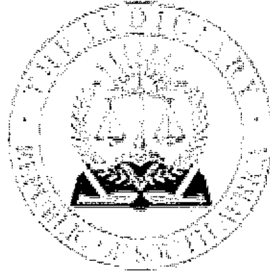
Editorial note: Certain information has been redacted from this judgment in compliance with the law.

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: 36734/2019

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED: ~~YES~~/NO

6/12/2024
DATE SIGNATURE

In the matter between:

ZAKHELE INNOCENT NDLOVU Plaintiff

and

MINISTER OF POLICE First Defendant

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS Second Defendant

JUDGMENT

Van De Venter, AJ

Introduction

[1] Plaintiff instituted an action for damages against the Minister of Police for unlawful arrest and detention on the one hand claim A and on the other for

malicious prosecution against the National Director of Public Prosecution, claim B.

[2] The Plaintiff partly abandoned claim A for unlawful arrest the morning of the trial.

[3] The trial proceeded in terms of claim A unlawful detention, claim B malicious prosecution, as well as the quantum of the claim.

History Of Pleadings

[4] The Plaintiff's (Ndlovu) pleaded case is that he was unlawfully and wrongfully arrested and detained on 6 November 2016 at Boksburg prison for rape of a minor child.

[5] Ndlovu was detained for two years, four months and 23 days before his case was finalised 27 March 2019 and found not guilty in terms of section 174 of Criminal Procedure Act 51 of 1977.

[6] His rights were infringed, freedom of movement, privacy, dignity, integrity and he suffered damages in the amount of R10 million.

[7] Ndlovu further avers that members of SAPS unlawfully and intentionally set the law in motion by laying the charge of rape of minor child. Also because of the members of the SAPS, particularly the investigating officer's, malicious conduct, the Plaintiff was prosecuted in open Court.

[8] He avers that the senior public prosecutor maliciously placed the matter on the roll without careful consideration of facts and circumstances of the allegations.

[9] He avers that he suffered damages in the amount of R 10 million for malicious prosecution.

[10] The NDPP prosecution failed because Ndlovu was acquitted or found not guilty because the doctor, in his completion of the J88, stated that there was no penetration, and that minor child is still a virgin.

[11] This concludes the Plaintiff averments in the particulars of claim.

[12] The particulars of claim are full of factual mistakes and no corrections were done at any stage before the trial started.

[13] Both the claims are defended, and a special plea and plea were delivered on 25 February 2020 by both the first defendant, Minister of Police and the second defendant, NDPP.

[14] The issue in the special plea was dealt with in a Court order dated 9 June 2022 and need no further mention here. The balance of the plea, related to the unlawful arrest is sifted out because of the abandonment by the Plaintiff. The unlawful detention and malicious prosecution claims were denied, and the Plaintiff bears the onus of proof in this instance.

Plaintiff's case

[15] I shall now turn to deal with plaintiff's evidence, and briefly recap same.

[16] Ndlovu testified that he is now 29 years old and born in 1995, and on that Sunday, 16 November 2016 he was at his house, [redacted] Z[redacted] Z[redacted], Katlehong, Gauteng Province when the investigating officer with the brother of the Child arrived. He was then informed that he raped the child, and he said he knows nothing about it, and was taken to the police station.

[17] Monday, 17 November 2016 he appeared in the Magistrate Court in Boksburg, he had his own private lawyer, and he was there remanded for 7 days for a bail application.

[18] After 7 days he went back to Court. He testified the investigating officer informed him and I am using his own words "no bail because the Child is not

safe, and will be illtreated by him outside", he could not explain how, or in what way will the child be illtreated by him outside and bail was denied.

[19] He confirmed that he had legal representation at that time.

[20] He explained his relationship with the Child, she is family being his aunt's daughter.

[21] He testified and it was later confirmed in cross examination that he was between 15 and 16 years old and grade nine when the alleged rape offence occurred. He never finished school. He was 21 when he was arrested.

[22] The Child was starting school in 2011 when she came to stay with him and his grandmother, who was working at the time.

[23] At the time of the arrest in 2016 he testified that child was not there anymore, she was then staying at her mother in Balfour, Mpumalanga.

