

**REPUBLIC OF SOUTH AFRICA**



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

**CASE NO: A2023-125472**

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

 20 November 2025

In the matter between

**NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS**

Appellant

And

**SANDILE RICHNET NDLOVU**  
Respondent

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**JUDGMENT**

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## **Mdalana-Mayisela J**

### **Introduction**

[1] This appeal comes before the court by way of an application for condonation of the late prosecution of the appeal and for reinstatement of that appeal. The appeal is directed against a judgment of the Germiston Regional Court, Acting Magistrate Mputle, handed down on 24 July 2023, in which the appellant was held liable for malicious prosecution and ordered to pay damages in the sum of R200,000.00 to the respondent.

[2] The respondent has raised several points in limine and vigorously opposes the application for condonation. The issues for determination are, therefore.

[2.1] Whether the points in limine should be upheld;

[2.2] Whether condonation for the late prosecution of the appeal should be granted and the appeal reinstated; and

[2.3] Should condonation be granted, the merits of the appeal itself.

### **The points in limine**

[3] The respondent raised three preliminary points: first, the initial lack of a formal condonation application; second, the confusing citation of the appellant; and third, the jurisdiction of this court and the appealability of the judgment.

[4] Regarding the first point, it is correct that when the appeal was initially enrolled, no formal application for condonation was before the court. This procedural defect was rightly flagged by the registrar. However, this point has been superseded by subsequent developments. The appellant has since filed a comprehensive application for condonation and reinstatement. To dismiss the appeal on this basis now would be to elevate form over substance. This point is dismissed.

[5] On the second point, the respondent correctly identifies a lack of clarity in the papers. The notice of appeal cites the "*National Director of Public Prosecutions*", while some subsequent documents refer to the "*Minister of Police*". The judgment of the court a quo, however, is unequivocal; it is a judgment against the National Director of Public Prosecutions for malicious prosecution. The citation of the Minister of Police in some documents is an error. This is a formal irregularity that is capable of correction and does not go to the heart of the matter. The interest of justice requires that the correct party, the National Director of Public Prosecutions, prosecute the appeal. The point is dismissed, and the citation of the appellant is hereby amended to reflect the National Director of Public Prosecutions in all further proceedings.

[6] The third point relating to jurisdiction and appealability is without merit. The appellant's reliance on the Magistrates' Courts Act is correct in substance, and the judgment for a substantial sum of money is plainly a final and appealable order. This point is dismissed.

### **The application for condonation and reinstatement**

[7] The appellant failed to prosecute the appeal within the 60 days prescribed by Rule 50(1) of the Uniform Rules of Court. The legal principles governing condonation are trite.<sup>1</sup> The applicant must show good cause, which requires a reasonable and acceptable explanation for the delay, bona fides, the absence of undue prejudice to the other party, and, crucially, prospects of success on the merits. These factors are not considered in isolation but are interrelated. The court has a discretion to be exercised judicially upon consideration of all the facts.

### **Explanation for the delay**

[8] The appeal lapsed around 10 January 2024. The application for condonation was filed in September 2024, resulting in a delay of approximately

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<sup>1</sup> *United Plant Hire (Pty) Ltd v Hills* 1976 (1) SA 717 (A) at 720E-G; *Minister of Safety and Security and Another v Scott and Another* 2014 (6) SA 1 (SCA) at [16].

eight months. This is an inordinate and significant delay that requires a convincing explanation.

[9] The appellant's explanation primarily rests on systemic challenges within the state attorney's office, including high caseloads, administrative inefficiencies, and the departure of the former attorney handling the matter. While this court is not oblivious to the resource constraints faced by state institutions, the explanation provided is generic and lacks specific detail. It fails to account convincingly for an eight-month period of inactivity, particularly in the face of persistent inquiries from the respondent's attorneys. The explanation is, at best, weak.

[10] The appellant's further argument that the respondent could have mitigated the delay by prosecuting the appeal himself under the Uniform Rule of Court 50(4)(b) is unpersuasive. The primary duty to prosecute an appeal rests squarely on the appellant. A respondent is under no obligation to assist an appellant in complying with the Rules of Court.

### **Prospects of success**

[11] This factor often becomes the determining element in condonation applications, especially where the explanation for the delay is lacking. After careful analysis of the record and the arguments, I am of the view that the appellant has demonstrated strong prospects of success on appeal for the following reasons.

[12] The test for malicious prosecution is set out authoritatively in *Minister of Justice and Constitutional Development and Others v Moleko*.<sup>2</sup> A claimant must prove: [a] that the defendant set the law in motion, [b] that the defendant acted without reasonable and probable cause, [c] that the defendant acted with malice (*animus injuriandi*), and [d] that the prosecution failed.

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<sup>2</sup> (131/07) [2008] ZASCA 43 para 8.

[13] The court a quo's judgment appears vulnerable to at least two of these elements. First, regarding the element of reasonable and probable cause, it applied a standard that seems more appropriate for a conviction than for initiating a prosecution. The test for reasonable and probable cause is an objective one. It is not based on the subjective beliefs or motives of the prosecutor. Reasonable and probable cause exists if a reasonable person would have concluded that the accused was probably guilty on the facts available to the prosecutor at the time.<sup>3</sup>

[14] The control prosecutor, Mr. Oberholzer, was faced with a docket involving a serious Schedule 6 offence. The docket contained a statement from a complainant who stated that he saw the appellant in the company of three other perpetrators when they boarded his taxi before the crime was committed. Days after the incident, the complainant identified the respondent and another person as his assailants, and they were arrested. An eyewitness statement corroborated the commission of the crime. The two statements contained evidence that a shot was fired during the robbery that took place in a taxi. The arresting officer's statement, confirming the identification of the appellant and another person by the complainant during the arrest, was also in the docket when the decision to enroll the matter was taken.

