THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable
Case No: 194/2023

In the matter between:

NATIONAL DIRECTOR OF
PUBLIC PROSECUTIONS **APPELLANT**

and

SIJOYI ROBERT MDHLOVU **RESPONDENT**

Neutral citation: *The National Director of Public Prosecutions v Sijoyi Robert Mdhlovu* (Case no 194/2023) [2022] ZASCA 85 (03 June 2024)

Coram: HUGHES, MATOJANE and GOOSEN JJA and DAWOOD and BAARTMAN AJJA

Heard: 3 May 2024

Delivered: 3 June 2024

This judgment was handed down electronically by circulation to the parties' legal representatives via e-mail, publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down is deemed to be 11h00 on 03 June 2024.

Summary: Application for leave to appeal – referral for oral evidence in terms of s 17(2)*(d)* of the Superior Courts Act 10 of 2013 – whether reasonable prospect of success and compelling reasons for appeal established. *Actio Inuiriarum* – malicious prosecution – whether the absence of reasonable cause to prosecute and intention to cause injury or harm established.

ORDER

On appeal from: Mpumalanga Division of the High Court, Mbombela (Sieberhagen AJ, sitting as a court of first instance):

(a) The application for leave to appeal is granted with costs.

(b) The appeal is upheld.

(c) The order of the high court is set aside and replaced with the following: 'The plaintiff's claim is dismissed with costs'.

(d) The respondent is ordered to pay the costs of the appeal.

JUDGMENT

Matojane JA (Hughes and Goosen JJA and Dawood and Baartman AJJA concurring):

Introduction

[1] This is an application by the National Director of Public Prosecutions (appellant) for leave to appeal against the whole of the judgment and order of the Mpumalanga Division of the High Court, Mbombela (per Sieberhagen AJ) (the high court) handed down on 24 May 2022, in which the appellant was held liable to Mr Sijoyi Robert Mdhlovu (respondent) for malicious prosecution. The National Director of Public Prosecutions (the NDPP) is not only seeking leave to

appeal but also requests that, if granted, this Court consider and make a decision on the merits of the appeal.

[2] In accordance with s 17(2)(*d*)[1] of the Superior Courts Act 10 of 2013, this Court directed that the application be referred for oral argument. Furthermore, both parties involved in the matter were instructed to be prepared to argue the substantive issues of the case should the court require them to do so during the hearing.

[3] On 26 April 2024, the Registrar sent an e-mail to the respondent's legal representatives, Meintjies and Khoza Inc. (Meintjies). The purpose of the communication was to notify them that the respondent had not filed heads of argument and the required practice note for the hearing scheduled for 3 May 2024.

[4] On 30 April 2024, the respondent's attorneys sent a letter to the Registrar requesting a postponement of the hearing for the application for leave to appeal. This marked the initial instance of such a request being made. The Registrar forwarded Meintjies' letter to the appellant's legal representatives, who responded by expressing their opposition to any postponement. Despite the respondent's lawyers being provided with the Court order and a notice of the hearing date, the respondent did not bring a substantiative application for a postponement and failed to attend Court on the day of the scheduled hearing. Accordingly, the hearing proceeded without the respondent's presence.

Background

[1] Section 17(2)*(d)* of the Superior Courts Act provides:

. . .

'*(d)* If leave to appeal in terms of paragraph *(a)* is refused, it may be granted by the Supreme Court of Appeal on application filed with the registrar of that court within one month after such refusal, or such longer period as may on good cause be allowed, and the Supreme Court of Appeal may vary any order as to costs made by the judge or judges concerned in refusing leave.'

[5] On 12 June 2015, the respondent decided to withdraw charges against accused individuals in cases under investigation by Sergeant Nkambule (the investigating officer). The charges included armed robbery, murder, and illegal possession of a firearm. The investigating officer brought witnesses to the respondent's office for consultations in preparation for the trial that was due to start. The respondent informed the investigating officer that he would be withdrawing the charges due to a discrepancy in the ballistics report. He told him that the report showed that the firearm analysed by forensics experts had a serial number, whereas the firearm found in the possession of the accused did not have one.

[6] The investigating officer indicated to the respondent that this issue could have been raised earlier, as the respondent had the dockets with him all along. He assured the respondent that the firearm sent for ballistics examination was the same one found in the accused's possession and suggested calling an expert to confirm this.

