

**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable

Case no: 1908/2020

In the matter between

PALI DANIEL MOEKETSI

PLAINTIFF

and

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

DEFENDANT

Neutral citation: *Moeketsi v The National Director of Public Prosecutions* (1908/2020)
[2025] ZAFSHC 340 (06 November 2025)

Coram: Lekokotla AJ

Heard: 2, 3 and 5 September 2025

Delivered: 06 November 2025

Summary: Malicious prosecution – requirements for – reasonable and probable cause – *animus iniuriandi* – effect of withdrawal of prosecution.

ORDER

The application is dismissed with costs, including costs consequent upon employment of counsel, on scale B.

JUDGMENT

Lekokotla AJ

[1] The plaintiff has instituted an application for malicious prosecution.

[2] This claim arises from an incident where, in the early hours on or about 2 October 2017 at the Theunissen Caltex garage in Theunissen, Piet Retief, a number of armed men set explosives and robbed the Caltex garage at gunpoint. The plaintiff is one of the accused who was arrested a few days later and appeared before the Theunissen Magistrates Court in 16 October 2017 on a charge of robbery with aggravating circumstances.

[3] The plaintiff contends that his prosecution was malicious and caused him to suffer damages and, as a result, the defendant should compensate him for the damages suffered. The defendant disputes the claim, contending that there was no malicious prosecution of the plaintiff and that the plaintiff has failed to prove the requirements of malicious prosecution. Further, that the plaintiff has suffered no damages as a result.

[4] The case proceeded in respect of merits and quantum on 2, 3 and 5 September 2025.

[5] The plaintiff was the sole witness who tendered evidence in this case. The defendant led the evidence of two witnesses, Mr Vuyisile Didi (Mr Didi) and Mr Raymond Dirk McBetty (Mr McBetty), who were regional court prosecutors, at the relevant times. They tendered evidence on behalf of the defendant.

Malicious prosecution

[6] It is trite that the requirements for malicious prosecution that the claimant must

allege and prove are that: (a) the defendant set the law in motion (by instigating or instituting the proceedings); (b) the defendant acted without reasonable and probable cause; (c) the defendant acted with malice or *animo iniuriandi*; and (d) the prosecution failed. These are the requirements that the plaintiff ought to prove in order to succeed with his claim. This was confirmed by the Supreme Court of Appeal (SCA) in *Relyant Trading (Pty) Ltd v Shongwe and Another (Relyant)*¹ and *Minister of Justice and Constitutional Development and Others v Moleko (Moleko)*.²

[7] It is common cause that the defendant set the law in motion by instituting proceedings against the plaintiff on 16 October 2017 when it decided to prosecute him on the charge of robbery with aggravating circumstances. This was established. It was never in dispute. The plaintiff confirmed this when he recounted that his first appearance was on 16 October 2017. He had further subsequent appearances, which will be discussed below.

Reasonable and probable cause

[8] One of the contentious requirements is whether the plaintiff has established that the institution of prosecution was without reasonable and probable cause. The plaintiff contends that the defendant had no reasonable and probable cause in prosecuting him. The defendant denies this.

[9] In *Prinsloo v Newman (Prinsloo)*,³ the then Appellate Division defined reasonable and probable cause as an honest belief founded on reasonable grounds that the institution of proceedings is justified. This test was confirmed by the SCA in *Moleko*.⁴

[10] One of the complaints that have been levelled against the defendant is that, in taking a decision to prosecute the plaintiff, it had no reasonable grounds for doing so because it merely relied on the sole evidence, which was the statement of the investigating officer, Mr Olivier. The complaint is that, at the time of taking the decision to prosecute the plaintiff, the defendant had no other evidence at his disposal. Furthermore,

¹ *Relyant Trading (Pty) Ltd v Shongwe and Another* [2006] ZASCA 162; [2007] 1 All SA 375 (SCA) (*Relyant*).

² *Minister of Justice and Constitutional Development and Others v Moleko* [2008] ZASCA 43; [2008] 3 All SA 47 (SCA); 2009 (2) SACR 585 (SCA) (*Moleko*) para 8.

