IN THE HIGH COURT OF SOUTH AFRICA

[EASTERN CAPE DIVISION – MTHATHA]

CASE NO.: 579/2021

In the matter between:-

SIYABULELA MENYO	**PLAINTIFF**
and	
MINISTER OF POLICE	**FIRST DEFENDANT**
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	**SECOND DEFENDANT**

JUDGMENT

NORMAN J:

[1] Plaintiff instituted damages claim against the Minister of Police, who was cited as the first defendant for unlawful arrest in the amount of R300 000.00 and for unlawful detention in the amount of R500 000.00. He cited as the second defendant, the National Director of Public Prosecutions and claimed for malicious prosecution an amount of R500 000.00. There was no separation of issues of merits and quantum as envisaged in Rule 33 (4) of the Uniform Rules of Court. The Minister of Police and the plaintiff settled the dispute between them. This judgment involves only the second defendant.

Plaintiff's case

[2] Plaintiff testified that he was a witness in a murder trial at the Regional Court sitting at Qumbu. After he gave his testimony he was directed by the Regional Court Magistrate to take a sit on the benches. The trial proceeded and was postponed around 16h00. He waited for witness fees for transport and for food. Two police officers arrived and arrested him and took him to the police station where he was charged. They transferred him to Tsolo police station where he was detained in the police cells. He found about 20 to 21 other detainees. He was made to sit on the floor. It was cold and there was a bad smell because the ablution facilities were also in the same cell. He was not offered any food. He was not given anything to sleep on. The next day the same police officers who arrested him took him back to Qumbu police station. He was made to sign documents and nothing was explained to him. He was detained at the Qumbu police cells. After 18h00 when other inmates were served food he was not because he was told by the lady who was accompanied by police, who came to serve them food that because he did not have a dish he would have to eat from the floor. He was given a blanket to sleep on. The following day more detained were brought into the cell. There were too many to the extent that he sat on the toilet seat that night.

[3] The day the same police officers came and took him out. They were hitting him on the head. He was again made to sign a document. He did not know what was written on it. On 8 June 2020 he was taken to court. The prosecutor indicated that he was not going to be released on bail because they were going to check his status. He was remanded for seven (7) days. He was transferred to Wellington prison. On the second occasion he was taken to court he was granted bail.

[4] He testified that the conditions in Wellington were not good because there were no sponges or blankets and he slept in his clothes. There were about 70 -75 inmates in the cell that he was put in. When he went to court after he had been released on bail he was told the case had been withdrawn. He had a legal representative who was ready to proceed instead they were told the docket could not be found and he could go collect the bail money. His brother is the one who had paid bail and he collected it.

[5] At the time of his arrest he was working as a painter and a tiler. He was never told that he had lied in court or the reason for his arrest. During the arrest and detention he was fearful. He felt that prosecutors wanted to cause him pain and indeed he felt pain.

The community labelled him as a criminal. He was dismissed by his employer Mr Xolisa Mneno.

[6] During cross- examination Mr Badli who appeared for the second defendant indicated to the Court that the claim between plaintiff and his client had been settled. A draft order consented to by both parties was made an Order of court.

[7] In cross- examination, Ms Qikila, who appeared for the second defendant, put to the witness that the witness for prosecution will tell the court that the prosecutor decided to enrol the case on the basis of the documents that were in the docket including statements in CAS /09/6/2020. The witness will also tell the court that there was a link between the charge and the offence that the plaintiff had committed. There was a warning statement where the plaintiff admitted that he gave false information at the Regional Court in Qumbu. The plaintiff responded that in court he told the truth when he testified. It was put to him that he gave a reason for giving false evidence that because he was raised at the Mthobeli Mvana's homestead he was afraid that he was going to be chased away from that homestead. Plaintiff admitted that he was raised by the Mvana family but denied that he gave false evidence. He stated that the public prosecutor Mr Bidla told him to come and sit in court he was not going to be used as a witness because he was raised by that family.

[8] She put to the plaintiff that the witness will testify that she consulted with Mr Bidla in order to clarify issues in his statement which was A1 in the docket. The witness was told by Mr Bidla that he led the witness in the morning but after lunch the witness changed all his evidence. Plaintiff denied that he changed his evidence. It was put to the plaintiff that the matter was struck off the roll due to unavailability of the docket and can still be reinstated. Plaintiff responded that he would be happy if the matter could be reinstated so that he would know whether he was guilty or not. Upon such response it was put to the plaintiff: '*I am not saying the matter will be re- enrolled. The public prosecutor is saying if the docket is found the matter may be reinstated*'. Plaintiff closed his case.

[9] The second defendant applied for absolution from the instance on the basis that plaintiff failed to discharge the onus resting on him. She argued that plaintiff failed to prove that the prosecution has failed or that the trial was finalized in his favour. She further argued that plaintiff failed to prove that the second defendant acted without

reasonable and probable cause or that the second defendant acted with malice. She argued that in **Minister for Justice & Constitutional Development v Moleko**[1]. On this basis she asked that the Court should grant absolution from the instance. Ms Mncotsho – Boya, for the plaintiff opposed the application for absolution. She argued that plaintiff was not declared a hostile witness in the murder trial or impeached. On this basis she argued that the court must refuse to grant absolution from the instance.