[7] The respondent agreed to postpone the matter to allow the investigating officer to obtain a supplementary affidavit from the ballistics expert to remedy the discrepancy. However, later that day, the respondent withdrew the charges without informing the investigating officer. In his testimony, the respondent stated that he informed the investigating officer that the cases were not trial-ready due to issues with the chain of evidence concerning the firearms identification in the four cases. He claimed that the forensic investigation department had failed to properly identify the firearm, leading him to withdraw the charges in court. He stated that he was not aware of the practice in Mbombela, which obliges prosecutors to obtain authorisation of their seniors before withdrawing charges.

[8] The investigating officer subsequently lodged a complaint against the respondent with his superiors at the South African Police Service (SAPS). The complaint alleged that the respondent breached an earlier agreement to postpone the matter, allowing formal chain evidence relating to the firearm to be obtained. The complaint and associated documents were forwarded to Advocate Moonsamy, the Deputy Director of Public Prosecutions in Mpumalanga (the DDPP), for further review.

[9] After an investigation, which included consultation with five further legal professionals, the DDPP took the decision to prosecute the respondent on two counts of fraud and, as an alternative, defeating the ends of justice. This was pursuant to the Director of Public Prosecutions (the DPP) for the Gauteng Division, Pretoria, confirming in a memorandum dated 28 December 2015 that there was a prima facie case against the respondent on those charges.

[10] In August 2017, the respondent was charged with two counts of fraud and, in the alternative, defeating the ends of justice. The charges stemmed from accusations that he had deliberately provided false information to the Department of Justice and Constitutional Development or the investigating officer. Specifically, it was alleged that the respondent had falsely stated that an accused person had no link to the charges brought against them in court and that the complainant was unable to identify the property that had been stolen in relation to those charges.

[11] Furthermore, it was alleged that the respondent had falsely claimed that an accused, Mr Nonyane, was only implicated in the charges based on the testimony of his co-accused. However, the respondent was aware that Mr Nonyane had admitted to committing the offence for which he was charged and that some of

the stolen property had been found in his possession. Additionally, the complainants positively identified the recovered property as belonging to them.

[12] The respondent pleaded not guilty, and the trial commenced in the Mbombela Regional Court on 29 August 2017. On 30 August 2017, at the close of the State's case, the respondent was discharged on all counts in terms of s 174 of the Criminal Procedure Act 51 of 1977 (the CPA).[2]

[13] Aggrieved by his prosecution, on 15 March 2018, the respondent issued a summons against the NDPP for malicious prosecution in the high court. He contended that the prosecution was motivated by malice, initiated without reasonable and probable cause, and ultimately failed. The appellant opposed the claim, maintaining that the prosecution was legally justified. The high court found against the NDPP.

Leave to appeal

[14] On 20 July 2022, the appellant filed a notice of application for leave to appeal in the high court, which was accompanied by an application for condonation for the late filing of the said notice. The court refused to entertain the application for condonation, stating that it was an issue that had to be dealt with by the appeal court. In refusing to entertain the application for condonation, the court misconstrued its role in terms of Uniform Rule 49(1)(*b*), which provides for the process to be followed in seeking leave to appeal when it was not originally requested at the time of the initial judgment or order.

[2] Section 174 of the Criminal Procedure Act 51 of 1977 provides:
'**Accused may be discharged at close of case for prosecution**
If, at the close of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any offence of which he may be convicted on the charge, it may return a verdict of not guilty.'

[15] The condonation application has become moot since the high court explicitly granted it by considering the merits of the leave to appeal application and dismissing it. The matter before us is an order denying leave to appeal. The application was submitted within the prescribed time limits and was referred for oral argument. The evidence suggests that the appeal has a reasonable chance of success, and there are compelling reasons to grant leave to appeal.

The high court's findings

[16] After a separation of issues in terms of Uniform Rule 33(4),[3] the high court dealt only with the merits and not the quantum of the respondent's claim. Two issues were identified: (a) whether the prosecution was initiated without reasonable and probable cause, and (b) whether it was actuated by 'malice' in the sense of *animus iniuriandi* on the part of the appellant.

