

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, MTHATHA**

CASE NO. 967/2015

APPEAL CASE: CA 99/2018

REPORTABLE

In the matter between:

ZANELE MATSHABANE

Appellant

and

MINISTER OF POLICE

1st Respondent

NATIONAL DIRECTOR OF PUBLIC

PROSECUTIONS

2nd Respondent

JUDGMENT

DA SILVA AJ:

INTRODUCTION

[1] On 5 September 2014, the appellant, together with her late boyfriend Gcinibandla Nelson Gabayi (“Gabayi”), were arrested by members of the South African Police Service (“the Service”) at Madeira Police Station and detained at Central Police Station until 8 September 2014. The appellant and Gabayi were charged by the police for malicious damage to property, assault by threats and *crimen inuria*. The appellant and Gabayi made their first court appearance at the Mthatha Regional Court on 08 September 2014 and were granted bail. They were released on 09 September 2014. Following the arrest and detention aforementioned, the appellant and Gabayi were prosecuted in the Regional Court in Mthatha for malicious injury to property, assault with intent to do grievous bodily harm and *crimen inuria*. The appellant and Gabayi were acquitted of all charges.

[2] The appellant and Gabayi issued individual summons in the High Court. The above are the common cause facts pleaded by the appellant and Gabayi in their respective particulars of claim, which facts have not been denied by the respondents.

[3] In addition to the above, the appellant and Gabayi also pleaded that:

3.1 The arrest and detention were unlawful.

3.2 During the arrest, the appellant and Gabayi were unlawfully assaulted by members of the Service resulting in various bodily injuries and a miscarriage of the appellant’s foetus.

3.3 The prosecution, for which the appellant holds both respondents liable, was without reasonable and probable cause and actuated by malice.

[4] The appellant was substituted for Gabayi who had passed away after the close of pleadings. During the trial members of the Service, namely Captain Mpanzela and Warrant Officer Wesi testified followed by Mr. Mbeleki (the prosecutor), in support of the respondents' case. Thereafter the plaintiff testified in support of her claims and that of Gabayi for unlawful arrest and detention and assault. She testified on her behalf for malicious prosecution. Dr. Mntonintshi testified in support of the appellant's and Gabayi's claims for assault.

JUDGMENT OF THE COURT A QUO

[5] After hearing the evidence, the Court *a quo* dismissed the appellant's and Gabayi's claims for assault. The Court *a quo* also dismissed the appellant's claim for malicious prosecution. The Court *a quo* found the first respondent liable for their claims for unlawful arrest and detention. The reasons for the judgment, insofar as they are relevant to this appeal, appear from the body of this judgment. The first respondent was ordered to pay 50% of the appellant's and Gabayi's costs of suit in respect of the determination of the merits of their claim, inclusive of the filing of supplementary heads of argument.

NOTICE OF APPEAL

[6] The appellant has appealed against the judgment of the Court *a quo* on various grounds. These grounds are summarized as follows:

6.1 The Court *a quo* erred in the evaluation of and in disregarding the evidence of Dr. Mntonintshi –

6.1.1 as the doctor's evidence was not intended to prove the actual act of assault but served as mere corroboration that the assault took place;

6.1.2 as the Court *a quo* ignored the gist of the doctor's evidence and focused on whether the doctor's evidence established the cause for blood shot eyes as if that was the only issue or the only injuries sustained in the assault; and

6.1.3 on the basis of the criticism that he never testified during the criminal trial was baseless and without merit.

6.2 The Court *a quo* erred in finding that the appellant's version was fraught with discrepancies and no support could be found for Gabayi's claim in the appellant's version. The Court further erred in finding that appellant had not discharged the onus resting on her to establish that she and the deceased had in fact been assaulted. The Court *a quo* should not have adopted a piecemeal evaluation of the evidence and it

failed to evaluate the evidence holistically insofar as Gabayi's (the deceased) claim was concerned.