[10] I applied the test in **Claude Neon Lights (SA) Ltd v Daniel**[2] that absolution from the instance might be granted if, at the closing of the plaintiff's case, there is no evidence to support the plaintiff's claim or there is insufficient evidence upon which a court, acting reasonably, could or might find for the plaintiff. I refused to grant absolution from the instance and undertook to give reasons in this judgment.

[11] The evidence of the plaintiff was not disputed by the second defendant by way of cross- examination. All that happened was that a version was put to the plaintiff and he was afforded an opportunity to comment thereon. I was therefore satisfied that there was accordingly evidence to support plaintiff's claim and that this court acting reasonably could find for him.

Defendant's case

[12] Second defendant led the evidence of Ms Elizabeth Nomabali Mcaba. She is employed by the second defendant as a prosecutor. She has been employed for fifteen years. She is the prosecutor that enrolled the matter as she was working at Qumbu. She testified that before enrolling a matter she looked at the statements to see whether there is anything that links or implicates the accused person to the offence, whether there is anything that the accused has to answer to. She considered the complainants statement, all the documents in the docket, a copy of the constitutional rights of the accused, whether there is confirmation that the accused had been arrested. After reading the complainants statement she read therefrom that the plaintiff had taken an oath to give evidence but having done so when he was under cross – examination he

[1] Minister for Justice & Constitutional Development v Moleko (131/07) [2008] ZASCA 43 (31 March 2008).
[2] Claude Neon Lights (SA) Ltd v Daniel (113/75) [1976] ZASCA 59 (19 August 1976); 1976 (4) SA 403 (A).

decided to say he saw nothing. She realized that in the statement it was not clear that the accused had changed what he said before.

[13] The complainant, Mr Bidla was also a prosecutor in the same office. She called the complainant for clarity. She had looked at the accused's warning statement. The accused admitted that he gave false evidence because he was raised by Mthobeli Mvana's family. He was afraid that he would be chased away from that homestead. In consultation with the complainant he established that Mthobeli Mvana was the accused in the murder trial case. She decided that, having taken into consideration all that information that there was enough evidence to enroll the matter for the accused to explain himself in court. She responded to certain allegations contained in the particulars of claim, in particular, at paragraph 15.1 where it was alleged:

> *"The Public Prosecutor who enrolled the matter for prosecution on the 08th day of June 2020 had no reason to prosecute the Plaintiff but he or she enrolled the matter base(sic) on the factor that the complainant was also a Public Prosecutor in the regional Court of Qumbu."*

[14] She denied the allegations that there were no reasonable factors justifying the prosecution; that she failed to consider relevant information and that the prosecution was instigated by malice. Under cross – examination she did not fare well. She contradicted herself about the warning statement whether it was complete or not. She was not certain whether there was a commissioned warning statement or not. Her evidence changed that they do not rely on the warning statements because in many instances the accused state that they choose to remain silent. They rely mainly on the 'A1' statement. She stated that for purposes of enrolling a case they look at whether there is a *prima facie* case, whether there is something that an accused has to answer to. That is what is key for the screening prosecutor because there are usually many new cases that are brought which must be enrolled by 10h00.

[15] When questioned about the failure to consult with the policeman, Mr Phakade, who took down the warning statement and on its authenticity, she stated that that was not the work of the screening prosecutor but for the prosecutor that is going to run the trial. When it was put to her that plaintiff disputed the contents of the statement, her response was that that had nothing to do with the screening prosecutor. The docket was brought on the 8 June 2020 and she took between 5 to 10 minutes before enrolling it. That time included the consultation she had with the complainant. When asked who brought the docket to her. She answered that it was the police.

[16] When asked about the name of the police she responded that dockets would not be brought to her by detectives as there is someone attached to the police who would bring the docket. She conceded that the information sought and given to her by Mr Bidla was known to her alone and was not under oath. She later conceded that from the statement of Mr Bidla there was a contradiction made by the plaintiff. She did not enquire from Mr Bidla about what happened in court, in fact, she stated that she was not interested in that. Initially she stated that she considered the elements of perjury but not all, later, she changed and stated that she did not use the elements per se and could not refer to any elements of the offence whether they were there or not.

[17] When the elements of perjury were put to her, she agreed but stated those elements are to be proved at trial but for screening purposes she had to establish the reasonable prospects of a successful prosecution. She did not dispute that the plaintiff attended court on five occasions. The second defendant closed her case.

Issues for determination

[18] Both parties agreed that this court had to determine whether the prosecution of plaintiff was malicious; whether there was probable and justifiable cause to prosecute plaintiff; whether the prosecutor acted with malice in prosecuting plaintiff, whether there was a *prima facie* case on which the plaintiff's prosecution was based and whether the prosecution failed.

