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**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case number: 22401/2018

In the matter between:

LUTHANDA MPOSELWA

Plaintiff

and

MINISTER OF POLICE

First defendant

DIRECTOR OF PUBLIC PROSECUTIONS

Second defendant

Case number: 22402/2018

And in the matter between:

BONANI ZELEN

Plaintiff

and

MINISTER OF POLICE

First defendant

DIRECTOR OF PUBLIC PROSECUTIONS

Second defendant

REASONS DELIVERED ON 29 SEPTEMBER 2025

VAN ZYL AJ:

Introduction

1. These two actions were heard together because they arose from the same facts.¹ The plaintiffs sought delictual damages from the defendants arising from their alleged unlawful arrest, wrongful detention, assault, and malicious prosecution.
2. On 18 June 2025, after the close of the plaintiffs' case, I granted the following order pursuant to an application by the defendants under Rule 39(6) of the Uniform Rules of Court:²
 - 2.1 The defendants' application for absolution from the instance at the close of the plaintiffs' respective cases is granted in respect of all of the plaintiffs' claims, on the basis that there is not sufficient evidence upon which the Court, applying its mind reasonably to such evidence, could or might find for the plaintiffs.
 - 2.2 The plaintiffs are to pay the defendants' costs of suit jointly and severally, the one paying, the other to be absolved, including counsel's fees taxed on Scale B.
3. The basis of the defendants' application was that the plaintiffs failed to make out a *prima facie* case in their evidence to sustain any of their

¹ I refer to the plaintiffs collectively as "the plaintiffs", unless it is necessary to distinguish between them, in which case I shall refer to them by name.

² Rule 39(6): "*At the close of the case for the plaintiff, the defendant may apply for absolution from the instance, in which event 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.*"

claims. In furnishing the reasons for the order granted, I set out the relevant factual background as it appeared from the pleadings and the evidence, before discussing the applicable legal principles.

The factual background

The plaintiffs' arrests

4. On 20 October 2017, members of the South African Police Service ("SAPS") arrested the plaintiffs on suspicion of their having been involved in the rape and murder of Ms Z[...] S[...], which had taken place on 3 September 2017.

The institution of prosecution, and the plaintiff's continuous detention until bail

5. On 23 October 2017 Ms Harmse, the senior public prosecutor at the Khayelitsha Magistrates' Court, preferred charges of rape and murder against the plaintiffs. Mr Macaba was appointed as prosecutor to the case, and the matter was postponed to 30 October 2017 for bail information. The plaintiffs were in custody during this period.
6. On 30 October 2017, the State indicated that it would oppose the plaintiffs' bail applications as they stood charged with offences listed in Schedule 6 to the Criminal Procedure Act 51 of 1977 ("the CPA"). The matter was postponed to 28 November 2017 for the institution of bail applications. The plaintiffs had legal representation. On 28 November 2017, Mr Macaba requested the court for a postponement to allow the State to obtain two outstanding statements, and the matter was postponed to 30 January 2018.
7. Before the postponed date, on 3 January 2018, the State requisitioned Mr Zeleni, and he was granted bail on an unopposed basis. Mr

Mposelwa remained in custody.

8. On 30 January 2018, the matter was postponed to 14 March 2018 for Mr Mposelwa's bail application, and further investigation. On 14 March 2018, Mr Mposelwa's bail application was received, and the matter was postponed again to 17 April 2018 for the hearing of the bail application. On 17 April 2018, the matter was postponed until 8 May 2018, due to the absence of the police docket from court. On 8 May 2018, the matter was again postponed until 28 May 2018, due to the court roll being full. On 28 May 2018, the matter was postponed for the final time until 26 June 2018.
9. Mr Mposelwa was granted bail on 28 May 2018 on an unopposed basis. The matter has not yet been taken any further.

The institution of these actions

10. On 5 December 2018, the plaintiffs issued summons against the defendants for damages arising from the plaintiffs' alleged unlawful arrest and detention, an alleged assault on them, as well as malicious prosecution.
11. Their pleadings are similar, and the relevant allegations as pleaded can be summarised as follows:
 - 11.1 In relation to the unlawful arrest, there was no reasonable or probable cause in law to justify the arrest and assault. Notably, neither plaintiff pleaded that his arrest had been effected without a warrant, or on the basis of a defective warrant. The particulars of claim in each instance relied expressly on the absence of reasonable grounds for the arrests.