6.3 The Court *a quo*, whilst accepting that there was no evidence to implicate the appellant in the charges of malicious injury to property, failed to find that there was malice on the part of the first respondent when instigating criminal charges against the appellant.

6.4 The Court *a quo* adopted an approach that the appellant was under an obligation to prove malice outside the non-existence of a reasonable and probable cause for the prosecution and the persistence by the first respondent with charges. In short, the Court *a quo* failed to establish that malice could be established from the objective facts and that it is a legal conclusion rather than a factual one.

6.5 The Court *a quo* erred in not finding that the first respondent was liable for malicious prosecution of the appellant.

6.6 Regard being had to the fact that the prosecutor (Mbeleki) had conceded that there was no evidence against the appellant herself in respect of the charge for malicious injury to property, the Court *a quo* erred in not finding that the second respondent was liable for malicious prosecution.

CONDONATION

[7] At the hearing of the appeal, the appellant sought condonation for the late filing of the heads of argument. The application for condonation was not opposed.

[8] Having satisfied ourselves that the appellant had shown good cause, condonation was indeed granted.

[9] Nothing further needs be said in this regard.

ASSAULT

[10] I now turn to deal with the appellant's claim for assault.

[11] An assault violates a person's bodily integrity. Every infringement of the bodily integrity of another is *prima facie* unlawful. Accordingly, an allegation of "assault" implies wrongfulness.¹

[12] It is for the plaintiff to allege and prove the fact of physical interference. Accordingly, the plaintiff must allege and prove facts which *prima facie* and objectively indicate an assault.²

[13] In support of her claim for assault, the appellant testified in chief that:

¹ ***Bennet v Minister of Police*** 1980 (3) SA 24 (C).

² ***Jackson v SA National Institute for Crime Prevention*** 1976 (3) SA 1 (A); ***Mabaso v Felix*** 1981 (3) SA 865 (A).

- 13.1 The appellant met Mpanzela from whom she and Gabayi asked for shelter in the Madeira Police Station. Mpanzela agreed to them joining other persons in the passage close to the charge office. At some stage the appellant went to the toilet which she found opened and without a latch. Thereafter upon her return to the passage, Gabayi also went to the toilet.
- 13.2 The appellant heard Mpanzela accusing Gabayi of burglary. When she attempted to intervene, Mpanzela struck her. Thereafter two other police officers, which included Wesi arrived and assaulted her and Gabayi. They were both kicked with booted feet and sprayed with pepper spray in their eyes.
- 13.3 The appellant and Gabayi then ran out of the police station to the other side of Madeira Street but returned to apologize. When they came back, Wesi sprayed them both with pepper spray. After 03h00 they were handcuffed and taken to Central Police Station.
- 13.4 The appellant and Gabayi were taken to Court on Monday, 8 September 2014 when they were granted bail of R1 000.00 each.
- 13.5 They were however released on 9 September 2014 whereafter they immediately consulted a doctor (Mntonintshi) to whom they narrated

the events of the assault. After a period of two days the appellant suffered a miscarriage.

[14] Under cross-examination, it was put to the appellant that her evidence in chief was inconsistent with what she had testified in the Regional Court during the criminal trial in the following regards:

14.1 In the Regional Court, the appellant had testified that she and Gabayi had asked for shelter from a female police officer who had agreed that they could obtain shelter at the police station. In the High Court the appellant testified that they had asked for shelter from Mpanzela.

14.2 In the High Court the appellant testified that there were 15 people who were receiving shelter in the passage on the night in question. In the Regional Court she had testified that there were 4 people.

14.3 In the High Court the appellant testified that Mpanzela gave her permission to go to the toilet. However, in the Regional Court she testified that she had trespassed to a place where she had not been given permission to go.

14.4 In the High Court she testified that Gabayi went to the toilet alone after she had returned from the toilet. However, in the Regional Court, she testified that she had accompanied Gabayi to the toilet.

