



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MTHATHA)**

CASE NO.:1391/2019

In the matter between:

MIHLE NTOBOLE

Plaintiff

and

**NATIONAL DIRECTOR FOR PUBLIC
PROSECUTIONS**

Defendant

JUDGMENT

ZONO AJ:

Introduction

[1] The plaintiff instituted action proceedings against the defendant for damages arising out of the alleged malicious prosecution. The defendant is sued on the basis that he is vicarious liable for the wrongs of the members of the

prosecuting authority acting within the course and scope of their employment with him¹. Pursuant to the arrest and detention by the member of South African Police Service, the plaintiff was caused to appear in court on 27th December 2017 facing the charges rape, kidnapping and assault with intent to do grievous bodily harm. Sequel to the first appearance, a number of postponements ensued until the 12th April 2018 when the charges against the plaintiff were withdrawn.

[2] Plaintiff averred that, at all material times the Public Prosecutor concerned was in possession of the police docket and was aware that there was no evidence that would lead a reasonable person to conclude that the plaintiff committed the offences he was facing when he took a decision to prosecute. The prosecution was carried out with malice, with intent to injure the dignity and personality of the plaintiff, without reasonable and probable cause and without lawful or justifiable excuse. As a result of the prosecution the plaintiff suffered damages.

[3] Thereanent to this case, the defendant averred that a case of kidnapping and rape was opened against the plaintiff and there was evidence implicating him to the case and therefore the enrolment of the plaintiff's case was lawful and justifiable and was without malice. It is also averred that the withdrawal of the charges on 12th April 2017 was in terms of the provisions of section 6(1) of the Criminal Procedure Act 51 of 1977 as amended.

[4] During the trial of this matter, it was agreed that the matter proceeds both on merits and quantum and a ruling was made to that effect. The plaintiff accepted his duty to begin and onus of proof. The plaintiff himself testified and was the

¹ Section 2 of State Liability Act No 14 of 2011

sole witness in his case and the Public Prosecutor, Mr Mbaleni testified on behalf of the defendant.

[5] The plaintiff testified that he was charged with an offence of rape, kidnapping, and assault. He appeared in the reception court on 27th December 2017 where he was arraigned for the aforementioned offences. The matter was postponed for several occasions until when it was withdrawn on 12th April 2018. He testified that there was no evidence to support the charges he was facing. The prosecution merely relied on the word or mere say so of the victim to prosecute him. The prosecution had no reasonable ground to believe that the plaintiff committed the offences.

[6] During cross examination the plaintiff did not dispute that the Public Prosecutor perused the statement of the victim, A[...] M[...] and that of the complainant, her father D[...] M[...] that implicated him to the charge of rape and kidnapping. He categorically stated that he has a problem with the conduct of Public Prosecutor charging him based only on the statement of A[...]. He added that he was charged without any reasonable ground and he tried to inform the Public Prosecutor about his side of the story, but he did not listen. He could not remember if he did or did not interact with the Public Prosecutor when he was before court, but he was certain that he told everyone who came to him that he was innocent. It was also put to him that the Public Prosecutor is not permitted to talk with him as an accused in the criminal case.

[7] The defendant called the evidence of Sicelo Siviwe Mbaleki who is a Public Prosecutor who took a decision to prosecute the plaintiff and enrolled the matter for plaintiff's prosecution. He testified that he dealt with the plaintiff on 27th

December 2017 during his first appearance in court. He stated that he relied on the statement of the victim, A[...] and does not agree with plaintiff's testimony that he was not supposed to have been charged. He went on testifying about what was contained in the victim's statement.

[8] In the statement it is stated that the victim knew the plaintiff as they were from the same village. The victim was attending a night vigil at another homestead and when she was next to the gate of the said homestead she came across the plaintiff and Mosuli. Plaintiff called her and she refused to give him attention and told him that she was going to the night vigil. Plaintiff dragged her against her will into the dark place, which act amounted to kidnapping. At the dark place the plaintiff kicked her on the legs and she fell down. When she was on the ground, both plaintiff and Mosuli undressed her everything including her underwear. Mosuli was the first one to rape her. When he finished and getting up, the victim struggled to free herself up and attempted to escape where the plaintiff chased her down and caught her and kicked her on the legs causing her to fall down. As she was already naked, the plaintiff raped her. There was also victim's father's statement (complainant). He concluded that there was a *prima facie* case of rape. He then enrolled the matter.

[9]The Public Prosecutor however testified that there was another prosecutor, whose name was not disclosed, who sat in the office solely to read the dockets and take decisions whether or not to prosecute. That Prosecutor does not go to court; he only hand over the docket to the one who is in court. That Prosecutor took the decision to prosecute the plaintiff. He testified that he is the Public Prosecutor who was in court and he received the docket from the other prosecutor and perused same, and he concurred with the decision to prosecute.

