

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

Case No: 4573/2022

Not reportable

In the matter between:

**ZABATELE ABEL NYENZANE
THABANG ALEX DINALE**

**FIRST PLAINTIFF
SECOND PLAINTIFF**

and

**MINISTER OF POLICE
NATIONAL DIRECTOR OF
PUBLIC PROSECUTIONS**

**FIRST DEFENDANT
SECOND DEFENDANT**

Neutral Citation: *Nyenzane and Another v Minister of Police and Another*
(4573/2022) [2026] ZAFSHC 74 (26 February 2026)

Coram: NEMAVHIDI AJ

Heard: 30 September 2025

Delivered: This judgment was handed down electronically by circulation to the parties representatives by email and released to SAFLI. The date and time for hand-down is deemed to be 09h30 on 26 February 2026.

Summary: Section 40(1)(a) and (b) of the Criminal Procedure Act 51 of 1977 permits a peace officer to effect arrest without a warrant any person who attempts or commits an offence in his presence. The offence need not later be proven; it is sufficient that the officer honestly and reasonably perceived conduct constituting a crime. To succeed in malicious prosecution, a plaintiff must prove: (a) the defendant instituted proceedings; (b) without reasonable and probable cause; (c) with malice; and (d) the prosecution failed.

ORDER

- 1 The plaintiffs' claims for unlawful arrest and detention are dismissed.
- 2 The plaintiffs' claims for malicious prosecution are dismissed.
- 3 The first plaintiff's claim for assault is dismissed.
- 4 The plaintiffs are ordered to pay the defendants' costs, jointly and severally, the one paying, the other to be absolved, such costs to include the costs of counsel at Scale B

JUDGMENT

Nemavhidi AJ

Introduction

[1] This is an action for damages arising from the arrest and prosecution of the plaintiffs on 6 September 2021. The first plaintiff claims for assault, unlawful arrest, unlawful detention, malicious prosecution and loss of income. The second plaintiff claims for unlawful arrest, unlawful detention and malicious prosecution. The claim for assault by the second plaintiff was previously dismissed. The defendants admit the arrest and detention but contend that these were lawful and justified.

Issues for Determination

- [2] The issues to be decided are:
- (a) whether the arrest and detention of the plaintiffs were lawful;

- (b) whether the prosecution of the plaintiffs was malicious; and
- (c) whether the first plaintiff has proven his claim for assault.

Evidence and Credibility Findings

[3] The critical factual dispute is whether the plaintiffs were seen emerging from a room in which unlicensed firearms and ammunition were found, or whether they were arrested while waiting in a parking area away from the room. Having considered the evidence, I am satisfied that the version of the police witnesses – Colonel Majikela (Majikela), Sergeant Mokhethi (Mokhethi) and Constable Morwagae (Morwagae) – is credible and reliable. Their testimonies were consistent in material respects, corroborated by each other, and aligned with the objective probabilities.

[4] The plaintiffs' version – that they travelled to Theunissen to attend to travel claims and to enquire about dogs, and that they were arrested while innocently waiting in a parking lot – is improbable. It is unlikely that they would first go to a hostel without contact details for the person they sought, rather than proceeding directly to the magistrate's court. Their claim that they were left handcuffed and unattended for over an hour while police attended to the scene is also unconvincing. The evidence of Aubrey Yola (Yola), called by the plaintiffs, did not assist their case. His explanation for being in the room was improbable and did not credibly distance the plaintiffs from the scene.

[5] I therefore accept the defendants' evidence that the plaintiffs were seen leaving the room where the firearms were subsequently discovered, in the company of other known offenders from Bloemfontein.

Lawfulness of the Arrest

[6] The arrest was effected without a warrant, purportedly under ss 40(1)(a) and (b) of the Criminal Procedure Act 51 of 1977. Section 40(1)(a) permits a peace officer to arrest without a warrant any person who commits or attempts to commit an offence in his presence. The offence need not later be proven; it is sufficient that the officer honestly and reasonably perceived conduct constituting a crime.¹

[7] In support of this approach, the Supreme Court of Appeal in *Biyela v Minister of Police*² summed the approach as follows:

‘[33] The question whether a peace officer reasonably suspects a person of having committed an offence within the ambit of section 40(1)(b) is objectively justiciable. It must, at the outset, be emphasised that the suspicion need not be based on information that would subsequently be admissible in a court of law.

[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.’³

[8] The evidence shows that Mokhethi saw the plaintiffs and others exiting a room where unlicensed firearms and ammunition were immediately found. Yola, found inside, directed suspicion to those who had just left. In these circumstances, Mokhethi could reasonably have perceived that the plaintiffs were involved with something pertaining to the unlawful possession of firearms. The arrest under s 40(1)(a) was therefore lawful.

[9] Alternatively, even if s 40(1)(b) is considered, the requirements are met: Mokhethi was a peace officer; he entertained a suspicion that a Schedule 1 offence

¹ *Minister of Safety and Security and Another v Mhlana* [2010] ZAWCHC 23; 2011 (1) SACR 63 (WCC) para 12.

² *Biyela v Minister of Police* [2022] ZASCA 36; 2023 (1) SACR 235 (SCA).

³ *Ibid* paras 33-34.

