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

Case no: 3006/2022

In the matter between:

ELFORD NKOSINATHI BASTILE

Plaintiff

and

MINISTER OF POLICE

First Defendant

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Second Defendant

JUDGMENT

ZILWA AJ

Introduction

[1] The plaintiff has instituted three distinct claims, as provided for by *actio injuriarum*, against the first defendant for wrongful and unlawful arrest on the one hand, claim A, and on the other for wrongful and unlawful detention as well as malicious prosecution against both defendants, claim B and C. All the three claims are defended by the respective defendants.

[2] Each party adduced oral evidence in support of their respective cases. The contents of the police docket entailing the criminal case against the plaintiff in the Bityi Magistrate's Court was discovered *inter partes* in terms of the Uniform Rules and they were also referred to, during trial. The plaintiff was the only witness in his case. On behalf of the first defendant, Sergeant Somthi-Flanis ('*Somthi*'), came forward to testify as the arresting officer. Mr Dwakaza and Mr Komanisi, employees of the second defendant as district and regional court prosecutors respectively, testified as second defendant's witnesses.

Facts

[3] On 13 January 2020 at around 15H00 along the N2 national road, near Mthatha Ultra City, the plaintiff was arrested on board a bakkie ferrying passengers *en route* to his rural area of Msana Location, KwaNdaba Administrative Area in Mthatha ('*Msana*'). Two police bakkies stopped the vehicle in which the plaintiff was travelling, and a police officer came out of the vehicle in company of the complainant. The police officer asked from the complainant the name of the person who allegedly violated her sexually, and the latter called the name of the plaintiff. The police officer shouted that the person by the name of '*Nkosinathi*' should get out of the bakkie. The plaintiff came out of the bakkie, and the police officer informed him that he was under arrest. This was a warrantless arrest.

[4] The plaintiff was instructed to take off his shoelaces and belt and he was loaded at the back of the police van and was transported to Bityi Police Station. After his first appearance on 15 January 2020, the matter was postponed by agreement with Ms Mtswesi, plaintiff's legal representative, to 20 January 2020 for a formal bail application. The bail was opposed by the State because the plaintiff was facing an

offense falling under Schedule 5. The bail was refused and he remained in custody for a period of 474 days until he was found not guilty on 15 April 2021.

[5] The plaintiff pleaded that this his arrest took place at or near Msana¹ by members of the South African Police Services having been accused of rape of and assault with intent to do grievous bodily harm to one N[...] T[...] (*'complainant'*).²

[6] In a nutshell, the first defendant's case is that the docket was received by Somthi on 13 January 2020 at 12H00. She proceeded to Sinawe Centre at Mthatha General hospital (*'Sinawe'*) where she interviewed the complainant who was being examined by the doctor. The complainant informed her that one Nkosinathi Bastille pushed her door, broke it, assaulted and raped her. She noticed that the complainant's upper lip was swollen. She got information that the accused was travelling from Mthatha town to Msana and she asked for a backup. She drove together with some other officials who were coming from Bityi police station. They stopped the bakkie and introduced themselves to the driver. The complainant pointed out the plaintiff as the perpetrator and it was at that stage that he was informed of his rights as listed in the pocketbook. He was arrested without a warrant. Somthi did not experience any difficulty with the identity because the plaintiff was positively identified by the complainant. She used her discretion when arresting the plaintiff and handing him to police officers from Bityi police station for detention.

[9] The second defendant's case is that the prosecutor, Mr Dwakaza, considered the complainant's statement which revealed that she was sure that it was the plaintiff who entered her house. She narrated her ordeal to one Loyiso Matebele (*'Matebele'*), namely, that the plaintiff assaulted and raped her. The prosecutor did note the difference in dates between the statement of the complainant and that of the report she gave (*'first report'*) and he did not regard the difference as material and as such it did not affect his decision to enroll the matter. When considering the complainant's statement as a whole, he noted that when she narrated the first report,

¹ *Albeit* that the plaintiff's evidence was that the arrest took place on the N2 National Road near Mthatha Ultra City. Under cross-examination, he further raised an issue that the police should have waited for him to get home before arresting him.