³ *Prinsloo v Newman* 1975 (1) SA 481 (A) (*Prinsloo*).

⁴ *Moleko* para 20.

that the statement contains inadmissible hearsay evidence, which was obtained from an informer who remains nameless and faceless. Since that informer would not appear in court to corroborate the information contained in Mr Olivier's affidavit, then this court should reject it as it is inadmissible.

[11] The defendant denies this and contends that, in light of the contents of Mr Olivier's statement, the information emanating the informer contained sufficient evidence upon which the stand-in prosecutor from Welkom, Mr Didi, formed an honest belief founded on reasonable grounds that the institution of proceedings is justified. This, according to the defendant was a reasonable and probable cause to prosecute the plaintiff.

[12] The question is whether the defendant had this honest belief that the institution of proceedings is justified. Also, whether it was founded on reasonable grounds.

[13] The evidence tendered by the plaintiff is that the prosecution had no basis for prosecuting him because he always maintained that he was innocent and that this was later found through the evidence obtained by his cell phone provider Mobile Telephone Network (MTN) that he was not on the scene of the robbery on the date in question.

[14] The evidence of Mr Didi is that, when he examined the statement of Mr Olivier, it contained details of a robbery and that those details were not (and would not have been) known to the public. This included the details of the motor vehicle that was alleged to have been used during the robbery (a white Audi A4, partial place MP registration), the type of firearms that were used during the robbery (a 9 mm and a full automatic assault rifle); the number of people that were involved in the robbery at the Caltex garage (four armed masked men and an armed driver); the details of the alleged robbers. The statement of Mr Olivier contains the names, the nicknames as well as the residential addresses of the alleged robbers, including those of the plaintiff.

[15] The testimony of Mr Didi went to reveal that the informer had informed Mr Olivier that the men who were involved in the armed robbery at the Caltex garage in Theunissen were known to him or her and that, at approximately 22h00-23h00, these men were at his suburb and they called him (the informer) and when they met he realised that they had a large assault rifle and a 9 mm gun, and large sums of cash in their possession.

These men then bragged to the informer how they blew up a safe at the Theunissen Caltex garage and thereafter robbed the garage. Furthermore, the informer had informed Mr Oliver that the alleged robbers had gone to his (informer's) home driving a white Audi A4 with MP partial plates and that they changed the plates of the motor vehicle to the ones bearing the registration BYM[...].

[16] Mr Olivier's statement lists the names of the six alleged robbers, which were communicated to him by the informer, including their nicknames. The names included the name of the plaintiff, including his nickname, Zorro as well as his residential addresses. Similar information appears in respect of the other accused, including their residential addresses. The plaintiff was arrested at approximately 00h15 on 13 October 2017 at the address that is contained in Mr Olivier's statement.

[17] When the plaintiff was arrested, Mr Olivier and others searched the plaintiff's home when they arrived as they were in the process of arresting him. They found green gloves, two cell phones and a memory stick. They informed the plaintiff of his rights and thereafter arrested them. When they searched the homes of the other suspects, they found more cell phones, memory sticks etc, even bank cards some rifles were found.

[18] Mr McBetty's testimony was that, if he had had the statement of Mr Olivier prior to enrolling the matter, he would have taken the same decision as one taken by Mr Didi in that he would have enrolled the matter as Mr Olivier's statement was very detailed and gave a lot of information which would have created the impression that the plaintiff and his co-accused were guilty of crime. This is despite the fact that the information that Mr Olivier received was from an informer, whose identity could not be revealed. This is also because there were two insiders who were working at a garage who were suspected of having been linked to the crime in question. There would have been a possibility of persuading them to co-operate or even to turn State witnesses.

[19] According to Mr McBetty, the statement of Mr Olivier is too detailed for him to have been lying about what he wrote on it based on the information that he received from an informer. This statement was also backed up by a lot of verifiable facts.

[20] It goes without saying that the evidence that the defendant relied on did not have to

contain statements upon statements of individuals to help the prosecutor form the basis upon reasonable grounds whether prosecution was justified. What matters is the quality of available evidence. Even one piece of evidence, such as the statement of Mr Olivier, is sufficient as long as it contained credible information that was useful for the arrest and in this case, gave direction of what further evidence was necessary.

