



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 6017/2022

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: /NO

(3) REVISED YES/NO

3/2/2025
DATE

[Redacted Signature]
SIGNATURE

In the matter between:

THEMBANI NCUBE

NDEBELE MTHANDAZO (MANDLA GWAXA)

First Applicant

Second Applicant

AND

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

JUDGMENT

Introduction

- [1] This is an application by Thembani Ncube and Ndebele Mthandazo for leave to appeal against the whole of the judgment and order of this court handed down on 21 November 2024, and in which judgment the Respondent's application for absolution for the instance was granted with costs. The applicants seek leave to appeal to the Full Court of this Division.

Background

- [2] On the 14 October 2019, prosecutors in the employ of the Respondent's proffered criminal charges of assault GBV and business robbery against the First and Second Applicants.
- [3] It was common cause between the parties that prosecutors in the employ of the Respondent set the law in motion and instituted the criminal proceedings and that the prosecution failed on 7 October 2021, the Applicants were acquitted and discharged in terms of Section 174 of the Criminal Procedure Act 1977 (as amended) ("CPA")¹.
- [4] The Applicants pleaded in their particulars of the claim that the prosecutor when instituting the criminal prosecution against them (1) had no reasonable probable cause for doing so, nor did the prosecutor have any reasonable belief in the truth of the information contained in the police docket, and (2) failed to acquaint themselves of the contents of the relevant police docket from which it would have been obvious that there were no reasonable grounds or facts justifying the prosecution of the Applicants. The Applicants had pleaded that they had suffered damages for contumelia.

¹ Act 51 of 1977

- [5] The First and Second Applicants testified at the hearing of the trial. No other witnesses were called. The Applicant's further did not call their expert witness on damages.
- [6] The First and Second Applicants testified to the circumstances surrounding their arrest and detention and the conditions they endured during their incarceration until their acquittal and discharge on 7 October 2021.
- [7] The First and Second Applicants placed no evidence before the court as to what was contained in the police docket nor the information contained therein and on which the prosecutor had made their decision to prosecute the First and Second Applicants.
- [8] The docket had been produced by the Respondent and was included in the trial bundle. However, no reference was made to the police docket by the Applicants during their evidence in chief and no documents contained in the docket were referred to.
- [9] In the pre-trial conference held between the parties on 8 June 2023 the following enquires and responses appear from the minute:²

"Does the Defendant admit that only documents specifically referred to and proven will form part of trial record, and if not, which and on what basis.

Answer: Agreed."

- [10] During cross examination the following two documents were put to the Applicants by the Respondent's counsel :-

² CaseLines 007-16

[10.1] The Notice of Rights in terms of the Constitution signed by the First Applicant³ and

[10.2] the statement made by the complainant to the South African Police Services on the day that the robbery took place.⁴ The Respondent put to the First and Second Applicants that as appeared from this statement, the complainant had identified two of the assailants, namely First and Second Applicants, who were robbing the shop and had pointed them out to the police at the scene. The Applicants were arrested at the scene.

[11] When the First Applicant gave evidence, the First Applicant conceded to a question by the Respondent's Counsel that the statement by the complainant implicated the First Applicant in a robbery. The Second Applicant also conceded that he had been pointed out at the scene as the person who had committed the robbery and was similarly referred to the statement made by the Complainant.

[12] The First and Second Applicants also failed to lead any evidence on the quantum of the damages sustained by the First and Second Applicants.

Leave to Appeal

[13] On 12 December 2024 the First and Second Applicants filed a notice of application for leave to appeal. However, the granting of leave to appeal is not there for the asking. A party must make out a case for such relief. It is settled law that leave to appeal may only be granted if the proposed appeal would have reasonable prospect of success.⁵ *Mont Chevuax Trust* is one of the first cases to consider the nature of the new test. There, Bertelsmann J explains:

³Caselines 010A-179

⁴Caselines 010A-174

⁵The *Mont Chevaux Trust v Tina Goosen And 18 Others* 2014 JDR 2325 (LCC).

