

IN THE HIGH COURT OF SOUTH AFRICA
(KWA-ZULU NATAL LOCAL DIVISION, DURBAN)

CASE NO: 4347/15

(1)	REPORTABLE: <u>YES</u> / NO
(2)	OF INTEREST TO OTHER JUDGES: <u>YES</u> /NO
(3)	<u>REVISED.</u>
.....	
DATE	SIGNATURE

In the matter between:

THE HONOURABLE MR JUSTICE CHIMANLAL
NORATAM PATEL

PLAINTIFF

and

THE NATIONAL DIRECTOR OF
PUBLIC PROSECUTIONS

FIRST DEFENDANT

THE DIRECTOR OF PUBLIC PROSECUTIONS,
KWA-ZULU NATAL

SECOND DEFENDANT

MINISTER OF JUSTICE AND CONSTITUTIONAL
DEVELOPMENT

THIRD DEFENDANT

LINDIWE NXELE

FOURTH DEFENDANT

SOPHIE MOIPONE DINA NOKO

FIFTH DEFENDANT

JUDGMENT

LEDWABA, DJP:

INTRODUCTION

[1] The plaintiff, the Honourable Mr Justice Chimantal Noratam Patel, the former Judge President of the Kwa-Zulu Natal High Court Division, instituted an action for malicious prosecution against the five (5) defendants jointly and severally claiming an amount of R3 000 000.00 (three million rand) being damages in respect of *contumelia*, embarrassment, impairment of his dignity, reputation and humiliation.

[2] The five (5) defendants, *viz*, The National Director of Public Prosecutions (NDPP), first defendant, The Director of Public Prosecutions Kwa-Zulu Natal (DPP), second defendant, Minister of Justice and Constitutional Development (Minister of Justice), third defendant, Lindiwe Nxele (Nxele), fourth defendant, Sophie Moipone and Dina Noko (Advocate Noko), fifth defendant) are defending the action and are represented by The Office of the State Attorney.

SUMMARY OF THE BACKGROUND EVIDENCE

[3] The background facts which I regard relevant to the plaintiff's action, are divided into two sections to avoid duplication and to provide continuity in the timeline of events. The first section consists of the facts pertaining to the day of the incident and circumstances that led to the charge laid against the plaintiff while the second section consists of the steps taken in the investigation of the charge by the first and second defendants, the decision to proceed with prosecution and then finally the decision to withdraw the charge.

[4] During the civil proceedings the plaintiff testified and called two witnesses, Ms Morar and Ms Marais, to support his claim. The defence called three witnesses, Ms Nxele, Advocate Noko and Advocate Cyril Selepe, the last two being in the employ of the second defendant.

[4.1] Facts and circumstances that led to the charge:

[4.1.1] On 22 October 2013, when the plaintiff arrived in his office after dealing with the opposed motion roll in Court, he discovered there was no paper available for use in the printer. He enquired from his Registrar, Ms Devika Roma, known as Morar (hereinafter referred to as Ms Morar) why there was no paper in his office printer. Ms Morar replied that she had requisitioned the required stationery on 10 October 2013, from the fourth defendant, Ms Nxele, but stated that Mrs Nxele had not yet informed her whether the stationery was ready for collection. Ms Morar stated that she had in the interim been borrowing stationery from her colleagues. The plaintiff was concerned that he had not been informed that there was a shortage of paper and testified that had he known that the Court lacked stationery, he would have made the necessary intervention. He instructed Ms Morar to enquire about the status of the outstanding stationery.

[4.1.2] Ms Morar, after leaving the plaintiff's chambers, tried to phone Mrs Nxele to follow up on the stationery she requisitioned but Mrs Nxele was not available at the time and she left a message with Ms

Charmaine Zamile Mkhize (Ms Mkhize), who works in the office of Ms Nxele.

[4.1.3] Later that morning Ms Nxele returned her call and informed her that the stationery had been ready for collection, from the day after the requisition was made. Ms Morar testified that during the course of their telephone conversation, Ms Nxele screamed at her and asked her why she had told Ms Mkhize that she, Ms Nxele, was incompetent. Ms Morar then complained to the plaintiff about how Ms Nxele spoke to her on the phone. The plaintiff instructed her to inform Ms Karlien Marais (Ms Marais), the Court Manager, to come to his office with Ms Nxele.