[24] He testified that his private lawyer dumped him, and his lawyer just discussed the bail with his mother never with him.

[25] He had three legal representatives during the trial, of which two were from legal aid and one was a big man, he does not know his name. The last lawyer was Mr du Plooy who told the Plaintiff to abandon the second bail application on 11 December 2017 until the trial, because the case was just about to be heard.

[26] The trial started 13 February 2019 and finished 27 March 2019.

[27] He further testified that when the trial started the doctor testified that he did not find intercourse and J88 form was never read to him.

[28] The Child testified through the social worker.

[29] The Mother of the child also testified, and repeated what daughter said that he raped her all the time at home.

[30] Ndlovu did not testify at any stage during his trial and Court found him not guilty and he was discharged. It is important to note that he never gave any statement during the whole case.

[31] He testified that he was in custody for two years and a few days.

[32] Ndlovu became emotional when he went on to testify about the personal experiences and harsh circumstances in the holding cell, giving examples of overcrowding, little food and terrible ablution facilities, and having to pay for a "sponge" to sleep on.

[33] He testified in chief that he attended Court several times during the two years and state prosecutor, or the Magistrate never asked him about bail or for his release.

[34] He confirmed that the investigating officer knew where he stayed, he was never previously arrested and was not a violent person.

[35] He testified that he claimed R10 million because he had to pay his lawyer, and he lost his dignity in detention. He lives in the same community, and they see now another person. He could not again explain why he was detained.

[36] He never returned to school, was traumatised and never received counselling due to financial constraints of his own and his mother.

[37] He is currently working at Highveld Mushrooms and earns R 1 100 weekly and has no money left for counselling.

[38] Ndlovu was subjected to extensive and probing cross examination.

[39] During cross examination the following further information was confirmed:

39.1 Ndlovu was working at the time of his arrest, it was a misunderstanding on the bail recommendation form where it was marked that he was not working.

39.2 He signed exhibit "A" being the charge sheet but did not check the contents because he was scared.

39.3 The charge was explained as rape a Schedule 6 offence in terms of the Criminal Procedure Act 51 of 1977.

39.4 He knows that there was a bail application but does not remember that his lawyer explained the procedure to him.

39.5 Again, he confirms, that he cannot remember which lawyer acted on his behalf at what time, but he remembers two very well being Kganakga & du Plooy, the third lawyer only discussed the bail with his mother.

39.6 Exhibit "B" was shown to Ndlovu and he accepted that matter was postponed for a formal bail application called the first bail on 15 November 2016 and matter transferred to the Regional Court, 7 days after his arrest.

39.7 He again admitted that bail was denied but contended it was because he was told the complainant (Child) won't be safe and confirmed that the process was fair.

39.8 Exhibit "C" was shown to Ndlovu and he accepted the contents, that on 4 December 2017, the case was postponed to 11 December 2017 and bail application was abandoned. His lawyer told him to abandon the bail.

[40] Ndlovu testified that this was not fair to him, that he had to stay in prison for the whole time and it was the Court's fault from the beginning therefore it was not fair towards him because bail was refused. Again, he confirmed that he was not told what is required in a Schedule 6 charge.

[41] Ndlovu testified that he thought he will get bail the second time around but understood that he abandoned the second bail on advice of his own legal

representative. This was testified repeatedly and will for that reason not be repeated.

[42] He also testified that he did not ask any questions, because he thought his lawyers knew what they were doing.

[43] It is on record that exhibit "D" shows Ndlovu testified that when his one legal representative withdrew, the matter was removed for him to apply for legal aid.

[44] Ndlovu testified that he trusted his legal representatives completely and both sides, together with the Court dissatisfied him.

[45] During re-examination Ndlovu testified again that the requirements of a Schedule 6 offence, bail application for rape was never explained to him, but that the full details were discussed with his mother.

[46] The only reason Ndlovu knew why he was not granted bail was because the child's life wat not safe if he is outside. He also mentioned at this late stage that he thought because he was a first offender he will get bail.

[47] Ndlovu closed his case without calling further witnesses.