11.2 In relation to assault, SAPS members assaulted them with fists and open hands, by kicking them, and by suffocating them with a plastic bag.

11.3 In relation to malicious prosecution and wrongful detention, there was no reasonable or probable cause for prosecution, and the prosecutor intentionally and maliciously placed false information before the court, which led to them being refused bail. In any event, so the plaintiffs pleaded, on 26 June 2018, the matter was struck off the roll due to insufficient evidence, and therefore the prosecution was malicious.

12. The defendants' pleaded case in opposing the relief sought was, in summary, as follows:

12.1 In relation to the arrest, the police arrested the plaintiffs lawfully in accordance with the provisions of section 40(1)(b) of the CPA on suspicion that they committed the offences of murder and rape.

12.2 In relation to detention, the plaintiffs' detention was lawful as they could not be released on police bail prior to their first court appearance, and they both abandoned their bail applications on 28 November 2017. On 3 January 2018, the State requisitioned Mr Zeleni and fixed his bail on an unopposed basis.

12.3 In relation to the alleged assault, the defendants denied that such assault took place, but admitted that the plaintiffs were handcuffed.

12.4 In relation to the alleged malicious prosecution the defendants

pleaded that there was reasonable and probable cause to prosecute the plaintiffs. The prosecution did not fail because the matter was struck merely off the roll after the prosecutor has sought another postponement to follow up on evidence. In any event, at all material times both SAPS and the prosecutor acted lawfully.

13. Neither plaintiff delivered a replication to the defendants' plea.

The plaintiffs' submissions and evidence

14. The basis of the plaintiffs' contention in support of their claims, as set out in their counsel's opening statement, was, in brief, that the arresting officer did not entertain any reasonable suspicion as to the plaintiffs' involvement in the offences. The plaintiffs relied on a statement of Sergeant Fana, from which it appeared that Sergeant Fana had received what he called reliable information that Mr Mposelwa and one Mr Scott had been involved in the crimes. There was no statement by the "reliable source" him- or herself. Mr Mposelwa was arrested on 20 October 2017 based on this source only. Under pressure from a subsequent assault by SAPS members, Mr Mposelwa pointed out Mr Zeleni as having been involved too, and the latter was arrested.

15. The plaintiffs submitted that, in those circumstances, there could be no reasonable and probable cause to arrest the plaintiffs, and everything that happened thereafter was unlawful. The plaintiffs indicated that they would tender evidence that there was no reasonable and probable cause, and the *onus* was on the defendants to prove that there was. The plaintiffs submitted further that the criminal case against the plaintiffs was struck off the roll because of a lack of evidence. DNA evidence collected on the scene and from the deceased was compared to plaintiffs' DNA, with negative results. That is why the prosecution has never proceeded.

16. Mr Mposelwa testified in his evidence in chief that, when he asked the police after his arrest what linked him to the offences, they informed him that a piece of a wig apparently belonging to the deceased was found in his house. He described the assault at the hands of SAPS members, and stated that his injuries consisted of bruises on his wrists and arms. He testified that, on 28 November 2017, he abandoned his bail application, because of the strong antagonistic feelings of the community towards him and Mr Zeleni. He testified, too, that the prosecutor had told the magistrate that there was evidence linking the blood of the deceased found on the duvet seized from his house. He was released on bail on 28 May 2018, after the State no longer opposed bail.

17. Insofar as it relates to the claim based on malicious prosecution, it was put to Mr Mposelwa during cross-examination that SAPS's contention was that he had been arrested by Constable Mahlomonyane who had received information about Mr Mposelwa's involvement on the charge of murder during a briefing conducted by Captains Bavuma and Rossouw in the early hours of the morning of 20 October 2017. Mr Mposelwa did not dispute the contention. It was further put to Mr Mposelwa that the second defendant (the DPP) did not regard the prosecution as being finalised. The case was still unsolved, and the DPP and SAPS have continued working on the investigation, even though the matter had been struck off the roll on 26 June 2018. Mr Mposelwa did not dispute this.