[4.1.4] The meeting the plaintiff requested then took place in the plaintiff's chambers and present was the plaintiff, Ms Marais, Ms Morar and Ms Nxele. There are differing versions of what transpired there and in particular what the plaintiff is alleged to have said and how it was understood by those present.

. Ms Nxele testified that when Ms Marias, Ms Morar and herself entered the plaintiff's chambers the plaintiff was seated behind his desk and before they could sit down the plaintiff suddenly started shouting at her and said, "*what nonsense is this who gave you the right to shout at my secretary (Ms Morar)?*" She then decided to first greet the plaintiff who just instructed her to sit down.

[4.1.5] She further stated that Ms Morar explained to the plaintiff that when she enquired from Ms Nxele about the stationery, she responded in a rude manner. The plaintiff shouted at her again and pointed fingers at her and said *“nonsense, trash, rubbish and that she was useless”* without giving her an opportunity to respond or put forward her version. Later when she tried to explain what transpired between Ms Morar and herself, the plaintiff continued shouting at her and told her that he is running a busy office. She explained to the plaintiff that it was Ms Morar’s responsibility to collect the stationery; it was not her duty to tell Ms Morar that the stationery is ready and she was not prepared to do the job of Ms Morar because they were both employed by the Department of Justice. She further testified that she believed that the plaintiff shouted and insulted her because she was a black woman who was defenceless and he would have behaved differently if she was a man.

[4.1.6] I interpose to mention that in the Trial Bundle¹, the memorandum of the second defendant, dated 7 January 2014, states that Ms Marias indicated that the plaintiff spoke in a raised voice and did not allow the complainant, Ms Nxele to speak. However, Ms Nxele in her statement to the police stated that the plaintiff shouted at her.

[4.1.7] The plaintiff testified that when Ms Marias and Ms Nxele entered his chambers, they sat down and he spoke to them about the importance

¹ See Trial Bundle page 20.

of the Court being run efficiently. According to the plaintiff he told Ms Nxele that it is not acceptable for her to shout at his secretary. Ms Nxele stated that she wants to respond and the plaintiff gave her a chance to respond. Ms Nxele denied shouting at Ms Morar and she further said that Ms Morar is not her boss. He then asked her who is her boss and she responded by saying it is the Department of Justice. He angrily raised his hands and said “*do I have to cope with this rubbish?*” Ms Nxele retorted and said “*do you call me rubbish?*” He denied that when he said rubbish he was referring to her personally and Ms Marais informed Ms Nxele that the plaintiff was not referring to her when he mentioned the word “*rubbish*”.

[4.1.8] He enquired of Ms Nxele whether she understood the English language and directed that her appointment file should be made available to him so that he could check it. In assessing the situation in the meeting held in the plaintiff's chambers it seems clear that emotions were running high , in particular on the part of the plaintiff and Ms Nxele .In addition it is also clear that the word ‘*rubbish*’ was used by the plaintiff. What is in dispute is the context within which the word was used. I am also mindful in a society such as ours with a diversity of languages there is always scope for misunderstanding and misinterpreting language.

That being the case it does appear that the plaintiff was angry and I do think that his questioning of Ms Nxele's ability to speak English was

unwarranted in that it unnecessarily called into question her competence and ability to do her work.

[4.1.9] The plaintiff further testified that he had an open door policy with staff members to discuss issues negatively affecting the efficient operation of the Court. He further stated that on some previous occasions when he was faced with related issues with the staff members, he was frustrated when some of the staff said that they were not accountable to him, as the Head of the Court, but to the Department of Justice.

[4.1.10] On 24 October 2013, Ms Nxele reported the incident of what happened in the plaintiff's chambers to the Office of The Public Service Association and also laid a charge of *crimen injuria* against the plaintiff on 25 October 2013, at the Durban Central Police Station.

[4.1.11] On 25 October 2013, a journalist phoned the plaintiff about the criminal charge laid against him. The plaintiff informed the journalist that he was not aware of any criminal charge against him and he advised the journalist to contact Ms Marais to obtain further details of what actually transpired before publishing anything. An article was nevertheless published in the Sunday Times Newspaper on 27 October 2013, under the headline "*Case Against Leading Judge*".

The key issue in dispute and around which much of this action revolves, is whether the plaintiff referred to Ms Nxele as being '*rubbish and useless*' or whether he used the word '*rubbish*' to describe his unhappiness about the state of affairs that related to the stationery and the dispute that evolved around it. It is matter I will return to.