*"[i]t is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion...The use of the word 'would' in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against".*⁶

- [14] The same approach was then applied in other provinces. In *Matoto*, Daffue J cited *Mont Chevaux* with approval and said:

*"there can be no doubt that the bar for granting leave to appeal has been raised. The use by the legislature of the word '**only**',.... is further indication of a more stringent test."*⁷

- [15] Indeed, it has been said that "the test for leave to appeal now more onerous."⁸ The matter has been put beyond doubt by the SCA. In *Notshokovu* it said:

*"an appellant...faces a higher and stringent threshold in terms of the Act, compared to the provisions of the repealed Supreme Court Act 59 of 1959."*⁹

- [16] In *Smith*¹⁰ Plasket AJA explained the meaning of "reasonable prospects of success" as follows:

*"[m]ore is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless."*¹¹

⁶ At para 6 (emphasis added).

⁷ *Matoto v Free State Gambling and Liquor Authority* [2017] ZAFSHC 80 para 5 (emphasis added).

⁸ *Valley of the Kings Thaba Motswere (Pty) Ltd v Al Mayya International* [2016] ZAECGHC 137 para 4

⁹ *Notshokovu v S* [2016] ZASCA 112 para 2 (emphasis added).

¹⁰ *S v Smith* 2012 (1) SACR 567 (SCA).

¹¹ *Smith* para 7.

- [17] Bearing these authorities in mind, I turn to deal with the grounds advanced by the Applicants in this case in their quest to procure such leave.

Grounds of appeal

- [18] The Applicants in their notice of appeal criticized this court for failing to consider the ruling and findings of the criminal court which discharged the Applicants in terms Section 174 of the Criminal Procedure Act 1977 (as amended) (CPA). This ruling had not been placed before this Court during the trial proceedings. Applicants' counsel, however, argued that as the criminal court had found that the State had no prima facie case and discharged the Applicants, this Court ought to draw an adverse conclusion from that fact and find that the prosecutor acted without reasonable and probable cause in instituting the criminal proceedings.
- [19] Applicants counsel referred this Court to the judgment of Sieberhagen AJ in *Sijoyi Robert Mdhlovu vs The National Director of Public Prosecutions*¹² as support for his submission that the lack of a prima facie case at the conclusion of the criminal proceedings was sufficient for this court not to have granted absolution from the instance.
- [20] This judgement was however overturned by the Supreme Court of Appeal in *The National Director of Public Prosecutions v Sijoyi Robert Mdhlovu*¹³, where Matojane JA stated that:-

"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 prosecution. Suspicion of guilt on reasonable grounds suffices. The question is what a

¹² [2022] ZAMPMBHC 36; [2023] 1 All SA 458 (MM)

¹³ (194/2023) [2024] ZASCA 85; 2024 (2) SACR 331 (SCA)

reasonable prosecutor would have done in light of the information available at the relevant stage.”¹⁴

And further stated:

“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.”¹⁵

“By concentrating on the prosecution’s ultimate failure, the High Court erroneously diverted attention from scrutinizing reasonable and probable cause.”¹⁶

[21] The only evidence before this Court from the docket with regards to the prosecutor’s decision to prosecute was the statement from the complainant. Bearing this statement in mind, the evidence that the Applicants were identified at the scene of the alleged robbery and the judgement of Matojane JA, the fact that the prosecution ultimately failed, does not support the submission that the evidence before this Court was such that the Respondent had a case to meet or answer.

[22] There was also some criticism of this Court for failing to consider that a J88 Form was not provided with the charge sheet to the criminal court. Again, no reference was made to this in the evidence of the Applicants at the hearing of the trial. In addition, the fact that money and cellphones were not found in Applicant’s possession does not advance the Applicant’s case as this Court was not made privy to exactly what was allegedly stolen during the robbery.