(possession of unlicensed firearms) had been committed; and his suspicion was based on reasonable grounds. The reasonable suspicion threshold is low and requires only specific and articulable facts.⁴

[10] The facts known to Mokhethi at the time – the stolen vehicle nearby, the plaintiffs emerging from the room, the locked door, the discovery of firearms, Yola's reference to those who had just left, and the lack of satisfactory explanation from the plaintiffs – objectively provided reasonable grounds for suspicion. Courts have previously held:

'If the jurisdictional requirements are satisfied, the peace officer may invoke the power conferred by the subsection, ie, he may arrest the suspect. In other words, he then has a discretion as to whether or not to exercise that power (cf *Holgate-Mohammed v Duke* [1984] 1 All E R 1054 (HL) at 1057). No doubt the discretion must be properly exercised. But the grounds on which the exercise of such a discretion can be questioned are narrowly circumscribed. Whether every improper application of a discretion conferred by the subsection will render an arrest unlawful, need not be considered because it does not arise in this case.'⁵

Once the jurisdictional facts for arrest are established, the arresting officer has a discretion whether to arrest. The plaintiffs did not plead or prove that Mokhethi exercised his discretion irrationally. The court will not lightly interfere with such a discretion.⁶ Accordingly, the arrest and subsequent detention were lawful.

Malicious Prosecution

[11] To succeed in malicious prosecution, a plaintiff must prove:

- (a) the defendant instituted proceedings;
- (b) without reasonable and probable cause;
- (c) with malice; and

⁴ Ibid.

⁵ *Minister of Safety and Security v Sekhoto and Another* [2010] ZASCA 141; 2011 (1) SACR 315 (SCA) para 29.

⁶ Ibid.

(d) the prosecution failed.⁷

[12] The decision to prosecute was taken by Mr Khumalo, a prosecutor employed by the second defendant, on 8 September 2021. There is no evidence that the first defendant instigated the prosecution. At the time of the decision, Mr Khumalo had before him the statements of Majikela, Mokhethi, Morwagae and Mandla Zondi. These statements implicated the plaintiffs in the possession of firearms. The plaintiffs had provided no exculpatory warning statements.

[13] On that information, a reasonable prosecutor could have concluded that there were grounds to prosecute. The test is not whether a *prima facie* case existed, but whether a reasonable person in the prosecutor's position would have suspected guilt.⁸

‘Proof of *animus iniuriandi*, in the sense of intention to injure, is an essential element of the *actio iniuriarum* on which a malicious prosecution claim is based. The DDPP had to intend to prosecute the respondent with the consciousness of wrongfulness. Negligence or even gross negligence is insufficient - there must be *dolus*, at minimum, in the form of *dolus eventualis*.

To show *animus iniuriandi*, the respondent had to demonstrate that the DDPP foresaw the possibility that initiating the prosecution was wrongful in that reasonable grounds for it were lacking but that she acted recklessly as to that consequence. The high court's analysis took an unduly narrow view of the evidence.

An improper motive alone is insufficient to establish *animus iniuriandi* for a malicious prosecution claim. As noted above, the prosecution must also have been initiated without reasonable and probable cause. Given my finding that there was an objectively reasonable basis to prosecute the respondent, any improper motive does not render the prosecution wrongful. Moreover, the desire to set an example that prosecutors will be held accountable for unjustified decisions is not in itself

⁷ *Minister of Justice and Constitutional Development and Others v Moleko* [2008] ZASCA 43; [2008] 3 All SA 47 (SCA) para 8.

⁸ *National Director of Public Prosecutions v Sijoyi Robert Mdhlovu* [2024] ZASCA 85; 2024 (2) SACR 331 (SCA).

an improper motive for a prosecution that is otherwise justified. Ensuring the integrity of the prosecutorial process is a valid and important consideration. While the phrasing of the NDPP's memo was perhaps ill-advised, it does not establish the required intention to injure the respondent through baseless proceedings.⁹

[14] The plaintiffs led no evidence to show that Mr Khumalo acted without reasonable cause or with malice (*animus iniuriandi*). His testimony indicated an honest belief in the plaintiffs' guilt based on the docket. Malice or consciousness of wrongfulness has not been established. The claim for malicious prosecution therefore fails.

Assault

[15] The first plaintiff's claim for assault is not credible. His pleaded case was that he was assaulted with fists and dragged to a police van. His testimony in court was that he was hit with open hands. This material contradiction undermines his reliability. Moreover, the second plaintiff, who was with him throughout, testified that he did not witness any assault. No medical evidence was presented to corroborate the alleged injuries. The claim for assault is dismissed.

Conclusion

[16] In the result:

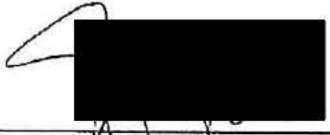
- (a) The plaintiffs' claims for unlawful arrest and detention are dismissed;
- (b) The plaintiffs' claims for malicious prosecution are dismissed; and
- (c) The first plaintiff's claim for assault is dismissed.

Order

[17] In the result, the following order is made:

⁹ Ibid paras 31-33.

- 1 The plaintiffs' claims for unlawful arrest and detention are dismissed.
- 2 The plaintiffs' claims for malicious prosecution are dismissed.
- 3 The first plaintiff's claim for assault is dismissed.
- 4 The plaintiffs are ordered to pay the defendants' costs, jointly and severally, the one paying, the other to be absolved, such costs to include the costs of counsel at Scale B.



B NEMAVHIDI
ACTING JUDGE OF THE HIGH COURT

Appearances

For the plaintiffs:

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Instructed by:

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Bloemfontein

For the defendants

M.S. MAZIBUKO

Instructed by:

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