Defendant's Case

[48] The first and second defendants started their case in defence and called the Investigating Officer, T Mdlandlamba (TM).

[49] Her evidence in chief can be summarised as follows:

49.1 She testified that she is a witness on behalf of the first Defendant and has been an Investigating Officer for 18 years and 19 years working for South Africa Police Service.

49.2 She confirmed that she was the person who arrested Ndlovu on 6 November 2016. When she was asked about her duties and her role in the case, she was firm in her answers, and confirmed several times that:

49.2.1 She was part of the first bail process

49.2.2 It was a Schedule 6 sexual offence

49.2.3 Ndlovu and the Child were related

49.2.4 There was a possibility that they would come across each other, she testified that she had a safety concern.

49.2.5 Child was very afraid of Ndlovu

49.2.6 Child was very young.

She testified that after the docket went to Court she would only be back at Court if State Prosecutor requested her to be there.

[50] It was put to her that in this matter, she did not do what she was supposed to do and that was to take the docket to the Court and State Prosecutor, for decision first.

[51] TM denied that she did anything different than usual by arresting Ndlovu and not to take the case for decision first.

[52] The State Prosecutor called her for the 2nd bail application and said Ndlovu had new facts. Upon arrival she was informed that there are no new facts, and she was released and never returned to Court again.

[53] TM was taken through the warning statement she completed upon questioning Ndlovu and after he read document, it was signed by him. She went further and explained that questioning on the bail recommendation form was done in the language Ndlovu understood, therefore where she completed the form to say "unemployed" Ndlovu gave the answer, and he understood the question.

[54] TM was taken to exhibit "E" on 080-37 called a bail recommendation form, completed by herself, when preparing to take Ndlovu to Court. The purpose is

to know more about the Accused (Ndlovu) and help the State Prosecutor at the time of the bail application.

[55] This form goes with the docket to the State Prosecutor and gives information about Ndlovu, but the Court makes the decision to grant bail, not her. She testified once a docket goes to Court it is out of her hands and control what happens afterwards.

[56] In cross examination TM was extensively asked about her experience in child rape cases, and how a case is prepared to ultimately go to Court.

[57] She testified that her main duty is to:

57.1 Find out what happened;

57.2 Get statement from victim;

57.3 Get doctor's report

[58] TM was asked to explain how she decided that this is a rape case with the J88, exhibit "G" she received from doctor. TM's answer was unequivocal:

58.1 She read the J88 this is the report from the doctor.

58.2 She was not concerned about paragraph three because every injury can heal in three years. It was put to her that J88 states and I quote "no forceful penetration, laceration, tearing, bleeding".

58.3 Hymen was broken

[59] TM then confirmed again that she proceeded with the rape case because of the victims (Child) statement – the Child said she was raped, and she was only 11 years old, and together with the doctor's report, it carries equal weight.

[60] TM explained that she made the decision to arrest on rape, the Court decides the bail, she is not the one to decide and in fact she is not mandated to give bail, and that an Investigating Officer does not have any influence over the State Prosecutor.

[61] During cross examination she was repeatedly questioned over her completion of bail recommendation form, but the answers stayed consistently the same as per evidence in chief – the form is for information purpose only.

[62] TM stated that she did oppose bail, but it was not because she had a bad attitude, and she does not know Ndlovu personally, she gave her reason to oppose bail only because it is a Schedule 6 Offence and victim was too young. BUT the Magistrate is the one to decide bail, and he does not listen to her.

[63] TM stated that when the docket went to the State Prosecutor, the investigation was complete from her side on 8 November 2016.

[64] The social worker report and the Kidz Clinic report is compiled for the State Prosecutor, and not necessary for the investigator officer.

[65] It was put to her that just objecting to bail caused the detention of the Plaintiff and TM did not comment on this.

[66] The second witness called by the Defendants were Adv T.G. Twala (Twala) mainly to dispute the claim for malicious prosecution, but also elements of the claim for unlawful detention.

[67] His evidence can be summarised as follows:

[68] He confirmed his work experience being 21 years as a State Prosecutor, and 12 years in the Special Sexual Offences Court.

[69] I was informed that the first State Prosecutor sadly passed away before this hearing.

