



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

Reportable

Case No.: 16845/2018

In the matter between:

VUYISA ERIC NJIKELANA

Plaintiff

and

MINISTER OF POLICE

First Defendant

DIRECTOR OF PUBLIC PROSECUTIONS

Second Defendant

Coram: Francis J

Heard: 4 February 2026

Delivered: 4 March 2026

ORDER

- 1 The plaintiff's claims are dismissed.
2. The plaintiff is ordered to pay the defendants' costs of the action on scale C.

JUDGMENT

FRANCIS, J:

INTRODUCTION

[1] This judgment concerns a claim for damages arising from the plaintiff's arrest, detention, and prosecution on charges of murder. The plaintiff, Mr Vuyisa Eric Njikelana, was arrested on 23 June 2015 and detained for approximately 19 months before being acquitted in the Western Cape High Court on 1 December 2017. He now claims R17 million in damages from the Minister of Police and the Director of Public Prosecutions..

[2] The matter has a complex procedural history. The plaintiff initially claimed for unlawful arrest, unlawful detention, and malicious prosecution. However, prior to the leading of evidence, the plaintiff abandoned his claim for unlawful arrest and conceded that this portion of his claim had prescribed in its entirety. The claim for unlawful detention was partially prescribed; the plaintiff now pursues damages for detention from 11 September 2015 (being three years before summons was issued) until his release on bail on 27 March 2017. The claim for malicious prosecution was pursued in full.

[3] The issues of liability and quantum were separated and the trial on liability commenced before this Court. The plaintiff was the sole witness in support of his case. At the conclusion of the plaintiff's case, the defendants applied for absolution from the instance in terms of Rule 39(6) read with Rule 39(13). That application

was dismissed, and the defendants were directed to proceed with their case. The defendants called four witnesses: Warrant Officer Reney Abrahams (the first responder), Captain Mlamli Sishuba (the investigating officer), Ms Arnell Vermaak (the prosecutor who opposed bail), and Advocate Dumisani Koti (the senior public prosecutor who conducted the trial in the High Court).

[4] The issues for determination are narrow but consequential: first, whether the plaintiff's detention after his first court appearance was unlawful and attributable to the defendants; and second, whether the prosecution of the plaintiff was malicious. The plaintiff bears the onus on both claims.

THE FACTUAL BACKGROUND

[5] The factual matrix within which these claims arise is drawn from the pleadings, the evidence led at trial, and the extensive documentary record comprising the police docket, bail transcripts, and criminal trial transcripts. The parties agreed that the documents discovered are what they purport to be, and no dispute exists in respect thereof.

[6] On 13 June 2015, two adult males were brutally murdered in Witsand, Atlantis, in what has been described as an act of mob justice or vigilantism. The facts of the killing, as they emerged during the subsequent bail proceedings, were graphic and disturbing. The two deceased were assaulted over a period of time, dragged from one location to another, and ultimately killed.

[7] The police attended the scene on the evening of 13 June 2015. The first responder, Warrant Officer Abrahams, arrived to find a large group of people and

what appeared to be a mound of plastic and tyres in the road. Beneath this covering were the bodies of the two deceased. One person was found at the scene attempting to set the bodies alight and was arrested.

[8] Captain Sishuba was appointed as the investigating officer. He attended the crime scene on the night of 13 June 2015 and returned the following day. On 14 June 2015, he noticed a trail of blood leading from the crime scene and followed it. This trail led him to the residence of one Madodomzi Butshingi. When he arrived, he observed a large crowd surrounding Butshingi. The situation appeared dangerous, and Sishuba removed Butshingi from the crowd and took him to the police station for his safety.

[9] Butshingi subsequently provided a warning statement to Captain Sishuba on 15 June 2015. In that statement, Butshingi implicated the plaintiff in the following terms:

"Vuyisa who was also helping have dragged them outside the yard. When they were outside the yard, I was not part of the assault. Vuyisa assaulted them until they bled and he had blood on his shoes."

[10] Captain Sishuba continued his investigation. He consulted with various witnesses and received information from informants that the plaintiff had participated in the murders. He did not, at that stage, have a fixed address for the plaintiff and relied on an informant to locate him. Certain information from co-accused 3, which implicated the plaintiff, had not yet been reduced to a sworn written statement at the time of arrest or bail opposition.