Submissions on behalf of the plaintiff

[19] Ms Mncotsho – Boya submitted that plaintiff had discharged the onus resting on him. She submitted that the fact that Ms Mcaba relied on the statement of Mr Bidla that did not contain the elements of the offence of perjury and on the non- commissioned warning statement of the accused, offends the requirement that a prosecution should be commenced when there is prima facie evidence, made under oath. In this regard she relied on **Matsose v Minister of Police and Another[3].** She further argued that

[3] Matsose v Minister of Police and Another (CIV APP FB 14/21; 814/2016) [2023] ZANWHC 117; [2023] 4 ALLSA 136 (NWM) (28 July 2023) para 88.

there was no reasonable and probable cause for the prosecution. In this regard she relied on **Beckenstrater v Rottcherand Theunissen**[4].

[20] She submitted that Ms Mcaba acted recklessly in prosecuting the plaintiff and foresaw the possibility that initiating the prosecution was wrongful in that there were no reasonable grounds for doing so. She relied on the **National Director of Public Prosecutions v Sijoyi Robert Mdhlovu**[5] for that contention. She submitted that the prosecution failed because plaintiff last appeared in court in 2020. A period of 4 years has since lapsed. The case has not been reinstated since 2020. The second defendant's counsel indicated that the case would not be reinstated. She relied on **Payi v Minister of Police and Another**[6], where Pakati J, stated 'in *casu, the prosecutor did not believe that the plaintiff was guilty, hence he argued with his seniors and was not opposed to plaintiff's release on 12 September 2018 when the matter was struck from the roll.*' She submitted that the *Payi decision* applies to this matter.

[21] She further submitted that the second defendant failed to put her version to the plaintiff in relation to two critical issues, namely, how malicious prosecution made him feel, how the community viewed him after the arrest and that when he testified in the criminal court he told the truth. She submitted that the court must accept that which was not challenged and referred in this regard to a Constitutional Court decision in **President of the Republic of South Africa v South African Rugby Union**[7].

[22] She conceded that the pleadings do not specifically allege that the prosecution of the plaintiff failed. She contends that the issue was sufficiently canvassed during trial the court should follow the decision in **Minister of Safety and Security v Slabbert**[8]. She submitted that plaintiff discharged the onus resting on him and judgment should be entered in his favour.

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[4] Beckenstrater v Rottcherand Theunissen [1995] (1) SA 129 (A) at 136 A – B.
[5] National Director of Public Prosecutions v Sijoyi Robert Mdhlovu (Case no. 194/ 2023) [2023] ZASCA 85 (03 June 2024) at para 32.
[6] Payi v Minister of Police and Another (2063/2019) [2024] ZAECQBHC 14 (22 February 2024) at para 69.
[7] President of the Republic of South Africa v South African Rugby Union 2000 (1) SA (CC) at para 61.
[8] Minister of Safety and Security v Slabbert (668/2009) [2009] ZASCA 163.

Submissions by the second defendant

[23] Ms Qikila submitted that plaintiff failed to discharge the onus resting on him, to prove that the prosecution of the plaintiff was malicious. He also failed to prove that the proceedings were terminated in his favour. She submitted that if a matter is struck off the roll that does not amount to termination of the proceedings. She submitted that when Ms Mcaba enrolled the matter she was able to have regard to the whole docket. That way she did not ignore any of the evidence that was placed before her. She submitted that in 'A1' it is clear why the plaintiff was charged and what offence he had committed. That, she argued, was confirmed in the warning statement where it is indicated that plaintiff made a false statement because he confirmed that he was raised by the Mvana family. She submitted that the prosecutor did not have to prove the truth of that statement. She only needed to find the link between the charge and the offence with everything to be clarified in court. She submitted that the second defendant admitted that she set the law in motion. The prosecutor believed that there was a prima facie case hence she enrolled the matter. She further argued that the plaintiff failed to prove that the proceedings were decided in his favour. Plaintiff, she argued, failed to prove malice on the part of the second defendant. On this basis she argued that the claim should be dismissed with costs. She relied on the *Moleko* judgment referred to, above.

Quantum

[24] Ms Mncotsho – Boya relied on several previous awards on the issue of quantum. She placed reliance on **Nkogatse v Minister of Police and Another**[9] an amount of R500 000.00 was awarded to a former police officer for damages arising out of his malicious prosecution. She further relied on **Rautenbach v Minister of Safety and Security and Others**[10] where the plaintiff appeared before court four to five times and charges were withdrawn after six months. Damages were awarded in the amount

[9] Nkogatse v Minister of Police and Another [2023] ZAGPPHC 408 (2 June 2023).

[10] Rautenbach v Minister of Safety and Security and Others (48774/09) [2013] ZAGPPHC 387 (20 November 2013).

of R150 000.00. In **Gumbi v Minister of Police**[11]where the court awarded an amount of R570 000.00 for malicious prosecution damages. The plaintiff appeared nineteen times in court and his case attracted media publicity. She also relied on the case of **Payi v Minister of Police and Another**[12] where an amount of R300 000.00 was awarded to plaintiff for damages he suffered as a result of malicious prosecution. She submitted that an amount of R350 000.00 as an award for damages would be adequate.

