



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

Case No: CA 89/2021

In the matter between:

MINISTER OF POLICE

APPELLANT

and

AYANDA MARULA

RESPONDENT

JUDGMENT

MBENENGE JP and KRÜGER AJ:

Introduction

[1] This is an appeal against a judgment delivered by the Regional Magistrate's Court, King Williams Town¹ in which the merits of a claim for malicious prosecution were decided in favour of the respondent.

[2] At the commencement of the hearing, condonation was granted for the late prosecution of the appeal and its reinstatement by the appellant, and for the respondent's late delivery of his heads of argument.

¹ Hereinafter conveniently referred to as 'the Regional Court' and used, interchangeably, with 'the Regional Magistrate.'

[3] To avoid confusion, reference will be made to the parties as they were in the Regional Court; the respondent, Ayanda Marula as ‘the plaintiff’, and the appellant, the Minister of Police as ‘the defendant’.

Background

[4] It was not in dispute that the plaintiff, in the company of three friends, drove to Ndlovini Township on 26 February 2013 to confirm an arrangement about the payment of money to them by the deceased and two others. At Ndlovini, one of the friends, Odwa Mhlaba,² stabbed the deceased with a knife, causing his death. Mhlaba reported to the South African Police Service³ on the same day that he had stabbed the deceased. He was arrested later that day. Two days later, he admitted in writing to having stabbed the deceased, adding that he had been acting in self-defence.

[5] On 27 February 2013, the plaintiff deposed to a statement regarding the incident to Warrant Officer Tweni.⁴ He admitted having been in the company of Mhlaba and others and having travelled together to and from Ndlovini in his vehicle on 26 February 2013 but recorded that he neither stabbed the deceased nor witnessed the stabbing.

[6] The plaintiff was arrested for, and charged with, the murder of the deceased by Tweni, on 5 March 2013. He appeared with his co-accused, including Mhlaba, in court on the same day on a charge of murder. The matter was postponed, and the plaintiff thereupon detained by order of the court.

[7] On 15 March 2013, the plaintiff was released on bail. Some months later, after several court appearances, on 22 November 2013, the murder charge against the plaintiff was withdrawn.

In the Regional Court

[8] The plaintiff testified that Tweni arrested him, despite knowing that he was not responsible for the death of the deceased. According to the plaintiff, Tweni informed him that he and the prosecutor decided that Mhlaba’s companions, including him, must be arrested. Tweni displayed a negative attitude towards him. He did not want to listen to him and arrested him despite his explanation that he did not kill the deceased. The plaintiff further

² Hereinafter referred to as ‘Mhlaba’.

³ Hereinafter referred to as ‘the SAPS’.

⁴ Hereinafter referred to as ‘Tweni’.

testified that Tweni told him that the deceased was his (Tweni's) herdsman and that they were from the same locality.

[9] Tweni testified that he was the investigating officer in the criminal matter concerning the murder of the deceased. He received the relevant docket on 27 February 2013 and collected witness statements, from among others, the plaintiff. The prosecutor, after the first appearance of Mhlaba in the district court on a charge of murder, and after reading the statements in the docket, instructed him to arrest the men who were with Mhlaba at the scene of the crime. This included the plaintiff. The prosecutor expressed the view that Mhlaba's companions may have been involved in the commission of the offence and instructed him to arrest and charge them as co-accused with Mhlaba. Based on this instruction, Tweni proceeded to arrest the plaintiff. Tweni conceded to knowing, at the time of the arrest, that the plaintiff did not kill the deceased. He denied that the deceased was his herdsman.

The impugned judgment

[10] The Regional Court was seized with a claim for malicious prosecution against the SAPS. From the record, it was evident that the plaintiff's claim for wrongful arrest and detention against the defendant was withdrawn at the commencement of the trial as it had prescribed.

[11] Relying on *Qwaba v Minister of Safety and Security*,⁵ the Regional Magistrate held that it was appropriate for a claim for malicious prosecution to be instituted against the Minister of Police. This was in response to Tweni's evidence that he acted on the instruction of the prosecutor. That evidence as well as the defendant's argument that decisions regarding prosecution fell exclusively in the domain of the National Prosecuting Authority⁶ were rejected, with the Regional Magistrate finding that, by placing reliance on the authority of the NPA to institute criminal prosecutions, the defendant attempted to escape liability for malicious prosecution.

⁵ [2018] ZAECHMC 32 para 35.

⁶ Hereinafter referred to as 'the NPA'.

[12] From that premise, the Regional Magistrate held that the arrest and the prosecution of the plaintiff were intertwined. Since an arrest without a warrant may be carried out by a peace officer who has a reasonable suspicion that a person committed a Schedule 1 offence,⁷ it was held that an arresting officer in the position of Tweni ought to have taken steps to confirm his suspicion as reasonable before arresting the plaintiff. Based on that finding, the Regional Magistrate focused the subsequent enquiry on the defendant's justification for the plaintiff's arrest.