However, during the questions by the court he testified that he is the ultimate decision maker and it is his decision and conduct that must be looked at and scrutinized.

[10] The Public Prosecutor disputed that plaintiff's defence was not considered when taking a decision to prosecute. He weighed both sides or version and found the complainant's story weighty when compared with the plaintiff's story. In the same vein, he testified that he had no time to speak to the plaintiff but considered his warning statement, that is where the Public Prosecutor sees accused side of the story. He testified and disputed that he had intention to injure and did not contemplate that charges would be withdrawn.

[11] In cross examination the Public Prosecutor conceded that there is a possibility that he might not have read the entire docket as he received the docket when the court was already in session. This bellies his version that he considered plaintiff's defence when he took the decision to prosecute. He did not recall how big the docket was. He was not certain if he read the statement of N[...]. He doubted having read N[...]'s statement that was taken on 25th December 2017 before the docket served before him, ostensibly on 27th December 2025. The Public Prosecutors, in the final analysis could not dispute that he did not thoroughly read the docket contents as he was already in court when he received same. He nonetheless enrolled the matter.

[12] The Public Prosecutor was referred to the statement of N[...] where the victim reported that she was nearly raped by Mosuli and the plaintiff as opposed to being raped. That part of the statement was juxtaposed with victim's statement where she said she was raped by the plaintiff. He could not reconcile

or clarify this obvious contradiction in the statements contained in the docket. In a nutshell he could not shed light as to how he applied himself to the contradictions. During the questions by the court the Public Prosecutor testified that when conflict arose from the statements contained in the docket the complainant generally should be confronted with that before the enrolment of the matter or before the suspect is arraigned in court. That did not happen in the case of the plaintiff. The plaintiff was arraigned in court and the matter was enrolled notwithstanding the apparent material contradictions patent in the statements. He clarified this further when Mr Calaza asked him, that serious contradictions which are such that there is no case against the suspect, the Public Prosecutor should query the docket and not enrol the matter. Unfortunately, that too did not happen in this case. He however accepted that there were material contradictions in the docket.

[13] A further contradiction was spotted during cross examination about the place where the victim was allegedly raped. The victim states in her statement that she was dragged and raped in a dark place whereas the statement by D[...] M[...], the complainant reveals that the plaintiff and Mosuli forcefully took the victim to another home and raped her.

[14] In a nutshell, the Public Prosecutor testified that he had the complainant's evidence when he enrolled the matter. Between the 26th February 2018, when the plaintiff was released on bail, and 12th April 2018 when the charges against the plaintiff were withdrawn, the Public Prosecutor had no new evidence other than complainant's evidence. From the onset, it is not clear what is meant by complainant's evidence. Could it mean complainant's statement? That is highly possibly because the docket does not contain only complainant's evidence. In

this case we have heard that suspects warning statements were in the docket and that is not complainant's evidence.

Discussion and Analysis

[15] Malicious proceedings and prosecution may take the form of abuse of criminal or civil proceedings. Malicious prosecution is an abuse of the process of the court by intentionally and wrongfully setting the law in motion on a criminal charge². There must be a prosecution before the plaintiff can bring an action for malicious prosecution³. A person may bring an action for malicious prosecution if he is charged. However, there are certain requisites that must be satisfied for a successful claim of malicious prosecution. In order to succeed in an action for malicious prosecution the plaintiff must show the following:

- “(a) that the defendant instituted or instigated the proceedings,*
- (b) that the defendant acted intentionally or with animus iniuriandi,*
- (c) that the defendant acted without reasonable and probable cause,*
- (d) that the defendant was actuated by an improper motive or malice,*
- (e) that the proceedings terminated in the plaintiff's favour, and*
- (f) that the plaintiff suffered damage.”*

[16] It is common cause both in the pleadings and evidence that the defendant set the law in motion by instituting or instigating the criminal proceedings against plaintiff. Mr Mbaleki, the Public Prosecutor who gave evidence on behalf of the defendant testified that he took the decision to prosecute the plaintiff. That accords with the provisions of section 20(1) of the NPA Act⁴ which provides thus:

² **Ledermen v Moharal Investments (Pty) Ltd** 1969(1) SA 297(A); 1969 (1) SA 190 at 196

³ LAWSA, 2ND edition, Volume 15 page 195 Para 316

⁴ National Prosecuting Authority Act 32 of 1998; section 179 (2) of the Constitution

“(1) The power, as contemplated in section 179 (2) and all other relevant sections of the Constitution, to

(a) institute and conduct criminal proceedings on behalf of the State;

(b) carry out any necessary functions incidental to instituting and conducting such criminal proceedings;

(c) discontinue criminal proceedings;

Vests in the Prosecuting Authority shall, for all purposes, be exercised on behalf of the Republic.”