[17] The high court found that both issues were in favour of the respondent. It held that the DDPP had acted with *animus iniuriandi* in that she subjectively foresaw the possibility that she was acting wrongfully in prosecuting the respondent but nevertheless continued recklessly as to the consequences. The court found that she lacked reasonable and probable cause for the prosecution, as she was not in possession of evidence showing a reasonable prospect of a conviction at the time.

The appeal

[3] Uniform Rule 33(4) provides:
'**Special cases and adjudication upon points of law:**
. . . .
(4) If, in any pending action, it appears to the court *mero motu* that there is a question of law or fact which may conveniently be decided either before any evidence is led or separately from any other question, the court may make an order directing the disposal of such question in such manner as it may deem fit and may order that all further proceedings be stayed until such question has been disposed of, and the court shall on the application of any party make such order unless it appears that the questions cannot conveniently be decided separately.'

[18] In order to succeed in a claim for malicious prosecution, the plaintiff is required to prove: (a) the defendant set the law in motion (instigated or instituted the proceedings), (b) the defendant acted without reasonable and probable cause, (c) the defendant was actuated by malice or *animus iniuriandi* and (d) the prosecution failed.[4]

[19] The key issues on appeal are whether the respondent discharged the burden of proving the lack of reasonable and probable cause to prosecute him and that the prosecution was instituted *animo iniuriandi* (i.e. with the intention to injure the respondent). The appellant submits that the high court erred in its assessment and application of the law on both points. If either element is not established, the delict of malicious prosecution is not made out.

Reasonable and probable cause

[20] In *Prinsloo and Another v Newman*,[5] this Court discussed the concept of reasonable and probable cause for prosecution in the context of malicious prosecution. The Court held that the test for reasonable and probable cause is an objective one.[6] It is not based on the subjective beliefs or motives of the prosecutor. Reasonable and probable cause exists if a reasonable person would have concluded that the accused was probably guilty on the facts available to the prosecutor at the time.[7]

[21] It follows that a prosecutor need not have evidence establishing a prima facie case or proof beyond a reasonable doubt when deciding to initiate a

[4] *Minister of Justice and Constitutional Development and Others v Moleko* [2008] ZASCA 43; [2008] 3 All SA 47 (SCA); 2009 (2) SACR 585 (SCA) para 8.
[5] *Prinsloo and Another v Newman* 1975 (1) SA 481 (A).
[6] Ibid at 509B.
[7] Ibid at 484B. See also *Relyant Trading (Pty) Ltd v Shongwe and Another* [2006] ZASCA 162; [2007] 1 All SA 375 (SCA) para 14; *Beckenstrater v Rottcher and Theunissen* 1955 (1) SA 129 (A) at 136A-B.

prosecution. Suspicion of guilt on reasonable grounds suffices. The question is what a reasonable prosecutor would have done in light of the information available at the relevant stage.

[22] The high court found that the NDPP failed to apply the correct test at all by focusing only on a prima facie case. Further, the NDPP did not present evidence to the court showing that the DDPP's decision was supported by reasonable and probable cause.

[23] A thorough review of the evidence that was before the DDPP when she decided to prosecute establishes objective probable cause to prosecute, notwithstanding that the respondent was discharged at the trial. In paragraph 17.4 of the judgment, the high court stated:

'Nothing in the form of the contents of the case dockets concerning the plaintiff, considered by Adv Moonsamy, was put before me on behalf of the defendant, establishing reasonable and probable cause to prosecute the plaintiff. Indeed, Adv Moonsamy testified that, in her view it was not necessary for her to have had reasonable and probable cause to institute the prosecution and all that she had to establish was whether a *prima facie* case could be established from the information and evidence considered by her. Even if she was correct, which she was not, neither she nor the defendant adduced any evidence whereon she made her decision. The high water mark of her evidence was that she resolved that, on the contents of the case dockets put before her, a *prima facie* case against the plaintiff existed.'

[24] The high court criticised the DDPP for presuming that a *prima facie* case sufficed but failed to properly assess whether the evidence in the form of statements and other information the DDPP relied on provided reasonable and probable cause or not. The evidence available when the decision was taken is relevant in establishing probable cause rather than the evidence accepted by the court when deciding the eventual outcome.

