



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

CASE NO.: 2902/2022

Reportable	Yes/No

In the matter between:

LUVO JONNATHAN DAMA

Plaintiff

and

MINISTER OF POLICE

1st Defendant

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

2nd Defendant

JUDGMENT

Cengani-Mbakaza AJ

Introduction

[1] The plaintiff instituted an action against the Minister of Police (the first

defendant) and the National Director of Public Prosecutions (the second defendant), claiming damages. In respect of the first defendant, the plaintiff claims an amount of R250 000 (Two Hundred and Fifty Thousand Rand) for the alleged unlawful arrest and detention.

[2] In addition, the plaintiff seeks damages to the amount of R500 000 (Five Hundred Thousand Rand) against the first and second defendant for unlawful detention post-court appearance, jointly and severally, the one paying the other to be absolved. Furthermore, the plaintiff claims damages to the amount of R250 000 (Two Hundred and Fifty Thousand Rand) against the first and second defendants for malicious prosecution.

[3] It is common cause that the arrest was effected by the members of the South African Police Services (SAPS) who were acting within the course and scope of the first defendant's employment.

[4] At a pre-trial conference held on 12 August 2024, the parties agreed that the defendants would bear onus and the duty to begin with the alleged unlawful arrest and detention. The parties further agreed that the plaintiff would bear onus to prove malicious prosecution. Furthermore, it was agreed that there would be no separation of issues between the merits and the quantum. This agreement was subsequently endorsed at the commencement of the trial proceedings.

The pleadings

[5] In pursuit of the claim for unlawful arrest and detention against the first defendant, the plaintiff alleges that SAPS lacked justification for arresting him, as no reasonable grounds existed to suggest that he committed the alleged crimes of robbery or attempted murder. Therefore, SAPS acted with ulterior motive, by arresting him for purposes not permitted by the legislature. The arresting officer used his power to arrest to frighten and harass him.

[6] The plaintiff further contends that the arresting officer failed to consider his explanation during his arrest, as there was no evidence linking him to the alleged crimes. He asserts that the arresting officer failed to consider the strong alibis that favoured him during the arrest and did not critically analyse the information they had.

[7] The plaintiff aver further that the arresting officer should have considered alternative means to secure his court attendance. Consequently, the plaintiff asserts that his arrest and detention from 27 to 30 September 2019 was unlawful.

[8] The plaintiff alleges that his detention from 30 September 2019 to 14 October 2019 was unlawful, as he was held for 18 days before his bail hearing due to the actions of the first and second defendant. He alleges that he was detained for crimes he had no knowledge of without his constitutional rights being properly considered.

[9] The plaintiff alleges malicious prosecution claiming that the first and second defendants set the law in motion by laying false charges against him. They also opposed his bail without reasonable cause, driven by malice. The plaintiff asserts that the public prosecutor failed to assess the strength of the state's case, including determining if prima facie evidence existed. He claims that the public prosecutor failed to ensure his release on bail or warning , considering the lack of prima facie evidence against him.

[10] In their plea, the defendants deny that the plaintiff's arrest and detention was unlawful. Furthermore, they aver that the plaintiff was facing charges of robbery with aggravating circumstances, attempted murder and intimidation falling under Schedule 6 in terms of bail legislation.

[11] The defendants aver that the case docket exhibited a prima facie case against the plaintiff, justifying arrest to bring him to justice. They claim that

they acted in good faith, without malice. Also, the detention post-court appearance was per the presiding officer's orders.

The plaintiff's case.

[12] The plaintiff testified that at the time of the incident he was staying at Ndlovini location working at Happiness Panel Beaters with his co-employees Messrs Thembani Zweni (Mr Zweni) and Mamush. On 27 September 2019, at around 5 o'clock in the morning, about four police officers accompanied by a foreign national (the complainant) known to him visited his home. The complainant pointed him out, the police officers hit him with a torch, making his family members including his children to stand up.

[13] They took him to the police station where he was made to sign a certain document. Although the contents of the document were not explained to him, it reflected a charge of attempted murder. When his fingerprints were taken, he was informed that he was being charged for attempted murder charge. He told the police that he had an alibi, having been at work, not at the crime scene. The plaintiff testified that he was not taken to court on 27 September 2019 for unknown reasons.

[14] He was taken to court on 30 September 2019 and without legal representation, he was advised that bail would be denied due to a previous conviction of assault with intent to do grievous bodily harm. He testified that the statement that he had a previous conviction was false, as the case of assault with intent to do grievous bodily harm was withdrawn without any conviction against him.

