IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, MTHATHA)

[REPORTABLE]

Case no. 2729/2019

Heard on: 14 October 2024

Date delivered: 14 November 2024

In the matter between:

ZUKO SODLALA	First Plaintiff
ANELE MTHETHO	Second plaintiff
And	
MINISTER OF POLICE	First Respondent
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Second Respondent
THEMBINKOSI MANGCIPHU	Third Respondent

JUDGMENT

MAJIKI ADJP:

[1] The two plaintiffs Messrs Zuko Sodladla (Zuko) and Anele Mthetho (Anele) instituted action proceedings against the defendants for damages claim. The claims arise from their alleged arrest, detention and malicious prosecution. The first to the third defendants are Minister of Police (minister), National Director of Public Prosecutions (NDPP) and Mr Thembinkosi Mangciphu(the complainant). The minister and NDPP are sued based on vicarious liability. This matter raises the issue of whether the arresting officer and prosecutors should have done more before arresting and prosecuting Zuko and Anele. Only the minister and NDPP defended the action.

[2] At the end of the plaintiffs' case an application for absolution was unsuccessfully made on behalf of NDPP. The reasons for that outcome will be apparent in the judgment.

[3] Most of the facts in this matter are common cause. On 26 October 2017 at Palmietfontein police station a complaint was registered following housebreaking at the house of the complainant on 24 October 2017. He deposed to a statement and the police went to the scene.

[4] Among others, the complainant informed the police that at the business where housebreaking took place, he had CCTV cameras. He viewed the footage and identified the culprits as Zuko and Anele. He knew them well. This was later confirmed by both Zuko and Anele during their testimony. They said he was their teacher and they frequently visited his business. Additional statements were minuted from the complainant and his witness.

[5] The arresting officer asked the complainant to show him the footage. After viewing the footage, the said officer was not comfortable with the quality of the images. The people depicted therein according to him were far. He requisitioned his colleague from Local Criminal Record Centre (LCRC). The said LCRC officer uplifted the fingerprints from the scene. He did form the suspicion that Zuko and Anele committed the housebreaking. However, he sent the video to experts in Pretoria for it to be cleared so that the quality of the visuals could

improve. He decided to wait for that process before he could act on his suspicion. The disc with the footage was sent on 22 November 2017. Even when his superior endorsed that he should effect the arrest, he decided against it.

[6] On 13 December 2017 the prosecutors made an endorsement on the docket with the following instructions:

- get the CCTV footage;
- trace and arrest Anele and
- finalise the case against Anele and use him as the state witness against the other.

The complainant was also putting pressure about lack of progress in the matter, saying he had informed the police who the suspects were.

[7] With their consent, the police took the fingerprints of Zuko and Anele. Upon seeking advice from the prosecutor, the prosecutor requested the docket for decision and that the complainant be brought. The footage was received. Before the fingerprints results came to hand, he took the complaint together with the footage, without opening or watching it, to the prosecutor. The prosecutor watched it with the complainant and his brother who both positively identified the culprits from a clear footage. The prosecutor then decided to prosecute them. The arresting officer never watched the footage.

[8] Thereafter, Zuko was arrested on 4 June 2018, Anele presented himself the next day after police left a message for him. On 20 June 2018 they were released on bail. On 11 March 2019 the matter was in court for trial. Upon the prosecutor seeing Zuko and Anele, he realised they were not the people on the footage. The complainant could not explain that discrepancy, the charges were therefore withdrawn.

[9] Both Zuko and Anele testified. There was nothing significantly different from what they said and the summary above. They testified first, as the *onus*

bearing parties in the case for malicious prosecution. Similarly, the arresting officer and the prosecutor testified. Their specific evidence that raises legal questions will be referred to in the process of evaluation.

[10] The pleaded case against police is '*that the arrest and subsequent detention was malicious and unlawful alternatively wrongful in that the police did not show the footage to the plaintiffs, did not watch the footage to verify whether indeed it has* [sic] *the plaintiffs in the video footage'*.

