



**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 ZELENI

Plaintiff

and

MINISTER OF POLICE

First defendant

DIRECTOR OF PUBLIC PROSECUTIONS

Second defendant

Order

The application for leave to appeal in relation to each of the plaintiffs is dismissed, with costs, including counsel's fees taxed on Scale B.

JUDGMENT DELIVERED ON 21 OCTOBER 2025
in application for leave to appeal

VAN ZYL AJ:

Introduction

1. The plaintiffs have applied for leave to appeal against the orders of absolution from the instance granted at the end of their respective cases on 18 June 2025. The essence of their application is that the Court erred and misdirected itself in law by entertaining the defendants' application for absolution because, first, the defendants had the *onus* to lead evidence which justifies the lawfulness of the arrest, detention and prosecution, and, second, the defendants had not adduced evidence justifying the arrest, detention and prosecution.
2. The application is expressly brought under the provisions of section 17(1)(a)(i)¹ of the Superior Courts Act 10 of 2013, namely that their appeal would have a reasonable prospect of success.² In argument, however, the plaintiffs' attorney relied on section 17(1)(a)(ii) too, namely that there are compelling reasons why the appeal should be heard:

"In order to be granted leave to appeal in terms of s 17(1)(a)(i) and s

¹ "17(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that-

(a) (i) the appeal would have a reasonable prospect of success; or
(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration; ..."

² See *Four Wheel Drive Accessory Distributors CC v Rattan* NO 2019 (2) SA 451 (SCA) para 34; *Ramakatsa and others v African National Congress and another* [2021] ZASCA 31 (31 March 2021) para 10.

17(1)(a)(ii) of the Superior Courts Act an applicant for leave must satisfy the court that the appeal would have a reasonable prospect of success or that there is some other compelling reason why the appeal should be heard. If the court is unpersuaded of the prospects of success, it must still enquire into whether there is a compelling reason to entertain the appeal. A compelling reason includes an important question of law or a discreet issue of public importance that will have an effect on future disputes. But here too, the merits remain vitally important and are often decisive. Caratco must satisfy this court that it has met this threshold.”³

3. In oral argument, the parties concentrated on two aspects, one in relation to the plaintiffs’ arrests and detention, and the other in relation to their alleged malicious prosecution.

The arrests and detention

4. The first complaint is that the Court erred in holding that the plaintiffs had an *onus* to prove that SAPS exercised their discretion properly in relation to the reasonable and probable cause underlying their arrests.
5. As indicated in the judgment, 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. The plaintiffs argued, however, that their reliance on the unlawfulness of the arrests on the basis that they had been effected without a warrant was implied. This was especially so as the defendants pleaded, in response to the allegations in the particulars of claim, that the arrests had been effected without warrants. The defendants thus (so the argument goes) attracted the *onus* of proving that the arrests were lawful, and the court was not at liberty to grant absolution at the end of the plaintiffs’ cases where the *onus* rested

³ *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd* 2020 (5) SA 35 (SCA) para 2 (my emphasis).

on the defendants.⁴

6. It is necessary to set out the relevant portions of the pleadings. Mr Zeleni pleaded the following in his particulars of claim:

“5. On the 20 October 2017 at approximately 04h20 and at or near Airport Industria, Plaintiff was wrongfully and unlawfully arrested, assaulted and later detained at Site B police station by the members of the South African police services, ...

...

15. At the time of the arrest, assault and detention, the SAPS members knew, alternatively ought to have known, that no reasonable grounds existed for the arrest, assault and subsequent detention of the Plaintiff, and that the arrest, assault and subsequent detention were effected *animo injuriandi*, alternatively without due care to Plaintiff's right to liberty.

...

19. There was no reasonable and/or probable cause in law justifying Plaintiff's arrest, assault and detention, accordingly his arrest, assault and detention were unlawful.”

7. The defendants pleaded, in response, as follows:

“Ad paragraph 5

10. Save to admit that the plaintiff was arrested on 20 October 2017, the remaining allegations are denied.

11. In amplification of the aforesaid denial, defendant pleads that plaintiff was lawfully arrested ... by a member of the South African Police Service ... in accordance with section 40(1)(b) of the Criminal Procedure Act 51 of 1977 ..., since the plaintiff was suspected of having committed the offences of murder and rape.

...