14.5 Another inconsistency that was pointed out to her was that she testified in chief about a miscarriage. However, both Mntonintshi and the doctors at the Hospital wrote that she had suffered an abortion.

14.6 In the Regional Court, the appellant testified that the commotion between her, Gabayi and Mpanzela happened next to charge office. However, in the High Court, she testified that the commotion happened in the passage next to office no. 18.

14.7 It was also put to her that at no stage during her incarceration did she ask to see a doctor.

[15] In respect of the aforementioned inconsistencies, the appellant did not proffer a credible version for why the record of the Regional Court differed from her version in the High Court. All she said was that the recording in the Regional Court was wrong and not a correct reflection of the evidence she had given notwithstanding the fact that the transcript was obtained by her attorney and used when questioning the witnesses of the first respondent.

[16] Dr. Mntonintshi also testified in support of the claim for assault. His evidence was a summation of injuries sustained by the appellant and Gabayi. He observed that the appellant had reddened eyes but did not conduct tests to determine the cause of the redness. He agreed that doom could have caused the redness as much as pepper spray and soap. He however could not give an age of the bruises other than to say that they were "*fresh*".

[17] Mpanzela denied that he assaulted the appellant and Gabayi. In fact, his evidence was to the effect that Gabayi assaulted him and then the appellant also joined in assaulting Mpanzela. Mpanzela was saved by Wesi and Mbangata, both members of the Service. Wesi denied that he ever pepper sprayed the appellant and Gabayi especially since he did not possess any pepper spray.

[18] It is clear that the versions of the appellant differed materially from that of the members of the Service. In fact, they were mutually destructive.

[19] Only one of these conflicting versions can be correct. The onus is on the appellant to prove that her version is the truth. In order to discharge this onus, the appellant must show by credible evidence that her version is more probable and acceptable than that of the members of the Service. In these circumstances what was said in ***National Employers' General Insurance Co Ltd v Jagers***³ is apposite:

“It seems to me, with respect, that in any civil case, as in any criminal case, the *onus* can ordinarily be discharged by adducing credible evidence to support the case of the party on whom the *onus* rests. In a civil case the *onus* is obviously not as heavy as it is in a criminal case, but nevertheless where the *onus* rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up

³ 1984 (4) SA 437 (E) at 440D – G.

and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false."

- [20] The Court *a quo* found the appellant's version to be fraught with discrepancies and concluded that she was clearly not a credible witness. The Court *a quo* also found that the discrepancies impacted adversely on the credibility of the appellant and on the issue of whether or not her version is more probable than that of the respondents' witnesses who alleged that there was an altercation not an assault. It could only have been on this basis that the Court *a quo* rejected the appellant's version and also found that the appellant's version could not support Gabayi's claim for assault.
- [21] The Court *a quo* also found that Dr. Mntonintshi's evidence was based on what he was told was the cause of the injuries as he had no direct knowledge nor did he do any independent tests to establish the cause of the blood shot eyes. As such, the Court *a quo* found the evidence of the doctor did not assist to establish that the appellant and Gabayi were assaulted by the members of the Service.
- [22] The question is whether this Court can interfere, on appeal, with the factual findings, including the credibility findings, of the Court *a quo*.

[23] In ***Makate v Vodacom Ltd***⁴ it was held that appeal courts are generally reluctant to interfere with factual findings made by trial courts, more particularly if the factual findings depended upon the credibility of the witnesses who testified at the trial.⁵ It, however, cautioned that:

“(E)ven in the appeal the deference afforded to a trial court's credibility findings must not be overstated. If it emerges from the record that the trial court misdirected itself on the facts or that it came to a wrong conclusion, the appellate court is duty-bound to overrule factual findings of the trial court so as to do justice to the case. In *Bernert* this court affirmed:

