kept in control of and by one man until the arrival of community members.

- [23] The second statement that was in the docket when it was brought to the arresting officer on 11th October 2010 was that of Constable Xuza which in relevant parts reads as follows:

“On Sunday 2010-10-10 at about 22:00 I was on duty doing night shift. We received a call from control 2 (two) that at Bongweni location, Zimbane A/A there are six (06) b/males that were arrested by the community members with stolen properties and they were beaten by the community. I and Sgt Nosilela we responded to the call of control by going there at Bongweni Location near Eskom. On our arrival we met with the headman of Bongweni, Mr Sibangela who took us to the scene of crime.

5.

We met so many community members with six (06) B/males they were very injured all over bodies and heads. We asked to the suspects what's happening. They didn't answer, but the headman Sibangela said they were caught by the community with stolen pigs and the piglets (two), these suspects were driving a motor vehicle reg B[...] Toyota Bakkie with cabbage and two piglets inside.

6.

These suspects were beaten by the bush-knives and firearms were used to assault them. One of them was shot at the stomach and the others got open wounds on head and arms seemingly the bush-knife was used.

7.

They were taken to the Nelson Mandela hospital by EMS ambulance and M/V was taken by the headman. The names of victims (i) Mandisi

Ntshovulana age 32 years (ii) Thandile Sibangela 29 years (iii) Buntu Tabashe 50 years (iv) Khaya Sibangela 32 years (v) Odwa Khalimashe 27 years (vi) Akhona Sibeko 19 years. All were admitted in Nelson Mandela Hospital.”

- [24] On the same date of 11th October 2010 the arresting officer together with other police officers visited the victims mentioned in the statement at the hospital. The arresting officer consulted with Thabile Sibangela and a statement was thereafter taken and the relevant parts thereof read as follows:

“

6

After ten minutes after arrival I heard big firearm shot and it was coming from the directing of the tip. When I was still shocked and a second shot again was shot, I jumped over the vehicle and others ran away because I noticed that the sound of the firearm was coming closer.

7.

Two men arrived, it was Mr Fodo and the other man, Gadi. They pulled me from the vehicle and they were assaulting me with a stick and they instructed us to lie down and we did, some of them ran away i.e Mandisi ran away but he was already shot whilst he was inside the car. Mr Fodo said why we are stealing his pigs. I could not answer him. They assaulted us with bush knife, sticks and shot us with firearm. I sustained multiple injuries. The people I know they assaulted us are only these two because there was a time when I got unconscious. I do not know other people who arrived and assaulted us because it was dark and it was hard to identify a person. I know and identified Mr Fodo and Gadi because they are the people I am already know as the people who stay next to my residential place. They stopped assaulting us when they heard a voice of my father. My father shouted by saying madoda ndim ngu Ndaba and they stopped assaulting us. My father suggested that an ambulance to be called because he saw us lying down. I was having severe pains. Mr Fodo chopped me and broke. I

was then broken on my left leg. I sustained injuries on my left side of the head and injuries all over the body. That is all I can say.” (sic)

- [25] All three statements complemented each other. The consultation with the victim and the statement taken from Thabile connected all the dots and filled all the gaps that were left in the previous statements. In addition to the statements and consultation referred to above, the arresting officer and other police officers approached the plaintiff on the 12th October 2010. Crucial events of the 12th October 2010 are hereinafter dealt with.
- [26] Besides the facts that the plaintiff demonstrated a belligerent attitude towards the police officers by refusing to cooperate and open his yard gate, when the gate was ultimately opened he did not seek to explain the events of the 10th October 2010 with a view to exonerate himself. It is clear from his testimony that the arresting officer and other police officers explained the nature of the charges he was facing, but nonetheless he did not seek to explain his side of the story. The plaintiff had all the time to explain himself to the police officers as it appears that he verbally interacted with them by *inter alia* asking them for the reason they were arresting him. Answering the question and cooperating with the plaintiff, the arresting officer and other police officers explained not only the nature of the offence the plaintiff was facing, but also explained the nature of the weapon used when that offence was used. That is clear from the plaintiff's evidence in chief. The attitude of not wanting to explain himself to the police officers persisted and transcended to the time when he signed his warning statement where it is recorded: *“Decline to make a statement he will make it before court.” (sic)* The warning statement is dated 13th October 2010.
- [27] Mindful of the statements in the docket and the interactions between the plaintiff and the police officers on 12th October 2010, I set out to deal with Mr Sintwa's main submission. Mr Sintwa, Counsel for the plaintiff strongly submitted that plaintiff's arrest was effected without verification of the information in the docket. When requested to explain the practical meaning of the word, especially in the context of this case, he was unable to. In law