Second defendant's submissions

[25] Ms Qikila submitted that the correct approach is to have regard to all the facts of the particular case and to determine the *quantum* of damages on such facts. She relied on **Minister of Safety and Security v Seymour**[13] where the award of R500 000.00 was set aside on appeal and substituted by an amount of R90 000.00. She submitted further that the amount claimed by the plaintiff, R500 000.00, is too excessive. Comparing the facts in **Rudolf v Minister of Safety and Security**[14] to this one, she submitted that both appellants were arrested on the 18th July 2003 and appeared in court on the 21st July 2003. The Supreme Court of Appeal in respect of Claim 2 for malicious prosecution awarded R50 000.00 in which the current value is R137 000.00.

Discussion

[26] In **Minister of Justice and Constitutional Development and Others v Moleko**[15]the Supreme Court of Appeal set out the elements or requirements for an action for malicious prosecution in these terms:

> *"8. In order to succeed (on the merits) with a claim for malicious prosecution, a claimant must allege and prove –*

[11] Gumbi v Minister of Police (07156/2016) [2022] ZAKZDHC 17 (1 April 2022).
[12] Payi v Minister of Police & Another (2063/2019) [2024] ZAECQBHC 14 (22 February 2024).
[13] Minister of Safety and Security v Seymour 2006 (6) SA 320 (SCA) at 325 para 17.
[14] Rudolf v Minister of Safety and Security (380/2008) [2009] ZASCA 39 (31 March 2009); The Quantum Yearbook by Robert Koch 2024 at page 39.
[15] Minister of Justice and Constitutional Development and Others v Moleko [2008] ZASCA 43; 2009 (2) SACR 585 (SCA) (31 March 2008) at para 8.

> (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* animo injuriandi*); and*
>
> (d) *that the prosecution has failed."*

[27] It is common cause that the prosecution initiated the prosecution and it set the law in motion.[16] It is also common cause that the plaintiff was refused bail at the instance of the prosecution. He appeared in court five times before the case was struck from the roll. The second defendant submitted that the striking off of a matter does not mean success for the plaintiff.

[28] I have to determine on the facts whether by instigating the proceedings the second defendant acted without reasonable and probable cause.

[29] Ms Mcaba testified that she had regard to the contents of the docket and in particular, "A1", being the complainant's statement, Mr Bidla, the notice of the accused's rights, the accused's warning statement, the statement of arrest. She found that the statement was not clear and she needed to be satisfied that there is a case for the accused to answer. She sought clarity by consulting with the complainant, her colleague. Thereafter she decided to enrol the matter. The second defendant did not lead the evidence of the complainant, Mr Bidla but relied on his A1 statement. The statement of the complainant briefly recorded that the complainant is a Regional Court prosecutor. He stated that:

> *"On the 04 June 2020 at Qumbu Magistrates Court at about 12:00 he was prosecuting a Mr Mthobeli Mvana who was charged with two counts of murder that occurred at Gura location, Qumbu."*
>
> *He led the witness, (the plaintiff) in this case, " who narrated the whole story in court and in the morning I read the docket content to him and he confirmed all what is contained there is what happened.*
>
> *During cross exam by the defence he decided to say he saw nothing on the day in question he was drunk while a statement was taken from him on the day of the incident.*
>
> *I therefor laying a charge of perjury against Siyabulela Menyo.'*

[30] The statement was commissioned. Nowhere in the statement is the part of the evidence complained of set out in detail.

[31] The warning statement referred to in Ms Mcaba's evidence stated:

[16] Moleko, supra, para 8 (a).

"I, Siyabulela Menyo, wish/ do not wish to make a statement/answer the following questions (Delete not applicable)

I admit that I did gave false information at Regional Court at Qumbu, the resoan(sic) is that I was raised at Mthobeli Mvana's homestead so now I am afraid that the Mvana Family will chase me away from their homestead."

[32] I hasten to point out that plaintiff disavowed the warning statement as he testified that he was made to sign documents which had not been explained to him. The warning statement does not have any deletions of what was not applicable as indicated on the form itself. It is not clear whether the plaintiff had been warned to remain silent and of the implications of making the statement since none of those choices were properly indicated on the form.

[33] The enquiry involves both a subjective and an objective element. In **Prinsloo v Newman**[17] the Court held:

> *'Not only must the defendant have subjectively had an honest belief in the guilt of the plaintiff, but his belief and conduct must have been objectively reasonable, as would have been exercised by a person using ordinary care and prudence."*

[34] The statement of the complainant as correctly found by Ms Mcaba lacked factual details. It does not detail what was in the plaintiff's statement and what was said in court contrary to what was stated in that evidence. Whether the plaintiff's statement was made under oath because Mr Bidla simply stated that he read out the docket to the plaintiff. What is the evidence that was given in court by the plaintiff or what is the information referred to in the warning statement? What is the evidence that the plaintiff gave in court which differed from the statement allegedly made by him? Where was the statement allegedly made by the plaintiff? Was that statement made under oath? What is it that the statement said about the Mvana family in the original statement, if it existed, which he later changed in evidence? What is the procedure that Mr Bidla followed in court when he formulated a view that plaintiff had changed his evidence? Was there an enquiry by the court into this? Was the plaintiff warned by the court that the State was going to embark on impeachment process as a witness or to declare him hostile? None of that information was present before Ms Mcaba.

