

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 29514/15

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

16/08/22

DATE

A handwritten signature in black ink, appearing to be "V. J. Gumbi", is written over a circular stamp.

SIGNATURE

In the matter between:

GABSON JOHN GUMBI

Plaintiff

and

MINISTER OF POLICE

First Defendant

**NATIONAL DIRECTOR OF PUBLIC
PROSECUTIONS**

Second Defendant

J U D G M E N T

This judgment is handed down electronically by circulation to the parties' legal representatives by email and publication by uploading it to the electronic file in this matter on Case-lines. The date and time of hand down is deemed to be 10:00 on 16 August 2022.

TEFFO, J:**Introduction**

[1] The plaintiff instituted an action against the Minister of Police, the first defendant, and the National Director of Public Prosecutions, the second defendant, for damages based on malicious prosecution. The action is defended.

[2] The trial began on 14 August 2019 and proceeded until 16 August 2019 when it became part-heard. It was postponed *sine die*. It was then set down for 26 and 27 March 2020 and 9 December 2020 when it could not be heard. It was eventually heard on 23 March 2021, and 8 to 9 July 2021 when the evidence was finalized. The record was transcribed and oral arguments were heard on 11 April 2022.

[3] The total claim comprised general damages for malicious prosecution and special damages. The claim for special damages was abandoned at the commencement of the trial.

[4] The defendants had raised two special pleas against the plaintiff's particulars of claim. The first special plea revolved around the issue of prescription. The defendants claimed that the cause of action relied upon by the plaintiff pertaining to his arrest and detention arose on 29 July 2011 and the summons was issued and served on 4 May 2015 after a period of three years. As a result, the cause of action that related to the arrest and detention of the plaintiff was abandoned.

[5] The second special plea related to the failure by the plaintiff to serve the defendants with a notice in terms of section 3 of Act 40 of 2002 within six months from the date on which the cause of action arose. This special plea fell away after the plaintiff was granted condonation by this Court for the late filing of the statutory notice.

Facts that are common cause between the parties

[6] On or about 29 July 2011 and in Carolina, the plaintiff was arrested by members of the first defendant in the course and scope of their employment with the first defendant. He was charged with the rape and murder of Ms Patricia Shongwe ("the deceased"). Subsequent thereto he was detained. He was eventually released on bail on 10 August 2011.

[7] Afterwards, on 29 December 2011, he was rearrested and his bail was withdrawn. On 16 April 2014 he was discharged in terms of section 174 of Act 51 of 1977 (*"the Criminal Procedure Act"*).

Facts that are in dispute

[8] Whether or not the defendants had reasonable cause for charging and detaining the plaintiff and whether or not the defendants had any reasonable belief in the truth of the information at their disposal on which the plaintiff was arrested, detained and charged. Furthermore, whether or not the defendants acted with "*malice*" or *animus iniuriandi*.

The evidence

[9] The plaintiff was the only witness to testify in support of his case. The defendants called a police officer and a Public Prosecutor as witnesses in defence of their case.

[10] The plaintiff, Mr Gabson John Gumbi testified that the deceased's body was found on 14 December 2010. She was his girlfriend. He last saw her on 11 December 2010. They met on 10 December 2010 and spent the night together at his friend, Mandla Gadebe's house where they had sexual intercourse. In the morning of 11 December 2010, he left the deceased at Mandla's house and went to work. He never saw her again.

[11] He became aware of the deceased's death after her burial when the police came to him and spoke about it. He told them that he last saw her on 11 December 2010 at Mandla's house where he left her when he went to work. The police left. A few months later, they returned and arrested him. He was detained for one night. The following morning blood was drawn from him. He was later released. Two months later the police returned and rearrested him. He was detained for some days and subsequently released on bail.

[12] When he applied for bail, he informed his attorney that the deceased was his girlfriend and they spent the night together at Mandla's place on 10 December 2010. The information was reduced to writing and he heard his attorney giving the information to the court.

[13] He was later arrested again and his bail was cancelled. He applied for the second bail. However, the application was not successful. He remained in custody until on 16 April 2014 when he was acquitted.