There was not [sic] proper investigation by members of South African Police services to ascertain whether there were reasonable grounds to believe that the plaintiffs were involved in the commission of the offence as alleged by the third defendant. More particularly, there was a video footage and the police took fingerprints of plaintiffs a week before the plaintiffs were arrested and detained…'

[11] The pleaded case against the prosecutor is that '*the prosecutors kept the matter on the roll from 5 June 2018 to 11 March 2019 even though it was said there was a footage of commission of the offence but did not watch it.'*

[12] The issue to be determined, against the minister is whether the arresting officer had a reasonable suspicion that Zuko and Anele committed the offence and he exercised his discretion to arrest reasonably. This arises in the light of the fact that the results of the fingerprints were still outstanding. Further, although the arresting officer knew the two arrested persons, he did not view the footage himself. As against the NDPP, the issue is whether the plaintiffs proved all the requirements for malicious prosecution.

[13] In the particulars of claim, it is alleged that when the prosecutor decided to proceed with the case he had no probable cause, the prosecution ended, the decision to proceed was unlawful and malicious; all the defendants had the intention to injure the plaintiffs.

APPLICATION FOR ABSOLUTION FROM THE INSTANCE

[14] At the end of the plaintiffs’ case NDPP submitted that there was no evidence upon which the court applying its mind reasonably could/may find for the plaintiffs.

[15] In *Minister of Justice and Constitutional Development and Others* v *Moleko* 2009 (2) SACR 585 (SCA) at paragraph 17, the court after analysing the role of the NDPP on the decision by NDPP to prosecute held that the decision to prosecute satisfied the requirements of setting the law in motion. At paragraph 57, with regard to the requirement of reasonable and probable course the court stated—

> ‘…
>
> It follows that a defendant will not be liable if he or she held a genuine belief founded on reasonable grounds in the plaintiff’s guilt. Where reasonable and probable cause for an arrest or prosecution exists the conduct of the defendant instigating it is not wrongful.
>
> …’

Regarding *animus injuriandi* at paragraph 63, as quoted in full below, the court said that requirement does not only include intention to injure but also the consciousness of wrongfulness.

[16] The evidence that was placed before court at the end of the plaintiffs’ case had revealed that on 23 April 2018, the prosecutor endorsed that he had watched the footage with the complainant, it was clear. The complainant identified the suspects. He ordered the investigating officer to charge the suspects with housebreaking and theft and detain them. Subsequently, when they were brought to court, he could see they were not the people on the video, the charges were then withdrawn.

[17] Considering that it only took the prosecutor seeing the suspects to conclude that they were not the persons in the footage. Further, awaiting for fingerprints results would have also had the effect of deciding against their prosecution. There was a possibility that such evidence could show that the

prosecutor had no reasonable or probable cause to prosecute, and that the prosecutor acted with intention to injure and with malice. The court was therefore of the view that there was evidence upon which it could find for the plaintiff, on the claim for malicious prosecution.

CASE GAINST THE 1ST DEFENDANT.

[18] Regarding arrest the second defendant pleaded that the plaintiffs were arrested in terms of section 40(1)(*b*) of the Criminal Procedure Act 51 of 1977 (the CPA). The *onus* is on the arresting officer to prove that he entertained a reasonable suspicion that suspects committed an offence referred to in schedule 1.

[19] According to the arresting officer, he had information from the prosecutor that the complainant identified the plaintiffs on the footage, committing the offences. That fortified his suspicion that he entertained earlier and had not acted on, when he considered that the footage was not clear enough.

[20] During the trial, the arresting officer was pressed about not waiting for the results of the fingerprints and not watching the footage himself, the second time. He responded that he had other duties, the prosecutor was still busy in court. However, he had no reason not to rely on the advice of the prosecutor.

[21] The arresting officer went on to state that before the prosecutor’s advice fortified his suspicion, he did not yield to the instruction of his own superior to effect arrest, before the return of a clear video. He also did not arrest since the information of the complainant, despite the pressure the complainant put on him.

[22] The question to be answered then is, for purposes of the arrest, would the fact that it later transpired that, the fingerprints results were negative and what transpired when the prosecutor saw the plaintiffs, put a hole in the justification of the arrest.