18. Mr Zeleni testified during his examination in chief that the reason for his arrest was that he had been implicated by Mr Mposelwa. He did not give any evidence as to the injuries sustained during his alleged assault while in custody. As regards his detention after arrest, he stated that he abandoned his bail application on 28 November 2017, because he wanted to wait for the outcome of the DNA results before going out in the community. On 3 January 2018, he was released on bail fixed on an

unopposed basis, despite the matter having been postponed to 30 January 2018. Insofar as it relates to the prosecution of the case, Mr Zeleni testify that the magistrate informed him and his co-accused when the matter was struck off the roll that, should the State obtain any evidence, they could come back to court and fetch the accused from where they were residing.

19. This was, in summary, the salient evidence. It was in the context of this evidence that the defendants applied for absolution from the instance at the close of the plaintiffs' case.

The applicable legal framework

20. There are various legal principles that come into play at this stage.

21. In relation to absolution from the instance, the test to apply in considering an application for absolution is not that the evidence led by the plaintiffs 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 plaintiffs. 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.

22. In *Claude Neon Lights (SA) Ltd v Daniel*³ the test for the grant of an order of absolution was formulated as follows:

"... when 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

³ 1976 (4) SA SA 403 (A) at 409G. Emphasis supplied.

upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff."

23. The test was reaffirmed by the Supreme Court of Appeal ("SCA") in *Gordon Lloyd Association v Rivera and another*:⁴

"The test for absolution to be applied by a trial court at the end of a plaintiff's case was formulated in *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A) at 409G-H in these terms:

'... (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. (Gascoyne v Paul and Hunter 1917 TPD 170 at 173; Ruta Flour Mills (Pty) Ltd v Adelson (2) 1958 (4) SA 307 (T)'

This implies 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 claim - to survive absolution because without such evidence no court could find for the plaintiff (*Marine & Trade Insurance Co Ltd v Van der Schyff* 1972 (1) SA 26 (A) at 37G - 38A; *Schmidt Bewysreg* 4th ed at 91-2). As far as inferences from the evidence are concerned, the inference relied upon by the plaintiff must be a reasonable one, not the only reasonable one (*Schmidt* at 93). 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' (*Gascoyne (loc cit)*) - a test which had its origin in jury trials when the 'reasonable man' was a reasonable member of the jury (*Ruta Flour Mills*). 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."

24. A *prima facie* case is sometimes referred to as sufficient evidence 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*”. 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.⁵

25. The plaintiffs, therefore, were required to establish all the elements relating to their claims of unlawful arrest, detention, assault, and malicious prosecution to survive absolution. 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

26. In relation to unlawful arrest, section 40(1)(b) of the CPA 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 1 to the CPA, other than the offence of escaping from custody:

“40 Arrest by peace officer without warrant

(1) A peace officer may without warrant arrest any person-

...

(b) whom he reasonably suspects of having committed an offence referred to in Schedule 1,⁷ other than the offence of escaping from lawful custody; ...”

27. It is well settled that police bear the onus to justify arrest without a

⁵ See *S v Boesak* 2001 (1) SACR 1 (CC) para 24; *Ex parte Minister of Justice: In re: R v Jacobson and Levy* 1931 AD 466 at 478–9.

⁶ *Nhlapo-Khumalo v Minister of Police and others* [2024] ZAGPJHC 838 (22 August 2024) para 14.

⁷ The offences referred to in Schedule 1 to the CPA include rape and murder.

warrant, and detention until the first court appearance.⁸ In *Duncan v Minister of Law and Order*⁹ the jurisdictional facts that must be present before section 40(1)(b) may be invoked are set out as follows:

"The so-called jurisdictional facts which must exist before the power conferred by section 40(1)(b) of the present Act may be invoked, are as follows:

- (1) The arrester must be a peace officer.*
- (2) He must entertain a suspicion.*
- (3) It must be a suspicion that the arrestee committed an offence referred to in Schedule 1 (other than one particular offence).*
- (4) That suspicion must rest on reasonable grounds."*

28. *Minister of Law and Order and another v Dempsey*,¹⁰ in turn, discussed the general principle as follows:

*"Once the jurisdictional fact is proved by showing that the functionary in fact formed the required opinion, the arrest is brought within the ambit of the enabling legislation, and is thus justified. And if it is alleged that the opinion was improperly formed, it is for the party who makes the allegations to prove it. There are in such a case two separate and distinct issues, each having its own onus (*Pillay v Krishni and Another* 1946 AD 946 at 953). The first is whether the opinion was actually formed, the second which only arises if the onus on the first has been discharged or if it is admitted that the opinion was actually formed is whether it was properly formed."*

29. In *Minister of Safety and Security v Sekhoto and another*¹¹ it was held that "... . 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 adopted in *Duncan* (at 819 B-D) as being applicable to attacks on the exercise of discretion under Section

⁸ *Minister of Police and another v Du Plessis* 2014 (1) SACR 217 (SCA) paras 14-17.

