

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

CASE NO. 849/2018
895/2018

In the matter between:

GIDEON DE BRUIN

First plaintiff

NEVILLE PETERSON

Second plaintiff

and

MINISTER OF POLICE N.O.

First defendant

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Second defendant

JUDGMENT

LAING J

[1] This is an application for absolution from a claim for damages. The plaintiffs brought three claims against the defendants: wrongful and unlawful arrest and

detention; wrongful and unlawful assault; and unlawful prosecution.¹ The third and final claim forms the subject of the defendants' application.

The plaintiffs' case

[2] The plaintiffs pleaded that police officers arrested them on 4 June 2017 in Cannon Street, Kariëga (Uitenhage). They alleged that the officers in question assaulted them prior to the arrest and again at the police station in Church Street, before detaining them in a holding cell. The plaintiffs appeared in the Magistrates' Court on 6 June 2017, whereafter they were released. The criminal proceedings were postponed on several occasions before charges were withdrawn on 13 July 2017.

[3] In his particulars of claim, the first plaintiff alleged that the officers wrongfully and unlawfully set the law in motion by laying charges of common assault against him and opening an investigation docket. He averred that the officers and the state prosecutor assessed the docket and ought to have known that there was no *prima facie* case against him and that the charge should have been withdrawn. He alleged that they owed him a duty of care in that regard. The continued prosecution, he said, amounted to wrongful, unlawful and negligent conduct, the result of which being that he suffered damages in the sum of R 400,000.

[4] The second plaintiff's particulars of claim were almost identical. However, he also made the averment that the state prosecutor proceeded against him without reasonable and probable cause and that he or she, and the officers in question, acted *animo iniuriandi*. He, too, claimed damages in the sum of R 400,000.

[5] It is necessary to pause and mention that the second plaintiff's particulars of claim were amended after the defendants had raised an exception. They argued, at the time, that the second plaintiff's claim failed to disclose a cause of action based on

¹ The nature of the claim regarding 'unlawful prosecution' has given rise to some confusion, as will be discussed below. For the moment, this and the remaining claims are described as they appear in the plaintiffs' particulars.

malicious prosecution. No exception was raised in relation to the first plaintiff's particulars.

First defendant's case

[6] The first defendant admitted that police officers opened a docket to facilitate the prosecution of the first plaintiff but denied the remaining allegations. He pleaded that the charges against the first plaintiff were withdrawn because of a mediation process initiated by the latter's attorneys, which culminated in the first plaintiff's having apologised to the officer involved, Sgt Eric Kriedemann. He denied liability for the damages claimed.

[7] Similarly, the first defendant denied liability for the damages claimed by the second plaintiff. His plea was essentially the same as that in relation to the first plaintiff.

Second defendant's case

[8] The second defendant pleaded that the relevant state prosecutor had proceeded with the prosecution of the first plaintiff on the strength of the statements submitted by Sgt Kriedemann and Const Ntsikelelo Roman. She averred that the state prosecutor had provided the first plaintiff's attorneys with copies of the contents of the docket and that the matter had been remanded for trial on 25 August 2017.

[9] Before the trial commenced, the above attorneys requested that the matter be considered for mediation. The complainant, Sgt Kriedeman, agreed thereto, which led to the first plaintiff's offering an apology for the assault, which was accepted. The charges were withdrawn. Consequently, the second defendant denied liability for the first plaintiff's claim for damages.

[10] The second defendant's plea to the second plaintiff's claim was almost identical. Likewise, she denied liability.

Trial proceedings

[11] The matter went to trial on all three of the plaintiffs' claims. Whereas the plaintiffs led a considerable amount of evidence regarding the assault and the events leading to their arrest and incarceration, very little was advanced in relation to the prosecution of the criminal charges.

[12] To complicate the matter, there was confusion as to the legal basis for the plaintiffs' claims. This needs to be discussed further.

Issues to be decided

[13] Both plaintiffs indicated in their particulars that their third and final claims were for unlawful prosecution. On closer examination, each of the claims appears to be a delictual action for damages, alleging wrongful and negligent conduct on the part of the defendants. There are, however, also faint traces of a claim for damages arising from malicious prosecution. This is especially so in relation to the second plaintiff's claim.