[23] What is required from the police in order to justify arrest as encapsulated in *Duncan v Minister of Law and Order* [1986] 2 All SA 241 (A) is: the arrestor must be a peace officer; he must have entertained a suspicion that the arrestee committed a schedule 1 offence, and the suspicion must rest on reasonable grounds.

[24] With regard to reasonable suspicion in a *Mabona and Another v Minister of Law and Order and Others* 1988 (2) SA 654 (E) at 658 the court stated:

> 'The test of whether a suspicion is reasonably entertained within the meaning of s 40 (1)(*b*) is objective (*S v Nel and Another* 1980 (4) SA 28 (E) at 33 H). Would a reasonable man in the second defendant's position and possessed of the same information have considered that there were good and sufficient grounds for suspecting that the plaintiffs were guilty of conspiracy to commit robbery or possession of stolen property knowing it to have been stolen? It seems to me that in evaluating his information a reasonable man would bear in mind that the section authorises drastic police action. It authorises an arrest on the strength of a suspicion and without the need to swear out a warrant, i.e. something which otherwise would be an invasion of private rights and personal liberty.'

[25] The process and steps taken by the arresting officer are common cause in this matter. He testified as to the extent of his resistance to act against the suspects. The first time they were pointed by complainant as suspects and the time his own superior considered it compelling that he must arrest. He waited for a clear footage. He only acted after the decision to prosecute was taken and the prosecutor had assured him of the identification of the suspects by two witnesses. It is common cause that the complainant knew them very well. It is difficult to comprehend that more was expected of him in order to formulate a reasonable suspicion, at least for purposes of arrest. The results of the fingerprints as asked by Zuko during his arrest would have been additional evidence at trial. Evidence reveals that they had not been received upon arrest. The arresting officer acted upon what he had at the time.

[26] Would it have helped to wait for the results of fingerprints; would it have helped if the arresting officer, who had seen the complainants, had watched the video himself. In retrospect, the answer to all these is in the affirmative. However, for purposes of arrest that answer does not imply that, on the facts in the possession of the arresting officer at that stage, in circumstances where the prosecutor said he had watched the footage, which was clear, his suspicion did not rest on reasonable grounds or the police did not investigate properly.

[27] In *Groves NO v Minister of Police and Another* 2024 (1) SACR 286 (CC) at paragraph 52 the court held:

> 'A warrant of arrest issued by a peace officer is to be distinguished from a warrantless arrest. The officer making a warrantless arrest has to comply with the jurisdictional prerequisites set out in section 40 (1) of the CPA. In other words, one or more of the grounds listed in paragraphs (*a*) to (*q*) of that subsection must be satisfied. If those prerequisites are satisfied, discretion whether or not to arrest arises. The officer has to collate facts and exercise his discretion on those facts. The officer must be able to justify exercising his discretion on those facts. The facts may include an investigation of the exculpatory explanation provided by the accused person.'

[28] Regarding whether he properly exercised his discretion to arrest, during the hearing, it was ascertained that the plaintiffs had been arrested on a suspicion of having committed a schedule 5 offence. The arresting officer in his testimony said he exercised the discretion to arrest because of the seriousness of the offence and the prosecutor's instructions. He said he could not have given the plaintiffs a warning under the circumstances. He said he knew that he could disregard the prosecutor's instruction for the plaintiffs' arrest, like he did with the one from his cluster head. Furthermore, Anele himself said when he was advised that he was identified in the footage committing housebreaking, he proffered no answer but co-operated with the arrest. Even Zuko who said he did ask about fingerprints and had denied knowledge of the housebreaking, he was

told that he would be advised about the results. His denial had to be weighed against the facts the arresting officer had.

[29] With regard to further detention after the first appearance, he said he had indicated, in writing, in the docket, that he was not opposing plaintiffs' release on bail. He admitted that the fact that he did not oppose bail was not different from exercising his discretion in favour of giving a warning to the plaintiffs.