[15] He was then advised that the matter would be transferred to the Regional Court. The case was postponed several times until charges were withdrawn by the state on 06 April 2021.

[16] When asked if there was any evidence linking him with the offence, he testified that there was none, except that the complainant pointed him out as the perpetrator. Under cross-examination, he was confronted about the allegations in his particulars of claim where he stated that the police assaulted him with a gun. He refuted this, conceding that no guns were used in the assault.

[17] When asked what the police should have done given the fact that he was pointed out by the complainant, he stated that the police were within their right to do their job. Later in cross-examination, the plaintiff conceded that he never presented his alibi to the police.

[18] Mr Zweni testified that the plaintiff could not have been at the crime scene since he was with him on duty when the incident happened. He saw the plaintiff being arrested and told the police that the plaintiff was with him at the time of the commission of the crime. The police informed him that the complainant pointed the plaintiff out and there was nothing they could do. When asked about specific dates, including the dates he claimed he was on duty with the plaintiff, he could not recall.

The defendants' case

[19] Mr Mwezi Gwedashe (Mr Gwedashe), a regional court prosecutor testified that he received the police docket on 30 September 2019. The docket was brought to him by the investigating officer and was asked to make a determination on whether the case should be enrolled or not.

[20] Upon examination of the police docket, he noticed that the investigation was incomplete. The medical report, commonly known as the J88 as well as SAP 69s were outstanding. Despite incomplete investigation, the docket included the complainant's statement, arresting officer's statement, statement of injuries, bail information sheet, the explanation of the plaintiff's constitutional rights and the police diary.

[21] He decided to prosecute based on prima facie evidence. When asked for the reasons for his decision, he testified that the complainant and the plaintiff knew each other, the complainant had an opportunity to identify him, and alleged that the plaintiff took his money. The plaintiff put the gun on the counter while looking at each other. Mr Gwedashe further explained that despite being charged with attempted murder, a further charge of robbery with aggravating circumstances was later added against the plaintiff.

[22] When confronted about the opposition of bail based on the previous conviction of assault with intent to do grievous bodily harm, Mr Gwedashe testified that bail would have been opposed in any event due to the schedule 5 offence of attempted murder, regardless of the mistake about the plaintiff's previous conviction.

[23] Under cross-examination, Mr Gwedashe testified that he charged the plaintiff on attempted murder based on the complainant's injuries which he considered potentially fatal.

[24] According to the docket statements , in particular the statement of injuries, the complainant's names were different. When asked to explain the discrepancy, Mr Gwedashe explained that police officers are not well versed with names of foreign nationals. He conceded however, that he did not notice the discrepancy regarding the complainant's names.

[25] Constable Khanyisile Nkihlana (the arresting officer) testified that the incident happened on 19 September 2019, and the complainant was detained in hospital until 23 September 2019. On 23 September 2019, he interviewed the complainant who informed him that the plaintiff , Luvo, who stays in the same area was the perpetrator of the crime.

[26] He asked the complainant to show him where the plaintiff lived. Together with the complainant, he went to the plaintiff's place, and the complainant

pointed out the plaintiff as the person who shot him with a firearm. Under cross-examination, the arresting officer was informed that he did not properly exercise his discretion to arrest. He explained that he considered the seriousness of the offence and the weapon used, concluding that arrest was the only option.

[27] When confronted about not doing an identification parade, he explained that the complainant named the plaintiff, Luvo, and pointed him out, therefore, an identification parade was not necessary.

[28] The last witness to be called by the defendants was Ms Chwayita Mkhwayimbana (Ms Mkhwayimbana), the public prosecutor. She testified that she could not proceed with bail application on 10 October 2019 and only dealt with it on 14 October 2019. She explained that on 10 October 2019, it was late afternoon when she received the plaintiff's docket for consideration and his case was crowded out due to a busy schedule. She stated that after receiving the docket, she spoke to the investigating officer about the bail proceedings.

[29] She testified that attempted murder charge which according to her involved the infliction of grievous bodily harm fell under schedule 5 in terms of bail legislation.

[30] After examining the docket, she concluded that the plaintiff would likely interfere with witnesses because he allegedly went to the complainant's shop two days after the incident and threatened to shoot him. Ms Mkhwayimbana opined that this demonstrated a risk of interference with investigations and opposed the granting of the plaintiff on bail. Despite the state's opposition, the magistrate granted bail to the amount of R1000.