² *Albeit* that the plaintiff's evidence was that he was never informed about the reasons for his arrest during his Mthatha Ultra City arrest.

she was not covered with a doek on her head, her upper body was naked and her breasts were exposed, she had nothing on her feet, she was crying, very shocked and her upper lip was swollen. He did not see the complainant as a person who was making up a story. He also considered the statement of Somthi and concluded that the complainant was not in doubt, as she pointed out the plaintiff among other people and therefore it cannot be said that she was influenced. The report by the doctor was also considered and it confirmed that the complainant was not making up a story. The doctor also noted the swollen upper lip and concluded that a penetration cannot be excluded. The prosecutor had an honest belief that the accused was implicated.

[10] While admitting the plaintiff's arrest and subsequent detention, the first defendant, in his plea, denied that his arrest and detention were unlawful. He pleaded that the plaintiff's arrest 'was justified in terms of section 40(1) of the Criminal Procedure Act³ (*the CPA*)', as there was a reasonable suspicion that he had committed an offence of rape and housebreaking. The first defendant further contends that the arrest was warranted, and the police officers were justified to arrest the plaintiff without a warrant and that, due to seriousness of the offence, the police officer had no authority to release and/or warn him to appear in court.

[11] In denying liability for the claim of malicious prosecution, the second defendant, admitted that her employees prosecuted the plaintiff. She contended in her plea that, after perusal of the police docket, prosecutors established a *prima facie* case. She further denied that the matter was enrolled without any reasonable cause and with intent to injure the plaintiff.

Issues

[12] The primary issues for determination as defined in the Rule 37 minute are: (a) whether the first defendant could be held liable for the plaintiff's unlawful arrest, detention and malicious prosecution; (b) whether the arresting officer entertained a reasonable suspicion that the plaintiff had committed the offence with which he had

³ 51 of 1977

been charged; and (c) whether the second defendant could be held liable for the plaintiff's unlawful detention and malicious prosecution.

The law

[13] Our law provides that a person may only be arrested and detained without a warrant authorizing his arrest in circumscribed instances, which the CPA sets out in section 40. At the centre of the present claim are the provisions of section 40(1)(b), in terms of which a peace officer may arrest a person without a warrant if he entertains a reasonable suspicion that the person committed an offence listed in Schedule 1.

[14] The facts which must be established for the justification of an arrest effected in terms of section 40 (1)(b) were set out in *Duncan v Minister of Law and Order*⁴, as being that: (i) the arrestor must be a peace officer; (ii) the arrestor must entertain a suspicion; (iii) the suspicion must be that the suspect (the arrestee) committed an offence referred to in Schedule 1 of the CPA; and (iv) the suspicion must rest on reasonable grounds.

[15] The test for the reasonableness of the grounds of suspicion on which the arrest is effected, was laid down in *Mabona and Another v Minister of Law and Order and Others*⁵, where the court held:

'[T]he 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 not certainty. However, the suspicion must be based upon solid grounds. Otherwise, it will be flighty or arbitrary, and not a reasonable suspicion.'

⁴ *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) at 818G-H.

⁵ *Mabona and Another v Minister of Law and Order and Others* 1988 (2) SA 654 (SE) at 658G-H.

[16] Section 60(11)(b) of the CPA has the following provisions:

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

[17] In a claim for malicious prosecution, in order to succeed, the plaintiff must allege and prove that (a) the defendants set the law in motion (instigated or instituted the proceedings); (b) the defendants acted without reasonable and probable cause; (c) the defendants acted with ‘malice’ (or *animus injuriandi*); and (d) that the prosecution has failed.⁶

[18] In *Willie’s Principles of South African Law*⁷, the learned author had the following to say:

‘... the person who set the law in motion is not liable for the resulting loss if he or she acted in good faith. The *actio iniuriarum* comes into play where the legal proceedings are instituted without reasonable and probable cause and it is done with an improper motive or with malice.’

[19] It bears mentioning that, as a starting point, a court that is called upon to determine the lawfulness of a warrantless arrest under section 40(1)(b) of the CPA, does no more than to consider the facts that were at the disposal of the arresting officer at the time of the arrest. In order to achieve that, it measures the conduct of the police officer(s) against the standard of reasonableness - the question being

⁶ *Minister for Justice & Constitutional Development v Moleko* 2009 (2) SACR 585 (SCA), para 8; *Minister of Safety and Security v Lincoln* 2020 (2) SACR 262 (SCA).

