




**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

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| (1) | REPORTABLE: No |
| (2) | INTEREST TO OTHER JUDGES: No |
| (3) | REVISED |
| <u>02 JUNE 2023</u> |  |
| DATE OF JUDGMENT | SIGNATURE |

CASE NO: 73663/2016

In the matter between:

HOSEA MADIME NKOGATSE

PLAINTIFF

And

MINISTER OF POLICE

FIRST DEFENDANT

THE NATIONAL DIRECTOR OF PUBLIC
PROSECUTIONS

SECOND DEFENDANT

This judgment is issued by the Judge whose name is reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on CaseLines by the Judge or her Secretary. The date of this judgment is deemed to be 02 June 2023.

JUDGMENT

COLLIS J

INTRODUCTION

1. The plaintiff's action against the first and second defendants is premised against the first defendant on their alleged conduct of unlawful arrest and detention and against the second defendant on their alleged conduct of malicious prosecution. The plaintiff has abandoned his claim of unlawful arrest and detention against the first defendant and is only proceedings against the second defendant.

ISSUES TO BE DETERMINED

2. The issue that this court was called upon to determine, as against the second defendant is whether the prosecution of the plaintiff was lawful.

3. The plaintiff's claim is premised on two of arrests that resulted in prosecutions. The first prosecution resulted in the plaintiff being found guilty and sentenced to 15 years imprisonment.

4. This conviction and sentence was set aside on special review and remitted back to the *court a quo* for a retrial before a different presiding officer. The reason for the conviction and sentence to be set aside on review was as a result of the plaintiff not having been represented by an attorney who had right of appearance in that court.

5. The plaintiff was then re-arrested and charged again. He then appeared before a different presiding officer. During the second prosecution he was found not guilty and discharged terms of section 174 of the Criminal Procedure Act. This transpired on 29 October 2015.

6. In respect of the claim for malicious prosecution this court was called upon to determine the circumstances of the second prosecution which was instituted and terminated in favour of the plaintiff, i.e whether such prosecution was unreasonable and without probable

cause and further whether same was malicious. The remaining two requirements are common cause between the parties.

BACKGROUND

7. The plaintiff is a former policeman who was with his friends on the 10 June 2007. On the day of the incident, he was driving his Citroen motor vehicle and Lufuno Rabumbulu (accused number 2) was driving VW Golf. They were busy enjoying themselves by indulging in drinking liquor.

8. Along their journey the plaintiff's motor vehicle collided with the VW Golf which Lufuno was driving and the occupants of the VW Golf climbed into the plaintiff's Citroen. According to the plaintiff's testimony they were about twelve (12) occupants in his vehicle as a result.

9. At Castenhof Clinic, along Allandale Road, Lufuno suggested that all the men got out of the plaintiff's car to avoid damaging it. Allandale Road is a dual carriage road. Loti remained in the plaintiff's vehicle. The plaintiff then drove with the girls and Loti towards a filling station in the direction of Ivory Park. Lufuno and the other men were then to catch a lift to Ivory Park.

10. The plaintiff drove further and stopped at a nearby filling station. He dropped the ladies and drove back to pick up Lufuno and the others. That was the time when Lufuno and the others got a lift from a red Ford Focus driven by Simphiwe Kiyane with Phumzile Ntseke (the deceased) as a passenger. The plaintiff then drove back to the filling station, picked up the ladies and he followed towards Ivory Park.

11. At the robot at Rabie Ridge, Lufuno took out his firearm and pointed at the driver of the Ford Focus, Simphiwe Kiyane and instructed him to get out of the car. Simphiwe got out of the vehicle and ran away to the opposite direction leaving his car and Phumzile behind. Phumzile also tried to escape but he was grabbed and pushed back into the car. They drove away with Phumzile to the direction of Ivory Park.

12. At or near Ivory Park Community Hall, Lufuno shot Phumzile twice. He died on the spot. Xolani and Nkosana took the deceased out of the car as the group proceeded to King's Palace at Tembisa. They abandoned the Ford Focus near King's Palace in Tembisa. The robbery of the Ford Focus and the killing of Phumzile happened out of sight of the plaintiff and the passengers in his vehicle.