[14] Under cross-examination he testified that his relationship with the deceased lasted for more than a year prior to her demise. After denying that he only disclosed one previous conviction when he applied for bail, he conceded that he had other previous convictions which happened long time ago. He did not disclose them but conceded that they included a case of rape that he committed in 2008. He admitted that in 2008 the police collected blood samples from him.

[15] It was put to him that he was re-arrested because he did not disclose his previous convictions and a pending case when he applied for bail, and he was granted bail on the wrong information that he gave the court. He conceded that it would therefore not have been wrong for the police to re-arrest him and apply for the cancellation of his bail.

[16] When told that the defendants will lead evidence that he was arrested because his DNA which was stored in the Forensic Science Laboratory ("the laboratory") that related to the rape that he committed in 2008 matched the DNA that was found from the deceased, he reiterated that he had sexual intercourse with the deceased on 10 December 2010 and that explained the presence of his DNA on the deceased. His further evidence was that he left the deceased with his sister and Mandla at Mandla's house. His sister passed away when he was in custody. He could not tell why his sister's statement was not taken by the police. His sister and her boyfriend rented a place at Mandla's house at the time when he was with the deceased there.

[17] He last saw Mandla the same year he was released from custody.

[18] The investigating officer asked him to provide him with Mandla's residential address and not his contact number. He denied that he refused to give him Mandla's contact number. He was detained at the time and his cellphone which had Mandla's contact number was at home. Subsequent to his release on bail, he went to Mandla and enquired whether the investigating officer came to him when he was in custody. The investigating officer never went to Mandla even though he provided him with Mandla's residential address.

[19] He further denied that he raped and murdered the deceased. He testified that Sgt Mashaba took the side of the deceased. He gave him Mandla's residential address, however he did not visit the address. He just wanted to arrest him.

[20] Mr Managa for the defendants applied for absolution from the instance at the close of the plaintiff's case. The application was dismissed.

[21] Mr Selebi Sibusiso Jack Mashaba testified that he is a Sergeant in the South African Police Service (SAPS) and has been a police officer for 19 years. He was the investigating officer in the criminal case against the plaintiff. He collated evidence during his investigation. He received information from the station about the body of a female person that was found next to the railway station. He drove to the scene where he found the body of a young female person which had injuries. The deceased was lying on the ground with her hands covering her head showing that she was trying to protect herself. Forensic pathologists and other officials from the Local Criminal Record Centre (LCRC) were called. They arrived, pictures were

taken and the body was transported to the mortuary. The scene was thoroughly inspected for any clues. No clue was found there. They all left the scene. The incident happened during the weekend although he could not recall the exact date.

[22] Arrangements were made for a *post mortem* to be conducted. At the same time investigations continued.

[23] The witness was taken through the investigation diary which indicated what happened on 14 December 2009. This was the day when the body was found.

[24] He managed to trace the family members of the deceased and the person who last saw her.

[25] On 18 December 2009 blood was drawn from the plaintiff. The plaintiff's blood sample and that obtained from the deceased were sent to the laboratory for analysis. They also had another suspect called Mr Sibusiso Ngcobo. Mr Ngcobo's blood was also taken and then sent to the laboratory for analysis. He also interviewed the deceased's friend, Ms Nomvula Ennocentia Madonsela ("Ms Madonsela") who mentioned in a statement filed in a police docket that on Saturday 12 December 2009 at approximately 22:00 she was with the deceased. They were from another friend and the deceased requested her to accompany her home.

[26] They went to her home and then proceeded to Mandla's place to look for the deceased's sister, Ntombifuthi. On their way, on the main road towards Gwebu's shop, they were accosted by a certain black male person

who had covered his head with a hat and a jacket. He pulled out a grass slasher and hit the tarred road. Sparks went out. He then said whoever he would grab between them, he would kill her. She and the deceased ran to different directions. She looked back and saw the man chasing after the deceased. She ultimately reached home and does not know what happened to the deceased. The next day she went to check on the deceased and she was told that she did not come back home. She does not know the suspect and would not be able to identify him. The incident happened at night and it was dark.

[27] The two sets of the blood taken from the two suspects were analysed and nothing was found from Mr Sibusiso Ngcobo. When comparing the blood results of the plaintiff, they matched the blood that was taken from the deceased.