Animus Iniurandi

[17] Intention to injure or *animus iniuriandi* is one of the requirements that needs to be satisfied. A person who lays a criminal complaint against another intends to injure him or her⁵. This transcends to setting the law in motion. Similarly, the exercise of a power to institute criminal proceedings on behalf of the state against any person⁶ is with the tentative intention for suspect to be convicted and ultimately sentenced. Tentative in the sense that the evidence at the disposal of the Public Prosecutor raises a possibility of conviction and sentence, subject to the evidence led during proceedings in court. Conviction with its consequences⁷ is injurious without blameworthiness. It goes without saying that the sentencing of the perpetrator is injurious as it sometimes steals the liberty and other valuable amenities of a person. The injury in those circumstances is retributive and not wrongful. Those kinds of injuries are justified in law. However, an immediate injury that is incidental to the institution of criminal proceedings is the uncertainty, anxiety and other immotional hardships one suffers when he or she is facing charges in the criminal proceedings. When he/she has to attend court he loses a valuable asset called *time for himself and his personal affairs*. His convenience goes away. His

⁵ LAWSA, Page 198, Para 321

⁶ Section 20(1) of National Prosecuting Authority Act 32 of 1998

⁷ For example, retention of finger prints with criminal record center which has other consequences, like difficulty to easily secure lucrative work opportunities

image to the society changed. People started to doubt his integrity. The list is endless. In a nutshell, when criminal proceedings are instituted, the Public Prosecutor does that with tentative intention to secure conviction, which is inevitably injurious, and ultimately a suitable sentence. The fact that the infliction or occurrence of the intended injury is justified in law or is not unlawful is neither here nor there. The intention at this level is satisfied only by the common cause facts that the plaintiff faced criminal charges in a court of law. In the light of the fact that there must be reasonable prospect of a conviction before the Prosecutor can enrol the matter or when he enrolls the matter, he obviously has that tentative or provisional intention to secure conviction.

[18] However, in *Moaki v Reckett and Colman (Africa Ltd) and another*⁸ it was held that:

the “Where relief is claimed by this *actio* the plaintiff must allege and prove that 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.’

[19] *Animus injuriandi* includes not only the intention to injure, but also consciousness of wrongfulness. In this regard *anumus injuriandi* (intention) means that the defendant directed his will to prosecuting the plaintiff (and this infringing his personality), in the awareness that reasonable grounds for the prosecution were (possibly) absent, in other words, that his conduct was (possible) 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

⁸ 1968 (3) SA 98 (A) at 104 A-B

a case the second element of *dolus*, namely of consciousness of wrongfulness, and therefore *animus injuriandi* will be lacking. His mistake therefore excluded the existence of *animus injuriandi*. A defendant must 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*)⁹. When the Public Prosecutor was selectively reading the contents of the docket, he was aware of the wrongfulness of his conduct, and he reconciled with the possibility that he must have been missing crucial information that would otherwise influence his decision. His conduct complied with all the elements of “*animus injuriandi*”. The Public Prosecutor could not justify his selective reading of the docket contents. He therefore knew that what he was doing was wrongful but continued to ignore other statements contained in the docket. That proves intention to injure whoever was affected by his decision.

Absence of reasonable and probable cause

[20] Reasonable and probable cause, in the context of a claim for malicious prosecution, means an honest belief founded on reasonable grounds that the institution of proceedings is justified¹⁰. The test for absence of reasonable and probable cause is both objective and subjective¹¹. It is objective in that when it is alleged that a defendant had no reasonable cause for prosecution it means that he or she did not have such information as would lead a reasonable person to conclude that the plaintiff had probably been guilty of the offence charged.¹²

⁹ *The Minister of justice and Constitutional Development v Moleko* 2008 (3) ALL SA 47 (SCA) Para 63-64

¹⁰ *Minister of justice and Constitutional Development v Moleko* 2008 (3) SA 47 SCA Para 20

¹¹ *Prinsloo and another v Newtman* 1975(1) SA 481 (A) at 492 C-F and 495 A

¹² *Hassien v Minister of police for the Republic of South Africa and others* (612/2019) [2025] ZAECHMHC 120 (18 November 2025) Para 52