13. According to Simphiwe Kiyane, the next car that approached since he was robbed of his Ford Focus was that of the plaintiff. Simphiwe Kiyane ran in front of the plaintiff's car, stopping it. The plaintiff stopped. It was at a robot. Simphiwe Kiyane threw himself into the car through a window. He told the plaintiff that he had been robbed of his car. The plaintiff then took Simphiwe to Rabie Ridge police station to open a case. At the police station, the plaintiff handed Simphiwe Kiyane to the police and left.

14. Lufuno called the plaintiff to come and pick the group up at King's Palace. The plaintiff indeed came and took them home in groups. The Ford Focus was surrounded by the police.

15. The plaintiff was arrested on the 19 June 2007 at Ivory Park Police Station by Captain Seretlo on charges of robbery with aggravating circumstances, kidnapping and murder under Ivory Park Cas 299/06/2007. This then in short, the circumstances leading up to the plaintiff's arrest.

ONUS

16. In respect of the malicious prosecution, the plaintiff bears the *onus* to prove that the prosecution was malicious.

THE LAW

17. As for the plaintiffs' claim of malicious prosecution the plaintiffs must allege and prove that the prosecution:

- (a) set the law in motion – they instigated or instituted the proceedings;
- (b) acted without reasonable and probable cause;
- (c) acted with malice (or *animo iniuriandi*); and
- (d) the prosecution has failed.¹

18. In *Magwabeni v Liomba*², the SCA defined malicious prosecution as follows:

“Malicious prosecution consists of the wrongful and intentional assault on the dignity of a person encompassing his good name and privacy....”

19. It is common cause that the defendant set the law in motion and that the prosecution failed. The questions before the court are whether the

¹ *Minister of Justice and Constitutional Development and Others v Maleko* [2008] 3 ALL SA 47 (SCA); 2009 (2) SACR 585 (SCA).

² (198/2013) [2015] ZASCA 117 (11 September 2015)

second defendant acted without reasonable and probable cause and whether the prosecution was malicious.

20. In the decision *Beckenstrater v Rottcher and Theunissen* (1955) 1 SA 129 (A) at 136A-B; Schreiner JA formulated the test for absence of reasonable and probable cause as follows:

“When it is alleged that a defendant had no reasonable cause for prosecuting.....this [means] that he did not have such information as would lead a reasonable man to conclude that the plaintiff had probably been guilty of the offence charged; if, despite his having such information, the defendant is shown not to have believed in the plaintiff’s guilt, a subjective element comes into play and disproves the existence, for the defendant, of reasonable and probable cause.”

HAS THE SECOND DEFENDANT ACTED WITHOUT REASONABLE OR PROBABLE CAUSE.

21. In assessing as to whether the second defendant acted without reasonable or probable cause the decision of Moleko,³ is instructive.

³ 2131/07) [2008] ZASCA 43 (31 March 2008) at paragraphs 63 and 64 on page 31.

“5.3.1 *Animus injuriandi* includes not only the intention to injure, but also consciousness of wrongfulness:

In this regard *animus injuriandi* (intention) means that the defendant directed his will to prosecuting the plaintiff (and thus infringing his personality), in the awareness that reasonable grounds for the prosecution were (possibly) absent, in other words, that his conduct was (possibly) wrongful (consciousness of wrongfulness). It follows from this that the defendant will go free where reasonable grounds for the prosecutions were lacking, but the defendant honestly believed that the plaintiff was guilty. In such a case the second element of *dolus*, namely of consciousness of wrongfulness, and therefore *animus injuriandi*, will be lacking. His mistake therefore excludes the existence of *animus injuriandi*.

5.3.2 The defendant must thus not only have been aware of what he or she was doing in instituting or initiating the prosecution, but must at least have foreseen the possibility that he or she was acting wrongfully, but nevertheless continued to act, reckless as to the consequences of his or her conduct (*dolus eventualis*). Negligence on the part of the defendant (or, I would say, even gross negligence) will not suffice.”

22. The decision *Beckenstrater v Rottcher and Theunissen* quoted *supra* described the requirement for malicious arrest and prosecution to be instituted in the absence of reasonable and probable cause 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 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 so doing they are actuated by indirect and improper motives.’”