⁷ 9th Edition, p. 1192; Also see: The Stair Memorial Encyclopaedia Vol. 15, para 453, quoted in Willies book, the following appears:

“Prosecuting or procuring prosecution without probable cause may go a long way towards proving the existence of malice, though the existence of malice is not proof in itself of the absence of probable cause.”

whether reasonable police officer(s) faced with such facts, would entertain a suspicion that the plaintiff was involved in the commission of a Schedule 1 offence.

[20] The above principles constitute the basic legal framework for the present matter. A summary of the evidence led is as follows:

Plaintiff's evidence

[21] The plaintiff testified that on 13th January 2020 at about 15H00 near Ultra City garage, which is situated along the N2 road, while on a van ferrying passengers to his rural area of Msane, coming from town, he was arrested by members of the South African Police Services in uniform driving two marked police vans. The arrest was carried out in full view of the members of the public as well as other passengers who were on the same vehicle he was in.

[22] One of the police vans blocked the way of the vehicle he was in, forcing it to stop and the other police vehicle stopped behind it. A police officer who alighted from the police van that stopped behind them was in company of the complainant. The police officer asked from the complainant the name of a person who violated her and in response, the complainant responded and shouted his name saying it's '*Nkosinathi Bastile*'. The police officer who was with the complainant shouted that the person by the name of *Nkosinathi* should get out of the vehicle. He had no choice but to comply and he requested one of the passengers to look after his groceries.

[23] As he got out of the vehicle, the police told him that he was under arrest, and they arrested him without a warrant. He asked for the reasons for his arrest, but he was told by the police that he knew what he did. In full view of the passengers and onlookers, the police instructed him to take off his shoelaces and belt and he was loaded at the back of the police van to Bityi police station. At Bityi police station, he was placed in the holding cells and interviewed and that is where he disputed the allegations.

[24] The police charged him with assault with intent to do grievous bodily harm and rape, being the charges he faced at the Bityi District Court. He appeared before court for the first time on 15th January 2020, where the bail was opposed and the case was postponed 20th January 2020 for profiling and bail. He was remanded in custody and transferred to the Mthatha Correctional Centre. The matter was ultimately transferred to the Mthatha Regional Court.

[25] He contended that his case was enrolled without minimum evidence and he was maliciously prosecuted. He was detained at the instance of both defendants and he felt abused and his rights were infringed.

[26] Under cross-examination by the first defendant, the plaintiff was asked about the complainant's injuries (swollen upper lip) that were confirmed by the doctor. He did not have any comment. Even the court asked him about the doctor's findings that a penetration cannot be excluded, and he did not have any comment.

[27] Under cross-examination by the second defendant, the plaintiff admitted that his name is mentioned in the complainant's statement as the person who broke her door, entered her room, assaulted and raped her. The plaintiff understood that breaking into someone's house, assaulting and raping someone are all criminal offences. He further understood that the police and prosecutors were expected to do their job as facts were contained in the statements and medical report. He further confirmed that there was no animosity between him and the complainant before the incident.

First defendant's evidence - Somthi

[28] She is holding a rank of a Sergeant attached to the Family Violence Child and Sexual Offences Unit. On Monday, 13 January 2020, she received information about the case opened at Bityi police station under Cas No. 60/01/ 2020 regarding rape of an elderly woman. She contacted Bityi police station for more information and she received a response that the victim was at Sinawe.

[29] She was informed that the complainant was due to attend a medical examination at Sinawe and that is where she met and interviewed her whilst the doctors were conducting medical examinations. According to the information she received from the complainant, the complainant knew the perpetrator to be Mxhosa Nkosinathi Bastile. Whilst still interviewing the complainant, she received a call or information that the person suspected as having raped the complainant is on the taxi from town to Msane. She asked for a backup and proceeded with Warrant Officer Timakwe and Constable Mdutshane to assist, together with the complainant.

[30] The vehicle was stopped, and the complainant identified the plaintiff who was at the back of the van. She and other members introduced themselves and read the information about the arrest through her pocketbook. She handed over the plaintiff to Captain Mshumi for detention at Bityi police station with no visible injuries.

Second defendant's evidence – Lindile Dwakaza

[31] He has been working for National Prosecuting Authority for 12 years. On 15 January 2020 he was on duty at Bityi District Court and he received a police docket relating to this matter. He acquainted himself with the contents of the docket and considered the facts as well as statements including the expert report.