‘What must be stressed here, is the point that has been repeatedly made. The principle that an appellate court will not ordinarily interfere with a factual finding by a trial court is not an inflexible rule. It is a recognition of the advantages that the trial court enjoys, which the appellate court does not. These advantages flow from observing and hearing witnesses as opposed to reading the cold printed word. The main advantage being the opportunity to observe the demeanour of the witnesses. But this rule of practice should not be used to tie the hands of appellate courts. It should be used to assist, and not to hamper, an appellate court to do justice to the case before it. Thus, where there is a misdirection on the facts by the trial court, the appellate court is entitled to disregard the findings on facts, and come to its own conclusion on the facts as they appear on the record. Similarly, where the appellate court is convinced that the conclusion reached by the trial court is clearly wrong, it will reverse it.’”

[24] Regard being had to the discrepancies in the appellant's version, as referred to above, I am of the view that the Court *a quo* did not misdirect itself on the facts and neither did it arrive at a wrong conclusion that the appellant had not proved that she and Gabayi had been assaulted. The discrepancies, which are material in nature and which are referred to above, clearly show that the appellant was not a credible witness.

⁴ 2016 (4) SA 121 (CC) (2016 (6) BCLR 709; [2016] ZACC 13) paras 37 and 40 (***Makate***).

⁵ See ***R v Dhlumayo and Another*** 1948 (2) SA 677 (A) and the authorities referred to therein.

[25] Indeed, the Court *a quo* does not list the discrepancies with the appellant's version in respect of the claim for assault. However, when regard is had to the record of the appellant's evidence, as adumbrated in paragraphs [13] – [15] above, I am not persuaded that the appellant was a credible witness.

[26] I am also of the view that Dr. Mntonintshi's evidence was based on what he was told was the cause of the injuries. He was not in a position to establish the age of the injuries nor the cause of the blood shot eyes.

[27] Absent evidence on the age of the injuries and the cause of the blood shot eyes, read together with the lack of credibility of the appellant's version, I am of the view that the appellant has not discharged the onus of proving that her version is more probable than that of the first respondent relating to the alleged assault on her and Gabayi.

[28] In the result, I am of the view that the Court *a quo*'s findings that the appellant had not discharged the onus of proving that she and Gabayi were assaulted by the members of the Service are unassailable.

MALICIOUS PROSECUTION

[29] To succeed in a claim for malicious prosecution, a claimant must allege and prove that⁶:

- (a) the defendants set the law in motion – they instigated or instituted the proceedings;
- (b) the defendants acted without reasonable and probable cause;
- (c) the defendants acted with malice – that is, with the intention to injure the plaintiff; and
- (d) the prosecution failed.

[30] It is not in dispute in this matter that Mpanzela preferred charges against the appellant that resulted in the National Prosecuting Authority instituting the criminal prosecution against her and that those proceedings terminated in her favour. What the appellant is challenging is the Court *a quo*'s finding that there was reasonable and probable cause for the prosecution and that the respondents acted without malice. Counsel for the appellant submitted that the Court *a quo* erred in its finding that the prosecution was with reasonable and probable cause and that there was no malice.

[31] The set of charges are discrete and have to be considered separately in determining the absence of reasonable and probable cause. Considerations

⁶ ***Minister of Justice and Constitutional Development and others v Moleko*** 2009 (2) SACR 585 (SCA).

pertaining to the one set of charges cannot be transposed onto the other. In other words, the fact that there was a reasonable and probable cause to prosecute on one set of charges has no effect on the outcome of the enquiry in relation to the other set of charges. This is so, because the question whether reasonable grounds for the prosecution exist is answered only by reference to the facts of each case. The Appeal Court in **Beckenstrater v Rottcher and Theunissen**⁷ set out the test for '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."