[70] Twala explained his modus operandi when receiving a docket from the investigating officer to be as follows:

70.1 Receive the docket

70.2 Look into the allegations

70.3 Must be satisfied that the elements of the alleged offence are present

70.4 What are the support documents available, for instance doctor's report.

70.5 Is the suspect identified

70.6 Is he linked to the offence

All the above will indicate to him that there is a prima facie case, with prospects of successful prosecution and the matter will on his decision then be enrolled on the Court roll.

[71] If there is not enough evidence in the docket he will decline to prosecute, and/or write instructions to further investigate certain aspects, to the investigating officer.

[72] Twala testified that the benchmark in his cases is a prime facie case, and he confirmed that in this present case there was 'n prima facie case.

[73] Twala explained that he took the following considerations into account when he took over the case as the second State Prosecutor:

73.1 Twala did not make the initial decision but agreed with the previous State Prosecutor

73.2 It is not only the decision of the investigating officer to proceed to prosecution.

73.3 Twala duly considered the contents of the J88, exhibit "G"

[74] Having regard to the J88 which is the Doctor's report, on which he was extensively cross examined, it was read into the record. The following explanations were given on the contents of the J88.

74.1 Paragraph one read: Hymen broken

74.2 Paragraph two: vagina admitted small pinkie finger

74.3 Paragraph three: No forceful penetration, laceration, tearing, bleeding

This last comment by the doctor is not strange he explained because the alleged rape happened three years before the examination took place.

[75] The evidence in the docket and the age of the child was enough to proceed with the prosecution.

[76] After making that decision, which is fully within in his mandate to do, he requested for the social worker's report and Kidz Clinic report to be completed.

[77] The Kidz Clinic report is mandatory for the State Prosecutor to establish whether a child is a competent witness and can tell the story at the trial. This happens in all cases with children under 18 years of age.

[78] The Kidz Clinic report informs the State Prosecutor if the child is a competent witness and what kind of help does child need to be able to testify in Court at the trial.

[79] This process in terms of protocol should take six to eight weeks to complete but normally it takes 12 – 13 months. The completion of this report is beyond a State Prosecutors' control.

[80] Twala continued to also explain that a case can also wait for DNA test results. Taking DNA swaps are standard procedure, but in the current matter these results did not delay the case because it was not required.

[81] At this stage of the evidence the chronological order of the court remands becomes extremely important.

[82] On 23 May 2017 the matter was remanded for disclosure for the accused defence lawyer to request copies to prepare for trial.

[83] Twala explained that it is practice in this specific court to roll matters every two weeks for follow up. This was supported by all the appearance sheets in the docket.

[84] Postponements are necessary and procedural inherent to a criminal prosecution of this nature.

[85] Twala confirmed that according to him this trial started within a reasonable time.

[86] The normal procedure after case is remanded for trial, is that the defence would approach state prosecutor to reconsider this matter.

[87] The senior State Prosecutor can also be asked by the defence to consider prosecution. If the Senior State Prosecutor is not satisfied with the prima facie evidence the case could have been withdrawn. It shows from the document at 014 – 27 that the Senior State Prosecutor did see the docket on 15 November 2015.

[88] Twala explained that a State Prosecutor in any criminal case has no mandate to consult with the accused or plays any role in the abandonment of a bail application as he cannot help an accused.

[89] On the 4 December 2017 the case was postponed for a second formal bail application to 11 December 2017, when bail was abandoned. Only Ndlovu's legal representative can advise him to abandon bail, this was evident in appearance sheet 014 – 39 to 014 – 41.

[90] On 6 June 2018 the case was postponed because the State Prosecutor was not there.

[91] On 17 July 2018 the case was postponed because the Presiding Officer was not there.

[92] On 8 October 2018 the case was postponed because mother of the accused was not there.

[93] Twala was asked to explain what he did when the mother did not come to Court.

[94] He explained that without a witness there is no case and he would ask for postponement and then it would be ultimately in the hands of the Magistrate (Court) to allow further postponement.

[95] The cross examination went on to the following and he was asked to explain 2 aspects:

95.1 his decision to prosecute.

95.2 proceeding with prosecution.