[32] Among the statements he considered was the complainant's statement who stated that her house was forcefully opened by the plaintiff who approached her, punched her with a fist, and inserted his penis in her private parts. The statement revealed that the plaintiff was the complainant's neighbor. He mentioned the elements of housebreaking, assault and rape and testified that he concluded that the elements of all these offences were contained in the complainant's statement and that the complainant did not consent to sexual intercourse.

[33] He also considered the statement of Matebele which revealed that the plaintiff entered the complainant's house and that the latter informed Matebele that the plaintiff had assaulted and raped her. He further testified that he noticed the difference in dates between the statement of the complainant and that of Matebele

and he did not regard the difference as material and therefore it did not affect his decision to enroll the matter.

[34] He further testified that when he viewed the complainant's statement, it revealed that when the complainant was doing the first report, her head was not covered, her upper body was naked with her breast exposed, she had nothing on her feet, she was crying, very shocked and her upper lip was swollen. He did testify that he did not see the complainant as the person who was making up a story.

[35] He further considered the statement of Somthi and concluded that the complainant was not in doubt as she pointed out the plaintiff among other people and therefore it cannot be argued that the complainant was influenced. He also considered the doctor's report, J88, which also confirmed that the complainant was not building up her evidence. The report by the doctor showed that he also noticed that the upper lip was swollen and his conclusion was that penetration cannot be excluded.

[36] He further testified that he had an honest belief that the accused was implicated and that the criminal case could not have proceeded to the final stage if there was no evidence. Section 174 of the CPA could have been applied for if there was no *prima facie* case against the plaintiff.

Luvuyo Komanisi's evidence

[37] He testified that charges against the plaintiff in the District Court were rape and assault with intent to do grievous bodily harm. He decided to add the charge of housebreaking with intent to rape and with rape. He considered all the statements contained in the docket and the essentials of a charge sheet were present. All elements of rape and house breaking were covered, the name of the perpetrator was mentioned, and he was well known to the complainant as they were neighbors.

[38] According to him, the complainant reported the matter to the neighbors promptly. He considered the medical report as well as conclusions by the doctor which did not exclude sexual penetration and, in his opinion, the doctor would have

indicated if there was no penetration. He considered the finding to the effect that the complainant's hymen was perforated.

[39] He testified that the identity of the accused was not an issue. Even though he mentioned in the statement of Matebele that he was attacked by '*Isihange*', the plaintiff also mentioned, in the same statement, the name of the plaintiff and there was no additional statement. In fact, the statement by Matabele mentioned that the complainant was attacked by '*Isihange*' which means 'the intruder' or 'the unknown person', according to him.

[40] He testified that he consulted the complainant and established consistency with her statement, the identity of the perpetrator and that she corroborated the issue of *Isihange*. He further testified that the State was happy with the evidence and proceeded without the DNA as DNA constitutes circumstantial evidence, in his view. He further testified that the request for DNA results becomes necessary when identities are unknown or the victim is the child or the victim is mentally retarded and when there is no sufficient evidence against the perpetrator.

Analysis

[41] As intimated above, the enquiry here should be, objectively speaking, what information Somthi had at her disposal when she effected the arrest and did that information, objectively speaking, empower her to arrest and detain the plaintiff as she did. In the final analysis the question ought to be, would a reasonable police officer, armed with the same information, which was within the knowledge of Somthi at the time of arrest, have arrested the plaintiff?

[42] The law on unlawful arrest and detention is set out in terms of legislation. Section 12(1)(a) of the Constitution⁸ provides:

'Everyone has a right to freedom and security of the person, which includes the right

—

⁸ Act 108 of 1996

a) Not to be deprived of freedom arbitrarily or without just cause;'

[43] 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, other than the offence of escaping lawful custody'.

[44] In *Minister of Law and Order and Others v Hurley and Another*⁹ the Court held:

'An arrest constitutes an interference with the liberty of the individual concerned, and it therefore seems to be 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.'

[45] In *Shaaban Hussein and Others v Chong Fook Kam*¹⁰, Lord Devlin had an occasion of stating the following:

'Suspicion in its ordinary meaning is a state of conjuncture or surmise where proof is lacking; "I suspect but I cannot prove". Suspicion arises at or near the starting-point of an investigation of which the obtaining of *prima facie* proof is the end . . . *Prima facie* proof consists of admissible evidence. Suspicion can take into account matters that could not be put in evidence at all . . . Suspicion can take into account also matters which although admissible could not form part of a *prima facie* case.'