[4.2] Facts pertaining to the investigation by the second and third defendants the decision to prosecute and the decision to withdraw the charge.

[4.2.1] On 28 October 2013, Ms Mkhize and Mrs Boniwe Lillian Ethel Mdunge (Ms Mdunge), who also works in Ms Nxele's office, deposed to statements to the South African Police concerning the communication exchanged with Ms Morar on 22 October 2013 and the report they made to Ms Nxele. On the 28 October 2013, Ms Nxele lodged a grievance about the plaintiff's conduct with the Department of Justice. Ms Marais and Ms Morar also deposed to statements to the police regarding the events of the 22 October 2013. .

[4.2.2] On 29 October 2013, the plaintiff addressed a letter to the Chief Justice of the Republic of South Africa and implored him to investigate the matter of the criminal charge against him.

[4.2.3] On 30 October 2013, Major-General Balaram Naidoo and Brigadier Isaiah Jabulani Zikhali obtained a warning statement from the plaintiff.

[4.2.4] Advocate Noko testified that she received the docket from the police during November 2013. She perused it and recalled that it contained the statements of Ms Nxele, Ms Morar, Ms Marias and the plaintiff. She gave it to her colleague, Advocate Selepe on 17 October 2014, almost a year after the alleged incident, to read, comment and to give his opinion. Advocate Selepe informed her that he thought there was a *prima facie* case against the plaintiff.

[4.2.5] Advocate Noko further testified that she personally interviewed Ms Nxele, Ms Morar and Ms Marais on 26 November 2013. She said she started preparing her memorandum in January 2014 before the matter was referred to the first defendant. In the memorandum she summarised the facts, referred to some decided cases and her conclusion was that *“there are reasonable prospects of success in the case and had decided to prosecute.”* She further testified that because the plaintiff was a Judge President she sought advice from the first defendant as to the process that should be followed before commencing with the prosecution.

[4.2.6] It is clear from the contents of the memorandum of Advocate Noko that in the statements of Ms Marias and Ms Nxele there are contradictions that related to how the plaintiff gesticulated with his hands or allegedly pointed at Ms Nxele when he spoke. Ms Morar and Ms Marais both testified that when they were in the plaintiff's chambers the discussion

commenced after they sat down. Both testified that they did not hear the plaintiff referring to Ms Nxele as nonsense, trash, rubbish and useless, as alleged by Ms Nxele. Importantly, the contents of their statements to the police do not confirm or corroborate Ms Nxele's version on this crucial aspect which as I have indicated is not only central to these proceedings but would have been material in any proposed prosecution of the plaintiff. They also said plaintiff did not shout and his voice was loud as he normally talks in a loud voice. I noted during the plaintiff's testimony that he speaks in a loud voice.

[4.2.7] In my view, the duty of a prosecutor is to carefully consider all the versions of the witnesses, statements and determine whether the contradictions therein are material or not before a decision to prosecute is made.

[4.2.8] Advocate Selepe testified that he received the docket from Advocate Noko but he said it was in August 2014 and he was of the view that there was a *prima facie* case against the plaintiff. He said he was involved in the case again when he prepared the summons to be served on the plaintiff. The summons was issued on 22 October 2014 and was served on the plaintiff on the same day.

[4.2.9] The plaintiff told the Court that the service of the summons on was effected on Diwali, which is one of the most auspicious occasions in

the Hindu religion and his view was that it was intended to humiliate him on this special day because he is a member of the Hindu religion. Advocate Selepe however testified that he did not know that 22 October 2014 was Diwali day.

[4.2.10] I interpose to state that there is no entry or recording in the docket or in Advocate Noko's memorandum to the first defendant, that she discussed the matter with Advocate Selepe. While I do not suggest that there was a legal duty on her to record same, my view is that in a matter where criminal conduct is imputed against a senior official it would have been prudent for Advocate Noko would have recorded the date and the opinion of Advocate Selepe in the docket. I have some doubt as to whether Advocate Selepe was in fact given the docket to comment on its contents.

[4.2.11] Advocate Noko testified that she gave Advocate Selepe the docket in October 2014 but Advocate Selepe said he received the docket in August 2014. Considering the chronology, Advocate Noko could not have given the docket to Advocate Selepe in October 2014, before it went to the first defendant. The docket was sent to the first defendant in August 2014 hence the recommendation was made to Advocate Ramaite SC, who was instructed by the first defendant to investigate the matter further.