⁹ 1986 (2) SA 805 (A) at 818G-H.

¹⁰ 1988 (3) SA 19 (A) at 38G. Emphasis supplied.

¹¹ 2011 (5) SA 367 (SCA) para 46, and see the discussion at paras 48-50. Emphasis supplied.

40(1)(b)."

30. *Mabona and another v Minister of Law and Order*¹² held that the information received by the police need not necessarily be of sufficiently high quality and cogency to support a conviction. Section 40(1)(b) requires suspicion, not certainty, provided that the suspicion must be based on solid grounds.

31. Turning to malicious prosecution, in *Minister of Justice and Constitutional Development and others v Moleko*,¹³ it was held that:

"In order to succeed (on the merits) with a claim for malicious prosecution, a claimant must allege and prove –

- 1. that the defendants set the law in motion (instigated or instituted the proceedings);*
- 2. that the defendants acted without reasonable and probable cause;*
- 3. that the defendants acted with 'malice' (or animus injuriandi); and*
- 4. that the prosecution has failed...."*

32. I consider the evidence against these broad principles.

The application of these principles to the relevant facts

33. It is common cause that plaintiffs were arrested without a warrant and by police officers. Thus, the provisions of section 40(1)(b) apply in assessing whether the plaintiffs have adduced evidence upon which a court, applying its mind reasonably, could or might find for the plaintiffs.

The claims based on the alleged unlawful arrest and detention

¹² 1988 (2) SA 654 (SE) at 658H. See also *Minister of Police v Nyoni and another* [2024] ZAGPJHC 245 (5 March 2024) paras 15-16.

¹³ 2009 (2) SACR 585 (SCA) para 8.

34. As indicated above, the plaintiffs' original contention in support of their claim for unlawful arrest and detention was that SAPS arrested them on 20 October 2017 only based on information received from a "reliable source" who did not make an affidavit and who was not identified. Therefore, the plaintiffs submitted, there was no reasonable and probable cause to arrest either of them.

35. I have mentioned that the plaintiffs did not base their claim on the fact that their arrests took place without warrants. Their issue was the alleged absence of reasonable and probable grounds for the arrests. As such, they had (on the authority of *Dempsey* and *Sekhoto*) to prove that the suspicion on which the police acted in arresting them had been improperly formed. The defendants' *onus* in relation to arrests without a warrant therefore did not stand in the way of the possibility of the grant of absolution at the close of the plaintiffs' case.

36. The plaintiffs' version was, however, materially undermined by their own oral evidence. As indicated earlier, Mr Mposelwa testified that, before his appearance at court, he asked the police what linked him to the case, and he was informed that it was the hair found in his house. Mr Mposelwa therefore knew, even before his first appearance in court, that his arrest had not only been based on the information from the "reliable source".

37. I agree with the submission of counsel for the defendants that Mr Mposelwa knew that SAPS had followed up on the information received from the source, and obtained evidence, namely a piece of hair in the form of a piece of a wig found during a search and seizure operation conducted on his house, which was considered a crime scene. The piece of hair placed in the victim in Mr Mposelwa's house. In addition to the information from the source, therefore, it is the piece of hair upon which the police exercised their discretion in terms of the provisions of

section 40(1)(b) and arrested him without a warrant. The presence of the hair associated with the deceased was a solid ground (to use the language of *Mabona supra*) for the police to form and entertain a suspicion that Mr Mposelwa had been involved in the crimes under investigation.

38. Mr Zeleni testified that the police went to his workplace to arrest him, and they took Mr Mposelwa and Mr Scott with them. When he asked the police as to what linked him to the case, he was informed that Mr Mposelwa had implicated him. Mr Zeleni further testified that it was not the first time that Mr Mposelwa had implicated him in some unlawful activity, and he (Mr Zeleni) did not know why Mr Mposelwa had done that.

39. It was also pointed out to the plaintiffs in cross-examination that Mr Scott had identified them as being the ones last seen with the victim.