[14] In argument, counsel for the first defendant pointed out that there is a difference between a claim for unlawful prosecution and one for malicious prosecution. The plaintiffs seem to have conflated the concepts. The court is inclined to agree.

[15] The confusing nature of the pleadings attracted an exception to the second plaintiff's particulars. It is unclear why this was not done regarding the first plaintiff, although it may have had something to do with the management of the respective cases prior to their consolidation. Notwithstanding the subsequent amendment of the second plaintiff's particulars, it can well be contended that both sets of particulars remain vague, embarrassing, and lack the averments necessary to sustain a cause of action, as contemplated under the provisions of rule 23 of the Uniform Rules of Court ('URC'). It is unfortunate that this issue was not dealt with conclusively either before the close of

pleadings or before the commencement of trial. The difficulties posed by the confusing nature of the pleadings manifested themselves in the parties' arguments, where aspects of both unlawful and malicious prosecution were addressed.

[16] In the end, it is left to the court to decide merely what has been placed before it. The chief issue for determination is whether the application for absolution succeeds.

Legal framework

[17] Under rule 39(6) of the URC, a defendant may apply for absolution from the instance at the close of the plaintiff's case. In *Carmichele v Minister of Safety and Security and another*,² the Constitutional Court confirmed³ that the test to be applied is that set out by the erstwhile Appellate Division in *Claude Neon Lights (SA) Ltd v Daniel*,⁴ where Miller AJA held:

‘when absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to the evidence, could or might (not should or ought to) find for the plaintiff.’⁵

[18] To avoid a ruling of absolution from the instance, the plaintiff is required to adduce *prima facie* evidence or proof, which must be assumed to be true unless there are clear indications to the contrary.⁶ The court is not required to make credibility

² 2001 (10) BCLR 995 (CC).

³ At paragraph [26].

⁴ 1976 (4) SA 403 (A).

⁵ At 409G-H. See, too, *Gordon Lloyd Page & Associates v Rivera* 2001 (1) SA 88 (SCA), at 92E-93A; and *Jacobs v Minister of Justice* 2022 (2) SACR 569 (SCA), at paragraph [3].

⁶ *Atlantic Continental Assurance Co of SA v Vermaak* 1973 (2) SA 525 (E), at 527C-D.

findings at this stage, except where the witnesses have palpably broken down and where it is clear that what they have stated is not true.⁷

[19] This, briefly, is the framework that is relevant to the present matter. We proceed now to apply the principles.

Application of the principles to the facts

[20] It is necessary, before embarking upon an assessment of the plaintiffs' claims, to point out the obvious: the *prima facie* evidence or proof presented by the plaintiffs must sustain the cases pleaded in their particulars. This requires us, at the outset, to return to the question of what exactly comprises the basis of each of the plaintiffs' respective claims. To that effect, both plaintiffs have relied on unlawful prosecution.⁸

Unlawful prosecution

[21] The Constitutional Court, in *Carmichele*,⁹ was prepared to develop the common law to recognise a claim for damages brought by a third party regarding the negligent conduct of a prosecutor. The position was affirmed more recently in *Minister of Justice and Constitutional Development v X*,¹⁰ where the Supreme Court of Appeal awarded damages to a mother and her five-year old daughter because of a prosecutor's failure to have taken reasonable steps to prevent the release of a convicted rapist. The law does not seem to have reached a stage of development, however, where an accused person in criminal proceedings can be awarded damages for ordinary negligence on the part of the prosecuting authority or delegated officials.

⁷ *Siko v Zonsa* 1908 TS 1013; *Ruto Flour Mills (Pty) Ltd v Adelson* (2) 1958 (4) SA 307 (T); and *Gafoor v Unie Versekeringsadviseurs (Edms) Bpk* 1961 (1) SA 335 (A), at 340D-E. In general, see the discussion in Van Loggerenberg, *Erasmus: Superior Court Practice* (Jutastat epublications, RS 20, 2022), at D1-530 to D1-531.

⁸ A more accurate description would be 'negligent prosecution'. The case law, however, does not appear to be consistent in the use of the term.

⁹ See n 2, *supra*.