[96] He stated that for him prima facie meant:

96.1 The necessary elements of the charge are present.

96.2 Evidence spoke to allegations.

96.3 Is there corroboration present.

[97] Twala further testified that the case for the State is reliant on "our witness". And he explained that:

"The case can be good on paper but if the witness is not good then case is not good."

[98] It was put to him that because Ndlovu was found not guilty and Twala caused him personal harm.

[99] Twala denied this and he does not know what personal harm he could have caused. He refuted any suggestion that he caused Ndlovu any personal harm and went on to explain all three State Prosecutors aligned their minds, which they did and decided this a prosecutable case.

[100] I find that this provides strong evidence that Twala's decision was not baseless or wholly unsupported by available evidence.

[101] Twala's experience as a State Prosecutor and his knowledge of prosecutorial standards and practices lent additional support to the reasonableness of his assessment.

[102] Twala contended that he agrees that Ndlovu should not be prejudiced. Himself as a State Prosecutor should do justice and not only prosecute.

[103] Twala mentioned that the Court cannot unjustly interfere in a case before him.

[104] In a Schedule 6 offence charge the duty is on the accused Ndlovu to show exceptional circumstances to be released on bail. These circumstances are not defined, and the following are standard and not exceptional, circumstances:

104.1 A known address.

104.2 Person will not interfere with witnesses

104.3 First offender

It must be something out of the ordinary, he contended.

[105] The Court has the discretion to decide what is exceptional and Twala was not the State prosecutor when the bail application was done.

[106] The bail recommendation form was scrutinised by the counsel of the Plaintiff. Twala explained that this form is a preliminary form to shed light on the personal circumstances of accused and to guide State prosecutor to information. This form does not have an influence on bail, only to guide to oppose bail or not. He corroborated TM's testimony.

[107] The State Prosecutor must place the facts before the Court to make a just and fair decision.

[108] A State Prosecutor assists the Court and does not have an influence over Court.

[109] Twala testified that the following document, the Kidz Clinic report, is the backbone of the evidence in a minor's rape case and the trial cannot start before this report is available and that report was available 7 March 2018. It was available in a reasonable time.

[110] He explained and confirmed that it was within his rank to withdraw the case against Ndlovu.

[111] He testified without waiver, several times, that during the lifespan of this matter it did receive urgent quick attention.

[112] The defendant wanted to make out a case that delay in the Kidz Clinic report caused Ndlovu to be unlawfully detained and this was repeatedly denied that Twala does not need the report to decide on bail.

[113] Twala gave the reason for Ndlovu being in custody was because he could not discharge the onus for bail.

[114] It is not the duty of State Prosecutor at any stage to investigate the reason why Ndlovu was in custody.

[115] Twala testified that a case must be dealt with as quick as possible, and a lengthy period would be three to four years later.

[116] When Twala was prompted about his recollection, of the reason of the outcome of the not guilty order, his undisputed immediate response was that the Child was emotional, crying hysterical, she did not respond to some of the questions and therefore there was not sufficient evidence for a reasonable man to convict.

[117] It was put to Twala that the discharge was because of insufficient evidence before Court. He denied and said the evidence was in the docket and in his discretion, there was reasonable and probable cause. On paper there was a case, and it is not in his control what happens in Court.

[118] It was put to him that this test is both subjective and objective, and the question is then would another person also decide to prosecute.

[119] Twala confirmed that the fact that the charge was only laid years after the alleged rape alone, would not have influenced his decision.

[120] The J88, the doctors report was objective proof of the following according to Twala that:

120.1 An examination was done by a qualified doctor
120.2 11-year old's hymen was broken
120.3 Admit a small finger, and he is trained that it is not supposed to be like that, and the finding supported and corroborated the offence.

[121] He was not concerned about the finding of no forceful penetration, tearing, laceration, bleeding is because of the time lapse between the offence and examination.

[122] Twala contended that the puzzle pieces fitted and J88 confirmed the clinical finding.

[123] The plaintiff placed it on record that the objective facts were not taken into account by Twala and the rights of Ndlovu was ignored.