[13] The absence of a written instruction to Tweni in the investigation diary resulted in the Regional Magistrate concluding that Tweni did not receive an instruction from the prosecutor.⁸ Even if an oral instruction had been given, she held, Tweni arrested the plaintiff without justification, knowing that he was innocent. As such, it found that the defendant set the law in motion without reasonable and probable cause. This triggered the malicious prosecution of the plaintiff which ended in the withdrawal of the charge against him, resulting in it being concluded that the plaintiff successfully proved his claim against the defendant.

The parties' contentions

[14] The appeal is predicated on two contentions namely, that the Regional Court erred in finding that Tweni set the law in motion against the plaintiff and that he did so with malice.

[15] Mr *Petersen*, for the defendant, submitted that the plaintiff failed to discharge the burden of proof on a balance of probabilities and that the Regional Magistrate conflated the requirements for claims based on unlawful arrest and malicious prosecution. He highlighted that the plaintiff failed to provide any evidence that Tweni played an active role in pursuing his prosecution. Such evidence, it was submitted, was required since the authority to prosecute rests constitutionally and statutorily with the NPA.

[16] In respect of malice, it was contended on behalf of the defendant, that there was no evidence of the plaintiff proving malice on the part of Tweni. In this regard, Mr *Petersen* referred to the uncontested evidence of Tweni that he acted on the instruction of the prosecutor to arrest the plaintiff. In particular, in instructing Tweni to arrest Mhlaba's companions, the prosecutor considered that the companions could have been co-conspirators who had a case to answer; Tweni honestly believed that the plaintiff had a case to answer

⁷ Section 40(1)(b) of the Criminal Procedure Act 51 of 1977.

⁸ Ibid.

when he arrested him as directed. This was bolstered by Tweni's evidence that he had hoped the plaintiff would be convicted of murder.

[17] Mr *Mduna*, for the plaintiff, submitted that the defendant did not provide any justification for Tweni's arrest of the plaintiff whom he knew to be innocent. Mr *Mduna*, however, conceded that the plaintiff and not the defendant bore the onus to prove all the requirements for a claim based on malicious prosecution.

The law

[18] In *Minister of Justice and Constitutional Development & Others v Moleko*,⁹ the requirements for an action for malicious prosecution were stated as being that-

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

[19] The Constitutional Court confirmed these requirements in *Kruger v National Director of Public Prosecutions*.¹⁰

[20] The impugned judgment is supine regarding how the plaintiff had established that Tweni acted without reasonable and probable cause. Reference is made in the judgment to *Waterhouse v Shield*¹¹ insofar as it defines 'reasonable and probable cause'. Without any elaboration and application of the law to the facts of this case, the Regional Magistrate concluded:

'The facts are largely common cause, that there was not even . . . *prima facie* evidence linking the plaintiff with the offence of murder. In all [probability], this whole exercise was malicious hence the case was subsequently withdrawn against the plaintiff.'

⁹ [2008] ZASCA 43; [2008] 3 All SA 47 (SCA); 2009 (2) SACR 585 (SCA) para 8.

¹⁰ [2019] ZACC 13; 2019 (6) BCLR 703 (CC) para 48. See also *Minister of Safety and Security v Lincoln* [2020] 3 All SA 341 (SCA) para 20, relying on *Lederman v Moharal Investments (Pty) Ltd* 1969 (1) SA 190 (A) at 196H, *Moleko* para 8 and *Woji v Minister of Police* [2014] ZASCA 108; 2015 (1) SACR 409 (SCA) para 33.

¹¹ 1924 CPD 155.

[21] However, no issue is raised on appeal regarding the finding of absence of reasonable and probable cause. In the view taken of this matter, nothing hinges thereon.

[22] Therefore, at issue in this appeal is whether the Regional Court was correct in finding that requisites (a) and (c) had been established, which we now turn to consider.

Did Tweni set the law in motion?

[23] The concept of ‘instigation’ has been said to be one of some complexity.¹²

[24] In *Lederman v Moharal Investments (Pty) Ltd*¹³ the then Appellant Division underscored the question of causality that must be considered in a claim for malicious prosecution. It held:

‘In the present instance, however, as will appear, the enquiry inherent in the concept “set the law in motion”, “instigate or institute the proceedings”, is the causing of a certain result i.e. a prosecution, which involves the vexed question of causality. This is especially a problem where, as in most instances, the necessary formal steps to set the law in motion have been taken by the police and it is sought to hold someone responsible for the prosecution. Amerasinghe, Aspects of the Actio Iniuriarum in Roman Dutch Law, recognises that “the problem is essentially one of causation” and suggests (at p 20):

“The principle is that where a person acts in such a way that a reasonable person would conclude that he (i.e. the defendant) is acting clearly with a specific view to a prosecution of the plaintiff and such prosecution is the direct consequence of that action, that person is responsible for the prosecution.”

