



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case Number: **11580/2016**

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: NO
- (2) OF INTEREST TO OTHER JUDGES: NO
- (3) REVISED: NO

DATE: 21 June 2024

SIGNATURE:

In the matter between:

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Applicant

(2nd Defendant in the action)

and

SIMON NTSIKELELE NTJINGA

Respondent

(Plaintiff in the action)

JUDGMENT

JANSE VAN NIEUWENHUIZEN J

INTRODUCTION

- [1] The applicant requests leave to appeal against the judgment and order of this court handed down on 16 April 2024, in respect of this court's finding that the applicant's prosecution of the respondent was malicious.

- [2] The application is more particularly in respect of the court's finding that the first requirement for a successful claim based on malicious prosecution, to wit, setting the law in motion, is not confined to the decision to charge an accused, but includes a decision to prosecute the accused, i.e. to proceed to trial.
- [3] Mr van Zyl SC, counsel for the applicant, submitted, with reference to *Woji v Minister of Police* 2015 (1) SACR 409 SCA, that a decision to proceed to trial and to persist with the trial (prosecution) is a breach of a public law duty and is a different cause of action than malicious prosecution. The relevant finding reads as follows:

“[28] The Constitution imposes a duty on the state and all of its organs not to perform any act that infringes the entrenched rights, such as the right to life, human dignity and freedom and security of the person. This is termed a public law duty. See C Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening) 2002 (1) SACR 79 CC (2001 (4) SA 938; 2001 (10) BCLR 995; [2001] ZACC 22) para 44. On the facts of this case, Insp Kuhn, a policeman in the employ of the state, had a public law duty not to violate Mr Woji's right to freedom, either by not opposing his application for bail, or by placing all relevant and readily available facts before the magistrate. A breach of this public law duty gives rise to a private law breach of Mr Woji's right not to be unlawfully detained, which may be compensated by an award of damages. There can be no reason to depart from the general law of accountability, that the state is liable for the failure to perform the duties imposed upon it by the Constitution, unless there is a compelling reason to deviate from the norm. Mr Woji was entitled to have his right to freedom protected by the state. In consequence, Insp Kuhn's omission to perform his public duty was wrongful in private law terms. See Minister of Safety and Security and Another v Carmichele 2004 (3) SA 305 (SCA) (2004 (2) BCLR 133; [2003] 4 All SA 565) paras 34 – 38 and 43.”

- [4] On the strength of the aforesaid finding, the Supreme Court of Appeal held that *Woji's* detention was unlawful. The finding does not support Mr Van Zyl's submission that the breach of a public law duty creates a different cause of action. To the contrary, the court found that the breach of the public law duty in the *Woji* matter sufficed for a finding that *Woji* was unlawfully detained.

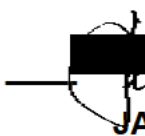
- [5] Ms Hartman, counsel for the respondent, submitted that setting the law in motion includes the decision to prosecute an accused. In support for this submission Ms Hartman relied on the full bench judgment in *Director of Public Prosecutions, Western Cape v Khumalo; Khumalo v Minister of Police* (A102/2022) [2022] ZAWCHC 172 (5 September 2022), in which the court held as follows at para [92]:

"[92] There is no dispute that the first requirement was met. It is clear that after his arrest the respondent was arraigned before the magistrate's court, and thereafter the matter was transferred to the regional court, thereby setting the law in motion by instituting a prosecution against the respondent."

- [6] I agree with Ms Hartman that the aforesaid finding supports the court's finding that setting the law in motion includes a decision to prosecute an accused.
- [7] The further ground of appeal is directed at the court's finding that Ms Germishuis acted with the necessary *animus injuriandi* in the form of *dolus eventualis*. Having considered the factual evidence informing the aforesaid finding, I am of the view that the appeal on this ground does not have a reasonable prospect of success.
- [8] In the result the application stands to be dismissed with costs following the cause.

ORDER

1. The application for leave to appeal is dismissed.
2. The applicant is ordered to pay the costs of the application.



JANSE VAN NIEUWENHUIZEN, J
JUDGE OF THE HIGHT COURT
GAUTENG DIVISION, PRETORIA

DATES HEARD:

20 June 2024

DATE DELIVERED

21 June 2024

APPEARANCES

For the Applicant: Advocate D Van Zyl SC

Instructed by: State attorney, Pretoria

For the Respondent: Advocate N Hartman

Instructed by: Taute Bouwer & Cilliers Inc