[35] As a prosecutor with experience she had to, at least, satisfy herself that there was evidence that was given by the plaintiff, the nature thereof, the evidence was given

[17] Prinsloo v Newman 1975 (1) SA 481 (A) at 495 H.

before the Regional Magistrate under oath, how and to what extent was that evidence changed to warrant a charge of perjury. In her evidence she stated that she asked the complainant who Mthobeli Mvana was. The complainant told her that Mthobeli was an accused in the murder case where the plaintiff was a witness and he changed his evidence about Mthobeli Mvana. Again, no details of this evidence that was changed were given by Ms Mcaba. She decided that if that is what the plaintiff did he needed to explain himself in court. What is lacking from that explanation is that she had no evidence before her which pointed to a commission of the charge of perjury even at a *prima facie* level. I say this for these reasons:

[36] A *prima facie case* would be made out when there is evidence upon which a court, applying its mind reasonably, could or might find for the plaintiff[18]. In order for a prima facie case to exist there must be evidence in respect of each essential element of the claim.[19] That is a *prima facie* case in civil litigation. In criminal cases that standard is set out in Matsose v Minister of Police[20] as , *' allegations, as supported by statements and where applicable combined with real and documentary evidence available to the prosecution, are of such a nature that if proved in a court by the State on the basis of admissible evidence, the court should convict."*

[37] Perjury consists in the unlawful and intentional making , upon oath, affirmation or admonition and in the course of judicial proceedings before a competent tribunal, of a statement which the maker knows to be or foresees may be false[21].

[38] The above definition is simplified by Professor Snyman[22] as : *"the unlawful and intentional making of a false statement in the course of a judicial proceeding which is material to any issue in the proceeding, by a person who has taken the oath or made an affirmation before, or who has been admonished by, somebody competent to administer or accept the oath, affirmation or admonition.'*

[39] Getting back to the facts of the case Ms Mcaba was not able to articulate the elements of an offence of perjury. In order for her to be satisfied that an offence had

[18] Mazibuko v Santam Insurance Co. LTD and Another 1982 (3) SA 125 (A) at 133.
[19] See: Professor P J Schwikkard et al: Principles of Evidence: page 625 para 32.5.
[20] Matsose v Minister of Police and Another (CIV APP FB 14/21: 814/2016) [2023] ZANWHC 117; [2023] 4 ALL SA 136 (NWM) (28 July 2023) para 88.
[21] Prof JRL Milton, 3rd edition, Volume 2: South African Criminal Law and Procedure page 131.
[22] Prof Snyman: Criminal Law 322.

been committed she needed to appreciate what those elements were. To avoid the questions relating to these elements she said it was for the prosecutor at trial to know those elements. If she acted in a prudent manner she would have realized that the complainant made no mention of the nature of the evidence that was given which was later changed. Relying on the warning statement which was not a sworn statement of the plaintiff and without speaking to Sergeant Phakade to ascertain the circumstances under which the statement was taken, demonstrated recklessness and showed that Ms Mcaba did not excise the care and prudence that is expected of her. Most importantly in this case the relevant warning statement has the problems that I have already alluded to.

[40] Whatever information she received from the complainant as explanation for what is not contained therein was never reduced into writing. Secondly, whatever facts were contained in the plaintiff's statement were not known to Ms Mcaba because she did not mention it as one of the documents that she had regard to. Most importantly the statement allegedly made by the plaintiff before the Regional Court was not placed before Ms Mcaba and before this court.

[41] Perjury is regarded as a serious criminal offence because it negatively impacts on the ability of the justice system to get to the truth.

[42] Taking into account all the evidence, I find that the second defendant did not have such information as would lead a reasonable person to conclude that the plaintiff had probably been guilty of the offence charged. Ms Mcaba, in her own words, did not know the elements necessary to prove an offence of perjury. It follows that she could not have objectively believed that there was a *prima facie* case. That means that there was no reasonable and probable cause to enroll the matter.