context is everything¹². When an authority was requested for proposition that an information in the docket must be verified before an arrest can be effected, he sought to rely on the case of *Mabona*¹³ referred to above. In his submission he sought to conflate the meaning of suspicion and certainty. I disagree that *Mabona* is an authority for proposition that there must be certainty that an offence was indeed committed by the suspect.

[28] Jones J¹⁴ observed as follows:

“.....It seems to me that in evaluating his information a reasonable man would bear in mind that the section authorises drastic police action. It authorises an arrest on the strength of a suspicion and without the need to swear out 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 the information at his disposal critically, and he will not accept it lightly or 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 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 upon solid grounds. Otherwise, it will be flighty or arbitrary, and not a reasonable suspicion.”

[29] Although the statement of sergeant Nosilela would be sufficient to arrest on the basis of a doctrine of common purpose as it is plain from the interaction between the plaintiff and the police officers on the 10th October 2010 that the plaintiff was the first one to catch the victims and thereafter called members of the community. Members of the community came at his instance and arrived when the victims were in plaintiff's hands and the victims subsequently

¹² *Minister of Home Affairs and others v Scalabrini Centre Cape Town and Others* 2013 (6) SA 421 (SCA); 2013 (4) ALL SA 571 (SCA) Para 89

¹³ *Mabona and another v Minister of law and order and others* 1988 (2) SA 654 (SE) at 659 E-H

¹⁴ *Mabona (Supra)*

sustained serious injuries. The arresting officer and other police officers continued with further investigations which included consultations and taking of further statements. It is clear from the discovered documents which Mr Sintwa was using in this trial that, some other statements were taken from other victims on the 11th October 2010, which attest to the same events of the 10th October 2010. This revelation gives more expression to the arresting officer's evidence that on the 11th October 2010 she visited the victims at the hospital with other police officers who might have taken statements from other victims as she was taking statement from Thabile.

[30] I am satisfied that the kind of information that was in the docket called for the plaintiff to be brought to court. It is crucial and opportune to deal with the manner in which a suspect should be brought to court if he is facing the kind of charges the plaintiff was facing. It is clearly established that the power to arrest may be exercised only for the purpose of bringing the suspect to justice¹⁵. Once the suspect is brought to court it is the role of the court whether to authorise his detention or release. Whilst attempted murder is a schedule 1 offence, it is also a schedule 5 offence. This is the charge the plaintiff was facing. In what follows I refer to the provisions of section 60(11)(b) of the CPA.

[31] Section 60 (11) provides that:

“(11) Notwithstanding any provision of this Act, where an accused is charged with an offence-

(a)

(b) referred to in Schedule 5, but not in Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies

¹⁵ **Minister of Safety and Security v Sekhoto** 2011 (1) SACR 315 (SCA); 2011 (5) 367 Para 42 and 44

the court that the interests of justice permit his or her release”.

[32] This section proceeds from a point of view that the release of a suspect facing a schedule 5 offence is granted only by the court upon representations having been made to the satisfaction of the court. The default position is that a suspect charged with schedule 5 offence must be detained. The detention of the suspect is determinable by the court. By necessary implications members of the SAPS seized with a matter where the suspect is charged with a schedule 5 offence are directed to arrest and detain the suspect until such time that he/she presents before court evidence that shows that interests of justice permit his or he is release on bail.