[25] In *Minister of Safety and Security v Lincoln*,¹⁴ the Supreme Court of Appeal referred, with approval, to a judgment of the Victoria Supreme Court in *Skrijel v Mengeler*,¹⁵ where Nettle J explained that ‘setting the law in motion’ requires ‘active involvement’ of the defendant in pursuing the prosecution of the plaintiff.

[26] Tweni’s evidence was that the prosecutor formed the view that Mhlaba’s companions could be co-conspirators, despite the statements in the docket, including the witness statement of the plaintiff. The prosecutor instructed Tweni to arrest the plaintiff and the other companions, which Tweni accepted and acted upon. Tweni testified that he had no authority in respect of the decision to prosecute.

¹² *Relyant Trading (Pty) Ltd v Shongwe and Another* [2006] ZASCA 162; [2007] 1 All SA 375 (SCA) para 9.

¹³ Above fn 10 at 197 A-F; also see *Heyns v Venter* 2004 (3) SA 200 (T) at 206F-207A; *Prinsloo and Another v Newman* 1975(1) SA 481 (A) at 492 C-G.

¹⁴ Above fn 10 para 28.

¹⁵ [2003] VSC 270 para 199.

[27] There is nothing strange about an investigating officer taking instructions from a prosecutor in conducting investigations into a criminal matter. The taking of instructions in these circumstances is consistent with the law; in terms of section 179 of the Constitution,¹⁶ the authority to institute criminal proceedings vests in the NPA. Section 20 of the National Prosecuting Authority Act 32 of 1998, confers the power contemplated in section 179(2) and all other relevant sections of the Constitution to institute and conduct criminal proceedings on behalf of the State; to carry out any necessary functions incidental to instituting and conducting such criminal proceedings; and to discontinue criminal proceedings, on the Prosecuting Authority. The Code of Ethics for Public Prosecutors¹⁷ also sets out important provisions in this regard. Paragraph 1.1.1(c) of the Code provides that in the institution of criminal proceedings, the prosecutor will proceed only when a case is well-founded upon evidence reasonably believed to be reliable and admissible and will not continue with a prosecution in the absence of such evidence. Also, according to paragraph 1.2.1(c) of the Code, the prosecution must have regard to all relevant circumstances and ensure that reasonable enquiries regarding evidence are made, irrespective of whether these enquiries are to the advantage or disadvantage of the alleged offender.

[28] In *Moleko*,¹⁸ Van Heerden JA found that the police officers in that matter did no more than ‘at all times [act] on the instructions and under the direction of the office of the DPP’. The learned judge of appeal concluded that the police officers, in taking instructions from the prosecutor and carrying them out, played no role in the decision to prosecute the plaintiff. No difference is discernible between the conduct of the officers in *Moleko* and that of Tweni.

[29] The plaintiff failed to prove that Tweni set the law in motion against him. There was no evidence before the Regional Court of Tweni’s active involvement in pursuing his prosecution. Nor was there any evidence of Tweni having acted with a specific view to a prosecution or that the prosecution was the direct consequence of that action. He merely carried the instruction of the prosecutor and, being no decision-maker himself, is not to blame, especially if regard is had to the fact that the prosecutor was, constitutionally and statutorily, better placed to decide on who ought to stand trial for the murder of the deceased.

¹⁶ The Constitution of the Republic of South Africa, 1996.

¹⁷ National Director of Public Prosecutors Ethics – *A Practical Guide to the Ethical Code of Conduct of Members of the National Prosecuting Authority* (March 2004).

¹⁸ Above fn 9 para 11.

[30] The reliance by the Regional Magistrate on *Qwaba* in response to what it saw as ‘passing the buck’ was misplaced. The relevant *dictum* in *Qwaba*¹⁹ reads:

‘Nor would it have been correct for the court a quo to have jettisoned the malicious prosecution claim purely by reason thereof that the National Prosecuting Authority (who had self-evidently not been joined in the action) is the only appropriate functionary to sue in a malicious prosecution suit. Such reasoning would be fallacious. At the risk of stating the obvious, nothing precludes a plaintiff even from citing a mere informer (ordinarily a lay person), as opposed to the police or prosecutor concerned.’

The passage does no more than clarify that a claim for malicious prosecution could be instituted against the member of the executive responsible for policing, or even a lay person. It was never the case of the defendant that a claim for malicious prosecution against it was not competent.