23. In order to assess as to whether the second defendant acted without reasonable or probable cause, the evidence of Mr Maphiri is instructed.

EVIDENCE

24. In this regard, Mr Maphiri testified that he was a Regional Court prosecutor at the time of the prosecution of the plaintiff and that he knew his responsibilities in terms of the Prosecutions Directives.

25. The prosecutor testified that in respect of the initial prosecution he got involved with the prosecution after the decision had already been taken to prosecute the plaintiff. When he got involved, he read the case docket before him and was satisfied with the decision to prosecute the plaintiff as a *prima facie* case was made out against the plaintiff. The state had three witnesses, namely Thabo Mokgale, Petunia and Simphiwe with Thabo Mokgale being a section 204 witness. The prosecutor also testified that he was also the prosecutor when the first conviction and sentence was set aside on review and a decision was thereafter taken to prosecute the plaintiff *de novo*.

26. At all material times he testified that he harboured no animosity towards the plaintiff as he was with him during the first prosecution. In relation to the second prosecution upon the matter being remitted back to the trial court to start the trial *de novo* he was satisfied that the evidence

contained in the docket was sufficient to establish a *prima facie* case against the plaintiff and it is for this reason that he even was able to add an additional charge of defeating the end of justice which was not initially proffered against the plaintiff. In addition, he also had the knowledge that the first prosecution resulted in a guilty conviction and sentence albeit that the conviction and sentence was set aside on review.

27. He testified that the decision to prosecute was therefore supported by objective facts and there were reasonable prospects of another successful prosecution. The decision to prosecute according to him was therefore rational.

28. Furthermore that even though there was a court order from the High Court ordering the case to be tried *de novo* and a directive from the Provincial Director of Prosecution to prosecute the plaintiff, he first satisfied himself that there was a *prima facie* case against the plaintiff. He indeed was satisfied that a *prima facie* case was made out against the plaintiff.

29. On this basis he testified that a reasonable and probable cause existed which warranted the second prosecution and it is on this basis that the second prosecution ensued.

30. In respect of the second prosecution counsel on behalf of the second defendant had argued, that the plaintiff had failed to prove that his

prosecution was without reasonable and probable cause and furthermore he failed to prove that the defendant acted with *malice*.

31. He further argued that the prosecution upon assessing the witnesses' statements took a decision to prosecute the plaintiff and that it would have been a dereliction of duty if he had not done so.

32. On point the counter-argument advanced on behalf of the plaintiff, was that this Court should first determine as to whether there was one or two prosecutions. In this regard the plaintiff contends that the prosecution commenced on the 21 June 2007 when the plaintiff appeared before the court for the first time and terminated on the 29 October 2015 when he was discharged in terms of Section 174 of the Criminal Procedure Act 51 of 1977. The decision by the High Court to review and set aside the conviction and sentence did not result in a second decision to charge the plaintiff but that the second defendant proceeded with the initial decision to charge the plaintiff and made an election to add a further charge.

33. In contrast the second defendant contends that the prosecution commenced on the 21 June 2007 when the plaintiff appeared before the court for the first time and terminated on the 12 May 2011 when the plaintiff was convicted and that a new prosecution commenced on the 19

May 2015 when the plaintiff appeared before the court for the first time in the *de novo* trial until 29 October 2015 when he was discharged.

34. The argument advanced on behalf of the plaintiff that two prosecutions ensued, to my mind is devoid of any merit. This I say so for the following reasons:

34.1 It is common cause between the parties that the first trial resulted in a conviction and sentence which was ultimately set aside on review.

34.2 It is further common cause that the setting aside of the conviction and sentence culminated in the plaintiff facing not only the initial charges once again but also an additional charge of defeating the ends of justice and that this trial proceeded *de novo* before a different presiding officer. If the initial prosecution was still persisted with, it would have the unintended consequences that no additional charges could be added to those initially faced by the plaintiff, or worse still that a court directs what charges should be proffered against an accused which will be against what falls within the exclusive purview of our Chapter 9 institution.

34.3 The inescapable conclusion must therefore be that the second trial ensued with a second prosecution before a different presiding officer and it is for this reason that I find that two prosecutions ensued and not one as contended for by counsel for the plaintiff.