[11] On 23 June 2015, Captain Sishuba, accompanied by other officers, approached what he believed to be the plaintiff's residence. He knocked on the door. A voice, which he initially believed to be female, responded that Vuyisa was not home. Sishuba persisted, and ultimately the plaintiff opened the door. Sishuba identified himself, informed the plaintiff of the reason for his arrest, and arrested him without a warrant in terms of section 40(1)(b) of the Criminal Procedure Act 51 of 1977.

[12] The plaintiff appeared in the Atlantis Magistrates' Court on 24 June 2015. The State opposed his release on bail. On 18 August 2015, the plaintiff launched a formal bail application. The application was opposed, and after hearing evidence from the plaintiff and Captain Sishuba, bail was refused on 23 November 2015.

[13] The grounds upon which bail was opposed included: that the plaintiff was charged with two counts of murder, which fall under Schedule 6 of the Criminal Procedure Act; that he bore the onus to establish exceptional circumstances warranting his release; that he was out on bail in a rape matter at the time of his arrest; that he had attempted to avoid detection prior to arrest; and that he was considered a flight risk.

[14] During the bail proceedings, the prosecutor, Ms Vermaak, outlined the State's case against the plaintiff. She stated that the State had three witnesses placing the plaintiff at the first crime scene where the assault commenced, and two witnesses placing him at the scene and alleging that he assisted in dragging the deceased out of the yard and participated in the assault. The docket at that stage included at least one exculpatory statement from Xolisa Lisa Silva, which did not implicate the plaintiff in the assault.

[15] The plaintiff remained in custody following the refusal of bail. He was transferred to Malmesbury Medium B Correctional Facility and subsequently to Pollsmoor Maximum Correctional Facility. On 27 March 2017, during the course of the trial, the plaintiff was granted bail in the amount of R1,000. His trial commenced on 6 March 2017 and concluded on 1 December 2017, when he was acquitted on both counts of murder.

[16] It is common cause that during the criminal trial, the State encountered difficulties with its witnesses. Xolisa Lisa Silva was declared hostile. An attempt to declare Dumisani Kheswa hostile was unsuccessful. Admissibility challenges were raised concerning Butshingi's warning statement. The prosecution ultimately failed to secure a conviction against the plaintiff.

THE PLEADINGS

[17] The plaintiff's amended particulars of claim allege that his arrest and detention were unlawful. In respect of the arrest, it is alleged that members of the South African Police Service "*entered and/or stormed into the Plaintiff's home whilst he was sleeping, awoke him and arrested him, without providing him with any explanation and/or reasons for his arrest*". It is further alleged that the plaintiff informed the police that he was "*merely a passer-by, on his way to work*" when he saw members of the community assaulting certain persons.

[18] In respect of the prosecution, the plaintiff alleges that the prosecutor decided to oppose bail and to prosecute in the absence of any facts suggesting that the plaintiff was not a candidate for bail. It is alleged that the prosecutor failed to

assess relevant facts, including that the plaintiff had a fixed address, had no pending cases, and did not know the witnesses. The plaintiff alleges that the prosecutor misled the bail court, and that the decision to prosecute was taken with animus injuriandi, in circumstances where the prosecutor did not believe in the plaintiff's guilt.

[19] The defendants, in their amended plea, deny that the arrest was unlawful. They plead that the plaintiff was arrested in terms of section 40(1)(b) of the Criminal Procedure Act on the reasonable suspicion that he had committed murder, a Schedule 1 offence. They deny that the plaintiff was not informed of the reason for his arrest and plead that he opened the door to the police after initially attempting to evade arrest by disguising his voice.

[20] In respect of the prosecution, the defendants deny that the prosecutors failed to adequately assess the facts or that they opposed bail without justification. They plead that after placing the necessary facts before the bail court, it was found that the plaintiff had failed to establish exceptional circumstances warranting his release. They specifically deny that the prosecution was malicious.

THE EVIDENCE

The plaintiff's evidence

[21] The plaintiff testified in support of his claim. His evidence-in-chief was brief. He stated that on the night of the murders, he was at Thulani Nombewu's house watching a soccer match with Silva and Thulani. They heard a noise outside and went to investigate. He saw the community surrounding two men who were

eventually murdered. He watched for less than a minute and left the scene. He stated that he was at no stage involved in the crime.