[31] Regarding the merits of the case, she testified that identification was not an issue since the parties knew each other. Although half-masked, the complainant named the plaintiff and pointed him out as the perpetrator.

Issues

[32] The primary issue for determination is whether the plaintiff's arrest and detention on a charge of attempted murder was justified. Additionally, this court must assess whether in arresting the plaintiff, the arresting officer objectively exercised his discretion. Furthermore, it must be determined whether the post-detention court proceedings were legally justified. Lastly, this court must consider whether the SAPS and the prosecutors acted with ulterior motive in motivating the plaintiff's detention post-court appearance. Finally, the issue is whether the SAPS and the prosecutors acted with collusion-driven malice in prosecuting the plaintiff.

The law and the court's analysis of evidence

Arrest and detention from 27 September 2019 to 30 September 2019

[33] Pursuant to s 38 of the Criminal Procedure Act¹ (CPA), arrest is one of the methods of securing the attendance of the accused to the court. In terms of the Constitution everyone has a right to freedom from arbitrary deprivation of liberty without just cause.² In instances where the arrest is deemed necessary, the onus rests with the arrestor to demonstrate that the arrest was objectively justifiable and lawful. The Supreme Court of Appeal (SCA) in *Minister of Law and Order and Others v Hurley and Another*³, stated:

‘An arrest constitutes an interference with the liberty of the individuals 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.’

¹ Act 51 of 1977.

² Section 12, of Act 108 of 1996, The Constitution.

³ [1986] ZASCA 53, [1986] 2 ALL SA 428 (A); 1986 (3) SA 568 (A) at 589E-F; see also *Hlope v Minister of Police* (426/2023) [2024] ZASCA 68; 2024 (2) SACR 148 (SCA) (3 May 2024).

[34] Section 40 (1) (b) of the CPA, empowers a peace officer to arrest a suspect without a warrant in circumstances where there is a reasonable suspicion that the suspect has committed a Schedule 1 offence, excluding the offence of escaping from lawful custody.

[35] The SCA in *Duncan v Minister of Law and Order*⁴(Duncan) set out four jurisdictional facts which flow from s 40 (1) of the CPA. These are: that the person arresting must be a peace officer, who entertained a suspicion, that the suspect committed a schedule 1 offence and that the suspicion vested on reasonable grounds.

[36] Upon establishing the jurisdictional facts contemplated in section 40(1) of the CPA, the arresting officer is vested with the discretion to decide whether to arrest the suspect, thereby exercising his power. The law sets important principles in the exercise of a discretion.

[37] These principles were set out by Harms DP in *Minister of Safety and Security v Sekhoto*⁵ (Sekhoto) and later confirmed by the Constitutional Court in *Groves NO v Minister of Police* (Groves)⁶. In *Groves*⁷, the CC stated:

‘[50] When making an arrest, a peace officer is required to respect, protect, promote and fulfil constitutional rights.’

[38] Referring to *Sekhoto*⁸, the CC⁹ held:

‘Once the jurisdictional facts for an arrest, whether in terms of any paragraph of section 40(1) or in terms of section 43 are present, a discretion arises. The question whether there are any constraints on the exercise of discretionary powers is essentially a

⁴ [1986] ZASCA 24; [1986] 2 All SA 241 (A); 1986 (2) SA 805 (A) at 818G-H.

⁵ [2010] ZASCA 141; 2011 (5) SA 367 (SCA); 2011(1) SACR 315 (SCA); (2011) 2 All SA 157 (SCA).

⁶ [2023] ZACC 36; 2024 (1) SACR 286 (CC); 2024 (4) BCLR 503 (CC) para 50.

⁷ Ibid.

⁸ Fn 6 above.

⁹ See Groves fn 7 *supra*.

matter of construction of the empowering statute in a manner that is consistent with the Constitution. In other words, once the required jurisdictional facts are present the discretion whether or not to arrest arises. The officer, it should be emphasised, is not obliged to effect an arrest. This was made clear by this Court in relation to section 43 in *Groenewald v Minister of Justice*. '[footnote omitted]

[39] In this matter, a case of attempted murder involving infliction of grievous bodily harm had been established despite being refuted by the plaintiff's counsel. It had been established that the complainant was shot in the chest and detained in hospital for at least four days. The arresting officer's undisputed evidence shows that the projectile was still in his body during the interviews. Despite the discrepancy regarding the complainant's names, it is this court's finding that the matter involves only one complainant, a shop owner, a foreign national and no one else.

