Reportable:	YES / **NO**
Circulate to Judges:	YES / **NO**
Circulate to Magistrates:	YES / **NO**
Circulate to Regional Magistrates:	YES / **NO**

IN THE NORTH WEST HIGH COURT, MAFIKENG

CASE NO: 1766/2021

In the matter between:

MINISTER OF POLICE **1st Applicant/Defendant**

DIRECTOR OF PUBLIC PROSECUTIONS **2nd Applicant/Defendant**

and

MOLEBATSI MOSES KGOSIETSILE **Respondent/Plaintiff**

DATE OF HEARING : **22 FEBRAURY 2024**

DATE OF JUDGMENT : **29 FEBRUARY 2024**

FOR THE PLAINTIFF : **ADV. DU PLESSIS**

FOR THE RESPONDENT : **ADV. D SMIT**

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives via email. The date and time for hand-down is deemed to be 10h00 on 29 February 2024.

ORDER

Resultantly, the following order is made:

(i) The Notice of Bar served by the respondent on 19 January 2022 be uplifted.

(ii) The first and second applicants are granted condonation for the late delivery of their pleas.

(iii) The first and second applicants must file their pleas within ten (10) court days from the date of this order.

(iv) The first and second applicants are ordered to pay the costs of this application for the upliftment of the bar jointly and severally, the one paying the other to be absolved, on a party-and-party scale, to be taxed.

JUDGMENT

HENDRICKS JP

[1] This is an opposed application for the upliftment of bar, with ancillary relief. A concise history of this matter is as follows. On 13 May 2021 the respondent served a notice in terms of the Legal Proceedings Against Certain Organs of State Act 40 of 2002 on the applicants. On 07 October 2021 the respondent served a summons on the applicants. A notice to defend was filed on 04 November 2021. The applicants failed to deliver their plea within the prescribed time limit. A notice of bar was served on the applicant's attorney of record on 17 January 2022. On 06 June 2022 the respondent served the applicant's attorney of record with a default judgment application, by virtue of the fact that despite placing the applicants under bar, their pleas were still not filed. Only after the serving of the respondents', with a default judgment application, was the current application for upliftment of bar served on 29 June 2002, on the respondent's attorneys.

[2] In it's explanation for the delay, the applicants state the following:

> *"4.1 During September and a portion of October 2021 the office of the State Attorney experienced severe problems with the email servers and no emails could be received or sent. This was due to the cyberattack on the Department of Justice. This caused a delay in corresponding with the Applicants. It is so that each attorney in the office of the State Attorney deals with a substantial number of active files, being approximately between 600 to 800 filed. The cyberattack caused a massive backlog,*

and it is (with respect) so that this then caused a delay in dealing with this matter.

It is submitted that the relevance hereof is glaring. Every state attorney, with 600 to 800 files, suffered a backlog, which caused the inevitable consequence that matter could not be attended to in time.

The office of the State Attorney was also periodically closed for decontamination procedures, due to covid-19 cases. The Office was again closed for a few days in April 2022.

A delay was also caused in obtaining the docket and the relevant information from the concerned prosecutors.

The Attorney of the Applicants did not receive the notice of bar immediately, as she was on family responsibility leave. Therefore, even though the notice of bar was served on 17 January 2022, it only came to her attention on 14 February 2022.

From the email annexures to the Founding Affidavit it is evident that several attempts were made to obtain the required documents. It is submitted (with respect) that it is reasonable to accept that the backlog experienced and the interruptions due to the covid decontamination procedures made it difficult to immediately obtain the required documents."

[3] The respondent in opposition contend that good cause for the upliftment of the bar was not shown by the applicants. It was furthermore contended that the applicants' default is willful and that

the application for the upliftment of bar is brought for the sole purpose of frustrating the finalization of the respondents' (plaintiff's) claim in the action instituted. To reiterate, only after the default judgment application was served on 06 June 2022, did the applicants file and serve the current application for the upliftment of bar. From 04 November 2021 when the notice of intention to defend was served and filed, up until 06 June 2022 when the default judgment application was served and filed, was nothing done in furtherance of this matter. This period stretch over eight (8) months. The contention is that not only was the delay willful but the period of delay is not satisfactory explained.

[4] The element of willfulness is one of the factors to be considered in deciding whether or not the applicants have shown good cause.

See:
- **Du Plooy v Anwes Motors (Edms) Bpk** 1983 (4) SA 212 (OPA).
- **Gumede v Road Accident Fund** 2007 (6) SA 304 (CDP).
- **United Plant Hire (Pty) Ltd v Hills and Others** 1976 (1) SA 717 (A).
- **Marijean t/a Audio Video Agencies vs Standard Bank of SA Ltd** 1994 (3) SA 801 (C).

[5] A full, detailed and accurate account for the cause of the delay and the effect thereof must be furnished.

See: **Uitenhage Traditional Local Council v SA Revenue Service** 2004 (1) SA 292 (SCA).

The respondent contends further that the applicants' pleas are still not finalized, that is why a prayer is included that they be afforded an additional ten (10) days after the upliftment of the bar is granted. The further contention is that it effectively means that from October 2021 up until June 2023, a period of twenty (20) months, was insufficient to produce the pleas. This proposition is not entirely correct. The applicants state categorically that the pleas are drafted, as a copy thereof is attached to the replying affidavit and it is ready and just awaiting service. It is custom that a period be included in the order to specify within which time frame the pleas had to be filled.