35. The evidence presented by the prosecutor on point however was not supported by any witness statements contained in the case docket. During the testimony of Mr. Maphiri he was unable to refer this Court to any specific witness(es) statement that pointed to the culpability on the part of the plaintiff during the commissioning of these offences. The prosecutor in question was required to interrogate the contents of the case docket to establish the plaintiff's culpability in the commissioning of these offences and absent such evidence it cannot be said that evidence existed that established a reasonable and probable cause.

36. For these reasons I therefore find that the plaintiff has discharged his onus in proving this requirement for malicious prosecution.

WHETHER THE PROSECUTION ACTED WITH MALICE?

37. The further issue which calls for determination by this Court is that the plaintiff must show that his prosecution was actuated by *malice or action injuriandi*.

38. In *Patel v NDPP and others*,⁴ it was held that the prosecutor exercises his discretion on the basis of the information before him or her.

⁴2018 (2) SACR 420 (KZD) (13 June 2018).

39. As per the Moleko decision, the defendant in a claim for malicious prosecution must have, at the time of instituting the prosecution proceedings, foreseen the possibility that the institution of the said prosecution proceedings would in any event injure the plaintiff and/or amount to malicious prosecution and then reconciled with himself with the possibility.

40. On behalf of the second defendant the argument advanced was that the plaintiff has failed to meet the test for malicious prosecution as set out in the Maleko-decision quoted above.

41. In the matter of Relyant Trading (Pty) Limited v Shongwe⁵, the court held that:

“An arrest is malicious where that defendant makes improper use of the legal process to deprive the plaintiff of his liberty.”

42. In this regard the argument advanced on behalf of the plaintiff is that immediately upon his release on 18 May 2015, following the setting aside of his conviction and sentence, Warrant Officer Phaka, on the strength of an invalid warrant of arrest, arrested and detained the plaintiff on the same charges.

⁵2006 JDR 0720 SCA at para 4 on page 4.

43. As a result thereof, the plaintiff appeared before the court on 19 May 2015. In addition to being charged with the same charges as before a further charge of defeating the ends of justice was also added.

44. In assessing this requirement, the question that this court will need to answer is whether it can be said that the prosecutor, in deciding to prosecute the plaintiff in the circumstances of this case had the required intention to injure the plaintiff (*animus injuriandi*).

45. In *Moleko* quoted *supra* the court held as follows:⁶

“[63] Animus injuriandi includes not only the intention to injure, but also consciousness of wrongfulness:

‘In this regard animus injuriandi (intention) means that the defendant directed his will to prosecuting the plaintiff (and thus infringing his personality), in the awareness that reasonable grounds for the prosecution were (possibly) absent, in other words, that his conduct was (possibly) wrongful (consciousness of wrongfulness). It follows from this that the defendant will go free where reasonable grounds for the prosecution were lacking, but

⁶ Ibid at para 63 and 64

the defendant honestly believed that the plaintiff was guilty. In such a case the second element of dolus, namely of consciousness of wrongfulness, and therefore animus iniuriandi, will be lacking. His mistake therefore excludes the existence of animus iniuriandi.

[64] The defendant must thus not only have been aware of what he or she was doing in instituting or initiating the prosecution but must at least have foreseen the possibility that he or she was acting wrongfully, but nevertheless continued to act, reckless as to the consequences of his or her conduct (dolus eventualis). Negligence on the part of the defendant (or, I would say, even gross negligence) will not suffice”.

46. On behalf of the plaintiff it was argued that when the prosecutor made the decision to prosecute, he lacked evidence that would have justified his decision to prosecute the plaintiff beyond reasonable doubt. He made such a decision conscious of the fact that he lacked such evidence. He did so in direct contravention of the Code of Conduct for Prosecutors.

47. *In casu* Mr Maphiri was not only the prosecutor who conducted the initial prosecution but he was also the prosecutor when the trial proceeded *de novo*. As such he was aware of the paucity of evidence contained in the

case docket and still proceeded to embark on the second prosecution. It is for this reason that counsel had argued that the prosecutor had the required *animus iniuriandi/malice* when the prosecution ensued.