[124] The plaintiff submitted that there was not enough evidence on what is necessary to prosecute in terms of Section 12 (1) of Constitution.

[125] Twala responded that he did not deprive Ndlovu of his liberty because of the fact that the investigating officer and a State Prosecutor opposed bail, he denied that there were no valid reasons to oppose bail and he has a duty to place the facts in front of the Court.

[126] Twala admitted that he put the case in motion, but that he did not institute the action the docket was brought to him. It is not his duty as a State Prosecutor, to place sufficient evidence before a Court for Ndlovu to be released.

[127] The Court decides to grant bail, and the onus is on Ndlovu to convince the Court to grant bail.

[128] He contended that, to have an address is not a factor that will influence the Court, the same goes to placing of evidence in front of the Court where the child lived two years before the date of his arrest. It would also not be the only factor to look at when bail is considered.

[129] His evidence throughout the cross examination was consistent that the clear discretion of bail lies with the Court and onus of proof on the Plaintiff.

[130] Twala never wavered in his answers that there was enough evidence for a reasonable cause and the three State Prosecutors individually, even the senior State Prosecutor concluded that there is a prosecutable case.

[131] He contended that he had no intention to injure the Plaintiff, he does not know the plaintiff and denies that his actions to prosecute was not reasonable, and he found the submission defamatory to the National Director of Public Prosecution and Minister of Police.

[132] Twala's evidence was consistent throughout the case. He testified that no Constitutional right was infringed because bail was denied, the plaintiff, like any other person was facing the wheels of justice.

[133] It is important to note that the second bail application was abandoned with no reason on the appearance sheet. Twala denied that plaintiff suffered damage, just because he went through a lot and endured a lot. The State Prosecutor did not order the detention, there is a process, and the Court ultimately decide, and the police assist with the information, State prosecutor is an officer of the Court but not the Court.

[134] In re-examination the State advocate put it to Twala that the assessment report of the Kidz Clinic is necessary.

[135] He testified yes and explained further that there are several institutions used for the report, Teddy bear Clinic, some Non-Governmental Organization and Kidz Clinic. The child will be referred to anyone depending on the trauma of

the child. For the completion of this report the State prosecutor relies solely to the specific turnaround time of the institution.

[136] This report is only relevant for trial purposes, and that date was 7 March 2018 which was confirmed.

[137] The last question posed was if a State Prosecutor investigates the granting or denial of bail and the clear answer was no, it is not his duty, it is between the state and the plaintiff because bail is this instance is not automatic.

[138] Twala, consistently testified that the turnaround time for this matter was reasonable. This was the end of the evidence by the first and second Defendants.

Arguments and findings of the Court

Unlawful detention - Claim A

[139] The Arguments by both the plaintiff and defendants were heard on 8 November 2024.

[140] The argument advanced by the plaintiff is that Ndlovu was unlawfully detained because he did not commit any offence.

[141] The second argument was that Ndlovu was unlawfully detained because his bail application was opposed and that led to him being incarcerated for the full period before the finalisation of the trial.

[142] Ndlovu accepted that he was lawfully arrested on a Schedule 6 Offence and that it is this very fact that led to his detention.

[143] By default, because the unlawful arrest was abandoned Ndlovu accepted that he was lawfully arrested for a Schedule 6 Offence. Then the onus is on him to

show in terms of Section 60 of the Criminal Procedure Act that there were extraordinary circumstances present in order to be granted bail. There was no evidence in front of me that I can find that the first and second defendant kept any evidence away from the Court, and if there was any other reason why the first bail application failed.

[144] There were two bail applications mentioned, the first bail application failed after seven days, and the second bail application was never brought and abandoned on 11 December 2017.

[145] The plaintiff's mother was not called as a witness on his behalf or the private attorney who represented him at the time. Both these two people could have helped the plaintiff in his claim to explain to the Court what happened in the first bail application especially because Ndlovu on more than one occasion during testimony clearly said his mother attended the bail application with his own private lawyer. The legal representative cross-examined TM on the J88, but no medical expert was called on behalf of the plaintiff to proof the submissions made in the particulars of claim or in evidence.

[146] There was only the oral evidence of the plaintiff and the docket that was discovered, presented to Court.