[4.2.12] Importantly, Advocate Noko did not comment or note in her memorandum that she consulted with Ms Morar nor Ms Marais, in respect of the contradictions in the three statements, regarding the insulting statement(s) allegedly made by the plaintiff. It is clear that the version recorded in the memorandum of Advocate Noko, after she consulted with Ms Nxele on 13 November 2013, differs in certain respects with the contents of the plaintiff's statement to the police dated 25 October 2013, regarding at which stage the alleged insulting word were uttered after they entered the plaintiff's chambers.

[4.2.13] About a year later in October 2014 (the first defendant informed the second defendant that) after several correspondence, further statements taken from witnesses and further reports were compiled, that Ms Nxele did not accept the suggestion of an informal mediation process. The first defendant informed the second defendant that the plaintiff should be prosecuted on a charge of *crimen injuria* and that it would not be improper if the plaintiff were to be given the option of paying an admission of guilt fine – this however was not reflected in the summons.

THE LEGAL FRAMEWORK AND EVALUATION OF THE EVIDENCE

[5] The requirements to prove a claim for malicious prosecution were discussed in **Minister of Justice and Constitutional Development v Moleko**² as follows:

² [2008] 3 All SA 47 (SCA) par 8.

“In order to succeed (on the merits) with a claim for malicious prosecution, a claimant must allege and prove –

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

The requirement of “malice” has been the subject of discussion in a number of cases in this court. The approach now adopted by this Court is that, although the expression “malice” is used, the claimant’s remedy in a claim for malicious prosecution lies under the injuriarum and that what has to be proved in this regard is animus injuriandi. See ***Moaki v Reckitt and Colman (Africa) Ltd and Another***³ and ***Prinsloo and Another v Newman***⁴. By way of further elaboration in ***Moleko***⁵ 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

³ 1968 (3) SA 98 (A) at 103-104.

⁴ 1975 (1) SA 481 (A) at 492 A – B.

⁵ At par 64.

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

[6] What triggered the prosecution of the plaintiff was the act of Ms Nxele preferring a charge of ***crimen injuria*** against the plaintiff. In her first statement⁶ to the police dated 25 October 2013, it is recorded that she said the following:

“...As we were approaching the Judges (sic) table where he was seated the Judge started shouting at me saying what nonsense is this who gave you the right to shout at my secretary. On our arrival to him I greeted him his answer was sit down....

...After Roma finished, the Judge started shouted (sic) at me insulting me pointing fingers at me in front of Marais and Roma calling me all sort of names, nonsense, trash, rubbish and how useless I am. The Judge never gave me a chance to tell my side of my story. Then I asked him if he was going to listen to my side of my story. I could see that he was concluded about me he said yes talk. I told the Judge what happened. After that the Judge kept on shouting at me saying that his office is very busy. I told the Judge that I will not serve his secretary, we are all employed by the department of justice...”

[7] After the Office of the NDPP received the first memorandum from Advocate Noko it instructed a team led by Advocate Ramaite SC to prepare a memorandum

⁶See Trial Bundle page 8A.

on the matter before deciding on whether the plaintiff should be formally charged. The team investigated the matter further and recommended as follows:

- [29.1] It is submitted that the NDPP should first of all liaise with the Office of the Chief Justice in order to determine whether this complaint against Mr Patel should not rather (and more appropriately) be dealt with by means of the disciplinary processes of the Judicial Conduct Committee.*
- [29.2] If the abovementioned option does not materialize, then it should be considered to initiate an Informal Mediation process.*
- [29.3] Failure to reach an amicable solution during an Informal Mediation process, a prosecution should be instituted. It would not be improper to allow the accused to pay an admission of guilt in these circumstances.”*
- [8] The first defendant wrote to the second defendant to inform her that for the matter to be dealt with through disciplinary process of the Judicial Conduct Committee and the complainant, Ms Nxele, should lay a complaint with the Judicial Conduct Committee. The NDPP further requested the DPP to ascertain whether Ms Nxele will be amenable to follow the recommended alternative dispute resolutions and to explain the benefits thereof.

[9] An important feature in this matter is what transpired following the recommendation made by the first defendant regarding mediation and the views of Ms Nxele on the issue and how this impacted on the final decision taken to prosecute the plaintiff . There appears to be some uncertainty as to whether Ms Nxele was opposed to mediation or insisted on the prosecution of the plaintiff. .