[22] In respect of his arrest, the plaintiff testified that the police knocked at his door and asked for him. He was scared and said he was not there. Only after the police identified themselves did he open the door. Captain Sishuba entered, pointed a firearm at him, and informed him that he was being arrested for the murder of the two men.

[23] Under cross-examination, the plaintiff's evidence unravelled in material respects. He was confronted with the allegations contained in his particulars of claim. He conceded that the allegations that his home was stormed while he was sleeping, that he was not informed of the reason for his arrest, and that he was merely a passer-by on his way to work were incorrect.

[24] He conceded that he was not on his way to work but had been drinking at Thulani's house. More significantly, he conceded that he was close to the assault and that at some stage he "*jumped over the deceased*". This version was materially different from his warning statement, in which he had stated: "*Before I could come any closer Mkhelele said I must go back ... I did not assault anyone. I did not even come close to these people.*"

[25] The plaintiff was confronted with the warning statement of his co-accused, Madodomzi Butshingi. He conceded that, considering Butshingi's statement, he was implicated in the incident. He was also confronted with the statements of Silva and Kheswa. Silva's statement recorded that he found Mkheleli standing with Vuyisa and Bheki amongst the community but did not implicate the plaintiff in the

assault. Kheswa's statement recorded: "*I saw Vuyisa also jumping the person that Madodomzi hit and fell but he was out of my view after that.*" The plaintiff interpreted "jumping" as leaping over, while the context of Kheswa's statement suggests participation in the assault.

[26] In respect of his bail application, the plaintiff had alleged that the prosecutor misled the court by failing to place before it that he had a fixed address, had no pending cases, and did not know any witnesses. Under cross-examination, he was confronted with the evidence given during his bail application. On page 201 of the bail transcript, the plaintiff testified: "*It was the shack I was staying in.*" On page 202, he testified: "*It is whilst I am inside prison*" when asked when his shack was demolished.

[27] The plaintiff conceded that his shack had been demolished at the time of his bail application, and that he did not know the address of his new RDP house. He conceded that he was out on bail in a rape matter at the time of his arrest on the murder charges. He conceded that he knew the witnesses, including Silva, Butshingi, and Kheswa. He conceded that the statements of Silva and Kheswa placed him on the scene, though Silva's did not implicate him in the assault.

The defendants' evidence

Warrant Officer Reney Abrahams

[28] Warrant Officer Abrahams was the first responder on the crime scene. She testified that she and her colleague arrived to find a large group of people and what

appeared to be a 'hill' covered with plastic. Upon investigation, they discovered two bodies. A person was attempting to set the bodies alight; they stopped him and effected an arrest. She secured the scene until other role players arrived. She confirmed that two adult males had been brutally murdered but had no information as to who committed the murders.

Captain Mlamli Sishuba

[29] Captain Sishuba was the investigating officer. He testified in detail regarding his investigation, the arrest of the plaintiff, and his role in opposing bail. His evidence was measured, consistent, and largely undisputed except where it conflicted with the plaintiff's version.

[30] He testified that on 14 June 2015, he followed a trail of blood from the crime scene to Butshingi's house, where he found a large crowd surrounding Butshingi in what he described as a dangerous situation. He removed Butshingi and took him to the police station. Butshingi subsequently provided a warning statement implicating the plaintiff.

[31] He consulted with various witnesses and received information from informants that the plaintiff had participated in the murders. He feared for the safety of witnesses and for the plaintiff himself, given the nature of the crime and community tensions. He did not initially know where to locate the plaintiff and used an informant to trace him. He acknowledged that certain information from co-accused 3 implicating the plaintiff had not yet been reduced to a sworn written statement at the time of bail opposition.

[32] On the night of the arrest, he approached the plaintiff's shack. He knocked and a female voice responded that Vuyisa was not home. He persisted, and ultimately the plaintiff opened the door. He introduced himself, explained the reason for the arrest, and conducted an interview. The plaintiff placed himself at the scene.

[33] Captain Sishuba testified that he discussed the matter with the prosecution and a decision was taken to oppose bail. The grounds for opposing bail included the seriousness of the offence, the fact that the plaintiff was on bail for a rape case, that he had no fixed address (his shack having been demolished), that he was considered a flight risk, and concerns for the safety of witnesses and the plaintiff himself.