Ad paragraph 15

21. *The contents are denied.*

21A. *In amplification of the said denial, the first defendant pleads that the members of SAPS had reasonable grounds for believing that the plaintiff was a suspect in the commission of the offence relating to the murder and rape of the deceased based on the following:*

21A.1 *The investigating officer had received information from a reliable source, one Masixole Scott, linking the plaintiff to the house of Luthando Mposelwa (Mposelwa) where the deceased was last seen alive.*

21A.2 *The plaintiff was pointed out by Mposelwa as a person who was at the house where the alleged activities leading to the deceased's death occurred.*

...

Ad paragraphs 19 and 20

25. *Save to admit that the criminal proceedings were instigated by the prosecutors, the rest of the allegations in this paragraph (sic) are denied.*

26. *In amplification of the denial, defendants aver that:*

26.1 *Plaintiff's arrest and detention were lawful.*

... ”

8. Mr Mposelwa pleaded, insofar as is relevant, as follows:

“5. *On the 20 October 2017 at approximately 01h40 and at or near Samora Machel, Plaintiff was wrongfully and unlawfully arrested, assaulted and later detained at Site B police station by the members of the South African police services, ...*

...

15. *At the time of the arrest, assault and detention, the SAPS members knew, alternatively ought to have known, that no reasonable grounds existed for the arrest, assault and subsequent detention of the Plaintiff, and that the arrest, assault and subsequent detention were effected animus injuriandi,*

alternatively without due care to Plaintiff's right to liberty.

...

18. *There was no reasonable and/or probable cause in law justifying Plaintiff's arrest, assault and detention, accordingly his arrest, assault and detention were unlawful."*

9. In relation to Mr Mposelwa's allegations, the defendants pleaded the following:

"Ad paragraph 5

10. *Save to admit that the plaintiff was arrested on 20 October 2017, the remaining allegations are denied.*
11. *In amplification of the aforesaid denial, first defendant pleads that plaintiff was lawfully arrested ... by a member of the South African Police Service, in accordance with section 40(1)(b) of the Criminal Procedure Act 51 of 1977 ..., since plaintiff was suspected of having committed the offences of murder and rape.*

...

Ad paragraph 15

23. *The allegations are denied.*

...

Ad paragraph 18

26. *the allegations are denied. In amplification hereof, defendants aver that plaintiff was lawfully arrested and at all relevant times was lawfully detained."*

10. Considering these pleadings, I do not agree with the plaintiffs' argument to the effect that the defendants' plea in each of the matters changed the ambit of the plaintiffs' cases as far as the *onus* was concerned. It is clear on the plaintiffs' pleadings that they squarely relied on the absence of reasonable cause, and this was confirmed by their counsel in his opening address. The plaintiffs' pleadings were never amended to widen the net of the particular – expressly pleaded - aspect of alleged unlawfulness on which they relied.

11. The case that the defendants had to meet was therefore not one of justifying the arrest without a warrant under section 40(1)(b) (in respect of which they would have had the *onus*), but it was one founded on the reasonableness of the discretion exercised under section 40(1)(b). As indicated in this Court's main judgment, in *Duncan v Minister of Law and Order*⁵ the jurisdictional facts that must be present before SAPS may invoke section 40(1)(b) 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."*

12. On the plaintiffs' own evidence within the factual context of the case, I found these jurisdictional facts to have been established. *Minister of Law and Order and another v Dempsey*,⁶ in turn, held in relation to the suspicion that:

*"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*

⁵ 1986 (2) SA 805 (A) at 818G-H.

⁶ 1988 (3) SA 19 (A) at 38G (emphasis supplied).

whether it was properly formed."

13. In *Minister of Safety and Security v Sekhoto and another*⁷ 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 40(1)(b)."⁸

14. It was for these reasons that I emphasised in the main judgment 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 cases like *Dempsey*, *Sekhoto*, and *Mabona*) to prove that the suspicion on which the police acted in arresting them had been improperly formed.

15. The plaintiffs failed to adduce any evidence to show that the members of SAPS exercised their discretion wrongly. Instead, the plaintiffs gave evidence which contradicted their pleaded case and their opening address to the effect that police acted solely on the information of unknown source who never made a statement. On the evidence placed before the Court, Mr Mposelwa knew he was linked by further evidence in the form of the hair piece found at his house linking the scene to the deceased. Mr Zeleni was pointed out by two witnesses, being Mr Mposelwa and one Scott. Scott gave a statement stating that the plaintiffs were the last persons to have been with the deceased prior to her death.