[21] The plaintiff raised a further complain criticising the statement of Mr Olivier, which was that since Mr Olivier relied on the evidence obtained from an informer, whose name or identity cannot or could not be divulged because they are informers. Therefore, since the informer was also not going to be called to court to testify, then Mr Olivier's statement amounted to inadmissible hearsay evidence.

[22] The defendant argued that the admissibility of Mr Olivier's statement should not be assessed based on its contents but rather on the statement itself, whether it is admissible evidence. Advocate Bomela contended that it is. No evidence was placed by the plaintiff on why Mr Olivier's statement should not be admissible by itself, except for the complaint that I have discussed above regarding the contents of what the informer told Mr Olivier.

[23] I agree with Advocate Bomela. There was no argument made by Advocate Mazibuko that the actual statement of Mr Olivier is not admissible. Even though, in its contents, it reveals the information received from the informer, whose identity cannot be revealed in order to protect their safety and privacy, that does not make it inadmissible. This is particularly because it contained very detailed information that I have detailed above, which helped the defendant to form the basis that the plaintiff is guilty of the offence that he was charged with.

[24] In *Relyant Trading*,⁵ it was held that

'It follows that a defendant will not be liable if he or she held a genuine belief founded on reasonable grounds in the plaintiff's guilt. Where reasonable and probable cause for an arrest or prosecution exists the conduct of the defendant instigating it is not wrongful.'

[25] Quoting the decision of the then Appellate division, *Beckenstater v Rottcher and*

⁵ *Relyant Trading* para 14.

Theunissen,⁶ the SCA in *Relyant Trading*,⁷ went on to state that:

‘The requirement of reasonable and probable cause is a sensible one: “For it is of importance to the community that persons who have reasonable and probable cause for a prosecution should not be deterred from setting the criminal law in motion against those whom they believe to have committed offences, even if in so doing they are actuated by indirect and improper motives.”’

[26] This is the test that was set out by the SCA and which is followed by all the courts in determining claims of malicious prosecution.

[27] In *Prinsloo*,⁸ it was held that what is required is an honest belief based on reasonable grounds that the institution of the legal proceedings was justified.

[28] From what we have heard from the plaintiff’s testimony is that the prosecution was based on the evidence of Mr Olivier, who was informed by an informer that he heard people bragging about having committed the crime in similar circumstances as the present. What the defendant has to establish is that in light of this evidence it held an honest belief, which was grounded on reasonableness regarding the justification of instituting the legal proceedings.

[29] In *Relyant Trading*, based on the facts of that case, where Mr Shongwe was mistaken for another customer who had bought goods on credit and never paid the balance of the instalments, the SCA held that where the evidence of Ms Mahlangu is concerned, the inference that she honestly believed in Mr Shongwe’s guilt and lacked any intention to injure him was held to be unavoidable. This view was premised on her training, experience with customers, the amount of time that she spent interviewing Mr Shongwe and the promptness with which she acted when she thought she recognised him as the person who defrauded her employer. The SCA concluded that any reasonable person in her position and on the information available to her would have concluded that Mr Shongwe was probably the person who committed the offence concerned.⁹

⁶ *Beckenstater v Rottcher and Theunissen* 1955 (1) SA 129 (A) at 135D-E.

⁷ Op cit fn 5.

⁸ *Prinsloo* 1975 (1) SA 481 (A).

⁹ *Relyant Trading* para 15.

[30] In *Moleko*,¹⁰ the SCA, quoted *Relyant Trading*, which had quoted *Beckenstater v Rottcher and Theunissen* where the following was held:

‘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 into play and disproves the existence, for the defendant, of reasonable and probable cause.’

[31] In *Moleko*, the SCA stated that reasonable and probable cause involves both a subjective and an objective element. This means that the defendant must not only 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.¹¹ Therefore, according to *Moleko*, in proving the element of reasonable cause, the prosecutor ought to harbour a subjective and honest belief that the plaintiff is guilty of the offence. This test goes on to require the objective assessment of the person exercising this power using ordinary care and prudence.