[32] The test contains both a subjective and objective element which means that there must be both actual belief on the part of the members of the Service and the prosecutor and that that belief must be reasonable in the circumstances.⁸

[33] I will first deal with whether Mpanzela acted with reasonable and probable cause when setting the law in motion against the appellant. Mpanzela admitted under cross examination that he did not see who caused the doors to the toilet to be opened. When he met Gabayi in the passage, the doors to the toilet were already opened. He also did not uplift any fingerprints from the door to verify that Gabayi and the appellant had broken the door. There were

⁷ 1955 (1) SA 129 (A) at 136A-B.

⁸ J Neethling, JM Potgieter & PJ Visser *Neethling's Law of Personality* (2 ed, 2005) at 176.

also no photographs taken to show that the door had been broken by Gabayi and the appellant. Wesi testified that as far as he was aware, the door to the toilet was open before he left to patrol outside. In any event there was no evidence whatsoever to prove that the appellant had committed malicious injury to property or that she had acted in common purpose with Gabayi.

[34] Regard being had to the above, I am of the view that Mpanzela set the law in motion against the appellant without reasonable and probable cause as he did not have such information as would lead a reasonable man to conclude that the appellant was guilty of the offence charged.⁹

[35] There was also no evidence to demonstrate that the appellant had committed assault with an intention to cause grievous bodily harm or assault by threats.

[36] In respect of the charges of *crimen inuria*, Mpanzela, in his evidence, only stated that the appellant called him “*inzule*”, which he understood in isiXhosa to mean that he is a foreigner and the person from outside Mthatha. Mpanzela considered it to be an insult and nothing more. His statement filed in the docket says much more and is very exaggerated. It appears that certain words were inserted post the making of the statement.

[37] Recourse being had to all of the above, it is clear that Mpanzela acted without reasonable and probable cause when instigating criminal proceedings against the appellant.

⁹ ***Beckenstrater v Rottcher and Theuiunsen*** 1955 (1) SA 129 (A) at 136A-B.

[38] The Court *a quo* found that the appellant had failed to establish that Mpanzela's conduct in setting the law in motion was actuated by malice. I agree with counsel for the appellant that the Court *a quo* erred in this regard. The requirement of "*malice*" has been the subject of discussion in a number of cases in the Supreme Court of Appeal. The approach now adopted is that, although the expression "*malice*" is used, the claimant's remedy in a claim for malicious prosecution lies under the *action injuriarum* and that what has to be proved in this regard is *animus injuriandi*.¹⁰ By way of further elaboration in *Moleko* it was said:

"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."

[39] The "*malice*" must be that of the person responsible for initiating the prosecution against the appellant. In this case the appellant was formally charged with malicious injury to property, assault by threats and *crimen iniuria* by a member of the Service (Mpanzela) at Madeira Police Station. It would appear that this is the stage at which the proceedings were initiated.

[40] Regard being had to the foregoing, it is demonstrably clear that when Mpanzela preferred charges against the appellant on 06 September 2014, he knew he had no information to support those charges. Mpanzela, must at the very least have known that no offence had been committed and that, in

¹⁰ See *Moaki v Reckitt and Colman (Africa) Ltd and Another* 1968 (3) SA 98 (A) at 103G-104E and *Prinsloo and Another v Newman* 1975 (1) SA 481 (A) at 492A-B.

preferring the charges against the appellant, he foresaw the possibility that he was acting wrongfully. There can be no question that when Mpanzela charged the appellant, he was aware of the fact that, by so doing, the appellant would in all probability be “*injured*” and her dignity (“*comprehending also [her] good name and privacy*”)¹¹ would in all probability be negatively affected.¹² He nevertheless continued so to act, reckless as to the consequences of his conduct. In my view, he thus acted *animo injuriandi*.¹³ Consequently, the appellant has proved the elements of malicious prosecution and her claim in this regard, with respect, should have succeeded against the first respondent.

[41] I now turn to deal with the second respondent. Mbeleki testified on behalf of the second respondent but was not the prosecutor who took the decision to prosecute the appellant. He, however, was the trial court prosecutor.