[28] When he was arresting the plaintiff and after he had explained his constitutional rights to him, the plaintiff disclosed certain information. He then made arrangements that he be taken to a magistrate on 1 August 2011 to make a confession. He realised when he read the confession that the plaintiff told the magistrate that the deceased was his girlfriend. That was the first time he became aware of the plaintiff's defence about his alleged relationship with the deceased and the fact that on 10 December 2009, they were together at Mandla Radebe's house.

[29] He asked Ms Madonsela about Mandla who she mentioned in her statement and she said she does not know where he resided. The deceased requested her to accompany her to Mandla's place and they did not reach the

place. He could not say if Ms Madonsela was talking about the same Mandla the plaintiff mentioned in his evidence as there are many people in the area with the same name.

[30] Ms Madonsela's statement could not assist his investigation. She mentioned that the person who accosted her and the deceased had covered his face. It was at night and the place was dark. He interviewed her three times and she said she would not be able to identify the culprit.

[31] After becoming aware of the plaintiff's defence, he went to the sisters of the deceased and they told him that they only knew Nonkululeko as the boyfriend of the deceased. He tried to investigate the information about Mandla in order to verify the plaintiff's version. He also visited the plaintiff and asked him about the whereabouts of his *alibi* witness, Mandla. He told him that Mandla was staying in Ermelo. He asked the plaintiff to provide him with Mandla's cellphone number to enable him to meet him. The plaintiff said he did not have it and that he should come back to him the following day.

[32] He returned to the plaintiff's home the next day and did not find him. Eventually he found him after some days and the plaintiff refused to provide him with Mandla's cellphone number. He therefore could not obtain a statement from Mandla. He only managed to obtain statements from the deceased's sisters and they all said the plaintiff's statement about him having a love relationship with the deceased is not the truth.

[33] Under cross-examination it was put to him that when the plaintiff was arrested in July 2011, he told the police about his *alibi* and that he had a secret love relationship with the deceased. Further that they were together at

Mandla, his friend's place. He disagreed and maintained that according to the information that he had, the deceased did not know the plaintiff.

[34] He denied that there were two panties at the crime scene, one pink and one white in colour and only one of them was taken to the laboratory. Further that there was a mixed-up of the exhibits and when the DNA report became available, it was rectified without conveying the information to the plaintiff.

[35] He denied that there was no evidence against the plaintiff and despite this, the defendants continued to keep him in custody for three years. He denied any malice on the part of the defendants and maintained that throughout their investigation, the defendants were satisfied that there was a case against the plaintiff.

[36] All the evidence which he collated during his investigation was forwarded to the Public Prosecutor. He could not investigate the plaintiff's *alibi* without his co-operation.

[37] Mrs Antoinette Kloppe testified that she was a prosecutor for 38 years. She is retired. From 2009 she was a Regional Court Prosecutor and in the main, she handled rape and murder cases. She only got involved in the criminal matter against the plaintiff when it was transferred to the Regional Court. She corroborated the evidence of Sgt Mashaba that prior to the arrest of the plaintiff there was no suspect. The case was only enrolled after the DNA evidence was received from the laboratory. Fluid like semen was found in the vagina of the deceased and sent to the laboratory.

[38] The plaintiff was arrested and he applied for bail. Based on the defence that he disclosed at the bail hearing, statements were obtained from the deceased's family members which all said the deceased did not reside in Carolina.

[39] The evidence that was in the docket when the matter came to the Regional Court, which she evaluated when she prepared for trial, was that the plaintiff was linked to the offences through the DNA report. She also had the affidavit of the plaintiff which was before the district court when he applied for bail wherein he disclosed a defence of sexual intercourse with the deceased with consent. There was also a *post mortem* report which was compiled after a *post mortem* was conducted on the body of a 15 years old girl who died of multiple injuries.

[40] Furthermore, there was a photo-album with photos that depicted the place where the deceased's body was found in the veld. The body was naked from the waist down. A panty of the deceased was found next to her body and the T-shirt she was wearing was pulled up and her breasts were exposed. The position in which she was found and the semen that was found in her vagina indicated that she was raped before she was murdered.