[25] The absence of the docket from the evidence before the court ought not to have been held against the NDPP. As the plaintiff, the respondent bore the overall onus and should have sought to compel its production to challenge the evidence of the DDPP. By concentrating on the prosecution's ultimate failure, the high court erroneously diverted attention from scrutinising reasonable and probable cause.

[26] During the trial, the DDPP testified that she considered various pieces of evidence when making her decision. This included a statement from the investigating officer, which detailed how the suspect, Mr Nkosi, was implicated in a business robbery and murder by his co-accused and that an unlicensed firearm was discovered buried at his residence. The investigating officer stated that the respondent reneged on an undertaking to postpone the cases for further investigation and scuppered the prosecution of serious criminal matters. While the investigating officer's opinion could not bind the respondent in the exercise of his prosecutorial discretion, his account raised a reasonable suspicion of impropriety that warranted further investigation as it suggests possible misconduct by the respondent in handling serious criminal cases.

[27] Additionally, Mr Nkosi's own confession in his warning statement admitted to the charge of possession of an unlicensed firearm. This evidence directly corroborates part of the investigating officer's account. It lends credibility to the allegation that the respondent improperly withdrew charges against a suspect who had confessed to a serious crime. While not conclusive, this evidence strengthens the case for reasonable and probable cause to investigate and prosecute the respondent. The DDPP also considered an affidavit from the respondent's supervisor, Ms Mashapa, which stated that the respondent had withdrawn serious charges, including murder charges, without authorisation and against standard practice. This evidence, coming from the respondent's own

supervisor, carries significant weight in suggesting that his actions were improper and warranted scrutiny.

[28] The DDPP testified that she consulted multiple prosecutors and advocates, who expressed the *prima facie* view that criminal charges against the respondent were justified. Most significantly, the DPP himself confirmed in writing that the dockets disclosed grounds for prosecution, albeit requesting further evidence be obtained before a final decision was made. While the DPP's confirmation was not an unequivocal endorsement, it provides strong evidence that the DDPP's decision was not baseless or wholly unsupported by the available evidence. While not binding, these opinions from legal professionals with knowledge of prosecutorial standards and practices lend additional support to the reasonableness of the DDPP's assessment of the evidence and decision to prosecute. The fact that the DDPP sought out multiple opinions suggests a diligent and good-faith effort to assess the merits of the case before proceeding. The high court unequivocally accepted the DDPP's evidence as credible.

[29] Viewed holistically and in context, the information at the DDPP's disposal at the time she decided to prosecute established reasonable and probable cause in the form of grounds for suspicion of guilt on which she was entitled to act. As the Supreme Court of Canada opined in *Miazga v Kvello Estate 2009 SCC 51*,[8] 'the reasonable and probable cause inquiry comprises both a subjective and an objective component'. The prosecutor must subjectively have a belief in the existence of reasonable and probable cause, and that belief must be justifiable from an objective point of view. The objective component requires the existence of sufficient evidence for a reasonable person to conclude that the accused was probably guilty.

[8] *Miazga v Kvello Estate*, 2009 SCC 51 [2009] 3 S.C.R. 339 at 341.

[30] The fact that the respondent was subsequently discharged does not negate the earlier existence of reasonable and probable cause. Also, the DDPP's statement that she believed there was a prima facie case but not enough evidence for a corruption charge does not imply that there was no probable cause for the actual charges of fraud and defeating the ends of justice brought forth by the prosecution. The high court's conclusion that there was no reasonable and probable cause is thus not properly substantiated by the evidence.

Lack of *animo iniuriandi*

[31] Proof of *animus iniuriandi*, in the sense of intention to injure, is an essential element of the *actio iniuriarum* on which a malicious prosecution claim is based. The DDPP had to intend to prosecute the respondent with the consciousness of wrongfulness. Negligence or even gross negligence is insufficient - there must be *dolus*, at minimum, in the form of *dolus eventualis*.[9]

[32] To show *animus iniuriandi*, the respondent had to demonstrate that the DDPP foresaw the possibility that initiating the prosecution was wrongful in that reasonable grounds for it were lacking but that she acted recklessly as to that consequence. The high court's analysis took an unduly narrow view of the evidence.