[33] It seems to me that the arresting officer is not empowered by law to release or to save the suspect charged with schedule 5 offence from detention otherwise than in terms of the court order. I therefore cannot find that the plaintiff under the circumstances of this case was arrested and detained unlawfully.

[34] An arresting officer effecting an arrest on the suspect exercises public power. The doctrine of legality which requires that power should have a source in law, is applicable whenever public power is exercised. Public power can be validly exercised only if it is clearly sourced in law¹⁶. Arresting officer's power to arrest and detain the suspect in circumstances like the present does not only arise from section 40(1)(b) of the CPA, but also in section 60(11)(b) of the same Act. The evidence before me clearly demonstrates that section 60(11)(b) of CPA which, by necessary implications authorises the detention of the suspect until he or she is dealt with in terms of the law applies¹⁷.

¹⁶ **AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another** 2007 (1) SA 343 (CC) Para 68.

¹⁷ **Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs** 2004 4) SA 490 (CC); 2004 (7) BCLR 687 (CC) (12 MARCH 2004) Para 27.

[35] In the circumstances, I need not deal with the charge of robbery with aggravating circumstances, which is also a schedule 6 offence as my observation will not be any different from the one made above¹⁸.

[36] On the conspectus of all the above I find no basis for finding that plaintiff's arrest and detention was unlawful. I therefore come to a conclusion that plaintiff's claim based on his arrest and detention cannot succeed and therefore must fail.

Malicious Prosecutions

[37] It is necessary to firstly understand the offences in respect of which the plaintiff was prosecuted. A distinction has to be drawn between the offences in respect of which the suspect is charged and offences in respect of which the suspect is prosecuted especially in the context of this case. I say this in parenthesis for what I shall discuss herein below.

[38] The annexure to the charge sheet shows that in the Regional Court: Eastern Cape Division, as the heading suggests, the plaintiff was charged with robbery with aggravating circumstances in that on 10th October 2010, the plaintiff did assault and take with force the motor vehicle keys, cell phone nokia, a wallet and a sum of R1500.00 where firearm was used from Khaya Sibangela; and that on the same date he did assault and with force take a cell phone, Samsung B3410 Delph and a watch from Buntu Sibangela, where a fire arm was used. It does not appear in the charge sheet or anywhere in the record and evidence as to when those charges were put/levelled against the plaintiff. However, it is plain from the discovered investigation diary that the matter was brought to the Regional Court on 05th April 2011.

[39] However, the summons in criminal case demonstrate that the plaintiff was summoned to appear in court in respect of the offence of attempted murder

¹⁸ Section 60(11)(a) of CPA.

on *inter alia*, 27th June 2011, 23rd September 2011 and 10th August 2016 etcetera. No mention of the charge or offence of robbery with aggravating circumstances is made. A subpoena in criminal proceedings was apparently prepared by the Public Prosecutor, Mr Zongo on 19th April 2017 refers only to the attempted murder and no mention is made of the robbery. Lastly, J14, which is a certified extract from the criminal record book demonstrates that the plaintiff was found not guilty of the attempted murder and was discharged. Again, no mention is made of the offence of robbery.

[40] It is virtually not clear at what stage the plaintiff was caused to face the charge of robbery, if he was at any stage. Even at the time when the plaintiff was arrested and detained on the 12th October 2010, he appears to have been warned of the charge of attempted murder only. A notice of rights in terms of the Constitution (section 35 of Act No 108 of 1996) signed on the 12th October 2010 at 19:20 shows that the plaintiff was facing a charge of attempted murder and nothing is said of the robbery. This simple means that from the beginning to the end the plaintiff was dealt with on the basis that he was a suspect in the offence of attempted murder.

[41] This becomes important because the plaintiff as well as his Counsel demonstrated that they seek to pursue the case of Malicious Prosecution only in respect of robbery with aggravating circumstances. The plaintiff categorically testified to that effect in the following words “ *I have no problem with the charge of attempted murder.*” He is on record to indicate his pursuit of his malicious prosecution claim only in respect of a charge of robbery with aggravating circumstances. Plaintiff ‘s particulars of claim are plainly not a model of clarity. Issues are not pleaded with clarity and precision¹⁹ hence there is no mention of the offences in respect of which the plaintiff was prosecuted in the whole tenor of the particulars of claim. They are replete with wordiness and unnecessary repetitions. It was for the first time in evidence that the plaintiff clarified that the claim for malicious prosecution is only in respect of the offence of robbery with aggravating circumstances.