¹⁰ 2015 (1) SA 25 (SCA).

[22] In *Matshego v Minister of Police*,¹¹ the court considered a claim arising from the plaintiff's arrest and prosecution on a charge of rape. In his amended particulars, the plaintiff alleged that:

'The defendant alternatively the prosecutor in charge of alternatively handling the prosecution of the plaintiff failed to properly consider the complaint of the rape complainant and the available evidence when he decided to proceed with the prosecution of the plaintiff alternatively to oppose the plaintiff's application for bail.'¹²

[23] The court interpreted the claim to be that the Director of Public Prosecutions had negligently failed to appreciate that the state's case had such slender prospects of success that it ought not to have been allowed to proceed or that it would have been inimical to the interests of justice for the state to have opposed the granting of bail. There were two components to the plaintiff's case: wrongful arrest and negligent prosecution. In relation to the latter, Tuchten J went on to hold as follows:

'This cause of action was not known to our common law, which recognised in this field only the delict of malicious prosecution, a claim which arises, all other things being equal, when the defendant sets the criminal law in motion against a plaintiff while knowing full well that the prosecution cannot succeed... Counsel submitted... that our law had recognised the delict of negligent prosecution... I do not read any of these cases as developing the common law so as to create the delict of negligent prosecution. In the absence of authority binding on me, I view such a development of the common law as undesirable. It would have a harmful effect on the administration of the criminal law if prosecutors ran the risk of being held liable in damages if they honestly applied their minds to the question whether a case should be withdrawn at the first appearance of the

¹¹ 2015 JDR 2275 (GP).

¹² At paragraph 2.

accused in court and negligently decided that the case should not be withdrawn. In the vast majority of cases and nearly all, if not all, serious cases, further investigation is required after the first appearance of the accused in court before the case is ready for trial. Recognising the delict of negligent prosecution would require a prosecutor to anticipate the outcome of the investigation. It would also enable an accused person to place pressure on a prosecutor by suggesting personal liability or damage to the prosecutor's career prospects if the case were allowed to continue past the first appearance in court. In short, a prosecutor who ran the risk of being held liable for negligent prosecution would find it difficult to carry out his duties without fear as required under section 176(4) of the Constitution.¹³

[24] The same principles can be said to apply when, as in the present matter, the case has reached trial stage. Recognising a claim for damages because of the negligent prosecution of an accused person would require the prosecutor to anticipate the outcome of the trial itself.

[25] Similarly, in *Minister of Police v Gombakomba*,¹⁴ a full bench considered the first respondent's claim for damages arising from his arrest and prosecution for the transportation of contraband cigarettes. The first respondent, a Zimbabwean citizen, claimed for loss of income by reason of a bail condition that had required him to surrender his passport, pending the finalisation of criminal proceedings. The court observed that:

'As to the second claim, it was conceded by counsel for the respondents in the hearing before us that the basis for the second claim was that the representative of the second appellant took too long to determine that the state could not succeed in the prosecution of the first respondent. This amounts to the

¹³ At paragraphs 24-26.

¹⁴ 2016 JDR 0662 (GP).

contention that the second appellant, through his representative, the local prosecutor, was negligent. As counsel readily conceded, in our law negligent prosecution does not give rise to a delictual claim on the part of an accused person and this second claim could not succeed.¹⁵

[26] The law appears not to have arrived at a point where the ordinary negligence of a prosecutor would give rise to a claim for damages on the part of an accused person.¹⁶ There would be obvious and sound policy considerations behind a court's reluctance to develop the law to that extent, which would seem to hamper or unfairly constrain a prosecutor in the effective fulfilment of his or her role. Consequently, in the present matter, the plaintiffs' reliance on a cause of action based on unlawful (negligent) prosecution is misplaced.

[27] The usual route available to the plaintiffs would be a cause of action based on malicious prosecution, i.e. the *actio iniuriarum*. The implications thereof for the present matter will be discussed in the paragraphs that follow.

Malicious prosecution

[28] As a starting point, there is a clear distinction between a claim for malicious prosecution and one for wrongful legal proceedings. An example of the latter would be the attachment or execution of property without a valid writ; another example would be an arrest without a warrant. The defendant would be required to prove the lawfulness of the attachment or execution, or the arrest, and would not be able to rely on the absence of *animus iniuriandi*.¹⁷ The present matter does not pertain to wrongful legal proceedings.