16. Thus, the allegation that SAPS acted solely on information from the

⁷ 2011 (5) SA 367 (SCA) para 46, and see the discussion at paras 48-50 (emphasis supplied).

⁸ See also *Mabona and another v Minister of Law and Order* 1988 (2) SA 654 (SE) at 658H.

unknown source to arrest Mr Mposelwa was incorrect. Furthermore, the allegation that Mr Zeleni was pointed out by Mr Mposelwa because of pressure from the alleged assault on the day of arrest was incorrect. Mr Zeleni had been pointed out by Scott as well, even prior to being pointed out by Mr Mposelwa. The plaintiffs were detained subsequent to their first court appearance because they had abandoned their bail applications of their own volition.

Malicious prosecution

17. The plaintiffs bore the *onus* of proving the jurisdictional requirements for a successful claim based on malicious prosecution. In *Minister of Justice and Constitutional Development and others v Moleko*,⁹ 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....”*

18. As regards the fourth requirement, the plaintiffs’ attorney strenuously argued that, as the matter had never been reinstated, the prosecution should have been regarded as having failed. He referred to *L.N v Minister of Police and another* in this regard¹⁰

“[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

⁹ 2009 (2) SACR 585 (SCA) para 8.

¹⁰ [2025] ZAGPJHC 710 (22 July 2025) paras 36-37:

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."

19. The plaintiffs argued, therefore, that I was wrong in holding the contrary.

20. In *LN*, the charges against the plaintiff had been withdrawn. In the present case, the matter was merely struck from the roll. I am bound by the decision of this Court in *Nogwebele v Minister of Police*.¹¹

".... I agree with the submission of the Second Defendant that the Plaintiff must prove that the criminal proceedings were terminated in his favour. What happened in this matter is that the criminal proceedings against the Plaintiff were temporarily terminated. It was not settled by an acquittal or a withdrawal thereof on the merits. It was always the intention to institute the proceedings against the Plaintiff. ..."

21. As indicated in the main judgment, however, if I am wrong in relation to this aspect, then I did not consider the plaintiffs to have overcome two further requirements for a successful claim based on malicious prosecution, namely that the prosecution had been instigated without reasonable and probable cause, and that the prosecutor acted *animo iniuriandi*.

22. On the evidence, the hair piece linked to the deceased and found at Mr Mposelwa's house constituted a probable cause for the prosecution. The pointing out of Mr Zeleni by Mr Mposelwa and Scott constitutes probable cause for the charges to be preferred against them. Thus, the plaintiffs' allegation that the charges were preferred on them based

¹¹ 2016 (2) SACR 662 (WCC) para 84.

solely on the information from an unknown source was incorrect.

23. The lower court's records reflected what had occurred on each appearance. There was no evidence of malice on the part of the prosecutor. On the plaintiffs' own evidence, they were made aware by the magistrate on the last court day that the striking of the matter from the roll was not the end of the matter.

24. In light of the above, this Court could not find in the plaintiffs' favour on all of the elements of malicious prosecution.

Conclusion

25. 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.

26. The plaintiffs have not raised any issue to satisfy this Court that the requirements of section 17(1)(a)(i) and (ii) of the Superior Courts Act have been met in relation to either reasonable prospects of success on appeal, or other compelling reasons why the appeal should be heard. As indicated, the plaintiffs did not in their notice of application for leave to appeal rely on section 17(1)(ii) but, in any event, the jurisprudence in relation to claims for wrongful arrest and detention is settled, with reference to *Duncan*, *Dempsey*, *Sekhoto* and *Mabona*. In terms of these authorities, where the defendants acted within the confines of section 40(1)(b) of the CPA, the *onus* is on the plaintiffs in relation to whether the discretion was exercised wrongly.

Order

27. The application for leave to appeal in relation to each of the plaintiffs is therefore dismissed, with costs, including counsel's¹² fees on Scale B.

P. S. VAN ZYL

**Acting Judge of the High
Court**

Appearances:

For the plaintiffs:

Mr K. Lingani, instructed by Lingani & Partners Inc.

For the defendants:

Mr M. Titus, instructed by the State Attorney

¹² "Counsel" in the context of Rule 67A means any legal practitioner, whether a referral advocate, a trust account advocate, or an attorney with higher appearance rights, who actually does the work of counsel.