

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO.: 7179/2014

26/1/18

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.
	
SIGNATURE	DATE
	26/01/2018

In the matter between:

JIMMY BAMBELA

1st Plaintiff

JOSEPH MASINDI

2nd Plaintiff

versus

NATIONAL DIRECTOR OF PUBLIC

PROSECUTIONS

Defendant

JUDGMENT

MPHAHLELE J:

[1] The plaintiffs instituted a claim for damages against the defendant arising from their alleged malicious prosecution by the defendant.

[2] At the commencement of the trial, and by agreement between the parties, the court made an order separating the merits for liability and quantum in terms of rule 33(4) of the uniform rules of court and the matter proceeded on the issue of liability, and the issue of quantum stood over for determination at a later stage.

[3] To succeed with a claim for malicious prosecution, the plaintiffs must allege and prove that: a) the defendant set the law in motion; b) the defendant acted without reasonable and probable cause; c) the defendant acted with malice or *animus iniuriandi*; and d) the prosecution has failed.

[4] The defendant conceded that that it set the law in motion and that the prosecution had failed. The only remaining issues are whether the defendant acted without reasonable and probable cause and with malice.

[5] The plaintiffs testified in person and the defendant led the evidence of the State Prosecutor, Ms. Ouma Mahlodi Serite.

[6] Joseph Masindi, the second plaintiff testified that on 29 July 2011 he was busy working near the first plaintiff's house when he was approached by three men driving in a private motor-vehicle looking for the first plaintiff. Upon enquiry, he informed the three men that the first plaintiff was staying with his wife and child. The men never disclosed the reason they were looking for the first plaintiff. He informed them the first plaintiff was not home at that moment. The men then left and indicated that they would come back later on. On their return, the men asked for the first plaintiff and he pointed him (the first plaintiff) out to them. The men then went into the first plaintiff's home and thereafter one of the men (one Mafokane) called him to the first plaintiff's home. Upon arrival at the first plaintiff's home, he was informed that he was under arrest and would be taken to the police station. After leaving the first plaintiff's home whilst in the motor-vehicle they were informed that they were arrested in relation to a charge of rape. The police informed them that they were pointed out by the community. They were taken directly to Musina hospital to draw

blood for DNA analysis. Thereafter they were taken to the police station whereat they were charged with housebreaking and rape.

[7] They made their first appearance in court on 01 August 2011 and the matter was postponed for further investigation. They were both refused bail and were ordered to remain in custody. On their second appearance in court on 08 August 2011, the matter was once again postponed to 16 August 2011, there was no mention of bail at this hearing.

[8] Under cross-examination, he agreed that the matter was postponed on 01 August 2011 for the appointment of a legal representative from the Legal Aid Board and the bail hearing was postponed to 08 August 2011. The plaintiffs only managed to consult with a lawyer after 08 August 2011 and bail was only granted on 16 August 2011 without any formal bail hearing.

[9] On 16 August 2011, the plaintiffs were granted bail of R1 000-00 each and the matter further postponed to 07 September 2011. One of the bail conditions was for the plaintiffs not to contact to the state witnesses. The court requested the prosecutor to furnish the plaintiffs with the names of the witnesses, in particular the complainants, for the plaintiffs to fully comply with the bail conditions. They waited in vain for the information but nonetheless the first plaintiff paid the bail money and was subsequently released.

[10] The second plaintiff remained behind in the cells for fear of contravening the conditions of bail. On 07 September 2011 he advised the court about his predicament. Nonetheless he paid the money fixed for bail. On 07 September 2011, the matter was postponed to 20 January 2012 and subsequently to 05 March 2012; May 2012; 05 June 2012 and finally to 03 July 2012. The prosecutor indicated that he was still waiting for the DNA results. On 03 July 2012 they were advised that results of the DNA tests did not implicate them in the commission of the offences they were charged with and they were released.

[11] Jimmy Bambela, the first plaintiff, testified that he was arrested on 29 July 2011 by three policemen at his home. He told the police that the second plaintiff was his friend. The second plaintiff was nearby and he pointed him out to the police who then arrested him as well. They were taken to draw blood for DNA tests before being taken to the police

station. He corroborated the evidence of the second plaintiff regarding the several court appearances, the postponements and the reasons thereof. Mr. Moropane, the Legal Aid attorney's request for the matter to be withdrawn was denied due to outstanding DNA results.

[12] The first plaintiff testified that the police claimed that community members informed them that he had committed the offences of housebreaking and rape.

[13] At their first court appearance the plaintiffs asked for bail but were advised to seek legal representation. They did not have a lawyer at their second court appearance on 08 August 2011. Bail was eventually granted after the prosecutor consulted with the investigating officer. No formal bail application was held. And they had no legal representative present in court on the day bail was granted.

[14] Ms. Ouma Mahlodi Serite testified that she was a prosecutor at the Musina Magistrate's Court. She received the docket in this matter on 01 August 2011. Upon perusal of the contents of the docket, she was satisfied that the matter was ready to be heard. She allocated a case number and enrolled the matter. She spoke to the investigating officer before enrolling the matter. She addressed the court requesting a postponement to a date less than seven days for a bail application. On both court appearances on 01 and 08 August 2011, the plaintiffs never applied for bail. She confirmed that the matter was postponed several times, including on 05 March 2012, as they were still waiting for the DNA results.

[15] On 05 January 2012, she erroneously made an entry in the SAPS investigative diary to the effect that the DNA results were received but immediately thereafter indicated that the matter was postponed due to the outstanding DNA results. Under cross-examination, she indicated that she was not the one who made the entry of 05 January 2012.

[16] Ms. Serite testified that she perused the docket to satisfy herself before enrolling the matter. It is important to note that no evidence was led as to the contents of the docket she took into consideration. The contents of the dockets remain, at the time of Ms. Serite's consideration, remain unknown.

[17] It appear that there was no other evidence other than the DNA results. The inscription made in the SAPS investigation diary as early as on 08 August 2011 read; *"All the witnesses say they failed to identify the suspects because they were [wore] masks, kindly establish how the two accused were arrested and who identified them"*.

[18] The matter was on several occasions postponed due to non-availability of the DNA results. However, the inscription in the SAPS diary dated 05 January 2012 reads: *"RESULT DNA! The results were received from Musina f.c.f. and the letter attached as per A13"*.

[19] Another entry made in the diary on 05 May 2012 reveal that the DNA results had been received and attached on the case docket but the matter was thereafter still postponed to later dates for lack of DNA results.

[20] As already alluded to in paragraph 4 above, the defendant conceded that that it set the law in motion and that the prosecution had failed. This concession is sufficient proof that the defendant took a deliberate act to institute the prosecution or set the law in motion without the influence of any external

[21] It is worth noting that the defendant's plea is a bare denial. Based on the evidence before this court, it is clear that the defendant acted without reasonable and probable cause and with malice when it initiated the prosecution being fully aware that none of the witnesses could identify the plaintiffs as perpetrators of the robbery and rape. The defendant was malicious in persisting with numerous futile postponements whilst being aware that DNA evidence failed to link the plaintiffs to the crimes.

[22] Under the circumstances, I hereby make the following order:

1. The defendant is liable to pay 100% of the plaintiff's proven or agreed damages
2. The defendant to pay the costs.



S S MPHAHLELE
JUDGE OF THE HIGH COURT,
PRETORIA

For the plaintiff: Advocate GH Janse van Vuuren

Instructed by: Erwee Attorneys

For the defendant: Advocate T Williams

Instructed by: The State Attorney