[6] Not only did the applicants explain that they are not in willful default but they also state that they have a *bona fide* defence to the action instituted by the respondent. This coincide with the good cause shown to exist. In addition to explaining the failure to deliver their pleas, the applicants must also place before the court sufficient evidence from which it can be inferred that there is a *bona fide* defence to the action. It is not sufficient for the applicants merely to state that there is a *bona fide* defence. In order to establish a *bona fide* defence, the applicants must set out averments which, if established at the trial, would entitle them to the relief asked for. It is necessary to deal with the merits of the case or produce evidence that the probabilities are actually in their favour.

[7] In deciding whether sufficient cause has been shown, the basic principle is that the court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated, and they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempts to formulate a rule of thumb would only serve to harden of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus, a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay.

See: **Melane v Santam Insurance Co Ltd** 1962 (4) SA 531 (A).

[8] In substantiating the fact that there are good prospects of success in defence of this action, the applicants state that the arrest and detention was lawful and that the jurisdictional facts related thereto, had been met. It is submitted that the respondent was arrested by a police officer, who entertained a suspicion that the respondent was

guilty of committing the offence of murder, which is contained in schedule 1 of the Criminal Procedure Act 51 of 1977, and that such suspicion was based on reasonable grounds. The respondent was pointed out by his friend as being the person who committed the offence, and the respondent then provided to the police officer the knife he used in the stabbing. It is submitted that there was a proper investigation by the concerned police officer and in the circumstances a reasonable suspicion had been formed. It is further submitted that in these circumstances where the respondent handed over the knife used in the stabbing and showed the police the scene of the stabbing, that the search of the respondent would also have been with his consent and not unlawful.

[9] It is further submitted that a substantial portion of the detention period was due to the respondent himself. From the founding affidavit it is evident that on occasion the respondent abandoned bail, or that his legal representative were not present at court. It is submitted that this aspect not only affects the merits of the respondent's claim, but would also call for diligent consideration on the quantum claimed. It is denied that the second applicant (as second defendant) acted without reasonable and probable cause, and acted with malice (or animo injuriandi). The second applicant is able to show that it had an honest belief in the guilt of the respondent, which belief was objectively reasonable. It is submit that it is not necessary for the second applicant to have believed in the probability of a conviction, but rather

a belief that there exist sufficient grounds for bringing the respondent to trial.

[10] The claim is *inter alia* based on malicious prosecution. The requirements for a successful claim for malicious prosecution as set out by the Supreme Court of Appeal (SCA) in **Minister of Justice and Constitutional Development v Moleko** [2008] 3 All SA 47 (SCA) at paragraph [8] were restated in **Rudolph 7 others v Minister of Safety and Security & another** 2009 (5) SA 94 (SCA) at paragraph [16]. It entails that:

(a) the defendants set the law in motion (instigated or instituted the proceedings);
(b) the defendants acted without reasonable and probable cause;
(c) the defendants acted with malice (or animo injuriandi); and
(d) the prosecution failed.

[11] With regard to the second issue for determination, reasonable and probable cause as a requirement for a successful claim for malicious prosecution has two constituent elements, the one subjective and the other objective. The second applicant must not only 'subjectively have had an honest belief in the guilt of the respondent, but the belief must have been objectively reasonable, as would have been exercised by a person using ordinary care and prudence. ' The word "guilt", can be misleading. It is not necessary that the second

applicant must believe in the probability of a conviction. It is rather the existence of a belief that there exists sufficient grounds for bringing the respondent to trial.

[12] In actual fact, the second applicant need only to be satisfied that there is a proper case to lay before the court, or that there is a probable cause to bring the respondent to a fair and impartial trial. After all, the second applicant cannot judge whether the witnesses are telling the truth, and he cannot know what defence(s) the respondent may set up. Guilt or innocence is for the tribunal and not for the second applicant. In my view, good cause has been shown for the upliftment of the bar and the consequential filing of pleas by the applicants. An order to that effect ought to be made.

[13] Insofar as costs are concerned, the applicants prays for costs in their favour in the event of opposition by the respondent. The respondent to the contrary contend that the applicants should be mulcted with a punitive costs order as between attorney-and-client. I do not agree. In as much as the applicants pray for an indulgence from this Court, they should not be punished with a punitive costs order. The delay is satisfactory explained. It is understandable that due to circumstances beyond the control of the attorney of record for the applicants, and due to the fault on the part of the attorney, the delay is not squarely to be laid at the applicants door. The explanation proffered is reasonable. I am of the view that the applicants should pay the costs

as they seek an indulgence, and the respondent cannot be punished for defending the application. Costs should also be on a scale as between party-and-party, and be taxed.

Order

[14] Resultantly, the following order is made:

(i) The Notice of Bar served by the respondent on 19 January 2022 be uplifted.

(ii) The first and second applicants are granted condonation for the late delivery of their pleas.

(iii) The first and second applicants must file their pleas within ten (10) court days from the date of this order.

(iv) The first and second applicants are ordered to pay the costs of this application for the upliftment of the bar jointly and severally, the one paying the other to be absolved, on a party-and-party scale, to be taxed.

_____

R D HENDRICKS

JUDGE PRESIDENT OF THE HIGH COURT,

NORTH WEST DIVISION, MAHIKENG