

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

Case No. 588/2013

In the matter between:

CHUMA GOQWANA

Plaintiff

and

NOXOLO MFOBO

First defendant

**MINISTER OF JUSTICE AND CONSTITUTIONAL
DEVELOPMENT**

Second defendant

JUDGMENT

Brooks J.

- [1] On 13 March 2013 the plaintiff issued a combined summons against the defendants for the recovery of damages which he alleges were suffered by him as a result of certain conduct on the part of the first defendant, who is a magistrate and who is alleged to have been acting in the course and scope of her duties in the employ of the second defendant.
- [2] To the extent that it is necessary to do so, the following elements of various allegations made in the particulars of claim are highlighted:
- On 6 June 2011 the first defendant presided in the regional court for the Eastern Cape region held at Mqanduli;
 - a case based on charges of rape against the plaintiff, which bore a 2009 case number, was struck from the roll by the first defendant due to the unavailability of state witnesses;
 - the plaintiff then sought leave to go home and informed the first defendant that he was on bail in respect of other matters bearing 2008 case numbers and that one of them was on the roll for the same day;

- the first defendant ordered that the plaintiff be detained until the following court day in order to have bail in the 2008 cases cancelled;
- on 7 June 2011 and in order to satisfy the plaintiff's detention the first defendant prevailed upon the prosecutor to bring "a sham application" for the cancellation of the plaintiff's bail;
- the first defendant then presided over the application and cancelled the plaintiff's bail in all of the 2008 cases;
- the cancellation of the plaintiff's bail was contrary to the provisions of section 68 of the Criminal Procedure Act 51 of 1977 and unlawful;
- the plaintiff's detention on 6 June 2011 was ordered arbitrarily and for that reason was wrongful and unlawful;
- the first defendant took the decision to cancel the plaintiff's bail on the day before the application was brought and accordingly the exercise embarked upon on 7 June 2011 was a sham and an abuse of judicial authority aimed at clothing her order of the previous day with a veneer of legality;
- as a result of the first defendant's conduct the plaintiff was kept in detention from 6 June 2011 until 18 May 2012, a period of 347 days, whereafter his release was ordered by the High Court.

[3] Subsequent to service of the combined summons the action was defended by both defendants.

[4] In due course special pleas were served and filed in identical terms on behalf of both defendants.

[5] Two of the three special pleas raised have been resolved between the parties by the application of appropriate mechanisms and are no longer in issue. The remaining special plea, that of non-joinder, is the subject of this judgment.

[6] The special plea is couched in the following terms:

- "1. Plaintiff in his particulars of claim bases his claim for damages as against both the first and second defendants on alleged facts enunciated and set out in paragraph 5 of the particulars of claim.
2. In paragraph 5.3 of the particulars of claim the plaintiff has alleged that the first defendant had on "7 June 2011 and in order to justify plaintiff's detention... prevailed on the prosecutor, to bring a sham application for cancellation of his (plaintiff's) bail in other cases".

3. The allegations set out in paragraph 2 above gives an impression and/or suggests that the first defendant has allegedly acted *mala fide* and/or maliciously in concert with a prosecutor in her court.
4. All prosecutors in the South African Judicial System fall within the ambit and control of the National Prosecuting Authority, which in turn is governed by the National Prosecuting Authority Act, 1998 (Act 32 of 1998).
5. From the above, the National Prosecuting Authority has a direct and substantial interest in these proceedings and should have been joined as a party.”

[7] In support of the special plea in argument, Mr *Sishuba*, who appeared on behalf of the defendants, submitted that in cancelling the plaintiff’s bail the first defendant was not acting alone. The reason for this submission was that the first defendant cancelled the bail pursuant to an application brought by the prosecutor and accordingly “acted in concert with the prosecutor”. This was the basis for the further submission that in the circumstances the National Prosecuting Authority “had a direct and substantial interest in the action and ought to have been joined as a party by the plaintiff”.

[8] Mr *Sishuba* confirmed that upon a reading of the relevant portions of the particulars of claim it was clear that the plaintiff targeted only the decision of the first defendant as being the cause of his detention and concomitant loss. However, the submission was to the effect that it would be convenient to have the National Prosecuting Authority as a party to the action in order that the prosecutor involved in the proceedings might be heard in response to the plaintiff’s allegations.