[30] This Court does not consider the arresting officer's agreement to the above proposition as having been well made. In the argument that the arrest and detention were unlawful counsel for the plaintiffs referred to *Louw and Another v Minister of Safety and Security* 2006 (2) (C) SACR 178 (T) at 186. Most importantly, the Constitutional Court confirmed that *Louw*'s judgment was not correct. In *Minister of Safety and Security v Van Niekerk* 2008 (1) SACR 56 (CC) at paragraph 15 the court cited with approval what was held in *Charles v Minister of Safety and Security* 2007 (2) SACR 137 (W) at 144 b-d. Therein, it was stated that the legislator granted a peace officer the right to make an arrest in the circumstances set out in section 40 of the CPA. It created a situation where due compliance with that section by the peace officer is lawful and affords him or her protection against an action for unlawful arrest. It was held further that a court has no right to impose further conditions on peace officers. To do so, would open a pandora box where the courts would be called upon to inquire into the reasonableness of the exercise of the discretion to arrest in a variety of circumstances and peace officers would be called upon to make value judgments every time they effect an arrest. At paragraph 19 the Court quoted standing order (G) 341 issued under Consolidation Notice 15/199 regarding arrest.

[31] Paragraph 3 of the standing order provides:

'Securing the attendance of an accused at the trial by other means than arrest

(1) There are various methods by which an accused's attendance at trial may be secured. Although arrest is one of these methods, it constitutes one of the most drastic infringements of the rights of an individual and a member should therefore regard it as a last resort.

(2) It is impossible to lay down hard and fast rules regarding the manner in which the attendance of an accused at a trial should be secured. Each case must be dealt with according to its own merits. A member must always exercise his or her discretion in a proper manner when deciding whether a suspect must be arrested or rather be dealt with as provided for in subpara (3) below.

(3) A member, even though authorised by law, should normally refrain from arresting a person if-

(a) the attendance of a person may be secured by means of a summons as provided for in s 54 of the Criminal Procedure Act, 1977; or

(b) the member believes on reasonable grounds that a magistrates' court, on convicting such person of that offence, will not impose a fine exceeding the amount determined by the minister from time to time by notice in the Government Gazette, (at present R1500), in which event such member may hand to the accused a written notice [J 534] as a method of securing his or her attendance in the magistrates' court in accordance with s 56 of the Criminal Procedure Act, 1977.

[32] In conclusion the Court held that it would not be desirable to attempt in an abstract way divorced from the facts of that case, to articulate a blanket, all-purpose test for constitutionally acceptable arrests. Guidelines themselves underline, the lawfulness of an arrest will be closely connected to the facts. In this Court’s view the exercise of the discretion to arrest, on the facts of this case, was justified. The plaintiffs were taken to court without any delay. They did not apply for and were not released on bail until they applied and were released on 20 June 2018.

MALICIOUS PROSECUTION

[33] Regarding malicious prosecution, the prosecutor who made the decision to prosecute testified. He did not know the complainant and the plaintiffs before his decision to have the latter charged and detained. In the docket there were two (2) statements, that of the complainant and his brother implicating the plaintiffs as having been seen in a footage, committing housebreaking. At first, he and his colleague requested that a clear footage be brought. When the clear footage came, they could see the faces of the people removing items. He was satisfied with their identification. After the plaintiffs were charged, he informed the complainant, who had been complaining about the lack of progress in the matter. The complainant confirmed that the plaintiffs were the people he identified.

[34] On their first appearance he did not notice the two plaintiffs, there were many cases he was dealing with. This appearance seems to have been a routine one, whilst there would still be a need for accused's profile to be received. On 19 June 2018 he received the docket with their profiles attached, relating to information that they had neither pending cases nor previous convictions. Further, the investigating officer had endorsed that he was not objecting to their release on bail. After he addressed on the issue of bail the matter was stood down to the following day for their attorney. On 20 June they were released and the matter was postponed to 11 March 2019. By that day, he knew the plaintiffs very well. He viewed the video footage again in preparation for trial. That is when he realised that they had the wrong people. When he confronted the complainant, he was not able to explain his earlier identification. The version of the complainant kept on changing until he accepted that the prosecution would fail. The prosecutor then applied for the withdrawal of the charges.