[147] The first and second defendant argued the following in terms of the result of the unlawful arrest claim that was abandoned.

[148] The Plaintiff bore the overall onus to proof and should have compelled the production of the bail application if he was not able to produce the transcription to challenge the evidence of the defendants.

[149] When the legal principles are to be applied the question to be answered is who bears the onus of proof.

[150] This can be found in the case of *Pillay v Kristine and Another* 1949 AD 946 at 941-2. The three rules are:

"(a) If a person claims something from another in a court of law, then he has to satisfy the court that he is entitled to it;

(b) ....

(c) He who asserts, proves and not he who denies, since a denial of a fact cannot naturally be proved provided that it is a fact that is denied and that the denial is absolute." This is a general legal principle generally applicable to matters serving before a court of law."

[151] The first bail application was mechanically recorded according to the appearance sheet. The plaintiff had the onus to proof that the first and second defendant did not adhere to the rules and therefore the bail hearing was unlawful and that followed that the detention became unlawful. This crucial part of evidence was not placed in front of me and was fatal in the plaintiff's case of unlawful detention.

[152] At least the best evidence available should have been placed in front of the Court.

[153] A second bail application, after a year in detention, was abandoned. No evidence was lead that this was in any way the fault of the first and second defendant. The plaintiff was the author of his own abandonment and the claim for unlawful detention must fail.

[154] I am of the opinion, based on the evidence by the plaintiff that he has made no case out that he was unlawfully detained.

Malicious prosecution – Claim B

[155] It is very much in dispute that defendant acted without reasonable and probable cause and with malice.

[156] The full legal requirements for malicious prosecution are as follows:

156.1 The first Defendant set the law in motion, instituted proceedings.

156.2 No reasonable and justifiable probable cause

156.3 Sole intention to defame the Plaintiff, malice.

156.4 Was found not guilty.

[157] The two easy requirements are number one, that law was set in motion, and number four, that the plaintiff was found not guilty. Number three having regard to reasonable and justifiable cause requirements the following flows from the evidence.

[158] Was the prosecution reasonable and justifiable:

158.1 Ndlovu 's evidence needs to be assessed. His evidence was simple to understand.

158.2 Because Ndlovu abandoned unlawful arrest he accepted that the charge was a schedule 6 offence. This follows then that it was accepted by Ndlovu that there were reasonable grounds to arrest him.

158.3 Because Ndlovu, chose, which is his right, not to give a warning statement if follows that first and second Defendant had no version to consider other than child's statement at any stage during the proceedings.

[159] Twala testified that he consents that the law was set in motion by the first defendant. Twala explained what he deemed to be a prima facie case, and that two Prosecutors before him agreed that there is a prosecutable case. Suspicion arises at or near the starting point of an investigation of which prima facie proof is the end.

[160] The plaintiff's legal representative argued that the test should not be prima facie but in reality, it has to be only reasonable and probable.

[161] It was clear to me that the plaintiff then accepted that there were reasonable grounds to arrest him, The *SCA in Biyela v Minister of Police (1017/2020) [2022] ZASCA 36; 2023 (1) SACR 235 (SCA) (1 April 2022) said "the standard of reasonable suspicion is very low."* It must be more that a hunch; it should

not be an unparticularised suspicion but must be based on specific and articulated facts or information.

[162] The mere fact that plaintiff was found not guilty, and discharge does not proof maliciousness, mala fide or unreasonableness.

[163] I find that the plaintiff has failed to discharge a duty rested on him to prove that the defendant at the relevant time did not have such information, as would lead a reasonable person to conclude, that the plaintiff had probably been guilty of the offence.

[164] If the plaintiff failed to prove his case against the defendant who else should have. It is the plaintiff who must face the consequences of not having enough evidence to hold the defendant liable.

[165] Twala testified that he did not have any reason to act maliciously against the plaintiff, he did not know him at the time, never met him when he took over the case and proceeded with the prosecution.

[166] He was guided purely by the objective facts in the docket when he took the decision, especially the J88 form.

[167] This was the objective requirement that satisfied the honest belief, based on reasonable grounds that the institution of proceedings is justified.