40. The upshot of this evidence, regarded holistically, is that both Mr Mposelwa and Mr Zeleni knew all along that the police did not act only on the information from the undisclosed source, but had made follow-up investigations which led to SAPS uncovering evidence which caused them to invoke their discretion under section 40(1)(b) of the CPA. The suspicion entertained by SAPS was reasonable in the circumstances. The plaintiffs' contention that the police acted only on the say-so of an unidentified source rings hollow. No court exercising its discretion reasonably can find in their favour – on the basis of their evidence - that the police acted unlawfully, outside the bounds of section 40(1)(b).

41. In *Nhlapo-Khumalo v Minister of Police and others*¹⁴ the court granted an application of absolution from the instance against the plaintiff who sued the police for unlawful arrest after having been arrested without a warrant

¹⁴ [2024] ZAGPJHC 838 (22 August 2024) paras 20-24. Emphasis supplied.

for carjacking and attempted murder, when the evidence in the docket indicated that he had been pointed out by his co-accused. The court held – in terms relevant to the present case - as follows:

[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. 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. ...”

[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. 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.”

42. In the present case, it is unfounded for the plaintiffs to claim that the police improperly exercised their discretion by arresting them without a warrant when there was evidence in Mr Mposelwa's house upon which the police could rely, as well as the pointing out made against Mr Zeleni by Mr Mposelwa and Mr Scott.

43. On the evidence before this Court, the jurisdictional requirements have been met to show that the police were entitled to invoke the provisions of section 40(1)(b) to arrest the plaintiffs without warrants of arrest. As stated in *Sekhoto supra*, once the jurisdictional facts have been established, it is for the plaintiffs to prove that the discretion was exercised in an improper manner. The plaintiffs' attempt to do so was thin in the extreme, and was ultimately eroded by their own evidence.

44. The plaintiffs' detention following arrest was lawful as they could not be released on police bail, and they both abandoned their initial bail applications. It is clear from the documentation that was submitted into evidence how the matter progressed from court day to court day. The plaintiffs did not lead any evidence that would even *prima facie* indicate that the detention was unlawful.

The claims based on the alleged malicious prosecution

45. As indicated, a plaintiff pursuing a claim based on malicious prosecution is required to adduce *prima facie* evidence to prove, on a balance of probabilities, that:

45.1 the defendant (in this case, the second defendant as DPP) set the

law in motion;

45.2 the instigation of the proceedings was without probable cause;

45.3 the proceedings were perpetrated with malice, and

45.4 the prosecution failed.

46. All four of these requirements must be present for a successful claim.

47. The DPP admits having set the law in motion in the present case, but denies the other elements of the claim. The first requirement has thus been satisfied.

48. I discuss the fourth requirement at the outset. It is undisputed that the matter was struck off the roll in June 2018, and not dismissed. This occurred after the prosecutor had asked for a further postponement in order to facilitate the investigation, despite having been granted a final postponement on the previous occasion. The charges have never been withdrawn as against the plaintiffs, and the plaintiffs have not been acquitted on the merits. Mr Zeleni, in fact, testified that the magistrate had explained to the plaintiffs on 26 June 2018 that the that the prosecution remained pending as, should the State obtain further evidence, it was at liberty to return to court and to collect the plaintiffs from their residences for that purpose.

49. It is thus common cause that it was made clear to the plaintiffs that the striking of their matter off the roll was not a failure of prosecution as envisaged for purpose of the jurisdictional requirements of malicious prosecution.¹⁵ In these circumstances, I agree with the submission by

¹⁵ See *Nhlapo-Khumalo v Minister of Police and others supra* para 29: “Further, the fact that the matter was struck off the roll at some stage cannot be equated to failed

the defendants' counsel that the plaintiffs failed to make out a *prima facie* case that the prosecution failed.

50. The plaintiffs' counsel argued that, as the matter has never been reinstated, the prosecution should be regarded as having failed. He did not cite case law in support of this contention, but if I am wrong in relation to the fourth requirement, that leaves the second and third requirements for a claim based on malicious prosecution. I do not consider the plaintiffs to have overcome those two hurdles.

51. In *Minister of Police v Ayanda Marula*¹⁶ the court remarked that lack of probable cause and malice are two distinct elements, both of which must be proved.

52. In *Minister of Justice and Constitutional Development v Moleko*¹⁷ it was held that:

"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'".