[41] She considered the defence that was raised by the plaintiff in his bail hearing. In her view this aspect was addressed by the family members of the deceased in the statements they made to the police where they mentioned that the deceased resided in Witbank where she attended school and she only visited her sister in Carolina for December holidays. Further to this the sister of the deceased said in her statement that on the night of 10 December

2009 to 11 December 2009 in the morning, the deceased was with her at her home in Silobela (Carolina). They spent the night together in one room. Later in the day they accompanied each other to Carolina town where they separated. The sister sustained injuries when they were in Carolina town and had to go to the hospital.

[42] The sister further stated that the plaintiff was not known to them. He could not have been in a relationship with the deceased as she would have known about it. There was also a statement of a friend of the deceased who said she was with her on the night of 12 December 2009 when they were accosted by an unknown male person.

[43] Further to this, she consulted with a sister of the deceased prior to proceeding with the trial. The sister confirmed what she said in her statement. It would have been unlikely for the plaintiff and the deceased to have been involved in a love relationship. She was satisfied that if the deceased's sister's statement was accepted in court, it would show that the plaintiff's version was not reasonably possibly true.

[44] The plaintiff's version that he and the deceased spent the night of 10 December 2009 at Mandla's house was rebutted by the Investigating Officer's statement that he asked the plaintiff to point out Mandla to him and the plaintiff did not co-operate. When she evaluated this evidence holistically, she was satisfied that the State had sufficient evidence to prosecute the plaintiff and there was a reasonable and probable cause to do so. She then decided to continue with the prosecution of the plaintiff and the trial proceeded.

[45] If the deceased had sexual intercourse with someone else and not the plaintiff one would have expected that person's DNA and not that of the plaintiff.

[46] There was no need whatsoever for the State to request the Investigating Officer to obtain the plaintiff's employer's statement. The offence was committed at night and not at the employer's premises.

[47] The mistake on the case numbers that appeared on the DNA results became immaterial when the plaintiff raised a defence of sexual intercourse with the deceased by consent.

[48] The plaintiff was acquitted in terms of section 174 of the Criminal Procedure Act based on a credibility finding the magistrate made regarding the evidence of the deceased's sister, something which the State did not expect.

[49] She corroborated Sgt Mashaba's evidence that after the plaintiff's bail was withdrawn, he never applied for bail again and he remained in custody until the case was finalised.

Applicable legal principles

[50] In order to succeed in a claim based on malicious prosecution a plaintiff must establish that:

(a) the defendant –

(i) set the law in motion (instituted or instigated the proceedings);

(ii) acted without reasonable and probable cause; and

(iii) acted with malice (or *animo injuriandi*) and

(b) that the prosecution failed.¹

[51] Whilst there may be a measure of overlap between the first three requirements, they remain separate elements of the cause of action and the plaintiff bore the *onus* to establish each distinctly.²

[52] Reasonable and probable cause in the context of this claim means “*an honest belief founded on reasonable grounds that the institution of the proceedings is justified*”.³ The concept, as is stated in *Relyant Trading (Pty) Ltd v Shongwe*,⁴ involves a subjective and an objective component:

“*The requirement for malicious arrest and prosecution that the arrest and prosecution be instituted ‘in the absence of reasonable and probable cause’ was explained in Beckenstrater v Rottcher and Theunissen [1955 (1) SA 129 (A) at 136A-B] as follows:*

‘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

¹ See *Minister of Justice & Constitutional Development & Others v Moleko* 2009 (2) SACR 585 (SCA); and *Woji v Minister of Police* 2015 (1) SACR 409 (SCA) para [32].

² *Relyant Trading (Pty) Ltd v Shongwe & Another* [2007] 1 All SA 375 (SCA) para [14]; and *Minister of Safety and Security & Another v Lincoln* 2020 (2) SACR 262 (SCA) para [21].

³ *Minister of Justice and Constitutional Development v Moleko*, *supra*, at para [20]; *Minister of Safety and Security v Lincoln*, *supra*.

⁴ *Supra*.

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.'