Was there malice or animo injuriandi

[43] When the Supreme Court of Appeal dealt with the requirement that the defendant must have acted with *malice or animo injuriandi* at paragraph 61 of the *Moleko* judgment it held:

> *"In the Relyant case, this court stated the following in regard to the third requirement:*

> *Although the expression "malice" is used, it means, in the context of the* actio iniuriarum, *animus iniuriandi. In* Moaki v Reckitt & Colman (Africa) Ltd and another *Wessels JA said:*
>
> > *"Where relief is claimed by this actio the plaintiff must allege and prove that the defendant intended to injure (either dolus directus or indirectus). Save to the extent that it might afford evidence of the defendant's true intention or might possibly be taken into account in fixing the quantum of damages, the motive of the defendant is not of any legal relevance."*

[44] At paragraph 62 in the *Moleko* judgment, the Supreme Court of Appeal stated:

> *"In so doing, the Court decided the issue which it had left open in* Lederman v Moharal Investments (Pty) Ltd *and again in Prinsloo v Newman namely that animus injuriandi, and not malice, must be proved before the defendant can be held liable for malicious prosecution as injuria."*

[45] At paragraph 63 the court stated:

> *"Animus injuriandi* includes not only the intention to injure, but also consciousness of *wrongfulness:*
>
> > *'In this regard* animus injuriandi *(intention) means that the defendant directed his will to prosecuting the plaintiff (and thus infringing his personality), in the awareness that reasonable grounds for the prosecution were (possibly) absent, in other words, that his conduct was (possibly) wrongful (consciousness of wrongfulness). It follows from this that the defendant will go free where reasonable grounds for the prosecution were lacking, but the defendant honestly believed that the plaintiff was guilty. In such a case the second element of* dolus, *namely of consciousness of wrongfulness, and therefore animus injuriandi, will be lacking. His mistake therefore excludes the existence of animus injuriandi."*

[46] I am satisfied that Ms Mcaba knew and appreciated that to prosecute where there was insufficient evidence was wrong. She appreciated such wrongfulness when she found that "A1" was not clear and had to consult with the complainant. Instead of her refusing to enrol the matter until there was sufficient evidence, she tried to augment the case by consulting with the complainant whose supplementary information was not documented. I find that by so doing, Ms Mcaba had the intention to injure the plaintiff and directed her will to prosecuting him and thus infringing his personality, in the awareness that reasonable grounds for the prosecution were possibly absent. I find that plaintiff has , on a balance of probabilities , proved this requirement.

That the prosecution failed

[47] Ms Qikila submitted that plaintiff failed to satisfy this requirement. Although this requirement was not pleaded clearly in the particulars of claim, the evidence, which is undisputed is that after several postponements the matter was struck off the roll due to

unavailability of the docket. Ms Mncotsho – Boya submitted that this court must adopt the approach in **Minister of Safety and Security v Slabbert**[23] held: *"There are, however, circumstances in which a party may be allowed to rely on an issue which was not covered by the pleadings. This occurs where the issue in question has been canvassed fully by both sides at the trial."*

[48] This issue was fully canvassed at the hearing. The issue is whether a matter struck off from the roll means failure of the prosecution. That debate too emerged at the trial. In this regard Ms Mncotsho – Boya relied on **Payi v Minister of Police and Another**[24] where the plaintiff was successful in a claim that followed after the matter was struck off the roll. A matter is struck from the roll because for one reason or another prosecution is not able to proceed. It may be as a result of witnesses that have not come to court or a docket that has gone missing as in this case. A criminal case that has been struck off, in my view, has the same consequences as a matter that has been withdrawn in that it is not pending before court. The prosecution has not had a successful prosecution. If one were to follow the second defendant's reasoning, that would mean that the prosecution could enrol matters where it does not believe that the plaintiff is guilty and simply have those matters struck from the roll. That would amount to a travesty of justice because a matter could remain struck from the roll for years with all those plaintiffs not being able to institute claims, if they so wish. The evidence of the plaintiff that he was told that the docket could not be found and he could collect his bail money , was not disputed. His brother who had posted bail for him collected it. It has been four years since the matter was struck from the roll. In those circumstances, in my view, for all intents and purposes the prosecution has failed.

[49] Section 342A (1) enjoins a court before which criminal proceedings are pending to investigate any delays in the completion of the proceedings which appear to be unreasonable and could cause substantial prejudice to the prosecution, the accused or his legal advisor, the State or a witness. This section is crafted in peremptory terms. In **S v Ndibe**[25]**,** Ndita J held that:

[23] ***Minister of Safety and Security v Slabbert*** (668/2009) [2009] ZASCA 163; [2010] 2 ALL SA 474 (SCA) 30 November 2009 at paragraph 12.
[24] ***Payi v Minister of Police and Another*** (2063/2019) [2024] ZAECQBHC 14 (22 February 2024).
[25] S v Ndibe (WCC) (unreported case No. 14/544/2010, 14-12-2012 at para 5 and 6.

"[5] This matter is concerned with the interpretation of s 3 (c) and (d). This is so because although the accused had pleaded and evidence led, the order issued by the presiding judicial officer was in terms of s 3(c). It is so that courts have a duty to ensure that that the rights in terms of s 35(3) to have trials commencing and being completed without unreasonable delay are enforced. Section 342(1) enjoins a court before which criminal proceedings are pending to 'investigate' the cause of the delay. In S v Van Huysteen ***2004 (2) SACR 478*** *(C), Traverso J (as she then was) held that s 342 (3) (c) does not require that a formal enquiry be held nor that a formal finding has to be made. If the presiding officer enquires as to the reasons for the request for a further postponement and concludes that a further postponement would lead to injustice, that is sufficient. The learned judge further held that s 342 A merely provides guidelines for the factors which a court should take into account when deciding whether to refuse a postponement or not. 342A(3) does not require that a formal enquiry be held or a formal finding be made. At para [8], page 480c-e the honourable judge heid that:*