¹⁵ At paragraph 4.

¹⁶ It is possible that there could eventually be development in this direction. See *Heyns v Venter* 2004 (3) SA 200 (T), at 208-9, where the court recognized a claim based on gross negligence, as discussed in Neethling and Potgieter, *Law of Delict* (LexisNexis, 2010), at 345, n 255.

¹⁷ See the discussion under 'Malicious and wrongful legal proceedings' in Harms, *Amler's Precedents of Pleadings* (LexisNexis, 9ed, 2018).

[29] The elements of a successful claim for malicious prosecution were confirmed in *Minister of Justice and Constitutional Development v Moleko*,¹⁸ where Van Heerden JA held as follows:

‘...In order to succeed (on the merits) with a claim for malicious prosecution, a claimant must allege and prove—

(a) that the defendants set the law in motion (instigated or instituted the proceedings);

(b) that the defendants acted without reasonable and probable cause;

(c) that the defendants acted with “malice” (or *animo iniuriandi*); and

(d) that the prosecution has failed.’¹⁹

[30] It was common cause, in the present matter, that there had been an altercation between the plaintiffs and two police officers. It was also common cause that Sgt Kriedemann’s statement had formed the basis for charges of common assault against the plaintiffs. It was not disputed that the statement had been accompanied by those of Const Roman and two other officers. It was, furthermore, common cause that the proceedings had culminated in a mediated outcome, whereby the plaintiffs had apologised and agreed not to assault Sgt Kriedemann in the future.

[31] To the above, the plaintiffs vehemently denied that either of them had assaulted Sgt Kriedemann. They alleged, moreover, that they had entered mediation proceedings and concluded the subsequent agreement under duress, without legal representation.

¹⁸ [2008] 3 All SA 47 (SCA).

¹⁹ At paragraph [8]. See, too, *Minister of Safety and Security NO v Schubach* [2014] ZASCA 216.

[32] Counsel for both defendants argued that the plaintiffs failed to produce any evidence to support a cause of action based on malicious prosecution. The court, having considered the record in detail, tends to agree. Whereas the plaintiffs presented a detailed description of the circumstances that led to their arrest and detention, they did not advance any material facts to demonstrate that the police officers involved, and the prosecutor, had lacked an honest belief, based on reasonable grounds, that the instigation or institution of proceedings was justified.²⁰ Similarly, the plaintiffs failed to demonstrate that the defendants had the intention to injure them, whether in the form of *dolus directus* or *indirectus*.²¹

[33] Of more concern, however, is the nature of the cause of action for the plaintiffs' third and final claims. Besides the problems created by the paucity of the plaintiffs' evidence regarding the above claims, the court is drawn back, ineluctably, to the difficulties posed by the cases that they pleaded. There are hints of the *actio iniuriarum* in each of the claims, even more so in relation to the second plaintiff's amended particulars. However, when reduced to their essence, the claims reveal a delictual cause of action based on unlawful (negligent) prosecution.²²

[34] At the very commencement of trial, counsel for the plaintiffs addressed the court and explained that the third and final claims were for damages arising from malicious prosecution. Counsel for the first defendant immediately took issue with this and contended that the claims were based on unlawful prosecution. Importantly, counsel for the plaintiffs merely acknowledged the point, without disputing the contention made. She proceeded further in accordance with the cases pleaded in her clients' particulars, viz. unlawful prosecution. Later in the proceedings, counsel for the first defendant started his cross-examination of the first plaintiff by reminding the latter that he had sued for damages arising from unlawful prosecution. Counsel for the plaintiffs never challenged this assertion. In her heads of argument, moreover, counsel for the plaintiffs

²⁰ *Prinsloo v Newman* [1975] 2 All SA 89 (A).

²¹ *Moaki v Reckitt and Colman (Africa) Ltd and another* [1968] 3 All SA 242 (A), at 246.