[10] During cross examination Advocate Noko was ambivalent about the conclusion of the prosecution team appointed in November 2014 and sought to distance herself from its conclusion. Advocate Noko said she was not persuaded by the recommendation of the prosecution team and she would have persisted in prosecuting the plaintiff but for the fact Ms Nxele later asserted that she did not consider that her *dignitas* was impaired by the use of the word “*rubbish*” which she attributed to the plaintiff.

[11] It is interesting that when Ms Nxele testified in court she insisted that the alleged utterance impaired her dignity but she told the prosecution team that alleged words uttered by plaintiff did not have an impact on her dignity. Furthermore Advocate Noko insisted that Ms Nxele wanted the matter to go to Court but Ms Nxele testified that she wanted to have a face to face discussion with the plaintiff. As I indicated that in the meeting held in the plaintiff's chambers the emotions were high, in my view Advocate Noko should have considered this aspect before taking a decision to prosecute. It is not surprising that there are material contradictions in the versions of Ms Nxele.

[12] It should be noted that Ms Nxele consulted with Advocate Noko again on 15 September 2014, in Pietermaritzburg. In the affidavit she signed on 15 September 2014, she states that Advocate Noko explained to her the contents of the letter dated 7 January 2014, that she wrote to the NDPP, her recommendation and the response from the NDPP. Her response was that she wanted to see justice done and if it's true that no one is above the law the plaintiff must deal with the allegations against him in a Court of law.⁷

[13] However in the affidavit⁸ made by Brigadier Isiah Jabulani Zikhali on or after 12 November 2014, it is recorded that:

“On 2014-11-12 the complainant was called to DPP's in Durban for consultation. The complainant was interviewed in my presence by advocate Khuzwayo, advocate Sibeko and Durban SPP. The contents of NDPP's letter were explained to the complainant by advocate Sibeko. The response from the complainant was that she misunderstood advocate Noko when she consulted her in Pietermaritzburg. The complainant stated that she thought she was going to be excluded from the process of mediation and that the Judge would be called alone. The complainant elected to follow the mediation process.”

[14] It should further be noted that on 15 August 2014, the NDPP addressed a letter to Advocate Noko and advised her about the advice of the Office of the Chief

⁷ See page 70 of the Trial Bundle.

⁸ See page 70 of the Trial Bundle.

Justice. In the letter dated 11 August 2014, addressed to the NDPP, the Office of the Chief Justice, *inter alia*, said the following:

"While I find the proposal that the matter would best be dealt with by the Judicial Conduct Committee, the challenges I have is that I cannot initiate that process. The complainant or someone on her behalf and with her consent would have to depose too an affidavit initiating the lodgement of a complaint against Patel, JP."

If the NDPP or someone attendant, see she is agreeable to it, and follow on his behalf could bring this option to her attention and she is agreeable to it and following through on it the, JCC would then have the jurisdiction to deal with the matter."

[16] Advocate Noko testified that on 15 September 2014, when she consulted with Ms Nxele, she advised her about the recommendation of Advocate Ramaite SC and that from the Office of the Chief Justice. Ms Nxele was not amenable to follow the alternative dispute resolution and she noted in her memorandum about Ms Nxele the following:

"My response to this matter is that I want justice being done. If it is true that there is no one who is above the law, the Judge must be brought before the court and answer the allegations."

[17] It is further important to mention that when Ms Nxele testified she said she told Advocate Noko that if the plaintiff apologised she would not have insisted that

the criminal case should proceed. However, this is not recorded in her affidavit of 15 September 2014, or in the affidavit of the Brigadier Zikali. When Ms Nxele testified she denied that she was informed about alternative dispute resolutions which she would have acceded to. Advocate Noko in her testimony, insisted that Ms Nxele wanted the matter to go to Court but Ms Nxele however, testified, that she told Advocate Noko that she wanted to have a face to face discussion with the plaintiff.

[18] On 15 September 2014, Advocate Noko addressed a memorandum to the NDPP wherein she informed him that the complainant was not amenable to following an alternative dispute resolution mechanism and therefore declined the advice. She then requested the NDPP for his advice on the way forward.