¹⁴ Supra at [21]

¹⁵ Supra at [24]

¹⁶ Supra at [25]

[23] Whilst evidence was led of a video surfacing at the criminal trial, no evidence was placed before this Court as to when this video surfaced or whether there was any reference to the video in the police docket. This Court is unaware of what the video depicted save for a statement by the Applicants that they were not the perpetrators. Whether this evidence was available to the prosecutor at the time of instituting the criminal prosecution was not disclosed to this court, nor was any evidence presented to this Court to suggest that the prosecutor ought reasonably to have been aware of the existence of the video at the time of instituting the criminal prosecution.

[24] In *Minister of Justice and Constitutional Development vs Moleko*¹⁷ Van Heerden JA stated that :

"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."*¹⁸

[25] The burden of proving the lack of reasonable and probable cause to prosecute and that the prosecution was instituted *animus iniuriandi* falls four square on the shoulders of the Applicants.

¹⁷ [2008] 3 ALL SA 47 (SCA)

¹⁸ Ibid at [8]

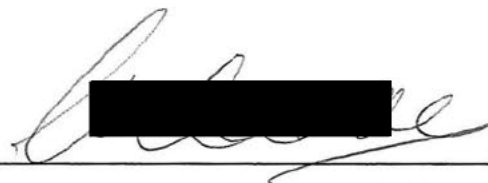
- [26] The concession by the Respondent that it failed to prove a prima facie case at the criminal trial was insufficient for this Court to have found that the prosecutor must have had no reasonable probable cause for instituting the criminal proceedings or that the prosecutor had no reasonable proof from the information contained in the police docket supporting a decision to prosecute or that the prosecutor had acted with malice (*animo iniuruandi*).
- [27] In all these circumstances, I can find no reason why this court ought to have or could find on the evidence before it, that the prosecutor acted without reasonable cause or with malice (*animo iniuriandi*), simply on the basis that the criminal court in deciding the eventual outcome found that there was no prima facie case against the Applicants.
- [28] From an objective point of view and from the evidence placed before this court, the identification of the accused by the complainant's statement and the fact that they were arrested on the scene trying to get through the door, does not support the Applicants suggestion that the prosecutor could not not have had a belief in the existence of a reasonable and probable cause or that, that belief was not justifiable from an objective point of view.
- [29] Furthermore, proving malicious prosecution requires that the prosecutor has acted egregiously and not just with flawed reasoning. Again, there is no evidence before this court to support such a finding. The fact that the Applicants were subsequently discharged does not in and of itself indicate that there was no reasonable and probable cause to prosecute the Applicants.
- [30] Furthermore, it is trite that the prosecutor had to have prosecuted the Applicants with *animus iniuriandi*. The Plaintiff bears the onus to demonstrate that the prosecutor at the time of initiating the prosecution foresaw that there were no reasonable grounds for persisting with the prosecution and acted recklessly as to that consequence.

[31] The failure by the Applicants to place any such evidence before the court, including their failure to place the docket before this Court, left this Court with little choice but to find that the Applicants failed to demonstrate that the prosecutor, firstly, had no reasonable probable cause for prosecuting the Applicants and secondly, acted with *animus iniuriandi*.

Conclusion

[32] Having considered the submissions made by both Counsel, I am of the view that the proposed appeal would have no reasonable prospects of success. I am also of the view that there are no compelling reasons why the proposed appeal should be heard. In the result, I make the following order:-

- 1 The application for leave to appeal is dismissed.
- 2 The Applicants are to bear the costs jointly and severally the one paying the other to be absolved.

A handwritten signature in black ink, appearing to read 'K Warren', is written over a horizontal line. A black rectangular redaction box covers the middle portion of the signature.

K WARREN
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

For the Applicants:

Advocate K Tsatsawane SC instructed by
Tsatsawane Inc

For the Respondent:

Advocate L Kalashe instructed by State
Attorney - Johannesburg

Date of argument:

16 January 2025

Date of delivery of judgment:

3 February 2025