[32] In his evidence, Mr Didi explained that after the discussion that he had with Mr Olivier, who had indicated that he was still awaiting the results of the cell phone records to see if they could lead the plaintiff to the commission of the crime, he was satisfied that the matter should be enrolled for the plaintiff’s prosecution.

[33] Mr Didi explained that there was nothing untoward with enrolling the case and postponing it for further investigation. This is because there is no requirement that the defendant should have in hand all the evidence required for prosecuting the accused at the first hearing. This is also because the hearsay evidence recorded in Mr Olivier’s statement may have been corroborated in future. But also, the charge that the plaintiff was facing was very serious. He had to consider that too in deciding on what to do next.

[34] Mr McBetty confirmed this evidence and stated that declining to prosecute was not even an option because it would have been risky as the defendant did not know who had bombed and robbed the Caltex garage. If they had not prosecuted the accused whose

¹⁰ *Moleko* para 57.

¹¹ *Ibid* para 20.

details, they already had from Mr Olivier's statement, the risk was that the defendant never would have found out who the actual perpetrators were and may never have known if they had simply released the plaintiff and his co-accused on such a serious charge.

[35] Furthermore, the fact that the accused was not represented at the first appearance suggests that there was a need to postpone the case for the accused to obtain representation while the defendant continued to obtain the cell phone records.

[36] In his evidence, Mr McBetty confirmed Mr Didi's testimony that he did not have to have every piece of evidence against the plaintiff prior to his first appearance, only the reasonable belief that he was guilty of the offence. He also testified that there was nothing untoward about Mr Didi having enrolled the matter on 16 October 2017, as it related to a very serious charge that the plaintiff was facing.

[37] Mr McBetty explained that what would have kept the prosecution ongoing would have been the hope that the cell phone records may link the plaintiff to the scene of the crime. Furthermore, the belief that the defendant may have asked further eye witness to co-operate and furnish more information which may have demonstrated that the plaintiff. Was involved in the armed robbery. Also, the possibility that the defendant may have turned some of the accused to State witnesses. He testified that those are all indications of reasonable and probable cause on the part of the defendant.

[38] In my view, based on the evidence presented as well as the evidence led by Messers Didi and McBetty, the prosecutor met this test by objectively exercising his power in making a decision to prosecute and further by forming a view subjectively that the plaintiff was guilty of the offence.

[39] The plaintiff failed to discharge the onus of proving absence of reasonable and probable cause.

Animus iniuriandi

[40] Another element that the plaintiff had to prove as malice or *animus iniuriandi*

[41] This element is relevant if there is absence of reasonable and probable cause. As is clear from above, the defendant had reasonable and probable cause to believe in the guilt of the plaintiff at the time of prosecuting the accused when he had his first appearance at the Theunissen magistrates court on 16 October 2017. However, for the sake of completeness, I address this issue.

[42] In *Relyant*, the SCA stated the following in regard to the requirement:¹²

‘Although the expression “malice” is used, it means, in the context of the action iniuriarum, animus iniuriandi. In *Moaki v Reckitt & Colman (Africa) Ltd and another* Wessels JA said:

“Where relief is claimed by this actio the plaintiff must allege and prove that the defendant intended to injure (either *dolus directus* or *indirectus*). Save to the extent that it might afford evidence of the defendant’s true intention or might possibly be taken into account in fixing the quantum of damages, the motive of the defendant is not of any legal relevance.’

[43] The evidence of malice (*animus iniuriandi*) – when asked the plaintiff did indicate that he was not aware of the prosecutor before, did not know him, and still does not know him and does not believe that he would specifically have had anything against him. However, he still maintained that the prosecution should never have happened in the first place because as it turned out later, there was no evidence to link him to the crime scene because the cell phone evidence excluded him from or around the scene of the crime.

[44] The defendant has to rebut the claim of *animus iniuriandi* – by demonstrating facts that show differently. That is to disprove that despite seeing a possibility of acting wrongfully, it still continued to act recklessly.