[46] In *Biyela v Minister of Police*¹¹ Musi AJA stated:

'The question whether a peace officer reasonably suspects a person of having committed an offence within the ambit of s 40(1)(b) is objectively

⁹ *Minister of Law and Order and Others v Hurley and Another* 1986 (3) SA 568 (A)

¹⁰ *Shaaban Hussein and Others v Chong Fook Kam* [1969] UKPC 26; [1969] All ER 1626.

¹¹ *Biyela v Minister of Police* 2023 (1) SA 235 (SCA) at paras [33] to [35]

justiciable. It must, at the outset, be emphasised that the suspicion need not be based on information that would subsequently be admissible in a court of law. The standard of a reasonable suspicion is very low. The reasonable suspicion must be more than a hunch; it should not be an unparticularised suspicion. It must be based on specific and articulable facts or information. Whether the suspicion was reasonable, under the prevailing circumstances, is determined objectively. What is required is that the arresting officer must form a reasonable suspicion that a Schedule 1 offence has been committed based on the credible and trustworthy information. Whether that information would later, in a court of law, be found to be inadmissible is neither here nor there for the determination of whether the arresting officer at the time of arrest harboured a reasonable suspicion that the arrested person committed a Schedule 1 offence.'

[47] *In casu*, the plaintiff's identity was not in dispute to the extent that, apart from the fact that they were neighbours, they were also related. When the arresting officer, accompanied the complainant, went to the plaintiff, the latter was able to identify him amongst other passengers without hesitation. This cannot be denied. Further information was received that the plaintiff was on the way from town to his homestead and that he was preparing to abscond to the Western Cape. Investigations led to the vehicle he was travelling on, which was stopped next to Mthatha Ultra City and upon arrival, the complainant positively identified the plaintiff as her assailant.

[48] Considering that rape is listed as a Schedule 1 offence in terms of section 40 (1)(b), an arrest may be effected without a warrant of arrest. Armed with all this information, especially the positive identification of the plaintiff as the perpetrator by the complainant, the arrest was effected. I find no basis to the contention that the investigating officer failed to analyse and assess the information at her disposal critically. This is not a case of - arrest first - and - investigate later. An interview with the complainant was held before she accompanied the arresting officer and pointed out the plaintiff as her assailant. This, in my view, is what a reasonable investigating officer would have done.

[49] I understand that the first defendant had a duty whether or not to detain after the arrest and that includes applying of mind.¹² I am satisfied that Somthi properly exercised her discretion in this regard after taking into account the seriousness of the offence, the fact that the complainant and the plaintiff were neighbours and the age of the complainant who was residing alone. It cannot be argued therefore that the decision to detain was malicious.

[50] Regarding further detention after the plaintiff appeared in court and remanded in custody, he has claimed such damages against the defendants even though that detention was at the court's instance. In this regard, the Supreme Court of Appeal in *Minister of Safety and Security v Sekhoto and Another*¹³ held that the role of the police officer/s becomes exhausted after bringing the suspect before the court and the role for determination of further detention pending trial is one of the court.

[51] In any event, a contention was made by the first defendant to the effect that the community was against the plaintiff's release on bail. This was never challenged by the plaintiff. At all material times, the plaintiff was legally represented in court and his case was always postponed in consultation and in agreement with his legal representative. Nowhere from the records does it appear that his legal representative was opposing further adjournments of the matter on the basis that he wanted to apply for bail. Even after the bail was refused, no appeal was brought against such refusal and there was no bail on new facts.

[52] Regarding the issue of malicious prosecution, I am not persuaded that the plaintiff led evidence, the upshot of which is that the first defendant was not in possession of sufficient evidence to charge the plaintiff for rape and housebreaking. In *Ledwaba v Minister of Justice and Constitutional Development and Correctional Services and Others*¹⁴, the Supreme Court of Appeal held as follows:

¹² *Mvu v Minister of Safety and Security and Another* 2009 (6) SA 82 (GSJ); *Hofmeyr v Minister of Justice and Another* 1992 (3) SA 108 (C)

¹³ *Minister of Safety and Security v Sekhoto and Another* 2011 (1) SACR 315 (SCA) at para 44

¹⁴ *Ledwaba v Minister of Justice and Constitutional Development and Correctional Services and Others* 2024 JDR 0623 (SCA) (referring to *Beckenstrater v Rottcher and Theunissen* 1955 (1) SA 129 (A) at 135 – 136)

‘When it is alleged that a defendant had no reasonable cause for prosecuting, I understand this to mean that he did not have such information as would lead a reasonable man to conclude that the plaintiff had probably been guilty of the offence charged; If despite his having such information, the defendant is shown not to have believed in the plaintiff’s guilt, a subjective element comes to play and disproves the existence, for the defendant, of reasonable and probable cause.’