[19] On 23 September 2014, the NDPP addressed a letter⁹ to the Office of The Chief Justice and informed the Chief Justice that the complainant was not willing to participate in the disciplinary process of the Judiciary Conduct Committee. As a result thereof, he directed that the plaintiff must be prosecuted on a charge of ***crimen injuria*** and that it would not be improper to allow the plaintiff to pay an admission of guilt fine.

[20] On even date, another letter was addressed to Advocate Noko by the NDPP wherein he stated that:

*"I have decided that Mr Patel must be prosecuted on a charge of ***crimen injuria***. I have also decided that it would not be improper to allow the accused to pay an admission of guilt fine."*

⁹ Letter from NDPP addressed to Office of the Chief Justice dated 23 September 2014.

[21] To determine whether there was malice or not, it will be worth recalling what the Supreme Court of Appeal said when it dealt with the duty of the prosecutor in **Minister of Police and Another v Du Plessis**¹⁰,

“...A prosecutor has a duty not to act arbitrarily. A prosecutor must act with objectivity and must protect the public interest. In S v Jija and Others 1991 (2) SA 52 (E) at 67I-68B the following appears:

“I must also mention that the Court had an uneasy feeling that State counsel had misconceived his function. It appeared to the Court from the nature of his address and attitude that he regarded his role as that of an advocate representing a client. A prosecutor, however, stands in a special relation to the Court. His paramount duty is not to procure a conviction but to assist the Court in ascertaining the truth (R v Riekert 1954 (4) SA 254 (SWA) at 261D-G; R v Berens [1985] 176 ER 815 at 822). See also R v White 1962 (4) SA 153 (FC); R v Tapera 1964 (3) SA 771 (SRA); S v Van Rensburg 1963 (2) SA 343 (N); R v M 1959 (1) SA 434 (A) at 439F.”

[22] In **Democratic Alliance v President of the Republic of South Africa and Others**¹¹ this Court, after a discussion concerning prosecutorial independence in democratic societies, quoted, with approval, the following part of a paper presented

¹⁰ 2014 (1) SACR 217 (SCA) at par 28.

¹¹ 2012 (1) SA 417 (SCA) at par 82.

at an international seminar by Mr James Hamilton, then substitute member of Venice Commission and Director of Public Prosecution in Ireland:

“Despite the variety of arrangements in prosecutor’s office, the public prosecutor plays a vital role in ensuring due process and the rule of law as well as respect for the rights of all the parties involved in the criminal justice system. The prosecutor’s duties are owed primarily to the public as a whole but also to those individuals caught up in the system, whether as suspects or accused persons, witnesses or victims of crime. Public confidence in the prosecutor ultimately depends on confidence that the rule of law is obeyed.”

We should all be concerned about the maintenance and promotion of the Rule of Law. Given increasing litigation involving the NDPP, these principles cannot be repeated often enough. We ignore them at our peril.

[23] A prosecutor exercises discretion on the basis of the information before him or her. In **S v Lubaxa**¹² this Court said the following:

“Clearly a person ought not to be prosecuted in the absence of a minimum of evidence upon which he might be convicted, merely in the expectation that at some stage he might incriminate himself. That is recognised by the common law principle that there should be “reasonable and probable” cause to believe that the accused is guilty of

¹² 2001 (2) SACR 703 (SCA) at par 19.

an offence before a prosecution is initiated and the constitutional protection afforded to dignity and personal freedom (s 10 and s 12) seems to reinforce it. It ought to follow that if a prosecution is not to be commenced without that minimum of evidence, so too should it cease when the evidence finally falls below that threshold."

[24] Courts are not overly eager to limit or interfere with the legitimate exercise of the prosecutorial authority. However, a prosecuting authority's discretion to prosecute is not immune from the scrutiny of a Court which can intervene where such discretion is improperly exercised. See generally **National Director of Public Prosecutions v Zuma**¹³. The following was held in **Minister of Police and Another v Du Plessis**¹⁴:

"Indeed a court should be obliged to and therefore ought to intervene if there is no reasonable and probable cause to believe that the accused is guilty of an offence before a prosecution is initiated."

[25] The second defendant should have been satisfied that there was reasonable and probable cause not just a ***prima facie*** case against plaintiff. The prosecutor should interrogate the docket in its entirety and apply his/her mind properly before taking a decision. Again, if I accept the version of Ms Nxele, it implies that Advocate Noko was not a credible witness and she fabricated the evidence. The defence failed to call the officer who commissioned Ms Nxele's statement, so that he could testify if the complainant understood the content of her statement and confirm the truthfulness thereof.