[34] He confirmed that all necessary information was disclosed to the bail court, including the existence of Silva's exculpatory statement. When the plaintiff's rape matter was finalised prior to the conclusion of the bail application, this was disclosed to the court. He disagreed that the decision to arrest, oppose bail, or prosecute was unlawful or malicious.

Ms Arnell Vermaak

[35] Ms Vermaak was the prosecutor who opposed bail in the Atlantis Magistrates' Court. She testified that dockets are screened by various prosecutors, and consultations are held with the investigating officer. A decision by the Regional Court control prosecutor would have been taken regarding enrolment of the matter.

[36] She testified that the plaintiff was charged with a Schedule 6 offence, requiring a formal bail application. The State looked at the docket as a whole in

determining which steps to take. The State relied on the doctrine of common purpose, which requires presence at the scene. Considering the information provided by informants, witnesses, and the plaintiff himself, including Butshingi's and Kheswa's statements, the State was satisfied that there were prospects of a successful prosecution, notwithstanding Silva's non-implicating statement.

[37] She confirmed the grounds for opposing bail: the seriousness of the offence, the plaintiff's pending rape case, the absence of a fixed address, and the risk of witness intimidation. She disagreed that the actions of the prosecution were malicious, stating that the facts on which the State's case rested were supported by witness statements and, to an extent, by the plaintiff's own admission of being at the scene.

Advocate Dumisani Koti

[38] Advocate Koti prosecuted the matter in the High Court. He explained that the matter was identified as a possible High Court matter and had been considered by various senior prosecutors in the office of the Director of Public Prosecutions. When he was allocated the matter, it was already enrolled for trial.

[39] He consulted with witnesses Silva and Kheswa, who confirmed the contents of their statements. Considering the principles of common purpose and the statements in the docket, he was satisfied that there was a prima facie case and reasonable prospects of a successful prosecution.

[40] He testified that both Kheswa and Silva were called as witnesses. Kheswa's evidence changed as noted in [16] above, and the State applied to have him

declared hostile. This was unforeseeable; he had been satisfied that Kheswa's statement implicated the plaintiff. He testified that in matters involving multiple accused, there are considerations such as the possibility that a co-accused might testify and implicate others. If one accused were discharged and such a situation arose, the State would have no recourse against the discharged accused.

[41] He testified that the State took all necessary steps and disagreed that the decision to prosecute was malicious.

EVALUATION OF THE EVIDENCE

[42] The factual disputes in this matter fall to be resolved by applying the well-established approach to mutually destructive versions. In ***National Employers General Insurance Co Ltd v Jagers*** 1984 (4) SA 437 (E) at 440D-G, the Court held that where there are two mutually destructive stories, the plaintiff can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate, and that the defendant's version is false or mistaken. In deciding whether the evidence is true, the Court will weigh and test the plaintiff's allegations against the general probabilities.

[43] In ***Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others*** 2003 (1) SA 11 (SCA) at para [5], the Supreme Court of Appeal set out the technique for resolving factual disputes: a Court must make findings on (a) the credibility of witnesses; (b) their reliability; and (c) the probabilities. Credibility depends on factors such as candour, demeanour, bias, internal and external contradictions, and the probability or improbability of particular aspects of a

witness's version. Reliability depends on opportunities for observation and the quality of recall.

[44] Applying these principles, I find that the plaintiff was a poor witness. His evidence was laced with inaccuracies, unreliable, and lacking in credibility. He conceded material contradictions between his pleaded case and his oral testimony. He initially claimed his home was stormed, but conceded the police knocked and he opened the door. He claimed he was not informed of the reason for his arrest but conceded Captain Sishuba informed him. He claimed he was a passer-by on his way to work but conceded he had been drinking at Thulani's house.

[45] Most significantly, the plaintiff conceded that he was close to the assault and jumped over the deceased. This version contradicted his warning statement, in which he stated he did not even come close to these people. He conceded that Butshingi's statement implicated him, and that Silva and Kheswa placed him at the scene, though Silva's statement did not implicate him in the assault. His evidence lacked the candour expected of a witness testifying truthfully.

[46] By contrast, the defendants' witnesses were credible, consistent, and reliable. Captain Sishuba gave detailed evidence that withstood cross-examination. He explained the investigation step by step, from following the trail of blood to Butshingi's house, to obtaining Butshingi's statement, to consulting with informants and witnesses, to ultimately arresting the plaintiff. He acknowledged difficulties in the investigation, including the need to use informants to locate the plaintiff, the challenges posed by community tensions, and the fact that certain information from co-accused 3 was not yet sworn.