¹⁹ Rule 18(1) of Uniform Rules of Court

[42] Lest I am perceived to be incorrect, plaintiff's Counsel, Mr Sintwa clarifies the position in his heads of argument filed on 30th July 2025 as follows:

- “57. The plaintiff led evidence that there was no evidence linking him to the offence of robbery with aggravating circumstances when he was charged by the police and.*
- 58. That the prosecutor failed to read the docket because had he done so, he would have seen that there are no statements linking him to the robbery with aggravating circumstances.*
- 59. Mr Zongo testified there was such statement, but he does not know in the district court as he was not the prosecutor there and only came to the matter in the Regional Court.*
- 60. There is no evidence of the prosecutor who enrolled the matter in the district court but it has been established through evidence that the statements relating to robbery were the following....*
- 63. There was clearly no evidence in the form of witness statement in the docket supporting the allegations of robbery with aggravating circumstances against the plaintiff.*
- 66. Mr Zongo testified that there was a prima facie evidence linking him to the offence in the regional court, unfortunately the prosecution did not start at the regional court but from the district court and we now know that at the district court during plaintiff's appearance there, there was no evidence linking the plaintiff to the offence of robbery.*
- 71. As pleaded in paragraph 11 of the plaintiff's particulars of claim, his case spent 11 months in the district court without any evidence linking him to the robbery”. (sic)*

[43] It is now plainly crystal that during the trial of this matter the issues narrowed themselves down to malicious prosecution only in respect of robbery with aggravating circumstances. Again plaintiff's heads of argument further narrowed down this issue only to relate to the period when the matter was still serving in the district court. No finding of liability need be made with regard to

the prosecution in the regional court. In the following paragraphs in plaintiff's heads of argument, Mr Sintwa argues thus:

"81. There is plathora of authorities with regard to the amount awarded for malicious prosecution but before that a concession has to be made with regard to the prosecution in the regional court.

82. The prosecution in the regional court does not attract liability and therefore the plaintiff is confined to the 11 months of the district court and we of the view that an amount of five hundred thousand rand would suffice in that regard" (sic).

[44] We now know that this matter concerns plaintiff's alleged prosecution in the district court for a charge of robbery with aggravating circumstances. This is now the only proper characterisation and scope of plaintiff's case for malicious prosecution. The crisp issue for determination is whether a plaintiff has made out a case for a claim of malicious prosecution in the district court.

[45] Malicious prosecution is an abuse of the process of the court by intentionally and wrongfully setting the law in motion on a criminal charge²⁰. In order to succeed in an action for malicious prosecution the plaintiff must show the following:

- (a) that the defendant instituted or instigated the proceedings,*
- (b) the defendant acted intentionally or with animus iniuriandi,*
- (c) that the defendant acted without reasonable and probable cause,*
- (d) that the defendant was actuated by an improper motive or malice,*
- (e) that the proceedings terminated in the plaintiff's favour, and*
- (f) plaintiff suffered damages²¹."*

²⁰ LAWSA Volume 15, Part 2, Second Edition, Page 175 Para 315

²¹ **Minister of Safety and Security v Moleko** 2008 (3) ALL SA 47 (SCA) Para 8.

[46] In order for the plaintiff to succeed in his claim for the malicious prosecution the essential requirements must all be met. In *Funani*²² this court made the following dictum:

“24. Having found that some requirements have been conceded by the defendant and others have not been proved by the plaintiff, a party on whom the entire onus lie, I find that the concession of other requirements is not helpful to plaintiff’s case. The test of proving requirements is conjunctive and not disjunctive. For a successful claim of malicious prosecution plaintiff must prove that all the requirements are cumulatively in existence. They must co exists with each other as they are inextricably linked to or dependent upon one another for a successful claim of this nature. Failure to prove one requirement will lead to a dismissal of plaintiff’s case. Having found that not all the requirements of the claim have been satisfied, I accordingly find that plaintiff’s claim cannot succeed with costs”.