[53] At paragraph 24¹⁵, the court further held that, to the extent that Ledwaba wanted to justify his action and prove his innocence, that is not the test for reasonable and probable cause in a malicious prosecution. Whether there was reasonable and probable cause for the prosecution depends on the facts or material which was at the disposal of the prosecutor, at the time that the prosecution was instigated, and careful assessment of that information.

[54] Save for the bare denial, no exculpatory evidence was ever proffered by the plaintiff at the time of the arrest, something that would have necessitated Somthi to investigate further before effecting arrest.

[55] The plaintiff further failed to lead evidence and prove that the suspicion formed by Somthi was improperly formed and that her discretion was for an improper objective. In *Groenewald v Minister van Justisie*¹⁶, it was held that:

‘Once the jurisdictional facts of the existence of the reasonable suspicion is proved by the defendant, the arrest is brought within the ambit of the enabling legislation and thus justified. If it is alleged that his suspicion was improperly formed, it is for the party who makes the allegation to prove it. There is no reason to deviate from the general rule that the party who attacks the existence of discretion where the jurisdictional, bears the honors of proof.’

[56] In my view, the first defendant had established that there were reasonable grounds to suspect that the plaintiff had committed the Schedule 1 offence, rape, assault with intent to do grievous bodily harm and housebreaking. Based on the

¹⁵ Ibid

¹⁶ *Groenewald v Minister van Justisie* 1973 (3) SA 877 (A) at 884. Also see: *Sekhoto (supra)* para 45 – 49; *Barnard v Minister of Police & Another* 2019 SACR 362 (ECG) at para [43] to [48]

evidence presented, I am satisfied that, regarding the claim of unlawful arrest of the plaintiff, the arresting officer, Somthi, acted on a reasonable suspicion as required by section 40(1)(b) of the CPA and had reasonable grounds to believe that the plaintiff had committed a Schedule 1 offense. Furthermore, I find no basis to conclude that the discretion to arrest was improperly exercised. Accordingly, I find that the arrest and detention of the plaintiff were lawful and there was no malice. As a result, the claims for unlawful arrest and detention and malicious prosecution must fail.

[57] Reverting to question of whether prosecution was malicious it is important to understand that malice, in this context, talks to the mental state of the prosecutor as the decision maker. This refers to circumstances where *animus iniuriandi* is established and has been shown to exist. Secondly, there must be consciousness of wrongfulness on the part of the decision maker. Both these factors must exist. In *Moaki v Reckitt & Colman*¹⁷ it was held that it is for the plaintiff to allege and prove that the defendant had necessary intention to cause him injury, either in the form of *dolus directus* or *dolus eventualis*.

[58] In *Moleko*¹⁸, at paragraph 11, the SCA mentioned that the prosecution occurred at the instance of the DPP and that the role of the police was merely to gather relevant information. In paragraph 28, it is important to note that the SCA mentioned that when they assessed malice, they noted that prosecutor did not know, and did not know of, never had any dealings with the plaintiff. The SCA also emphasized that *animus iniuriandi* must be proven. It is not only intention to injure but also the consciousness of wrongfulness of the prosecution.

[59] Lastly, in the case of *NDPP and Mdhlovu*¹⁹, the main question to be answered, in paragraph 19, was whether the onus of proof has been discharged, proving the lack of reasonable and probable cause to prosecute and that prosecution was instituted *animo iniuriandi*. The SCA specifically referred, at paragraph 20

¹⁷ *Moaki v Reckitt & Colman (Africa) Ltd and Another* 1968 (3) SA 98 (A)

¹⁸ *Supra*

¹⁹ *NDPP and Mdhlovu* 2024 JDR 2282 (SCA)

thereof, to an old case of *Prinsloo and Another v Newman*²⁰ where the court found that reasonable and probable cause can be explained as follows:

‘In *Prinsloo and Another v Newman*, this Court discussed the concept of reasonable and probable cause for prosecution in the context of malicious prosecution. The Court held that the test for reasonable and probable cause is an objective one. It is not based on the subjective beliefs or motives of the prosecutor. Reasonable and probable cause exists if a reasonable person would have concluded that the accused was probably guilty on the facts available to the prosecutor at the time.’