It follows that a defendant will not be liable if he or she held a genuine belief founded on reasonable grounds in the plaintiff's guilt. Where reasonable and probable cause for an arrest or prosecution exists, the conduct of the defendant instigating it, is not wrongful. The requirement of reasonable and probable cause is a sensible one: 'For it is of importance to the community that persons who have reasonable and probable cause for a prosecution should not be deterred from setting the criminal law in motion against those whom they believe to have committed offences, even if in doing so they are actuated by indirect and improper motives.'

[53] Chuks Okpaluba in an article called "*Reasonable & Probable Cause in the Law of Malicious Prosecution*",⁵ said the following:

"The requirement that the plaintiff in an action for malicious prosecution must prove a lack of reasonable and probable cause to initiate, instigate or continue the prosecution on the part of the instigator or prosecutor is one of the four elements of that cause of action. It is a vital link between the lawfulness of the prosecution and the state of mind of the defendant. Again whether a prosecution is wrongful or lawful depends on whether there was a reasonable or probable cause coupled with the animus injuriandi of the defendant in instigating,

⁵ A Review of South Africa & Common Wealth Decision [April 2013 Potchefstroom Electronic Law Journal 2013 (16) PER/PEL]

initiating or continuing it. It is not whether the prosecutor possessed evidence to secure a conviction since that is for the trial court to decide after the conclusion of the evidence; but, the honest belief by the prosecutor that, having carefully collected and objectively assessed the available information, the plaintiff was probably guilty of the crime. In coming to that decision the prosecutor must have grappled with both the subjective and objective elements in the exercise of that discretion.”

[54] The Supreme Court of Appeal in *Minister of Police and Another v Du Plessis*⁶ said the following:

“[29] In Democratic Alliance v President of the RSA and Others [2012] 1 All SA 243 (SCA) this Court, after a discussion concerning prosecutorial independence in democratic societies quoted with approval, the following part of a paper presented at an international seminar by Mr James Hamilton, a then substitute member of the Venice Commission and Director of Public Prosecution in Ireland:

‘Despite the variety of arrangements in prosecutor’s offices, the public prosecutor plays a vital role in ensuring due process and the rule of law as well as respect for the rights of all the parties involved in the criminal justice system. The prosecutor’s duties are owed primarily to the public as a whole but also to those individuals caught up in the system, whether as suspects or accused persons, witnesses or victims of crime. Public

⁶ 2014 (1) SACR 217 (SCA).

confidence in the prosecutor ultimately depends on the confidence that the rule of law is obeyed.'

We should all be concerned about the maintenance and promotion of the Rule of Law. Given increasing litigation involving the NDPP, these principles cannot be repeated often enough. We ignore them at our peril.

[30] A prosecutor exercises a discretion on the basis of the information before him or her. In *State v Lubaxa* 2001 (2) SACR 703 (SCA) para 19 this Court said the following:

'Clearly a person ought not to be prosecuted in the absence of a minimum of evidence upon which he might be convicted, merely in the expectation that at some stage he might incriminate himself. That is recognised by the common law principle that there should be "reasonable and probable" cause to believe that the accused is guilty of an offence before a prosecution is initiated ... and the constitutional protection afforded to dignity and personal freedom (s10 and s12) seems to reinforce it. It ought to follow that if a prosecution is not to be commenced without that minimum of evidence so too should it cease when the evidence finally fails below that threshold.'

Discussion

[55] The plaintiff's claim against the defendants was formulated in his particulars of claim as follows:

"On or about the 29th July 2011 at Carolina, the defendants wrongfully and maliciously set the law in motion by:

- 5.1 Charging the plaintiff with alleged charges of rape and murder, even after the Plaintiff furnished them with an alibi;*
- 5.2 By insisting that the Plaintiff be detained without bail without any evidence to warrant the criminal charges against the Plaintiff's detention until 10 August 2011 when the Plaintiff was granted bail of R1 500,00 (one thousand five hundred rand);*
- 5.3 By re-arresting the Plaintiff on 29 December 2011 and withdrawing his bail even after same was granted by the Carolina Magistrate's Court on 10 August 2011;*
- 5.4 By again insisting that the Plaintiff be detained without bail, without evidence to warrant criminal charges or the Plaintiff's detention until 16 April 2014 when he was discharged in terms of section 174 of the Criminal Procedure Act, 51 of 1977.*

6.