[47] Whilst it appears true that the criminal proceedings relating to the robbery with aggravating circumstances were instituted or instigated in the regional court it is not clear if there were any criminal proceedings in respect of the charge of robbery with aggravating circumstances instituted or instigated in the district court. The annexure is headed as follows:

*“ANNEXURE
IN THE REGIONAL COURT: EASTERN CAPE DIVISION
CASE NO: RCUM:130/11”*

It is noteworthy that the matter bore a 2011 case number in circumstances where the event in terms of which the plaintiff was charged occurred in October 2010. That gives credence to the fact that the charges of robbery with

²² *Funani v National Director of Public Prosecutions* (1298/2016) [2019] ZAECHMHC 71 (5 November 2019).

aggravating circumstances only surfaced after the matter had been transferred to the regional court.

[48] There is no evidence led to the effect that a charge of robbery with aggravating circumstances served before the district court. There is no evidence led to suggest that the plaintiff was prosecuted in the district court in respect of the offence of robbery with aggravating circumstances. Even the discovered face of docket does not make mention of an offence of robbery, but only of an attempted murder. The docket was opened at least at the inception of the case. If there was, at that stage, a charge of robbery it should have been adverted on the cover of the docket. The plaintiff therefore failed to prove that there was instigation of the criminal proceedings in respect of the charge of robbery. Plaintiff's alleged prosecution for eleven months does not appear to have been in respect of the charge of robbery. It is trite that there must be a prosecution before the plaintiff can bring an action for malicious prosecution²³. The plaintiff has dismally failed to prove the first essential requirement. On this basis plaintiff's claim of malicious prosecution cannot succeed.

[49] A benevolent and generous approach of broadly dealing with this claim of malicious prosecution on the basis of general reference to the plaintiff's prosecution cannot assist plaintiff's case. Even if it can be said, for example, there was in broad terms prosecution that took place in the district court, it would still suffer a deficiency of the last requisite about termination of proceedings. There is no evidence or whatsoever that there were any proceedings terminated in the district court. No action will lie until the criminal proceedings have terminated in the district court. No action for malicious proceedings have terminated in favour of the plaintiff²⁴. Where proceedings have not terminated, action for malicious prosecution must fail²⁵. On the facts of this case, it is common cause that no criminal proceedings terminated in the district court. Even the one relating to attempted murder terminated in the

²³ LAWSA Vol 15 (Supra) Page 195 Para 317.

²⁴ **Thompson v Minister Police** 1971 (1) ALL SA 534 (E) at 375

²⁵ **Susman v Krak** 1917 TPD 4378 at 438

regional court. Even where there was a claim relating to the prosecution in respect of attempted murder, it would fail as it would have been instituted with reasonable and probable cause. I say this in the light of the nature of the information that was before the prosecutor when a decision to prosecute was taken.

[50] In the amalgam of all the above, I am of a considered view that a claim for malicious prosecution cannot succeed. It must therefore fail.

Both Claims

[51] I have found that a claim of unlawful arrest and detention cannot succeed. I therefore find that it must be dismissed. The claim for malicious prosecution is equally unsuccessful. It must therefore be dismissed. The only outstanding issue is the one relating to costs. I see no reason for a deviation from the general rule that costs should follow the result. The plaintiff must bear the costs of this action.

Order

[52] In the result I make the following order:

1. **Plaintiff's claim of unlawful arrest and detention is hereby dismissed.**
2. **Plaintiff's claim of malicious prosecution is hereby dismissed.**
3. **The plaintiff is ordered to pay costs of suit.**

A.S ZONO
JUDGE OF THE HIGH COURT (ACTING)

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Matter heard on :28, 29 and 30 July 2025
Delivered on :12 August 2025