[40] Regarding the merits, the plaintiff's counsel argued that given the issue with identification of the perpetrator, an identification parade should have been held before the arrest of the plaintiff. I disagree with this proposition, based on the fact that the complainant mentioned the perpetrator's name and pointed him out to the police. Therefore, holding an identification parade would have been futile.

[41] Despite this court's assessment on this issue, it still needs to be established whether the arresting officer satisfied all the requirements as set out in *Duncan*¹⁰. The fact that the arresting officer is a peace officer is undisputed. The question is whether he entertained a suspicion, based on solid grounds, that the plaintiff was involved in the commission of a Schedule 1 offence.

[42] It should be acknowledged that a reasonable suspicion does not equate to certainty. Although still needs solid grounds, a reasonable suspicion is a lower

¹⁰ Fn 5 above.

bar. The SCA in *Biyela v Minister of Police*¹¹, per Musi AJA (with Petse AP and Dlodlo JA and Matonjane and Molefe AJJA held:

‘[34] 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.

[35] What is required is that the arresting officer must form a reasonable suspicion that a Schedule 1 offence has been committed based on 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.’

[43] In this instance, the arresting officer’s reliance on the complainant’s interview and his statement is solid. The plaintiff was allegedly seen by the complainant in his shop two days before the incident and had threatened to shoot the complainant asking him to stop selling in the area. He was allegedly seen by the complainant in broad daylight on 19 September 2019 despite his face being half masked. He allegedly spoke to the complainant, put a firearm on top of the counter and later shot him before he took his money.

[44] In addition, the complainant and the plaintiff know each very well living in the same area. The complainant accompanied the police to where the plaintiff stayed and pointed him out as the perpetrator. The SCA in *Abdul v S*¹² per (Nicholls, Mocumie, Schippers JJA, Tsoka and Meyer AJJA, stated that when seeing a person who is known to you, it is not a process of observation that takes place but rather one of recognition. At para 13, the court added that the time necessary to recognise a well-known person as opposed to identifying a

¹¹ (1017/2020) [2022] ZASCA 36; 2023 (1) SACR 235 (SCA) (1 April 2022).

¹² Unreported case no (134/2021), [2022] ZASCA 33 (31 March 2022) para 13

person for the first time is very different. It has been recognised by our courts that where a witness knows the person sought to be identified, or has seen him frequently, the identification is likely to be accurate.

[45] Given the low threshold for reasonable suspicion set by the SCA in *Biyela*¹³, in this instance the issue of identification hinges on recognition and not observation, rendering the arresting officer's actions justified. In any event, the plaintiff conceded that once the complainant pointed him out as the assailant, the arresting officer was justified in complying with the law.

[46] The plaintiff's credibility as a witness is shaky at best. Two major contradictions in his testimony are glaring red flags. In his particulars of claim, he stated that given his alibi which he provided upfront during the arrest, the police should have verified this information before arresting him. In the turn of events, he admitted that he never presented the alibi to the police like he initially claimed.

[47] In addition, although the pleadings suggest that the plaintiff furnished an explanation to the police, the evidence proves otherwise. In his warning statement, which was admitted before this court as an exhibit, the plaintiff elected to remain silent, no explanation was made to the police. Furthermore, although assault is not the plaintiff's pleaded case, the untrue allegations of assault with a gun tarnish the plaintiff's credibility as a witness.

[48] Mr Zweni's evidence did not assist the plaintiff at all. He could not confirm the crucial date he claimed he was with the plaintiff. He could not state whether this was the same date of the incident. His version about discussing the incident with the plaintiff while he was in the police van was not confirmed by the plaintiff. Furthermore, his version about telling the police in relation to the plaintiff's alibi directly contradicts the plaintiff's version. Under cross-

¹³ Fn 12 above.

examination the plaintiff categorically stated that the police were not aware of his alibi at the time of arrest.

[49] The last issue on this theme is whether the arresting officer exercised his discretion to arrest irrationally. The onus is on the plaintiff to prove this fact on a balance of probabilities.¹⁴ It is worth noting that notwithstanding the four methods of securing the accused's attendance to court, police powers are potentially limited to only two methods.

[50] Notably, for serious offences like attempted murder, especially with evidence linking the suspect with crime, as in the present matter, arrest becomes the preferred method to secure the attendance of the accused to court. This is so because according to s 38 of the CPA, police can only issue a written notice to appear in court for less serious offences. The two other methods of securing the attendance of the suspect to court namely, the summons and indictment are applicable to prosecutors only and not the police.