[9] The legal principles pertaining to the joinder of parties find concise expression in the following extract from a judgment of Brand JA¹ delivered on behalf of the full court in the Supreme Court of Appeal:

“It has by now become settled law that the joinder of a party is only required as a matter of necessity – as opposed to a matter of convenience – if that party has a direct and substantial interest which may be affected prejudicially by the judgment of the court in the proceedings concerned (see e g. *Bowring NO v Vrededorp Properties CC and Another* 2007 (5) SA 391 (SCA) para 21). The mere fact that a party may have an interest in the outcome of the litigation does not warrant a non-joinder plea. The right of a party to validly raise the objection that other parties should have been joined to the

¹*Judicial Service Commission and Another v Cape Bar Council and Another* 2013 (1) SA 170 (SCA) par [12]

proceedings, has thus been held to be a limited one (see e g *Burger v Rand Water Board and Another* 2007 (1) SA 30 (SCA) para 7; and Andries Charl Cilliers, Cheryl Loots and Hendrik Christoffel Nel *Herbstein & Van Winsen The Civil Practice of the High Courts of South Africa* 5 ed vol 1 at 239 and the cases there cited)."

- [10] Of equal importance is an understanding of what constitutes a direct and substantial interest. It is generally accepted that what is required in order to constitute a direct and substantial interest in relation to the principles of joinder is "a legal interest in the subject matter of the action which could be prejudicially affected by the judgment of the court".²
- [11] In my view, from whichever angle one approaches the allegations made in the particulars of claim it is clear that it is criticism only of the decision or decisions taken by the first defendant which is relied upon as the basis for the plaintiff's action. The only reference to the public prosecutor in the particulars of claim is a statement of fact alleged by the plaintiff, namely that the first defendant "prevailed on the prosecutor, to bring a sham application for the cancellation of plaintiff's bail..."³
- [12] In the particulars of claim, the intransitive verb "prevail" is used in the past tense and with the preposition "on". This usage is dealt with in the *Shorter Oxford Dictionary* as usage in a specialized sense and the word is defined therein as follows:

"prevail on, prevail upon succeed in persuading, inducing or influencing".

It is to be assumed that in drafting the particulars of claim the pleader made deliberate use of this particular word in order to convey a factual version. The use of the term "prevailed on" accordingly conveys a sense of the first defendant using her more authoritative role in the proceedings to direct the prosecutor to do something, possibly even against the latter's will or better judgment. This falls far short of the concept of the first defendant "acting in concert with a prosecutor", which carries the connotation of a more active, willing and even initiating participation on the part of the prosecutor. Accordingly, the interpretation of the allegation in the particulars of claim which is advanced in the special plea is erroneous. Even if there is room for error in this interpretation of the pleadings, the reality remains that it is

² *Henri Viljoen (Pty) Ltd v Awerbuch Brothers* 1953 (2) SA 151 (O) 167; *Brauer v Cape Liquor Licensing Board* 1953 (3) SA 855 (C); and *Bohlokong Black Taxi Association v Interstate Bus lines (Edms) Bpk* 1997 (4) SA 635 (O) 642 A – C.

³ *sub paragraph 5.3*

only the behaviour and the decision or decisions of the first defendant which are targeted in the particulars of claim. Nowhere is it suggested that any decision taken by the prosecutor is criticised by the plaintiff.

[13] It follows that any interest which the National Prosecuting Authority might have in these proceedings falls short of a legal interest which could be prejudicially affected by the judgment of the court.

[14] Nothing stops the defendants from calling the prosecutor as a witness if his or her evidence would be of assistance in their defence of the matter. This opportunity might be excluded only if the plaintiff has already approached the prosecutor to give evidence on behalf of the plaintiff and the prosecutor has agreed to do so. Indeed, these are mechanisms by which the convenience of hearing the prosecutor's version of events, being the element highlighted by Mr *Sishuba*, can be achieved.

[15] In my view, there is no merit in the special pleas of non-joinder.

[16] The following order will issue:

“1. The special pleas of non-joinder are dismissed, with costs.”

RWN BROOKS

JUDGE OF THE HIGH COURT

Appearances:

For the plaintiff:

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For the defendants:

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Date heard:	20 November 2018
Date of delivery of the judgment:	27 November 2018