> *"Na my mening hoef daar geen formele ondersoek gehou te word of geen formele bevinding gemaak te word ingevolge hierdie artikel nie. Indien die voorsittende beampte navrae doen oor die redes vir die versoek om 'n verdere uitstel, en die mening huldig dat 'n verdere uitstel tot 'n onreg sal lei is dit na my mening voldoende. Na my mening le art 342A slegs riglyne neer oor die faktore wat 'n hof in aanmerking moet neem by die oorweging van die vraag of 'n uitstel geweier moet word al dan nie."*

The learned judge recognising the importance and indispensability of section 35 of the Constitution, stated the following at para [9] on 480e-f:

> *"[9] Hierdie artikel moet voorts ook gelees word teen die agtergrond van die bepalings van die Grondwet van die Republiek van Suid-Afrika 108 van 1996 en meer bepaald die bepalings van art 35 daarvan, waarvolgens 'n beskuldigde se reg op 'n regverdige verhoor (met inbegrepe sy reg om sy verhoor sonder 'n onredelike vertraging te begin, en af te handel) aangestip word."*

[6] Whilst in some cases it may be apparent ex facie the record that a further postponement is prejudicial to an accused person, the enquiry envisaged in s 342 takes into account that the decision to remove a matter from the roll ought to involve a consideration as well as balancing of all the factors listed in s 3(2) in assessing whether the delay is unreasonable. It can be accepted that judicial officers to a large extent, and as they should, proactively recognise the forms of prejudice an accused person can potentially suffer due to slow grinding of the wheels of justice. To this end, they sometimes tailor the postponement in such a way that the harsh impact of the delay is mitigated, or grant such relief as maybe appropriate in the circumstances of a particular case. However, where a court is faced with an application for the striking off the roll of a case due to unreasonable delays, thereby invoking the provisions of s 342 A, such a court is in my view, compelled to give effect to the provisions of the section. A holistic reading of the provisions of s 342 A leaves me with the impression that what is intended is first the investigation into whether the delay is unreasonable, this as a matter of course necessitates an enquiry. The investigation includes taking into account the factors listed in s 2. Those factors are not limited to the prejudice suffered by an accused person and also include the impact an unreasonable delay may have in the administration of justice, the victim, and the States case. Even though S 342 (3) does not specifically state that a 'formal' enquiry be held, it does call at the very least for an enquiry, on the basis of which a finding must be made. Such an enquiry must have regard to the full conspectus of the factors in s 3 (2). In the absence of an enquiry, a court may find it difficult to assess whether a delay is unreasonable or how much systemic delay to tolerate. (See Sanderson v Attorney-General **1998 (1) SACR (227** CC*) at page 243 para 35). That can only be determined when there has been an enquiry albeit informal, in which the conspectuses of the factors listed have been considered. This I say mindful of the fact that the bulk of the criminal cases are heard before the magistrate's court, and to insist on a formal enquiry is likely to be burdensome to the already overstretched court rolls. The finding should be followed by a remedy the court considers appropriate, depending on whether the accused person had already pleaded or evidence led. It seems to me that, once the provisions of s 342 are invoked, the following three stages must be followed:*

> *(1) investigation of the cause of the delay in the finalisation of the case, taking into account the listed factors;*
>
> *(2) making of a finding whether the delay is reasonable or unreasonable;*
>
> *(3) depending on the stage of the proceedings, the application of the remedies provided."*

[50] I refer to these cases to demonstrate the seriousness with which delays such as those where the docket is not before court are to be viewed by the courts. In **Thompson**

and Another v Minister of Police and Another[26], Eksteen J , considered a stated case to adjudicate on , inter alia, the issue of prescription. The plaintiffs in that case had been convicted and sentenced. They appealed both the convictions and sentences successfully. The court found that the cause of action arose upon judgment of the court allowing the appeal against the convictions of the appellants.

[51] Eksteen J stated: *'It is generally accepted that in an action based on malicious prosecution the plaintiffs cause of action only arises after the successful termination of the criminal proceedings in the plaintiff's favour, or where the Attorney- General has declined to prosecute. (Lemue v Zwartbooi, 13 S.C. 403; Bacon v Nettleton, 106 T.H. 138)*

[52] The court also relied on Moaki v Reckitt and Colman (Africa) Ltd and Another[27], and stated*:*

> *"The learned Judge then goes on to refer to the basic elements of the actio injuriarum: under which heading malicious proceedings undoubtedly fall. Those elements may be summarised as a wrongful act intentionally done and which constitutes an aggression upon the person, dignity or reputation of another...* (footnotes omitted).
>
> *In an action based on malicious prosecution it has been held that no action will lie until the criminal proceedings have terminated in favour of the plaintiff. This is so because one of the essential requisites of the action is proof of a want of reasonable and probable cause on the part of the defendant, and <u>while a prosecution</u> <u>is actually pending</u> its result cannot be allowed to be prejudged by the civil action. (Lemue v Zwartbooi, supra at 407)*[28] (my underlining).