²² The term, 'negligent prosecution', is preferable and more in alignment with the treatment of the subject in case law. Nevertheless, 'unlawful prosecution' will continue to be used for purposes of the judgment, to reflect the language of the plaintiffs' pleadings.

expressly disavowed reliance on malice, indicating instead that the plaintiffs' cases were based on the unlawfulness of the defendants' conduct.²³

[35] In *Minister of Safety and Security v Slabbert*,²⁴ Mhlantla JA observed that:

'...The purpose of the pleadings is to define the issues for the other party and the court. A party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at the trial. It is equally not permissible for the trial court to have recourse to issues falling outside the pleadings when deciding a case.

...There are, however, circumstances in which a party may be allowed to rely on an issue which was not covered by the pleadings. This occurs where the issue in question was canvassed fully by both sides at the trial.'²⁵

[36] The above principles apply in the present matter. The plaintiffs' pleadings, as imperfect as they may be, were not designed to support claims for malicious prosecution. Instead, as plaintiffs' counsel made clear at the start of the trial and confirmed in argument, the claims were based on unlawful prosecution. This was the case which the defendants were called upon to meet. It is not permissible for this court to entertain anything to the contrary, especially where nothing to that effect was apparent from the plaintiffs' evidence.

Relief and order to be made

[37] The plaintiffs' claims were based on unlawful (negligent) prosecution. The courts have indeed considered delictual claims for damages arising from the negligence of a

²³ Curiously, counsel for the plaintiffs referred, in argument, to *Rudolph and others v Minister of Safety and Security and another* 2009 (5) SA 94 (SCA) and to *Korkie v Minister of Police* 2022 JDR 0178 (ECG), which pertain to claims based on malicious prosecution.

²⁴ [2010] 2 All SA 474 (SCA).

²⁵ At paragraphs [11] to [12].

prosecutor, as already discussed. Whereas the courts have recognised that damages may be awarded to third party victims of such negligence, the case law indicates that the courts are not (yet) prepared to entertain claims brought by an accused person for damages suffered because of the ordinary negligence of the prosecutor.

[38] The same appears to be true in relation to the ordinary negligence of police officers. In *AK v Minister of Police*,²⁶ the Constitutional Court held the police liable for damages caused by negligent investigative work, but this court has been unable to locate any authority for the assertion that the police can be held liable for damages arising from unlawful (negligent) prosecution, as opposed to malicious prosecution.²⁷ The case law has, in contrast, long recognised claims for damages arising from wrongful arrest and detention, for which the *actio iniuriarum* is available as a cause of action.

[39] Consequently, the third and final claims in the present matter, as pleaded, do not give rise to a proper cause of action against the defendants. It is possible that a more vigorously pursued exception would have dealt decisively with the issue at a far earlier stage.

[40] To the extent that the plaintiffs may have been able to overcome the above difficulties, they nevertheless failed to place sufficient facts before the court to sustain claims for malicious prosecution. Neither of the plaintiffs advanced any *prima facie* evidence or proof to demonstrate that the defendants had lacked reasonable and probable cause and that they had acted with malice against them.

[41] Ultimately, there is no evidence upon which this court, applying its mind reasonably, could or might find for the plaintiffs regarding their third and final claims. The costs must follow the result.

²⁶ [2022] ZACC 14.

²⁷ In *Palmer v Minister of Safety and Security* 2001 JDR 0444 (W), Horn J awarded damages against the police for unlawful prosecution. The grounds for the decision (*ratio decidendi*) were, however, clearly based on the elements of a claim for malicious prosecution.

[42] The following order is made:

(a) the application for absolution from the instance, brought by the first and second defendants, respectively, against the first and second plaintiffs' claims for unlawful prosecution (claim no. 3), are granted; and

(b) the plaintiffs are held liable for the defendants' costs, jointly and severally, in the event of one paying the other to be absolved.

JGA LAING
JUDGE OF THE HIGH COURT

For the plaintiffs: Adv Du Toit, instructed by Lessing, Heyns & Van der Bank Inc., Gqeberha.

For the first defendant: Adv Madokwe, instructed by the Office of the State Attorney, Gqeberha.

For the second defendant: Adv Makiwane, instructed by the Office of the State Attorney, Gqeberha.

Date of submission of heads of argument: 06 December 2022.

Date of delivery of judgment: 28 March 2023.