[60] They took it further and concluded that a prosecutor need not have evidence establishing a *prima facie* case or proof beyond a reasonable doubt when deciding to initiate a prosecution. Suspicion of guilt on reasonable grounds suffices. It is therefore my finding that, based on the evidence of the docket and the interview with the complainant, the suspicion of guilt was there and the first and second defendants acted upon this evidence with reasonable grounds. I accepted the evidence of the arresting officer and prosecutors as credible. The ‘not guilty’ finding does not negate in this instance the earlier decision to prosecute.

[61] In paragraph 38 of *Mdhlovu*, the court emphasized that prosecutors must be free to pursue cases they believe have merit without undue fear of adverse consequences, provided they act rationally, honestly and without improper motives. *In casu*, the plaintiff did not discharge the onus of proving the essential elements of his claim for malicious prosecution. For the plaintiff to be successful, all the requirements must be cumulatively in existence. Having found that not all the requirements of the claim has been satisfied, I accordingly find that the plaintiff cannot succeed. In my view, considering all the available evidence and all the facts, the criminal charges were not only reasonable but also justified.

[62] For what it is worth, I want to deal pertinently with the issue that the plaintiff’s counsel raised regarding the report that the complainant gave shortly after the incident. As per the statements contained in the docket, the complainant reported the incident to Matebele, Thembisa Gqwangqa and Chief Matiso. The plaintiff took an

²⁰ *Prinsloo and Another v Newman* 1975(1) SA 481 (A)

issue about the fact that the complainant only mentioned assault when he reported to the Chief and he did not say anything about rape. She only mentioned rape when she was probed by the Chief if it was only the assault that happened. Ms Gwangqa pulled her on the side and asked what had really happened and it was at that stage that she mentioned that the plaintiff also raped her. As a result of this the plaintiff argues that the plaintiff was influenced by the Ms Gwangqa to lay a complaint of rape. I disagree. My disagreement is based on the following:

- 62.1 One has to bear in mind that the plaintiff had undergone a devastating experience which, understandably, took a toll on her state of mind. Under these circumstances, it is reasonable to expect that the complainant was nervous and could not have been in a position to narrate everything.
- 62.2 One has to bear in mind that we live in a society where victims of sexual violence get killed so as to eliminate evidence. It would therefore be unrealistic to close eyes to the possibility that the complainant was not completely free to narrate what had happened, with fear of possible eventualities.
- 62.3 One should also bear in mind that it is expected that a female that has been sexually violated may feel embarrassed and not feel free to narrate such details especially to a male. Research explains the state of mind of a woman who has been sexually violated, towards men. For this reason, it is not far-fetched to expect that the complainant might have had a different feeling towards males after her ordeal, and that could have caused her not to be comfortable in front of the Chief until she was probed by Ms Gwangqa.

Costs

[63] The general rule in matters of costs is that the successful party should be awarded costs, and this rule should not be departed from except where there are good grounds for doing so. I can think of no reason why I should deviate from this

general rule. I find that the first defendant successfully discharged his onus to justify the plaintiff's arrest and detention. The plaintiff has failed to discharge his onus to prove that his prosecution was malicious. The plaintiff's action falls to be dismissed with costs as there are no reasons advanced as to why costs should not follow the result.

[64] Resultantly, the following order is made:

- 64.1 The plaintiff's claim against the first defendant for unlawful arrest and detention as well as malicious prosecution is dismissed.
- 64.2 The plaintiff's claim against the second defendant, is dismissed.
- 64.3 The plaintiff is ordered to pay the cost of suit on a party-and-party basis, in terms of Scale B.

H ZILWA
JUDGE OF THE HIGH COURT (ACTING)

Appearances:

For Plaintiff	:	Adv M C Manana
Instructed by	:	B. Mwelase Attorneys, Suite 319, 3 rd Floor, ECDC Building, York Road, Mthatha
For First Defendant	:	Adv LL Sambudla
Instructed by	:	The State Attorney, 94 Sissions Street, Fortgale Mthatha
For Second Defendant	:	Adv NO Nhantsi
Instructed by	:	The State Attorney, 94 Sissions Street, Fortgale, Mthatha

Date Reserved : 25 July 2025

Date Delivered : 04 November 2025