- 6.1 When so charging and detaining the Plaintiff, the Defendants had no reasonable cause for doing so nor did they have any reasonable belief in the truth of the information at their disposal on which the Plaintiff was arrested, detained and charged on 29 July 2011 and 29 December 2011.*

6.2 *The defendants' conduct was actuated by malice and/or animus iniuriandi."*

[56] The ineluctable evidence is that the plaintiff was linked to the murder and rape of the deceased through DNA evidence. The body of a female young person who was raped and murdered, was found next to a railway station with multiple injuries. No suspect could be found at the time. Fluid like semen was found in the vagina of the deceased when the *post mortem* examination was conducted and sent to the laboratory.

[57] The plaintiff was previously suspected of rape which was committed in 2008. His DNA sample was collected and stored in the laboratory. The DNA sample that was collected from the deceased matched the sample of the plaintiff that the laboratory had at the time. In a letter from the laboratory dated 17 August 2010 to the SAPS Carolina the following is stated:

*"DNA INFORMATION REPORT: REQUEST FOR A CONFIRMATION
BLOOD SAMPLE*

CAROLINA CAS 36/01/07 (4890/08)

CAROLINA CAS 58/12/09 (294/10)

1. *We have received information that the suspect in CAROLINA CAS 36/01/08 (4890/08) (05D3AA0728MX, JG GUMBI) was possibly involved in CAROLINA CAS 58/12/09 (294/10). The case needs to be further investigated to explain the presence of the suspect at this crime scene.*

2. *In order to verify this information for further evidence, a blood sample (i.e. confirmation blood sample), should be obtained from the suspect (05D3AA0728MX, JG GUMBI) and submitted to the Biology section in Pretoria for the confirmation of the DNA hit.*

AND/OR

Reference sample of possible suspect (NGCOBO SJ, 06D1AF1194XX) CAROLINA CAS 58/12/09 (294/10) was provided and this suspect was excluded as the possible donor of the DNA result obtained on the exhibits ..."

[58] A fresh blood sample was subsequently extracted from the plaintiff and sent to the laboratory. The DNA results of this sample confirmed what was stated in the letter referred to above that the plaintiff was involved in the murder and rape of the deceased.

[59] The deceased's body was discovered on 14 December 2009. In his evidence the plaintiff incorrectly mentioned the dates of 10 and 11 December 2010 as the dates he was with her. According to the plaintiff despite explaining the presence of his DNA on the deceased to the police, they arrested him.

[60] Sgt Mashaba denied this and maintained that he only got to know of the plaintiff's defence on the day of his first appearance in court from what purported to be a confession the plaintiff made before a magistrate on 1 August 2011. The information was further confirmed in an affidavit made by the plaintiff when he applied for bail. He then investigated the plaintiff's

defence by interviewing the members of the deceased's family, the deceased's boyfriend and the deceased's friend who was the last person to be with her prior to her death. From the information he gathered the plaintiff and the deceased did not know each other.

[61] The plaintiff accuses Sgt Mashaba of not verifying his defence as he did not go to Mandla even after he had provided him with his residential address. He denied that he refused to provide Sgt Mashaba with Mandla's cell phone number. Without repeating Sgt Mashaba's evidence, it is clear that the plaintiff was not co-operative in ensuring that Sgt Mashaba meets with Mandla, his alibi witness. Sgt Mashaba did not know Mandla. At some stage he was told by the plaintiff that he was somewhere in Ermelo. If the explanation for the presence of the plaintiff's DNA on the deceased was the truth as he alleges, there would not have been any difficulty for the plaintiff to provide Sgt Mashaba with Mandla's cell phone number and residential address, if any, to enable him to do his work. After testifying that he left the deceased at Mandla's house on the morning of 11 December 2009, under cross examination he mentioned the presence of his sister at the place and that he left the deceased with his sister. It was strange that he could not explain why the police did not obtain his sister's statement that could have confirmed his defence. When asked about the whereabouts of his sister, he was quick to say she passed on when he was in custody.

[62] The statement of Ms Madonsela who was with the deceased on the night of 12 December 2009 was made on 18 December 2009. Sgt Mashaba testified that the statement could not assist his investigation because Ms

Madonsela indicated that the incident happened at night in the dark. She would not identify the perpetrator.