[47] Ms Vermaak and Advocate Koti testified candidly about the decision-making process. They acknowledged that witnesses became hostile and that the prosecution ultimately failed. However, they explained that at the time decisions were taken, they had witness statements implicating the plaintiff, and they believed there were reasonable prospects of success, despite the presence of Silva's exculpatory statement. Their evidence was not seriously challenged on credibility grounds.

[48] Where the versions of the plaintiff and Captain Sishuba conflict, I accept the evidence of Captain Sishuba. His version is consistent with the contemporaneous documentary record, inherently probable, and supported by the probabilities. The plaintiff's version, by contrast, is internally inconsistent, contradicted by his own prior statements, and improbable.

THE CLAIM FOR UNLAWFUL DETENTION

Legal principles

[49] The plaintiff bears the onus of proving that his detention was unlawful. However, it is trite that once an arrest and detention are admitted or proved, the defendant bears the onus of justifying the arrest (see, *Minister of Law and Order v Hurley* 1986 (3) SA 568 (A) at 589E-F; *Minister of Safety and Security v Sekhoto and Another* 2011 (5) SA 367 (SCA) at para [7]).

[50] The arrest in this matter was effected without a warrant in terms of section 40(1)(b) of the Criminal Procedure Act. The jurisdictional facts for a defence under this section are: (i) the arrestor must be a peace officer; (ii) the arrestor must

entertain a suspicion; (iii) the suspicion must be that the suspect committed an offence referred to in Schedule 1; and (iv) the suspicion must rest on reasonable grounds (*Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) at 818G-H).

[51] The test for reasonable suspicion is objective: would a reasonable person in the position of the arresting officer, possessed of the same information, have considered that there were good and sufficient grounds for suspecting that the person to be arrested was guilty of the Schedule 1 offence (*Mabona and Another v Minister of Law and Order and Others* 1988 (2) SA 654 (SE) at 658E-G)). The suspicion must be based on solid grounds; it need not amount to certainty, but it must be more than flighty or arbitrary.

[52] The plaintiff argued that because murder is a Schedule 6 offence for bail purposes, it somehow precludes arrest without a warrant. This argument is without merit. It is well established that offences may appear in multiple schedules. Murder is both a Schedule 1 offence (for purposes of arrest without warrant) and a Schedule 6 offence (for purposes of bail) (see, *Nompetsheeni v Minister of Police and Others* (2094/2021) [2023] ZAECHMC 37 (18 July 2023) at para [32], and *Nhlapo-Khumalo v Minister of Police and Others* (16408/2022) [2024] ZAGPJHC 838 (22 August 2024) at para [23]).

[53] The plaintiff abandoned his claim for unlawful arrest on the basis of prescription. However, he persists in his claim for unlawful detention after his first court appearance. The legal position regarding post-first-appearance detention is nuanced. After an accused's first court appearance, detention is ordinarily by order of court. In such circumstances, the plaintiff must establish that the judicial decision refusing bail was materially induced by wrongful conduct on the part of

the defendants (*Zealand v Minister for Justice and Constitutional Development and Another* 2008 (2) SACR 1 (CC)).

[54] As the Constitutional Court held in *Zealand* supra at para [43], the mere fact that a magistrate issued orders remanding an accused in detention is not sufficient to establish that the detention was lawful. The substantive protection afforded by section 12(1)(a) of the Constitution requires that every encroachment on physical freedom be justified by acceptable reasons. If the decision to oppose bail was taken without reasonable and probable cause, or if the bail court was misled, the subsequent detention may be unlawful.

Application to the facts

[55] I am satisfied that Captain Sishuba entertained a reasonable suspicion that the plaintiff had committed murder. At the time of arrest, he was in possession of Butshingi's warning statement directly implicating the plaintiff. He had received information from informants. He had consulted with witnesses. The information available to him, viewed objectively, would have led a reasonable person in his position to suspect that the plaintiff was involved in the murders, notwithstanding the later emergence of evidential weaknesses.

[56] The plaintiff's argument that the suspicion was not reasonable because Butshingi's statement was later challenged, or because other statements were not yet obtained, cannot be sustained. The test is applied at the time of arrest, with the information then available. Later developments do not retrospectively render an initially reasonable suspicion unreasonable.