¹³ 2009 (2) SA 277 (SCA).

¹⁴ *Supra* at par 31.

[26] Crucially, in my view, when the plaintiff was summoned he was not informed about an opportunity to pay a fine as recommended by the first defendant. Advocate Noko could not give a satisfactory answer as to why the directive by the first defendant that the plaintiff be given the opportunity to pay an admission of guilt fine was not implemented.

[27] A prosecutor should assess whether there is sufficient and admissible evidence to provide a reasonable prospect of a successful prosecution, otherwise the prosecution should not commence. According to the DPP's Prosecution Policy Code of Conduct, Guidelines and Directing under the heading: When the role of the prosecutor is described, it is stated that:

"Prosecutors must at all times act in the interest of the community.....

Members of the Prosecution Authority must act impartially and in good faith. They should not allow their judgment to be influenced by factors such as their personal views regarding the nature of the offence or the race, ethnic or national origin of the offender or the victim, or the race, ethnic or national origin, sex, religious beliefs, political views or sexual orientation of the victim, witness or the offender"

When regard is had to the evidence that was before the first and second defendants before the decision to prosecute was taken there must have been considerable doubt with regard to the version and understanding of Ms Nxele with regard to what was said. Ms Nxele would have been a single witness and in this regard the first and

second defendants would also have had to be satisfied that her evidence would have passed the threshold of being satisfactory in all material respects. For the reasons already given there would clearly been doubt about that which in turn would seriously question whether it could be said that there was reasonable and probable cause to prosecute at the time the decision was taken .

[28] After summons was served on the plaintiff, a prosecuting team comprising of Advocate E Khuzwayo, GP Sibeko and Maimane, was appointed by Advocate Noko. The team consulted extensively with the complainant and the witnesses, formed a view and addressed a memorandum to Advocate Noko, wherein they recommended as follows:

*"We are thus recommended that an informal mediation be done in this matter and the prosecution not be continued with against the accused. Should the state continue to pursue with the prosecution of this matter, we would be prosecuting maliciously especially since we have considered all the merits and the merits of the matter and we are aware that there no reasonable prospects of success. It is our beliefs that were opening a door to a civil claim being levelled against us especially since we are now aware of the material contradictions. See **Minister of Justice and Constitutional Development v Moleo [2008] 3 ALL SA 47 (SCA)** and **Minister of Police and Another v Du Plessis 2014 (1) SA 217 (SCA)**. We are not persecutors but we are Prosecutors who should strive at all times to prosecute without, fear or prejudice which our vision guides us to do. We are not only guided by the Vision and Mission statement in the decision making process as well as*

integrity. Having noted the contradictions and despite this proceeding with a prosecution in the matter impedes on our integrity.

It is also recommended that the DPP consult with the NDPP on the issues raised."

[29] The prosecuting team had a meeting with Advocate Noko and informed her that Ms Nxele no longer regarded the alleged words uttered by plaintiff as having an impact on her dignity and that she wanted mediation to be held. The matter against the plaintiff was formally withdrawn on 11 December 2014, when plaintiff appeared in Court.

[30] As pointed above Ms Nxele's version in the written statements she made and her version when she testified in Court is full of material contradictions and inconsistencies. Her version further contradicts the version of Advocate Noko on certain material aspects. Under cross examination she was evasive and argumentative.

[31] I need to further consider whether on the facts of this matter it can be said that the first defendant mainly relied on the memorandum of the second defendant in arriving at her decision to sanction the decision of the second defendant. In my view, the first defendant should have carefully considered the statements in the docket before he sanctioned the decision of the second defendant to prosecute the plaintiff. The first defendant did not testify to explain how they arrived at a decision to sanction prosecution.

[32] There is no doubt that Advocate Noko was acting within the course and scope of her duties with the second defendant. I do not think that she should be personally liable. There is no evidence implicating the third defendant, the Minister of Justice and Constitutional Development.

[33] The second defendant did not inform the plaintiff about an alternative to pay a fine and she further testified that mediation, as directed by the first defendant and recommended by the prosecution team, has not been pursued. Advocate Noko was not a good witnesses and she did not, in my view, execute the duties reasonable expected from a Director of Public Prosecution. She gave long-winded and argumentative answers when she testified.