53. The SCA held further¹⁸ that, in claims for malicious prosecution, *animus iniuriandi* includes not only the intention to injure but also consciousness of wrongfulness:

prosecution. ..." See also *Nogwebele v Minister of Police* 2016 (2) SACR 662 (WCC) para 84.

¹⁶ [2022] ZAECKMHC 112 (29 November 2022) para 36.

¹⁷ 2009 (2) SACR 585 (SCA) para 20.

¹⁸ *Moleka supra* paras 63-64. Emphasis supplied.

“63. ...‘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.”

54. The SCA in *Minister of Safety and Security v Tyokwana*¹⁹ dealt with the requirement of *animus* (that is, malice) and remarked that a plaintiff is required to prove that the defendant intentionally pursued the prosecution despite knowing that there were no reasonable grounds for doing so.

55. In the present matter the plaintiffs presented no *prima facie* evidence showing that the DPP doggedly prosecuted despite a lack of reasonable and probable grounds to do so. It is clear from the plaintiffs’ testimony that there was independent evidence in addition to information from the unidentified source upon which the prosecutor preferred the charges against them.²⁰

¹⁹ 2015 (1) SACR 597 (SCA) para 15.

²⁰ See *Minister of Safety and Security v Lincoln* 2020 (2) SACR 262 (SCA) para 48, where the SCA held that Lincoln had not *prima facie* established the absence of reasonable and probable cause for his prosecution, and that the Minister ought to have been absolved from the instance: “[48] As far as the subjective element of this

56. No evidence was adduced to prove that the prosecutor, Mr Macaba, misled the court in any manner. Both of the plaintiffs abandoned their bail applications on 28 November 2017. After the State received the forensic report showing no DNA linking Mr Zeleni to the crime scene, the prosecutor brought him before court in early January 2018, before the remand date of 30 January 2018, and the court fixed his bail on an unopposed basis.

57. Mr Mposelwa testified that he abandoned his bail application because the prosecutor had told the magistrate that there was evidence linking the blood of the deceased found on the duvet seized from his house. The magistrate's contemporaneous notes, admitted into evidence, do not reflect any such submission. Mr Mposelwa also testified that he initially abandoned his bail because there was hostility towards him from the community. The history of the criminal proceedings, contained in the magistrate's notes, indicates that the prosecutor acted impartially in his dealings with the matter. Mr Mposelwa was granted bail on 28 May 2018.

58. On 26 June 2018, it appeared that the investigation had stalled, as the police were still waiting for two statements. When he asked for another postponement, the court was not inclined to grant it, and the matter was struck off the roll. There is nothing in this evidence which supports a *prima facie* case upon which a reasonable court could or might find in favour of the plaintiffs' claim that the prosecutor conducted himself with malice in the prosecution of the criminal case.

requirement is concerned, Knipe and Rossouw testified that they believed that the evidence which they had obtained made a proper case to support the charges. This was confirmed by Bouwer. The majority is of course correct that the reasonable and probable cause which may be apparent from the docket could have been contrived. That was Lincoln's case. But what the majority lost sight of was that Lincoln bore the onus to prove this, as I have pointed out earlier. He did not even attempt to do so. In my view the minority was therefore correct in holding that Lincoln had not prima facie established the absence of reasonable and probable cause and that the Minister ought to have been absolved from the instance." (Emphasis supplied.)

The alleged assault

59. The plaintiffs did not present any evidence regarding the assault and their injuries except for their say-so. There is no evidence to the effect that they had been taken to a doctor during their detention to treat their injuries. Mr Mposelwa alluded to injuries on his wrists, arms, legs and back. He undertook to present evidence from a doctor in support of his claim, but closed his case without doing so. Mr Zeleni did not testify as to his injuries at all.

60. There is, in my view, no *prima facie* evidence upon which this Court could or might find in the plaintiffs' favour in relation to this aspect of their claims.

Conclusion

61. In all of these circumstances I considered that, based on the evidence presented in the context of the pleadings, there was no *prima facie* evidence upon which this Court could or might find in the plaintiffs' favour on any of their claims.

62. It was thus in the interests of justice to grant the defendants' application for absolution from the instance.

P. S. VAN ZYL

**Acting Judge of the High
Court**

Appearances:

For the plaintiffs:

Mr D. Filand, instructed by Lingani &
Partners Inc.

For the defendants:

Mr M. Titus, instructed by the State
Attorney