[15] Mr. Oberholzer testified that there was sufficient evidence in the docket to link the appellant to the commission of the crime of robbery with aggravating circumstances. He believed that there was a *prima facie* case against the appellant. He placed the matter on the roll of the reception court. He also issued instructions to the investigating officer for further investigation. The matter was postponed for seven days to allow the investigating officer to verify the appellant's address for a Schedule 6 bail hearing. The senior public prosecutor withdrew the charges against the appellant on the second court appearance without discussing the reasons with Mr. Oberholzer. From the diary section of the docket, it appears that the charges were withdrawn because

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<sup>3</sup> Prinsloo and Another v Newman; National Director of Public Prosecutions v Sijoyi Robert Mdhlovu (194/2023) [2024] ZASCA 85; 2024 (2) SACR 331 (SCA) (3 June 2024) para [20].

the crime occurred inside the taxi, with the perpetrators seated behind the complainant, who was the driver.

[16] In my view, sufficient evidence existed in the docket for the reasonable person to conclude that the appellant was probably guilty of the crime of robbery with aggravating circumstances at the time the matter was enrolled on the reception court roll. The court a quo's finding that the prosecutor should have "*foreseen insurmountable challenges*" and declined to prosecute seems to require a final assessment of the evidence at the inception of the case, which is not the correct legal standard. I find that the appellant established an element of reasonable and probable cause.

[17] Second, regarding the element of malice, the court a quo inferred malice from the prosecutor's conduct and failure to decline to prosecute. This is a misdirection. Malice, or *animus injuriandi*, requires proof of an intention to injure or a consciousness of wrongfulness. There is no evidence on record that Mr. Oberholzer acted with spite, ill-will, or any motive other than the proper exercise of his prosecutorial discretion. The fact that a senior prosecutor later withdrew the charges based on a different assessment of the identification evidence points at the very least, to a difference of professional opinion within the National Prosecuting Authority. It does not, without more, provide a basis for inferring malice. The respondent failed to prove the element of *animus injuriandi* on a balance of probabilities.

[18] Furthermore, the conflation of the seven-day detention from 8 to 15 May 2017, which was a statutory postponement for bail information explicitly permitted by section 50(6)(d) of the Criminal Procedure Act 51 of 1977, with the initiation of malicious prosecution, is a further error.

### **Prejudice and bona fides**

[19] The respondent has suffered prejudice through the delay in finality. However, this prejudice can be ameliorated by a suitable costs order. The appellant, while dilatory, has ultimately taken steps to regularize its position and

has demonstrated a genuine desire to pursue the appeal, as evidenced by the filing of this application following the court's query.

### **Conclusion on condonation**

[20] This is a challenging case. The appellant's explanation for the delay is poor. However, the court must balance this against the strong prospects of success in a matter involving a substantial sum of public money and a judgment that appears, on a *prima facie* basis, to contain material legal errors. The constitutional imperative that courts must do justice between the parties weighs heavily. It would not be in the interest of justice to allow a potentially erroneous judgment to stand based on the procedural failures of a legal representative, particularly when the substantive legal arguments are compelling.

[21] Consequently, and despite the unsatisfactory explanation for the delay, the application for condonation and the reinstatement of the appeal is granted.

### **The merits of the appeal**

[22] The main issues on the merits of the appeal are whether the respondent, on a balance of probabilities, discharged the burden of proving the lack of reasonable and probable cause to prosecute him, and whether the prosecution was initiated with malice.

[23] Having had a full argument on the merits, and for the reasons substantially outlined in paragraphs 13 to 18 above, I am satisfied that the court *a quo* misdirected itself in the application of the *Moleko* test.

[24] The respondent failed to discharge the burden of proving that the appellant, through its prosecutor, acted without reasonable and probable cause. The evidence in the docket at the time the decision to prosecute was taken was sufficient to establish a reasonable and probable cause. Furthermore, the respondent provided no evidence to prove the essential

element of malice. The inference of malice from the mere fact of prosecution, in the circumstances of this case, was not justified.

[25] Accordingly, the appeal must succeed.

**ORDER**

[26] As a result, the following order is made;

1. The application for condonation for the late prosecution of the appeal is granted, and the appeal is hereby reinstated.
2. The appeal is upheld.
3. The order of the Regional Court, Germiston, under case number CRC 419/2017 dated 24 July 2023, is set aside and replaced with the following:  
*"The plaintiff's claim against the second defendant (National Director of Public Prosecutions) is dismissed."*
4. Notwithstanding the success of the appeal, the appellant is ordered to pay the respondent's costs occasioned by the application for condonation and reinstatement, on an attorney and client scale.
5. In all other respects, each party is to bear its own costs of the appeal.

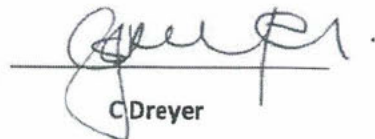


**MMP Mdalana-Mayisela**

**Judge of the High Court**

**Gauteng Division**

**I agree**



**Acting Judge of the High Court**

**Gauteng Division**

Digitally delivered by uploading to Caselines and emailing to the parties.

Date of hearing: 5 August 2025

Date of delivery: 20 November 2025

Appearances:

For the appellant: Adv T Monene

Instructed by: State Attorney, Johannesburg

For the respondent: Adv T Molo

Instructed by: T Matubatuba Attorneys