[33] An improper motive alone is insufficient to establish *animus iniuriandi* for a malicious prosecution claim.[10] As noted above, the prosecution must also have been initiated without reasonable and probable cause.[11] Given my finding that there was an objectively reasonable basis to prosecute the respondent, any

[9] *Moleko* fn 4 above para 64.
[10] *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (2) SA 277 (SCA); 2009 (1) SACR 361 (SCA); 2009 (4) BCLR 393 (SCA); [2009] 2 All SA 243 (SCA) para 37.
[11] Ibid para 37.

improper motive does not render the prosecution wrongful. Moreover, the desire to set an example that prosecutors will be held accountable for unjustified decisions is not in itself an improper motive for a prosecution that is otherwise justified. Ensuring the integrity of the prosecutorial process is a valid and important consideration. While the phrasing of the NDPP's memo was perhaps ill-advised, it does not establish the required intention to injure the respondent through baseless proceedings.

[34] The high court placed undue emphasis on the DDPP's statement in a memorandum that she did not believe that the available evidence could prove the respondent's corruption. This was taken to show she foresaw the prosecution was ill-founded. However, the charges actually brought were fraud and alternatively defeating the ends of justice. It does not follow that the DDPP doubted the sustainability of those charges merely because she did not consider a corruption case winnable.

[35] As discussed above, the DDPP did not act unilaterally but after extensive consultation and upon receiving the NDPP's written confirmation that the dockets disclosed a prima facie case justifying prosecution. It bears noting that the DDPP had no personal connection to the respondent, as she had been appointed to the office from another province just a month prior. These factors reduce the likelihood of a malicious motive. Her conduct, viewed objectively, is incompatible with a consciousness of wrongfulness, recklessness or *animus iniuriandi*. Proving malicious prosecution requires egregious conduct, not just flawed reasoning. The high court here was too quick to impute *animus iniuriandi* without clear evidence thereof.

[36] Importantly, as noted in *Moleko*,[12] If the DDPP had reasonable and probable cause to initiate the prosecution, any improper motive she may have had, such as seeking to punish or make an example of the accused, is irrelevant. The "sending a message" language used in the DDPP's memo, although ill-advised, seems to be intended to convey the seriousness of the allegations and the importance of holding prosecutors accountable rather than a desire to punish the respondent unfairly. The language does not negate the objective evidence supporting the decision to prosecute. Furthermore, it does not necessarily prove malice, as *animus iniuriandi* requires the DDPP to have both intended to cause harm and been aware of the wrongfulness of her actions[13].

[37] Overall, the evidence falls short of establishing on a balance of probabilities that the DDPP acted with the requisite *animus iniuriandi*. Indeed, the indications are that she genuinely believed the respondent's prosecution was legally justified and appropriate in light of the seriousness of the investigating officer's complaint and the nature of the underlying criminal matters. More is required to prove *animus inuiriandi* than an error of judgement or misplaced zeal.

[38] Finally, and flowing from the above, the high court did not give sufficient regard to the constitutional imperatives of prosecutorial independence and discretion in its evaluation. Prosecutors must be free to pursue cases they believe have merit without undue fear of adverse consequences, provided they act rationally, honestly and without improper motives.

Conclusion

[39] For these reasons, I am satisfied that the respondent did not discharge the onus of proving the essential elements of his malicious prosecution claim. The

[12] *Moleko* fn 4 para 57.
[13] *Relyant Trading* fn 7 para 5.

high court erred in its evaluation and application of the legal requirements and its assessment of the evidence as a whole. The appellant succeeded in showing that the appeal would have a reasonable prospect of success and that it constitutes compelling reasons why leave to appeal should be granted.

[40] The application for leave to appeal and the appeal must thus succeed. I see no reason to depart from the ordinary rule that costs should follow the result in both this Court and the high court below.

[41] In the result the following order is made:

(a) The application for leave to appeal is granted with costs.

(b) The appeal is upheld.

(c) The order of the high court is set aside and replaced with the following: 'The plaintiff's claim is dismissed with costs'.

(d) The respondent is ordered to pay the costs of the appeal.

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K E MATOJANE

JUDGE OF APPEAL

APPEARANCES

For appellant:	H Epstein SC (with him T V Mabuda)
Instructed by:	The State Attorney, Pretoria
	The State Attorney, Bloemfontein
For respondent:	No Appearance