[57] In respect of the decision to oppose bail, the evidence establishes that the prosecutor had before her: (a) charges of murder, a Schedule 6 offence; (b) Butshingi's statement implicating the plaintiff; (c) information from the investigating officer that other witnesses implicated the plaintiff; (d) the fact that the plaintiff was out on bail in a rape matter; (e) the fact that the plaintiff's shack had been demolished and he had no fixed address; and (f) information that the plaintiff had attempted to evade arrest. The docket also contained Silva's statement, which was exculpatory and not suppressed.

[58] The plaintiff's contention that the prosecutor misled the bail court by failing to disclose that he had a fixed address, had no pending cases, and did not know the witnesses is factually incorrect. The evidence establishes:

(a) The plaintiff did not have a fixed address; his shack had been demolished, and he did not know the address of his new RDP house.

[b] The plaintiff did have a pending case; he was out on bail in a rape matter.

[c] The plaintiff did know the witnesses; he conceded knowing Silva, Butshingi, and Kheswa.

[59] The bail court refused bail after a full hearing. The court applied the Schedule 6 onus, considered the strength of the State's case, including contradictory statements, and was not satisfied that exceptional circumstances had been established. The plaintiff has failed to establish that this decision was materially induced by any misrepresentation or wrongful conduct on the part of the defendants, particularly as the exculpatory material was available.

[60] In respect of the continuation of detention after bail refusal, the plaintiff has not established that the defendants acted without reasonable and probable cause in continuing the prosecution. The prosecution had witness statements implicating the plaintiff, including Butshingi's and Kheswa's. The fact that witnesses later became hostile or recanted does not render the initial decision unreasonable. The requirement of reasonable and probable cause is judged at the time the decision is taken, with the information then available (see, ***Beckenstrater v Rottcher and Theunissen* 1955 (1) SA 129 (A) at 136A-B**).

[61] The plaintiff's claim for unlawful detention must therefore fail. He has not established that the decision to oppose bail was taken without reasonable and probable cause, that the bail court was misled, or that his continued detention was attributable to any wrongful conduct on the part of the defendants.

THE CLAIM FOR MALICIOUS PROSECUTION

Legal principles

[62] The plaintiff bears the onus of establishing the elements of malicious prosecution. In ***Minister of Safety and Security v Lincoln* 2020 (2) SACR 262 (SCA)** at para [20], the Supreme Court of Appeal set out the elements:

- (a) The defendant set the law in motion (instituted or instigated the proceedings);
- (b) acted without reasonable and probable cause;

(c) acted with malice (or animus injuriandi); and

(d) that the prosecution failed.

[63] It is common cause that the defendants set the law in motion and that the prosecution failed (the plaintiff was acquitted). The dispute centres on whether the defendants acted without reasonable and probable cause and whether they acted with malice.

[64] In ***Beckenstrater v Rottcher and Theunissen*** (supra) at 136A-B, the Court explained:

"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."

[65] The requirement of reasonable and probable cause is objective: did the prosecutor have such information as would lead a reasonable person to conclude that the plaintiff had probably been guilty of the offence charged? The requirement of malice is subjective: did the prosecutor act with animus injuriandi, that is, with the intention to injure (***Relyant Trading (Pty) Ltd v Shongwe*** [2007] 1 All SA 375 (SCA) at para [14].

[66] The court in *Kiviet v M and Others* (1361/2012) [2017] ZAGPJHC 368 (8 September 2017) at para [15] confirmed that nothing short of animus injuriandi will suffice. Mere negligence or poor judgment does not constitute malice.

Application to the facts

[67] The plaintiff has failed to establish that the defendants acted without reasonable and probable cause. At the time the decision to prosecute was taken, the prosecutor had before her:

- (a) Butshingi's warning statement directly implicating the plaintiff in the assault.
- (b) Information from the investigating officer that other witnesses implicated the plaintiff.
- (c) Statements subsequently obtained from Silva and Kheswa, which placed the plaintiff at the scene, though Silva's did not implicate him in the assault.
- (d) The plaintiff's own admission, in his warning statement, that he was present at the scene.

[68] The plaintiff's reliance on the inadmissibility of Butshingi's statement against a co-accused in both the bail hearing and the criminal trial is misplaced. The test for reasonable and probable cause is not whether the evidence would ultimately be admissible at trial, but whether a reasonable prosecutor, possessed of the information, would conclude that the plaintiff had probably been guilty. (see, *Beckenstrater* (supra)). The prosecutor is entitled to consider all information

available, including statements that may later be challenged, in forming a preliminary view, balanced against exculpatory material like Silva's statement.