[45] Mr Didi testified that he did not know the plaintiff before 16 October 2017 when he met him at the Theunissen magistrates court for his first appearance. He therefore could never have intended (directly or indirectly) to injure him in any way. In any event, his last involvement on that case was on the very same day, on 16 October 2017 when he postponed the criminal case for seven days, to 23 October 2017 to allow the plaintiff to obtain legal representation and to allow the defendant an opportunity to obtain cell phone records from the plaintiff’s cell phone network provider.

[46] Mr McBetty testified that with the type of evidence that the defendant had in the

¹² *Relyant Trading* para 5.

form of Mr Olivier's statement, and with the seriousness of the charge, it is not unusual for prosecutors to enrol the matter, postpone it for more evidence. He would have done precisely that as well since he saw nothing with Mr Olivier's statement. All that was missing were the cell phone records to reveal whether indeed the plaintiff and his co-accused were at or around the crime scene on the date in question.

[47] McBerty further testified that they (the defendant) knew that cell phone records were critical for him to decide whether or not to proceed with the plaintiff's prosecution.

[48] The plaintiff testified that he appeared numerous times before court before the charges were withdrawn on 4 December 2017. It is common cause that the plaintiff paid bail on 30 October 2017.

[49] There was no evidence that was led to the effect that there was malice in the context of *actio iniuriarum*, in the form of *animus iniuriarum*, i.e. an intention to injure. When asked directly in cross examination whether the plaintiff knew of the prosecutor who instituted prosecution against him, Mr Didi, the plaintiff's testimony was that they did not know each other prior to the proceedings. When asked whether there is a motive that Mr Didi may have harboured against him for subjecting him to prosecution when according to the plaintiff this should have never happened since he was not close to the scene of the crime, he stated expressly that he could not point out to any.

[50] In *Moleko*, the SCA held that *animus injuriandi* includes not only the intention to injure, but also consciousness of wrongfulness.¹³ In explaining this requirement, the SCA held as follows:

'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*.'

¹³ *Moleko* para 63.

[51] The SCA, in *Moleko*, went on to state that the defendant must 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, even gross negligence) will not suffice.¹⁴

[52] The plaintiff testified that the intention to injure his image on the defendant's part is apparent from the fact that the details of the crime, including the name of the suspects, including him were reported in a press release or statement that circulated in Theunissen. When asked how such publication tarnished his image when he did not even live in Theunissen, he replied that it was read widely and reached Welkom where he lived.

[53] When asked how his image was tarnished, the plaintiff answered that his community started thinking less of him as they believed that he was involved in a crime and that this diminished society's view of him. When asked how he could say this and to demonstrate what the community's perception was prior to this publication, he could not give a straight answer.

[54] When he was asked what options he had prior to enrolling the matter, Mr Didi testified that he could have (a) declined to prosecute the plaintiff; or (b) he could have postponed the matter and called the accused to appear in future; or (c) he could have done what he did in the present matter, which was to charge the plaintiff and postpone the matter for a few days to gather more evidence as Mr Didi did here; or (d) by raising a query.

[55] Mr Didi's evidence was that he could have chosen the same course which he did, which was to enrol the matter and postpone it for a few days to obtain further evidence. The other option was for him not to have prosecuted the matter and waited until he had received the evidence of the cell phone records as was required. However, he pointed out that this would never have been the decision he would have made because the

¹⁴ Ibid para 64.

accused were charged with a serious crime and also that the witness statement that he mainly relied on was detailed enough to cause him to believe that there was a reasonable prospect of a successful prosecution. This is because it recorded the information that was relayed to Mr Olivier by an informer (whose identity he could not reveal) that he had heard the accused and other men speaking about their armed robbery of the Caltex garage.

[56] Mr McBetty's evidence was that it would have been extremely risk if the defendant had declined to process and thereafter obtained cell phone records that reveal that the plaintiff was near the scene of the crime, then they would have had to arrest them again, charge them again with the same crime and prosecute them. The risk is that they may have ran away in the meantime and the defendant would have struggled to find them again.

[57] When Mr McBetty was asked by counsel for the plaintiff why that was risky since the plaintiff's residential address was contained in Mr Olivier's statemen and that the defendant would have known where to get him, his answer was he may have absconded there and they could not find him elsewhere. This is the risk that is not advisable for anyone to take.