[42] Consequently, there is no evidence by the second respondent to dispute the appellant’s contention that when the prosecutors instituted criminal proceedings against her on the charges, they had no reasonable and probable cause. It is important to note that the police had only charged the appellant with malicious injury to property, assault by threat and *crimen inuria*. However, the prosecutors charged the appellant with malicious injury to property, assault with an intention of committing grievous bodily harm and

¹¹ *Relyant Trading (Pty) Ltd v Shongwe and Another* [2007] 1 All SA 375 (SCA) para 5.

¹² See also the *Moleko* case para 65.

¹³ See the passage from the *Moleko* case para 64, quoted in para [18] above.

crimen inuria, which are far more serious charges. In fact, Mbeleki conceded that he continued with the trial knowing that there was no evidence against the appellant on the criminal charges, especially that of malicious injury to property.

[43] Even though the Court *a quo* found that Mbeleki acted without reasonable and probable cause, it found that there was no malice on Mbeleki's part because he conceded that it was a mistake. The Court *a quo*, with respect, erred in this regard, especially if regard is had to the fact that prosecutors must act in good faith. Mbeleki must have foreseen that he was acting wrongfully when he continued with the prosecution against the appellant in circumstances wherein he knew that there was no evidence to support the charges against the appellant, especially if regard is had to what is stated above in respect of the information that was available to Mpanzela when he preferred charges against the appellant.

[44] There can be no question that when the prosecutors preferred the charges against and prosecuted the appellant, they must have or should have been aware of the fact that, by so doing, the appellant would in all probability be injured and her dignity would in all probability be negatively affected. Knowing that there was no evidence to support the charges preferred against the appellant, the prosecutors must at the very least have foreseen the possibility that no offence had been committed and in deciding to prosecute the appellant, they were acting wrongfully. They nevertheless continued so to act, reckless as to the possible consequences of their conduct. In my view, the

prosecutors acted *animo injuriandi*. Consequently, the appellant has proved the elements of malicious prosecution and her claim in this regard, with respect, should have succeeded against the second respondent.

COSTS

[45] In view of the above, the appeal, only insofar as it relates to the appellant's personal claim for malicious prosecution is upheld with costs. It is clear from the foregoing that the appellant has been partially successful with her appeal. For this reason, the respondents should be mulcted with costs of the appeal.

[46] I take this opportunity of thanking counsel for the appellant in furnishing this Court with well-crafted heads of argument.

AMENDED ORDER

1. The appeal, only insofar as it relates to the appellant's personal claim for malicious prosecution is upheld.
2. The order of the Court *a quo* is substituted with the following:
 - (1) The first and second plaintiff's claim for assault is dismissed.

- (2) The second plaintiff's claim for malicious prosecution against the first and second defendants succeeds.
- (3) The first and second defendants are held liable, jointly and severally, the one paying, the other to be absolved, to the second plaintiff for the agreed or proven damages consequent upon the second plaintiff's malicious prosecution.
- (4) The first and second defendants shall pay the costs of the action, jointly and severally, the one paying the other to be absolved, which costs shall include the costs of drawing supplementary heads of argument.
3. The respondents are jointly and severally liable, the one paying the other to be absolved, for the costs of the appeal, including the costs of the application for leave to appeal.

A M DA SILVA

ACTING JUDGE OF THE HIGH COURT

I agree:

T MALUSI

JUDGE OF THE HIGH COURT

I agree:

B R TOKOTA

JUDGE OF THE HIGH COURT

Appearances:

For the appellant:

Adv. Matebese SC

Instructed by:

CAPS Pangwa & Associates

For the first respondent:

Adv Hinana

Instructed by:

The State Attorney (Mthatha)

For the third respondent:

Adv. Mfeya

Instructed by:

The State Attorney (Mthatha)

Date of Hearing:

12 August 2019

Judgment delivered:

04 October 2019