[69] Moreover, the rule against the admissibility of co-accused statements, as articulated in *S v Litako* 2015 (3) SA 287 (SCA) and *Mhlongo v S; Nkosi v S* 2015 (2) SACR 323 (CC), is not absolute at common law. There are exceptions, including statements made in furtherance of a common purpose (*Mhlongo v S; Nkosi v S* supra at [39]). The State's case against the plaintiff was based on the doctrine of common purpose. In such circumstances, a prosecutor could reasonably have considered Butshingi's statement as part of the evidentiary matrix, alongside contradictions.

[70] The plaintiff has also failed to establish malice. There is no evidence that the prosecutors acted with animus injuriandi. Neither Ms Vermaak nor Advocate Koti had any personal interest in the matter. They acted on the information before them, in the course of their professional duties. The fact that they persisted in the prosecution even as difficulties emerged does not establish malice. Indeed, for reasons of public policy, a prosecutor should not be deterred from setting the law in motion where reasonable and probable cause exists (see, *Die Minister van Polisie v Van der Vyver* (861/2011) [2013] ZASCA 39 (28 Maart 2013)).

[71] The plaintiff's submission that the prosecutor misled the bail court by stating that there were three witnesses placing him on the scene cannot be sustained. The evidence establishes that there were indeed witnesses placing the plaintiff at the scene: Butshingi's statement, Silva's statement, and Kheswa's statement. The fact that Silva was later declared hostile and Kheswa's evidence changed does not render the original statements false, nor does it establish that reliance on unsworn

information from co-accused 3 amounted to misrepresentation, as the bail court was aware of contradictions.

[72] The claim for malicious prosecution must therefore fail. The plaintiff has not discharged the onus of establishing that the defendants acted without reasonable and probable cause or with malice.

CREDIBILITY AND PROBABILITIES

[73] In concluding that the plaintiff's claims must fail, I have had regard to the overall credibility of the witnesses and the probabilities. The plaintiff's evidence was unreliable and materially contradicted by the documentary record and his own prior statements. The defendants' witnesses were credible and consistent.

[74] The probabilities favour the defendants' version. It is inherently probable that Captain Sishuba, an experienced investigating officer, acted on the information available to him, which included a direct statement from a co-accused implicating the plaintiff. It is probable that the prosecutors, acting in the course of their professional duties, assessed the docket and formed the view that there were reasonable prospects of success, despite evidential contradictions. It is improbable that they acted maliciously, given the absence of any personal interest in the matter and any evidence of animus injuriandi.

[75] The plaintiff's subsequent acquittal does not, without more, establish that the prosecution was malicious. The criminal justice system sometimes fails to secure

convictions despite reasonable and probable cause at inception. The test for malicious prosecution is not whether the prosecution ultimately succeeded, but whether it was instituted without reasonable and probable cause and with malice. For the reasons already stated, the plaintiff has failed to discharge the onus.

CONCLUSION

[76] The plaintiff abandoned his claim for unlawful arrest. His claim for unlawful detention after first appearance fails because he has not established that the decision to oppose bail was taken without reasonable and probable cause, that the bail court was misled, or that his continued detention was attributable to any wrongful conduct on the part of the defendants.

[77] His claim for malicious prosecution fails because he has not established that the defendants acted without reasonable and probable cause or that they acted with malice. The prosecutors had before them witness statements implicating the plaintiff, and they acted on that information in the course of their professional duties, notwithstanding the presence of contradictory material.

[78] In the result, the plaintiff's claims must be dismissed.

COSTS

[79] The defendants have been successful. The general rule is that costs follow the result; I see no reason to depart from that rule. The matter was complex and

involved multiple witnesses and extensive documentary evidence which justifies an award of costs on scale C.

ORDER

The following order is made:

1. The plaintiff's claims are dismissed.
2. The plaintiff is ordered to pay the defendants' costs on scale C.

M FRANCIS

Judge of the High Court

Appearances:

For Plaintiff: Adv S X Mapoma SC

Instructed by: Lingani and Partners Inc.

For Defendant: Adv Mark Filton

Instructed by: State Attorney