[58] The plaintiff's bail was fixed during the course of October2017. He only paid it on 30 October 2017.

[59] It is common cause that the letter from MTN exonerating the plaintiff from the crime when his cell phone number could not be located around the scene of the crime, is dated 6 November 2017. None of the defence witnesses could explain when it reached the defendant. However, the time period that passed between that date and 4 December is not unreasonably long as it was just over a month. What is also important to consider is what was happening with the plaintiff throughout that time.

[60] Subsequent to 6 November 2017, the plaintiff had two more appearances before court. The first one was on 17 November and the last one was on 4 December 2017 where the charges were withdrawn against the plaintiff. None of the defendant's witness could confirm whether the cell phone records were already in the possession of the

defendant when the plaintiff appeared in court on 20 November 2017. This is because they simply did not know this including when this document was placed in the court file.

[61] Mr McBetty testified that if he had proceeded with the plaintiff's prosecution beyond 4 December 2017, having had the results of the cell phone records, then his conduct would have been malicious as the defendant would have has no basis from the plaintiff's pr-longed prosecution. This is proof there was no animus iniuriandi against the plaintiff.

Whether proceedings have been terminated in the plaintiff's favour

[62] It is common cause that, on 4 December 2017, the defendant withdrew the charge of robbery with aggravating circumstances against him. It was the defendant's second witness, Mr McBetty who gave an instruction to Advocate Tshifuta, who was representing the defendant at the hearing on 4 December 2017 to withdraw the charges against the plaintiff as he became aware, though his discussion with Mr Olivier, on that date of this information.

[63] Advocate Mazibuko argued that the prosecuting authority's power to withdraw the charges is sourced from s 6 of the Criminal Procedure Act 51 of 1977. In this regard, he referred to the *National Director of Public Prosecutions and Others v Freedom under Law*,¹⁵ where the SCA held that the decision to withdraw a criminal charge in terms of s 6(a) can never be described as 'provisional' just because it can be reinstituted. This would be tantamount to saying that because a charge could be withdrawn, the institution of criminal proceedings is only provisional. The SCA concluded that the withdrawal of a charge in terms of s 6(a) is final. The prosecution can only be recommenced by a different, original decision to reinstitute the proceedings. Unless and until it is revived in this way, the charge remains withdrawn.

[64] In *Thompson v Minister of Justice (Thompson)*,¹⁶ it was held that:

'In an action based on malicious prosecution it has been held that no action will lie until the criminal proceedings have terminated in favour of the plaintiff. This is so because one of the essential requisites of the action is proof of a want of reasonable and probable cause on the part of the defendant, and while a prosecution is actually pending its result cannot be allowed to be

¹⁵ *National Director of Public Prosecutions and Others v Freedom Under Law* [2014] ZASCA 58; 2014 (4) SA 298 (SCA); 2014 (2) SACR 107 (SCA); [2014] 4 All SA 147 (SCA) para 34.

¹⁶ *Thompson v Minister of Justice* 1971 (1) SA 371 (E).

prejudged by the civil action (*Lemue v Zwartbooï*, supra at p. 407). The action therefore only arises after the criminal proceedings against the plaintiff have terminated in his favour or where the Attorney-General has declined to prosecute. To my mind the same principles must apply to an action based on malicious arrest and detention where a prosecution ensues on such arrest, as happened in the present case. The proceeding from arrest to acquittal must be regarded as continuous, and no action for personal injury done to the accused person will arise until the prosecution has been determined by his discharge.’ (*Bacon v. Nettleton*, 1906 T.H. 138 at pp. 142 - 3).

[65] Advocate Bomela argues that it is still open to the defendant to reopen the criminal proceedings against the plaintiff as long as it obtains sufficient or new evidence. He contends that consequently the criminal proceedings are still pending against the plaintiff. He relies on *Thopson* in support of this argument.

[66] Advocate Mazibuko argued that the criminal proceedings against the plaintiff are not pending since they were withdrawn as far back as 4 December 2017. Advocate Mazibuko contends that *Thompson* does not support the proposition made by Advocate Bomela.