[53] The action in this case was instituted on 12 February 2021. The second defendant took no steps between that time up to date of conclusion of trial to reinstate the matter. It is not in dispute that a period of four years has lapsed since the striking off of the criminal case. A reinstatement of the matter is not the plaintiff's responsibility but that of the State especially where the prosecutor , as in this case, is the complainant. The State was at liberty to reinstate the case even at the time a notice of demand was delivered. The evidence of the plaintiff that he was directed to collect his bail money and that his brother did , was uncontroverted. In my view, the fact that bail money

[26] Thompson and Another v Minister of Police and Another 1971 (1) SA page 371 (Eastern Cape Division)
[27] Moaki v Reckitt and Colman (Africa) Ltd and Another, 1968 (3) S.A. 98 (A.D.).
[28] Thompson page 375 paras A-C.

was collected the State was no longer concerned about the plaintiff's attendance at court and his obligation to obey the bail conditions in relation to the trial. As soon as the matter was struck from the roll it was no longer pending before the criminal court .The fact that the matter may be reinstated cannot be a defence to defeat the plaintiff's claim without facts demonstrating the will and effort to reinstate it. The matter implicates the plaintiff's rights entrenched in section 35 (3)(d) , amongst others, to have his trial begin and conclude without unreasonable delay. At the trial the second defendant did not demonstrate any probability that the reinstatement of the prosecution of the plaintiff would take place. The interests of justice demand that the election of the State not to reinstate the criminal case for four years ought not to prejudice the plaintiff in his claim.

[54] In the *Lemue* matter at pages 404 and 405 the court on appeal stated:

> "*After the Solicitor – General had decided to prosecute for perjury, there was nothing on record to show either that the Attorney- General was going to take up the prosecution, or that Lemue had taken any steps for a private prosecution."*

[55] At page 405 the court said : *' Though it is true that the Attorney – General may take up the prosecution and that a private prosecution may be brought , there is no statement and no probability of any such action being taken."* The sentiments expressed in both paragraphs apply equally to the matter at hand.

[56] I find that from the time of the institution of the claim up to the conclusion of the civil trial there was no criminal case pending before a court against the plaintiff. I accordingly find that for the reasons advanced the prosecution had failed. Plaintiff, on a balance of probabilities, succeeded in discharging the onus resting on him in this regard. The second defendant is accordingly held liable for the damages suffered by the plaintiff to his person and dignity as a result of malicious prosecution.

Quantum

[57] I had regard to the plaintiff's personal circumstances before and after the arrest as stated in the paragraphs dealing with his evidence. I had regard to all the previous awards relied upon by both counsel. As indicated in the Seymour judgment relied upon by the second defendant, in the assessment of general damages the facts of the

particular case must be looked at as a whole. The Minister of Police, as aforementioned settled the case based on unlawful arrest and detention with the plaintiff. The plaintiff attended court at least five times. He was granted bail. He was vilified by his community and labelled a prisoner. He stated that he was dismissed from his employment. An amount of R500 000.00 is indeed excessive hence Ms Mncotsho- Boya, suggested an amount of R350 000.00 whereas Ms Qikila proposed an amount of R137 000.00. There is no doubt that plaintiff suffered damages to his person and dignity, however, the award must not be extravagant. The fact that the prosecution was instigated by the prosecutor as a complainant who did not come to court to explain the reasons why he decided to lay the charge against the plaintiff is a matter that calls for a higher award. I am satisfied that an award in the amount of R200 000.00 (Two Hundred Thousand) would serve as adequate compensation. Plaintiff in his summons claimed interest at the mora rate payable 14 days from the date of judgment. I intend to make such an order.

Costs

[58] There are no reasons that have been advanced to persuade the court to deviate from the normal rule that costs follow the result.

Order

[59] I accordingly make the following Order:

1. **That the Second Defendant is liable to pay the plaintiff for damages suffered as a result of malicious prosecution in the sum of R200 000.00 (Two Hundred Thousand Rand).**
2. **Interest at the mora rate payable 14 days from the date of judgment to date of payment.**
3. **Costs of suit.**

T.V NORMAN

JUDGE OF THE HIGH COURT

APPEARANCES:

For the PLAINTIFF	**:**	**ADV MNCOTSHO-BOYA**
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For the DEFENDANT	**:**	**ADV QIKILA**
Instructed by	**:**	**STATE ATTORNEY** **BROADCAST HOUSE** **94 SISSON STREET** **MTHATHA** **REF: 648/21/A6S (Mrs Shumane)** **TEL: 047 502 9900/08** **EMAIL: BShumane@justice.gov.za / NMvandaba@justice.gov.za**

Matter heard on : 26 August 2024; 27 August 2024; 28 August 2024 & 29 August 2024

Heads delivered : 03 September 2024

Judgment reserved on : 03 September 2024

Judgment delivered on : 17 September 2024