[63] Sgt Mashaba further testified that from the statements obtained from the deceased's sisters, they all indicated that the plaintiff's defence relating to his secret love relationship with the deceased was not the truth.

[64] Sgt Mashaba's evidence was corroborated by Mrs Klopper who added that she consulted with the deceased's sister, Ms Ntombifuthi Martha Shongwe prior to the trial. Ms Shongwe confirmed the contents of the statement she made to the police that on the night of 10 December 2009, the deceased was at home in Silobela the whole day and they spent the night together in one room. The following day on 11 December 2009 the deceased accompanied her to Carolina town when they separated.

[65] The defendants' evidence is that the date of the deceased's death and rape is unknown. Her family members last saw her on 11 December 2009 while Ms Madonsela was with her on 12 December 2009.

[66] Mrs Klopper's evidence explaining what information was in the docket when the matter was enrolled in the district court, when it came to the Regional Court and what she considered when she continued with the prosecution of the plaintiff and eventually bringing the matter to trial, is on record. She was adamant in her evidence that if the deceased had sexual intercourse with someone else and not the plaintiff, one would have expected that to find that person's DNA and not that of the plaintiff.

Did the defendants set the law in motion?

[67] It is clear from Sgt Mashaba's evidence that all he did was to investigate the matter, collect the evidence and forward it to the DPP. He was not responsible for the prosecution of the plaintiff. At all times he acted on the instructions and under the direction of the Office of the DPP.

[68] The plaintiff conceded under cross examination that it was not wrong for the police to re-arrest him after he was granted bail and thereafter for his bail to be withdrawn after it was discovered that he failed to disclose his previous convictions when he applied for bail. There was no evidence that he subsequently made another application for bail after his bail was withdrawn as he testified.

[69] An issue was raised during the cross-examination of Sgt Mashaba and Mrs Klopper and also in the plaintiff's heads of argument that the plaintiff was prosecuted on the basis of a defective DNA report which Sgt Mashaba discovered on 14 September 2011 and rectified. Further that there was no reasonable and probable cause to prosecute or continue to prosecute him on the basis of that DNA report which both the police and the prosecutor were aware of and that the prosecution thereof was malicious.

[70] I must state from the onset that this issue was not pleaded. It only came for the first time when the defendants' witnesses were cross-examined. Even then I will briefly deal with it. The evidence of Sgt Mashaba and Mrs Klopper regarding this issue is on record. Both witnesses were extensively cross-examined on the issue. Sgt Mashaba's reply to a question as to what was rectified on the DNA result (A16) as per the entry that he made in his investigation dairy on 14 September 2011 was that he cannot remember.

Later on he testified that the lady who was typing the report put an old number in the report instead of the new one. He noticed that the exhibit number was incorrect and then wrote a letter to the laboratory correcting it. He was adamant that the report was not wrong. According to him the sample was correct. He explained that the original statement had to be rectified because of the wrong exhibit numbers. When he phoned the laboratory and alerted them of the problem, they said they had already analysed the samples and inserted the correct exhibit numbers.

[71] The two witnesses for the defendant disputed that the plaintiff was prosecuted on a defective DNA report. Mrs Klopper testified that she cannot comment on what had to be rectified on the DNA report. The plaintiff admitted the DNA results by conceding that the DNA that was found from the deceased's vagina was his because he had sexual intercourse with her with consent. What he disputed was the chain of evidence. At the time when the prosecution of the plaintiff was instituted, there was a section 212(4) statement (A16) which is *prima facie* evidence by mere production thereof that the plaintiff was linked to the offences through his DNA profile. She was clear in her evidence that she does not know what was rectified and cannot confirm whether that which was rectified changed the results. What she could confirm was that the enrolment was based on the *prima facie* evidence contained in the section 212(4) statement as it was available on the date of enrolment. She denied that the case against the plaintiff was built after the prosecution was instituted and that when she took over the docket in the Regional Court, there were shortcomings which she tried to rectify.

[72] She testified that the DNA results rested on serial numbers of exhibits and if there was a mistake in the serial numbers of the exhibits used to obtain the DNA results, the State would not have prosecuted using that sections 212(4) statement. What was rectified could not have been the contents of the actual analysis otherwise they would not have used that report to institute the prosecution of the plaintiff from the beginning.