[35] According to the prosecutor there was probable cause to enrol the matter, on the strength of the identification on the footage. He was going to secure and lead the evidence about admissibility of the footage during trial. He could not

recall if he had the expert affidavit that accompanies expert evidence in relation to the footage. He said he would have secured it or the expert for purpose of trial, nonetheless. He did not regard that the prosecution depended on the results of the fingerprints. There was a footage and two witnesses who identified the people in the footage. He denied that he rushed the matter because of malice and that he had intention to injure the plaintiffs. According to him, injustice would have resulted if he had failed to enrol the matter.

[36] According to Harms *Almer's Precedents of Pleadings* 9th ed at page 255, for a plaintiff to succeed in malicious prosecution, the plaintiff must allege and prove that:

(1) The defendant set the law in motion-they instigated or instituted the proceedings;

(2) the defendants acted without reasonable and probable cause;

(3) the defendants acted with 'malice' (or *animo injuriandi*) that is, with the intention to injure the plaintiff (the plaintiff must prove not only intent to injure but also consciousness of wrongfulness); and

(4) the prosecution failed.

[37] The plaintiffs did not particularly allege that the NDPP set the law in motion against the plaintiffs, an allegation in those terms is only in respect of the third respondent. The allegation against the NDPP is framed as '*when the prosecutor decided to proceed with case against the plaintiff, he had no probable cause for doing so'*. This can be vaguely read as a cross breed of elements 1 and 2 above, especially in the light of what was said in *Moleko*, *supra* at paragraphs 16 and 17. However, even if this Court were to be benevolent to the plaintiffs in this regard, the plaintiffs' action against the NDPP would not succeed, they would still have an uphill in proving the requirement of absence of reasonable and probable cause and that of malice. All the elements require to be proved.

[38] The prosecutor's evidence shows that NDPP was very cautious when the matter was first received. The prosecutors asked for a clear footage. It was only after receipt of the same and clear identification of the people in the footage that a decision to enrol the matter was taken.

[39] In *Reylant Trading Pty Ltd v Shongwe and another* [2007] 1 All SA 375 (SCA) at paragraph 14 the court quoted *Beckenstrater v Rottcher and Theunissen* 1955 (1) SA 129 (A) at 136 A-B with approval that:

> 'When it is alleged that a defendant had no reasonable cause for prosecuting, I understand this to mean that he did not have such information as would lead a reasonable man to conclude that the plaintiff had probably been guilty of the offence charged; if, despite having such information, the defendant is shown not to have believed in the plaintiff's guilt, a subjective element comes into play and disapproves the existence, for the defendant, of reasonable and probable cause.'

[40] With regard to malice at paragraphs 63 to 64 in *Moleko*, *supra*, 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*.'

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

[41] In the present case, this Court is of the view that plaintiffs failed to prove that the NDPP acted without reasonable and probable cause and with malice.

CASE AGAINST THE THIRD RESPONDENT

[42] The claim against the complainant is pleaded as setting the law in motion against the plaintiff by laying false charges without reasonable or probable cause. Further, all the defendants had the intention to injure the plaintiffs. These allegations do not present a complete cause of action in relation to either of the plaintiffs' claims.

[43] In order to succeed against the third respondent, in a claim for malicious prosecution, the plaintiffs had to prove that he colluded with relevant officials in his prosecution. That could not be the case as the claim against the NDPP has already failed.

[44] With regard to costs, the *Biowatch* principle ought to apply in this matter. The plaintiffs' defended suit is against organs of state. The plaintiffs were asserting their right to liberty, in the main. That they have lost, they should enjoy the shield of not having to pay costs to State.

In the result,

1. The plaintiffs' claim is dismissed with no order as to costs.

B MAJIKI
ACTING DEPUTY JUDGE PRESIDENT
OF THE HIGH COURT, MTHATHA

Appearances:

Plaintiffs	:	Mr Mzileni
Instructed by	:	Messrs Andile Mlonzana Attorneys 12 Reid Street Westdene **BLOEMFONTEIN** C/O Messrs Nosindwa Attorneys Inc. No. 23 Delville Road **MTHATHA**
Counsel for the defendants:		Mr Sintwa for first Defendant Mr Madubela for second Defendant
Instructed by	:	Office of the State Attorney Broadcast House No. 94 Sission Street Fortgale **MTHATHA** Ref. 971/19-A8N)