[31] From that incorrect premise, the Regional Magistrate proceeded to conflate the requirements, but more pertinently the onus applicable in relation to claims based on wrongful arrest and malicious prosecution, respectively. Deprivation of liberty through arrest is *prima facie* wrongful, and the onus is on the arrestor to justify the conduct.²⁰

[32] In all these circumstances, the Regional Court erred in finding that Tweni set the law in motion. There remains to consider the issue whether malice was proven to exist on the part of Tweni.

Malice

[33] In the context of the *actio iniuriarum* ‘malice’ means *animus iniurandi*.²¹

[34] In *Moaki v Reckitt & Colman (Africa) Ltd and Another*,²² Wessels JA held:

‘Where relief is claimed by this *actio* the plaintiff must allege and prove that the defendant intended to injure (either *dolus directus* or *indirectus*). Save to the extent that it might afford evidence of the defendant’s true intention or might possibly be taken into account in fixing the quantum of damages, the motive of the defendant is not of any legal relevance.’

[35] *Moleko*²³ also elaborates as follows regarding the expression ‘malice’:

¹⁹ Above fn 5 para 35.

²⁰ J Neethling and JM Potgieter *Law of Delict* (8th ed) (2020) at 397 fn 109 and the authorities cited therein.

²¹ Above fn 15 para 5.

²² 1968 (3) SA 98 (A) 104B-C.

‘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 consequence of his or her conduct (*dolus eventualis*). Negligence on the part of the defendant (or, I would say, even gross negligence) will not suffice.’

[36] Malice and lack of probable cause are two distinct elements, both of which must be proved, and either of which may exist without the other.²⁴

[37] It is as well to refer to *Minister of Safety and Security v Tyokwana*,²⁵ where the Supreme Court of Appeal dealt with the requirement of *animus*²⁶ (malice) which requires a plaintiff to prove -

‘. . . that the defendant, while being aware of the absence of reasonable grounds for the prosecution, directs his or her will to prosecuting the plaintiff. If no reasonable grounds exist, but the defendant honestly believes either that the plaintiff is guilty, or that reasonable grounds are present, the second element of *animus iniuriandi*, namely consciousness of wrongfulness, will be lacking.’

[38] No evidence was placed before the Regional Court that Tweni directed his will to the prosecution of the plaintiff, even if it were to be accepted that Tweni knew that the plaintiff was not the person who stabbed the deceased. Furthermore, the mere assertion of the plaintiff that Tweni displayed a negative attitude towards him does not mean that the plaintiff succeeded in demonstrating consciousness of wrongfulness. In fact, the evidence that Tweni acted on the instruction of the prosecutor and shared his concern that the companions could in fact be co-conspirators of Mhlaba was in no way refuted.

[39] The excerpt from the impugned judgment referred to in paragraph 20, makes it demonstrably clear that there was, regrettably, lack of appreciation for the duty cast on the plaintiff to prove each element of the delict with evidence. The lack of *prima facie* evidence linking the plaintiff to the murder and the subsequent withdrawal of the criminal proceedings against the plaintiff do not, in and by themselves, equate to malice.

²³ Above fn 9 para 64.

²⁴ Francois Du Bois *et al Willie's principle of South African law* (9th ed) (2007) at 1194. Compare, *Miazga v Kvello Estate* (2008) 282 (DLR 4th) 1 at 3, where the Supreme Court of Canada held:

‘In order for there to be a finding of malicious prosecution the trial judge must be able to find an influence of malice from both an absence of reasonable and probable cause and other evidence of malice or improper purpose.’

²⁵ [2014] ZASCA 130; 2015 (1) SACR 597 (SCA) para 15.

²⁶ *Relyant Trading* para 5. This was confirmed in *Moleko* para 61-64.

[40] There rested an evidentiary burden on the part of the plaintiff to prove malice, which the plaintiff failed to do. Once again, the Regional Magistrate erred in finding that there was malice on the part of Tweni.

Conclusion

[41] In sum, the plaintiff failed to discharge the onus placed on him to prove the requirements for a claim based on malicious prosecution on a balance of probabilities. The Regional Magistrate ought to have found as much and erred in not doing so. The appeal must, therefore, succeed.

Order

[42] The following order shall, therefore, issue:

- (a) The appeal succeeds, with costs.
- (b) The order of the Regional Court is set aside and replaced with the following:

‘The plaintiff’s claim is dismissed with costs.’

S M MBENENGE

JUDGE PRESIDENT OF THE HIGH COURT

R KRÜGER

ACTING JUDGE OF THE HIGH COURT

Appearances:

On behalf of the Appellant:

F Petersen

Instructed by:

The State Attorney

Gqeberha

c/o Yokwana Attorneys

Makhanda

On behalf the Respondent:

M T Mduna

Instructed by:

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Makhanda

Date heard:

11 November 2022

Date delivered:

29 November 2022