[73] It is clear from the evidence of Sgt Mashaba that the mistake on the exhibit numbers that had to be rectified was a genuine and *bona fide* mistake made in the laboratory. There is already evidence on record that there was no suspect in the criminal case against the plaintiff. He was linked to the offences committed in 2009 through his DNA profile that was stored in the laboratory in 2008 and he admitted that the DNA that was found on the deceased was his.

[74] No evidence was presented by the plaintiff that Sgt Mashaba did anything more than one would expect from a police officer in the circumstances. The prosecution occurred at the instance of the DPP. In my view the plaintiff failed to prove that the first defendant instigated or instituted the prosecution against him. The claim against the first defendant can therefore not succeed.

Was there any lack of reasonable and probable cause?

[75] In his heads of argument Mr Jacobs for the plaintiff submitted that the court should disregard the affidavits referred to by Sgt Mashaba in his evidence as the authors thereof were not called to testify. He claims that in the pre-trials as well as his opening address, the plaintiff clearly stated that

the status of the documents is what they purport to be, without admitting the content thereof. Further that it was agreed that only documents referred to in evidence shall be taken into account by the court.

[76] These affidavits are statements which were made to Sgt Mashaba during his investigation. They form part and parcel of the docket that was presented to the DPP for purposes of applying its mind and exercising its discretion to prosecute the plaintiff. They were referred to in evidence and the parties agreed that they should be taken into account by the court. I cannot therefore disregard them. They should be assessed together with the totality of the evidence before me.

[77] The answer to the question whether there was reasonable and probable cause does not lie in the question whether the prosecutor possessed evidence to secure a conviction but the honest belief by the prosecutor that having carefully collected and objectively assessed the available information, the plaintiff was guilty.

[78] I am satisfied from the evidence of Mrs Kloppe that she carefully considered the evidence that was before her in the docket. She mentioned in her evidence that amongst the documents that were in her possession, there was a post-mortem report. According to the evidence on the post-mortem report, the deceased was 15 years old when she died. In the light of this evidence, I am of the view that the evidence of the plaintiff that prior to the incident he was in a secret love relationship with the deceased, is not probable.

[79] Further evidence was that Mrs Kloppers applied her mind to the defence raised by plaintiff regarding the presence of his DNA on the deceased and was satisfied from the evidence of the deceased's sisters that his version could not be reasonably possibly true. I agree with her in this regard.

[80] The deceased was very young. The evidence of Ms Madonsela that an unknown male person who accosted her and the deceased threatened to kill anyone of them he would catch resulting in them running in different directions and her observation of the deceased being chased by him, support the information in the docket pertaining to the offences. I therefore have difficulty in accepting the version of the plaintiff explaining the presence of his DNA on the deceased. It is, in my view, improbable. It is rejected as false.

[81] Another aspect was raised which revolved around the issue of the panties allegedly found at the scene, a white and a pink panty that was referred to in the investigation diary. This aspect is, in my view, neither here nor there. The DNA evidence that was relied upon in this matter was found in the vagina of the deceased.

[82] Having said that I conclude that there was reasonable and probable cause to prosecute the plaintiff.

Did the DPP act with malice?

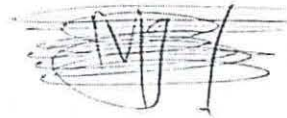
[83] Having regard to the conclusion that I have arrived at *supra* that there was reasonable and probable cause to prosecute the plaintiff, I find that the

plaintiff has failed to establish that the instigation or continuation of his prosecution by the second defendant was actuated by malice.

[84] There is no dispute that the prosecution of the plaintiff failed.

[85] It therefore follows that the plaintiff has failed to discharge the onus he bore to establish each of the requirements in a claim based on malicious prosecution.

[86] Consequently, the plaintiff's claim against the defendants is dismissed with costs.



M J TEFFO
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances

For the plaintiff	G Jacobs
Instructed by	Loubser Van der Walt Inc
For the Defendants	P Managa
Instructed by	State Attorney Pretoria
Heard on	11 April 2022
Handed down on	16 August 2022