[34] As the prosecution team correctly found, in my view, there was no reasonable prospect of a successful prosecution. The plaintiff and his witnesses were credible witnesses and their evidence is acceptable. I think the plaintiff also proved on the balance of probabilities that the first, second and fourth defendants acted with ***animus injuriandi***.

QUANTUM

[35] The assessment of an award for damages is not an easy task. The Court needs to carefully consider the facts and circumstances of the case before it, the aggravating and mitigating conduct of the defendants, the position of the plaintiff and the decided cases for guidance.

[36] The plaintiff was the Judge President of the KwaZulu-Natal High Court and was a few years from retiring with an unblemished record of service to the judiciary and the legal profession. His evidence on these aspects has not been challenged.

[37] The incident was widely publicised in the media and he had to appear in Court on two occasions as an accused. After the charge was laid it took about thirteen (13) months before the charge was withdrawn. During this time the prospect of being prosecuted would have been hanging over his head.

[38] No meaningful attempts were made to pursue alternative dispute resolution methods like mediation by the second defendant before she referred the matter to the first defendant. When the plaintiff was summoned to appear in the Criminal Court he was not given an option to pay an admission of guilt as it was recommended by the first defendant.

[39] The Plaintiff testified that the preferring of a charge of *crimen injuria* and the decision that he should be prosecuted impaired his dignity, reputation and embarrassed him. As a Judge his duty is to dispense justice but he was required to appear in a Criminal Court as an accused after the second defendant and the first defendant decided to prosecute him. The matter was highly publicised in the newspapers.

[40] I need to however, point out that the service of the summons on the plaintiff on Diwali day was not malicious and not intended to embarrass him as a member of the Hindu religion.

[41] I also need to state that before the first decision to prosecute was made by Advocate Noko, she could have involved a team of senior state advocates to assist her with the investigation of the matter. Advocate Noko sanctioned a further investigation by the prosecution team about a year after the charge was laid against the plaintiff.

[42] In the assessment of damages I will also take into consideration that it is still the second defendant that decided to establish a prosecution team and withdraw the charges before the trial could commence.

[43] The defendant's counsel submitted that the appropriate damages to be awarded is an amount of R150 000.00 (one hundred and fifty thousand rand) to R200 000.00 (two hundred thousand rand). I disagree. The defendants were aware that the case involves a senior Judge. That is the reason why two sets of senior state prosecutors were later involved to seek their views in assisting the first and second defendants. The failure by Advocate Noko to pursue mediation is, in my view, an indication that she was intent on seeing the matter being heard in a Criminal Court. According to Advocate Noko mediation was not an important way to resolve this matter because even when the civil trial was heard about three years after the prosecution team recommended it, it had not yet taken place.

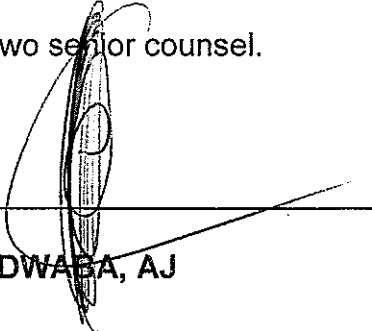
[44] Having regard to the circumstances of this case and having considered previous awards that I was referred to during the argument I think the amount of

R900 000.00 (nine hundred thousand rand) is fair and reasonable damages suffered by the plaintiff.

[45] The plaintiff's counsel sought a punitive cost order against the defendants. In exercising my judicial discretion, I am not satisfied that a punitive cost order would be appropriate. Each party were represented by two counsel and costs of two counsel is justified.

I make the following order against the first, second and fourth defendants jointly and severally:

1. Payment of the sum of R900 000.00 (nine hundred thousand rand only);
2. Interest at the rate of 10% per annum with effect from the date of judgment to date of payment;
3. Costs of suit on a party and party scale and the costs shall include costs of two senior counsel.



A P LEDWABA, AJ

APPEARANCES:

FOR PLAINTIFF: ADV. V I GAJOO SC and ADV R J SALMON SC

INSTRUCTED BY: NORTON ROSE FULBRIGHT ATTORNEYS, DURBAN

FOR DEFENDANTS: ADV M KHOZA SC and ADV. D MTSWENI

INSTRUCTED BY: THE STATE ATTORNEY

DATE OF HEARING: 5 – 9 DECEMBER 2016
3 – 7 APRIL 2017

DATE OF JUDGMENT: _____ 2018