48. In addition counsel had also argued that the prosecutor knew that his conduct would result in the incarceration of the plaintiff for extended periods and he also knew that the prosecution of the plaintiff without evidence would infringe upon the plaintiff's his right to dignity.

49. The prosecutor by his decision taken, therefore directed his will towards the injury of incarceration of the plaintiff in circumstances where the plaintiff did not meet the standard of reasonable apprehension of guilt.

50. As the plaintiff was not even present, so counsel had argued, when the offences of kidnapping, robbery with aggravating circumstances and murder were committed, the second defendant, had insufficient evidence to prove the elements of the individual offences including the offence of defeating the ends of justice and as such the prosecutor acted with malice under the circumstances.

51. On behalf of the second defendant the argument advanced was that the prosecutor, having been involved in the initial prosecution had insight into the case docket and was able to ascertain the strength of the

prosecutions' case and on the basis of the contents of the case docket, had embarked on the second prosecution.

52. The evidence presented by the plaintiff that he was not present when the offences were committed and that he even transported the complainant to the police station remains uncontroverted. In addition, the case docket further contains no witness(es) statements pointing to the participation of the plaintiff in the commissioning of these offences which is indicative of a prosecution which was embarked upon with malice and an intention to injure. As such this Court is satisfied that the plaintiff has discharged his onus that the prosecution acted with malice.

QUANTUM

53. It is trite that the trial court has a discretion to award what it considers to be fair and adequate compensation.⁷ The court has to consider the facts of the particular case in the assessment of compensation.⁸ In assessing an appropriate award to be made, the correct approach is to have regard to all the facts of the particular case and to determine the quantum of damages on such facts"⁹

⁷ Road Accident Fund v Marunga 2003(5) SA 164 SCA at 169f

⁸ Minister of Safety and security v Seymour 2006 (6) SA 320 SCA at 325B.

⁹ Minister of Safety and Security v Tyulu 2009 (5) SA 85 (SCA) paragraph 26 at 930-F.

54. Any award made by a court must be fair to both parties.¹⁰ To the facts applicable in this case, the plaintiff testified that the prosecution was painful and humiliating and that the prosecution resulted in his incarceration. It was common cause between the parties that the plaintiff is a former police officer and as such it must have been a very humiliating and degrading experience for him, more so in circumstances where it already has been found that his prosecution was motivated by malice. In *casu* it is common cause that the second trial lasted for just over a five-month period.

55. In determining an appropriate award to be made by the court, this court was referred to a number a caselaw by either, parties to assess previous awards made by our courts. As per the particulars of claim, the plaintiff seeks an award of an amount of R 5 million in respect of his claim for malicious prosecution.

56. This amount so claimed by the plaintiff was premised on the incorrect stance adopted by counsel for the plaintiff that there was one prosecution in respect of which the plaintiff was incarcerated for an extended period of time instead of two prosecutions.

57. As already found by this court, there was in fact two prosecutions and it is the second prosecution which this court has found to be without

¹⁰ De Jong v Du Pisanie NO 2005 (5) SA 457 (HHA)

reasonable or probable cause and motivated by malice since there was no evidence at all that the plaintiff had committed these offences.

58. Any award thus made by the court would be based on the period since the second prosecution was embarked upon until the plaintiff was discharged in terms of section 174 of Act 51 of 1977.

COSTS

59. In as far as an appropriate costs order to be awarded in the event of the plaintiff being successful, the plaintiff had argued for costs on an attorney scale to be awarded to him as the prosecution was actuated by malice.

60. In the circumstances of this case, I do not believe that a punitive costs order is warranted.

ORDER

61. Consequently, the following order is made:

61.1 The second defendant should be ordered to pay the plaintiff an amount of R 500 000.00 (FIVE HUNDRED THOUSAND RAND) for General damages.

61.2 The second defendant is ordered to pay the plaintiff's costs on a party and party scale.

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C.J. COLLIS
JUDGE OF THE HIGH COURT OF
SOUTH AFRICA

APPEARANCES:

Counsel for the Plaintiff: Adv S Mbhalati

Attorney for the Plaintiff: Mokoena Attorneys

Counsel for the Defendants: Adv T T Tshivhase

Attorney for the Defendants: State Attorneys

Date of Hearing: 10 October 2022

Date of Judgment: 02 June 2023