[51] In the matter under consideration, given the gravity of the crime of attempted murder, which includes the serious threats that the plaintiff allegedly posed to the complainant two days before the date of the second incident, the arresting officer was duty bound to arrest the plaintiff for purposes of bringing him to justice. Therefore, the plaintiff presented no evidence to prove on a balance of probabilities that the arresting officer exercised his discretion irrationally, arbitrarily or capriciously.

Detention from 30 September 2019 to 14 October 2019

[52] The plaintiff's counsel argued that the second defendant provided incorrect information to the court, stating that the plaintiff had a previous conviction of assault with intent to do grievous bodily harm. This led to him being considered under schedule 6 in terms of bail hearing. If correct

¹⁴ Duncan fn 5 supra para 819B-D; Sekhoto fn 6 supra para 49.

information were given, so it was argued, this could have been avoided. Citing the Constitutional Court (CC) judgment of *De Klerk v Minister of Police*¹⁵ (De Klerk), counsel submitted that the first defendant's opposition to bail was "thumb sucked" indicating an ulterior motive for arresting and detaining the plaintiff.

[53] Furthermore, the first defendant pleaded that the plaintiff was arrested and detained for robbery with aggravating circumstances, attempted murder and intimidation, yet the arresting officer's evidence shows that he was arrested for attempted murder only. Therefore, so it was argued, both defendants should be held liable for post-court detention.

[54] Pertaining to these submissions, the defendants' counsel presented contrary views which I am in agreement with. I acknowledge the principles laid down in *De Klerk*¹⁶, however I am mindful of the fact that each case is decided on its own facts. Just to put issues into perspective, in *De Klerk*¹⁷, the CC held:

‘[62] The principle emerging from our jurisprudence can then be summarised as follows: The deprivation of liberty, through arrest and detention, is per se prima facie unlawful. Every deprivation of liberty must only be effected in a procedurally fair manner but must also be substantively justified by acceptable reasons. Since *Zealand*, a remand order by a Magistrate does not necessarily render subsequent detention lawful. What matters is whether, substantively, there was just cause for the later deprivation of liberty. In determining whether the deprivation of liberty pursuant to a remand order is lawful, regard can be had to the manner in which the remand order was made.’

[55] In this matter, the first remand was to allow the plaintiff an opportunity to solicit the services of a legal representative. The other postponements which

¹⁵ [2019] ZACC 32; 2020 (1) SACR 1 (CC); 2021 (4) SA 585 (CC).

¹⁶ Ibid.

¹⁷ Ibid.

were not opposed by the plaintiff's legal representative were for the purposes of a formal bail application.

[56] The evidence shows that the prosecutor charged the plaintiff with attempted murder only. The mistake about his previous conviction was not the only factor in determining a schedule. A crime of attempted murder falls under schedule 1 in terms of the CPA, but also under schedule 5 in terms of bail legislation, specifically where there is infliction of grievous bodily harm. Therefore, only the magistrate can release the applicant on bail under schedule 5 if the interests of justice permit. The provisions of s 60 (11) (b)¹⁸ of the CPA which are couched in peremptory terms, fortify this aspect.

[57] In *Minister of Law-and-Order v Kader*¹⁹, a case that this court was referred to by the defendants' counsel, the SCA held:

‘It is the function of the judicial officer to guard against the accused being detained on insubstantial proper grounds, in any event, to ensure that his detention is not unduly extended.’

[58] The same principle was detailed in *Sekhoto*²⁰, where the court held:

‘While the purpose of the arrest is to bring the suspect to trial, the arrestor has a limited role in that process. He or she is not called upon to determine whether the suspect ought to be detained pending trial. That is the role of the court (or in some cases a senior officer). The purpose of the arrest is no more than to bring the suspect before court so as to enable the roll to be performed.’

[59] Therefore, in this instance, there is no evidence of an ulterior motive for the defendants' opposition of bail. Instead, the evidence suggests the state had

¹⁸ Section 60 of the CPA provides:

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

(b) referred to in Schedule 5, but not in Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that the interests of justice permit his or her release.” (emphasis added)

¹⁹ [1990] ZASCA 111;1991 (1) SA 41 (A) at 51A-C.

²⁰ Fn 6 supra at 383 G-384 A.

information that the plaintiff might intimidate a witness if released. This information was not “thumb sucked,” as suggested, it stemmed from a pattern of alleged intimidation of the complaint on at least two occasions.