[168] Therefore, the subjective belief must also be reasonable, as this coincide with Twala, testifying that with the contents of the docket he believed that there was a prosecutable case, and that is what he did.

[169] On the question if the prosecution was malicious mala fide the following is important to me:

169.1 Malice in this context talks to the mental state of Twala as the decision maker.

169.2 This speaks to one, where *animus iniuriandi* is established the intention to injure has been shown to exist and secondly consciousness of the wrongfulness of the decision so made.

[170] Both the factors must exist.

[171] In *Moaki v Reckitt & Colman* 1975 ISA481A at 492 it was held that it is for the plaintiff to allege and prove that the defendant had necessary intention to cause him injury, either in the form of *dolus directus* or *dolus eventualis.*

[172] Plaintiff merely used words to say that he was failed by both his legal representatives and the defendant.

[173] This is not support for malice and not to fully address it is also fatal to claim B.

[174] I refer to *Minister for Justice and Constitutional Development v Moleko* SCA 131/07 [2008] ZASCA 43 (31 March 2008). In this judgment in paragraph 11 the SCA mentioned the prosecution occurred at the instance of the DPP and that the role of the police was merely to gather relevant information.

[175] In paragraph 28 it is important to note that the SCA mention when they looked at malice, that the prosecutor did not know, and did not know of, never had any dealings with him, the plaintiff, they also mention that *animus iniuriandi* must be proven, that its not only intention to injure but also the consciousness of wrongfulness of the prosecution.

[176] Absolutely no evidence was led to this effect.

[177] Lastly the SCA in the case of *NDPP and Mdhlovu* case 194/2023 ZASCA 85 of 3 June 2023.

[178] The main question to be answered in par 19 of the appeal is, was the onus of proof discharged, proving the lack of reasonable and probable cause to

prosecute and that prosecution was instituted *animo iniuriandi*, explained previously.

[179] The SCA in *Mdhlovu* specifically referred, on page 8 paragraph 20 of the judgement, to the old case of Prinsloo and Another v Newman 1975(1) SA 481 (A) where the Appeal Court found that reasonable and probable cause can be explained as follows:

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

[180] They take it further and conclude that a prosecutor need not have evidence establishing a prima facie case or proof beyond a reasonable doubt when deciding to initiate a prosecution. Suspicion of guilt on reasonable grounds suffices.

[181] I find that based on the evidence of the docket and the two witnesses called, the suspicion of guilt was there and the first and second defendant acted upon this supported evidence with reasonable ground.

[182] I accepted the evidence of Twala wholly as credible.

[183] The not guilty finding does not negate in this instance the earlier decision to prosecute.

[184] I find that any possible intent of malicious motive was reduced because at least three State Prosecutors assessed the docket and decided to prosecute objectively. I find that this is incompatible with a consciousness of wrongfulness, recklessness in the current case.

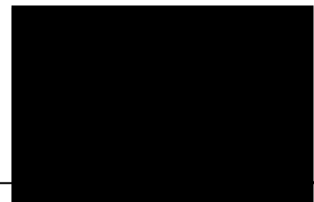
[185] On page 14 paragraph 38 in *Mdhlovu* it is said that Prosecutors must be free to pursue cases they believe have merit without undue fear of adverse consequences, provided they act rationally, honestly and without improper motives.

[186] For these reasons the plaintiff did not discharge the onus of proving the essential elements of his malicious prosecution claim.

[187] To be successful all the requirements must be cumulatively in existence. Having found that not all the requirements of the claim has been satisfied, I accordingly find that the plaintiff cannot succeed.

[188] In my view, the prosecution, on all the available evidence taken all the facts into consideration, the criminal charges were not only reasonable but also justified.

[189] Therefore, both claims are dismissed with costs.



VAN DE VENTER, C

ACTING JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

Dates of Hearing:	22, 23 and 24 October 2024
Date of Submissions:	08 November 2024
Date of Judgment:	06 December 2024

Appearances:

For the Plaintiff:	Adv. B.B. Ntsimane
Instructed by:	Masina Attorneys
For the Defendants:	Adv. T. Monene
Instructed by:	Office of the State Attorney