[67] I am inclined to agree with Advocate Mazibuko that the criminal proceedings are not pending, particularly since the defendant’s witnesses could not point any evidence to demonstrate this. In fact, Mr McBetty testified that there has not been any steps to reinstate the case against the plaintiff by the defendant.

[68] I however disagree with Advocate Mazibuko that the effect of the withdrawal of the charges is the same as conclusion of the trial in favour of the plaintiff. This cannot be. The witnesses of the defendant, particularly Mr McBetty explained that, when the regional prosecutor who was dealing with the matter (Advocate Tshifuta) called him on 4 December 2017, after the defendant had received the MTN records demonstrating that the plaintiff was not at the vicinity of the scene of the crime, he would have been with the investigator Mr Olivier at his office at the time and would have consulted with him and immediately made a decision, which he communicated to Advocate Tshifuta that she must withdraw the charges against the plaintiff, which she duly did on that day.

[69] The withdrawal of the charges against the plaintiff on the basis of ‘geen prima facie

saak' does not prove that the criminal proceedings were decided in favour of the plaintiff. It simply means that the case against the plaintiff could not proceed as soon as the defendant realised that there is no evidence that links the plaintiff to the crime scene and therefore there was no sufficient evidence which could have sustained the prosecution.

[70] What also supports this argument is that 7 and half years have passed since the case was withdrawn against the plaintiff. During this time, there has never been an indication or even an inclination to bring the charges against the plaintiff based on the facts of this case. In fact, none of the witnesses of the defendant testified that there is a likelihood or even an intention on the part of the defendant to re-instate the charges against the plaintiff.

[71] However, in agreeing with Advocate Mazibuko that there is no evidence to suggest that the proceedings against the plaintiff are pending, I disagree with him that the withdrawal of the charges is equivalent to the failure of prosecution as one would have in an instance where the defendant would have had the prosecution of the plaintiff dismissed.

[72] I am inclined to agree with Advocate Bomela that the only way that the plaintiff could, in reality, successfully resist his prosecution in future would be if he is in a position to raise the defence of *autrefois acquit*.

[73] In *Sayed and Others v S*,¹⁷ the SCA, quoting the old judgment of the then Appellate division in *R v Manasewitz*,¹⁸ the SCA reiterated the requirements of this special plea that 'the requisites for a plea of *autrefois acquit* are that the accused must have been tried previously on the same charge by a court of competent jurisdiction and acquitted on the merits'. It stated that this principle was endorsed by the Constitutional Court in *S v Basson*.¹⁹

[74] It is common cause that the plaintiff was never acquitted on the merits of the charge simply because the defendant terminated his prosecution on 4 December 2017 when it

¹⁷ *Sayed and Others v S* [2017] ZASCA 156; 2018 (1) SACR 185 (SCA).

¹⁸ *R v Manasewitz* 1933 AD 165.

¹⁹ *S v Basson* [2005] ZACC 10; 2005 (12) BCLR 1192 (CC); 2007 (3) SA 582 (CC); 2007 (1) SACR 566 (CC) paras 254 and 255.

learnt that the cell phone records did not link the plaintiff to the scene of the crime. It therefore follows that the plaintiff has equally failed to prove that termination was terminated in his favour, after having gone through the trial and having been acquitted on the merits after an entire court hearing on the merits. The proceedings against him simply never reached that stage.

[75] In light of the above, I conclude that the plaintiff has failed to prove the requirements of his malicious prosecution by the defendant. Therefore, his claim should fail.

Quantum of damages

[76] In light of my finding on the merits, I consider this aspect unnecessary to deal with.

[77] Consequently, I make the following order:

The application is dismissed with costs, including costs consequent upon employment of counsel on scale B.

B D LEKOKOTLA
ACTING JUDGE OF THE HIGH COURT

Appearances

For the plaintiff: S M Mazibuko

Instructed by: Mokhomo Attorneys, Bloemfontein

For the defendant: L Bomela

Instructed by: Office of the State Attorney, Bloemfontein.