[60] Moreover, the prosecutor’s omission to add serious charges of robbery with aggravating circumstances and intimidation at the plaintiff’s first appearance supports the fact that the defendants had no ulterior motive to cause the plaintiff’s further detention. Instead, the defendants acted within the confines of the law in opposing bail on the basis there was a likelihood that one or more of the provisions of s 60 (4) of the CPA²¹ would be compromised if bail were not opposed. Therefore, this court finds that the arrest and subsequent detention of the plaintiff, which includes the post- court appearance detention were lawful.

Malicious prosecution against the defendants

[61] In terms of our law, the requirements of malicious prosecution are set out. It is imperative that all these elements must be complied with. The SCA in *Minister of Justice and Constitutional Development and Others v Moleko* (Moleko)²² stated these requirements as:

1. the defendant must have sets the law in motion (instigate or instituted the *proceedings*).
2. the defendants must have acted without reasonable and probable cause;

²¹ Section 60 of the CPA provides:

“(4) The interests of justice do not permit the release from detention of an accused where one or more of the following grounds are established:

...

(c) where there is likelihood that the accused, if he or she were released on bail, will attempt to influence or intimidate witnesses or to conceal or destroy evidence...”.

²² [2008] ZASCA 43; [2008] 3All SA 47 (SCA); 2009 (2) SACR 585 (SCA) para 8.

3. the defendant must have acted with malice (or *animo injuriandi*); and
4. the prosecution must have failed.

[62] According to the plaintiff's particulars of claim, both defendants are accused of having acted maliciously in setting the law into motion without any reasonable and probable cause. These allegations are seriously refuted by the defendants.

[63] It is apposite to state that the National Prosecuting Authority (NPA) is a single and independent body that derives its powers from the Constitution. In terms of Section 179(2) of the Constitution, the NPA has the power to institute and conduct criminal proceedings on behalf of the state and to carry out the necessary functions incidental to instituting criminal proceedings.²³ The NDPP's duty is to hold the individuals accountable for their actions, deter crime and protect the public from harm. She must maintain a fair and just society and play a critical role in ensuring that justice is served for all. This mandate must be exercised without fear, favour or prejudice.²⁴

[64] The prosecutors including the NDPP are mandated to institute criminal proceedings based on reliable and well-founded evidence. To initiate the proceedings, they must assess whether there is reliable evidence to provide a reasonable prospect of a successful prosecution. In short, *prima facie* evidence must be established before a case is enrolled.

²³ Section 20 of the National Prosecuting Authority Act provides-

‘(1) The power as contemplated in section 179(2) of the Constitution and all relevant sections of the Constitution, to-

- (a) institute and conduct criminal proceedings on behalf of the State.
- (b) carry out the necessary functions incidental to the instituting and conducting criminal proceedings; and
- (c) discontinue criminal proceedings, vests in the prosecuting authority and shall. For all purposes exercised on behalf of the Republic.

²⁴ *Hololo v Minister of Police* (5171/2017) [2024] ZAECHMHC 92 at para 38.

[65] In this case, the arresting officer's role ended when he handed the docket over to the public prosecutor for consideration. With regards to the evidence that the docket contained, Mr Gwedashe and Ms Nkwayimbana's evidence hold strong. Their opinions carry weight, backed by their extensive experience in the field of prosecution. Given the prima facie evidence pointing to the plaintiff as the perpetrator, there was reasonable and probable cause to prosecute and set the law in motion.

[66] Regarding an element of malice, I need not say much, the principles in *Moleko*²⁵ speak for themselves. At para 64, the court expressed malice as follows:

'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.'

[67] In this case, the plaintiff led no evidence to prove *animus injuriandi* on a balance of probabilities. Even when the members of the first and second defendants testified, no facts suggesting collusion or malicious prosecution were put to them for comments. It then follows that the plaintiff's claims must fail.

Order

[68] Consequently, the following order shall issue:

1. The plaintiff's claims are dismissed with costs on Scale "A", as contemplated under Rule 67A read with Rule 69 of the Uniform Rules of Court.

²⁵ Fn 23 *supra*.

N CENGANI-MBAKAZA

ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for the Plaintiff : Adv T W Magadlela
Instructed by : MN Ntshwaxa Attorneys Inc.

MAKHANDA

Counsel for the Defendant : Adv F Pertesen
Instructed by : State Attorney
Gqeberha

Heard on : 05 November 2025

Judgment Delivered on : 20 January 2026