[21] In Lubaxa¹³

“[19] The right to be discharged at that stage of the trial does not necessarily arise, in my view, from considerations relating to the burden of proof (or its concomitant, the presumption of innocence) or the right of silence or the right not to testify, but arguably from a consideration that is of more general application. Clearly a person ought not to be prosecuted in the absence of a minimum of evidence upon which he might be convicted, merely in the expectation that at some stage he might incriminate himself. That is recognised by the common law principle that there should be “reasonable and probable” cause to believe that the accused is guilty of an offence before a prosecution is initiated (Beckenstrater v Rottcher and Theunissen 1955(1) SA 129 (A) at 135C-E), and the constitutional protection afforded to dignity and personal freedom (s 10 and s 12) seems to reinforce it. It ought to follow that if a prosecution is not to commence without that minimum of evidence, so too should it cease when the evidence finally falls below that threshold. That will pre-eminently be so where the prosecution has exhausted the evidence and a conviction is no longer possible except by self-incrimination. A fair trial, in my view, would at that stage be stopped, for it threatens thereafter to infringe other constitutional rights protected by s 10 and s 12”.

[22] Thereanent to the objective test and the kind of information that was at the disposal of the Public Prosecutor on 27th December 2017, the Public Prosecutor testified without equivocation that he confined himself to the statement of the victim, A[...] and the complainant, his father D[...] M[...]. Those statements implicated the plaintiff in the commission of an offence of rape. The Public Prosecutor limited himself only to the two statements when there were many other statements and information contained in the docket. What seemingly attracted and influenced the decision of the Public Prosecutor is paragraph 3 and 4 of A[...], victim’s statement, which reads as follows:

“Whilst I and together with them entered in the gate, I came across with too known males known as Mihle Ntobole and mesuli Phama. Mihle Ntobela called me and I told him that he must no call because I was going to attend a funeral service and its where he dragged me with my jersey out of the yard. I cried for help and I told him that he must stop dragging me. He dragged me on the street up until we reached on the dark place and its where he kicked my legs with booted feet and I end up lying with my back on the ground and both of them forcefully stripped off my shoes, trouser and underwear panty. Mihle Ntobole Kicked my legs with booted feet and end up fell on the ground

¹³ **S v Lubaxa** 2001 (2) SACR 703 (SCA) Para 19

with my back. Then A/male Mesuli is the first person to stripp off his trouser and under wear pant and kneeled on top of me and inserted his penis on my vagina and he moved up and down on top of me until his penis ejaculates.

4

When he finished raping me I kicked A/male Mesuli Phama with my legs and its where I got a chance to ran away from there and Mihle Ntobola chased me and end up caught on the same spot and he kicked me with my legs and I also end up lying with my back by that time he chased me, I was already naked. He kneeled on top of me and he also stripped of his trouser and under wear and drew up his penis and inserted it on my vagina. He moved up and down on top of me up until his penis ejaculates". (sic)

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[23] Complanant's father D[...] M[...] states in his statement that after having been told by his brother that his daughter was raped, he then enquired from his daughter who advised him that as she was attending funeral service and when she was next to the gate of the homestead where the funeral service was she was with Ongezwa. They came across A/ males Mihle Ntobole and Mosuli Phama who forcefully took her to another home and raped her without her consent. It is only these statements that attracted Public Prosecutor's interest. The police docket revealed that on the 25th December 2017 other statements were deposed to by the following persons.; Mesuli Aphelele Phama, the plaintiff, Alungile Konono Magula and N[...] M[...] . The Public Prosecutors elected not to read these statements on a mere basis that when he received the docket from another prosecutor, he was already in court. He nonetheless took a decision to enrol the matter and prosecute the plaintiff.

[24] At an objective level, the enquiry should start at the nature of the entire information placed before the Public Prosecutor for him to take a decision in terms of section 20(1)(c) and (b) of the NPA Act 32 of 1998. The Public Prosecutor confidently testified in chief to say the statement of A[...], and his father established a *prima facie* case. He said nothing about the existence of other statements that were in the docket. It is only during cross examination

that he conceded that there were other statements that were in the docket which he possibly did not read. His possible failure to read other statements is premised merely on the fact that when he received the docket, he was already in court with a load of court cases. That reason or explanation leaves much to be desired and is accordingly unacceptable.

[25] This explanation is seemingly suggestive of the fact that the Public Prosecutor had no sufficient time to properly, sufficiently and thoroughly read the docket contents, but nonetheless pressed forward to take a decision that has serious implications not only on the liberty of the plaintiff, but also on his image, esteem and sentiments. Two questions arise from his explanation which remained to be answered. If he felt that he suffered serious time constraints to justly deal with the docket at the time, it remains unclear why he rushed himself to take a decision which had such serious implications. Why the decision was taken in such a haste? That conduct was highly irrational and unreasonable in the circumstances. He should have provided himself with sufficient time to read that docket so as to enable him to take a just decision. The second question is alternative to the first one: What prevented the Public Prosecutor from passing the docket or assigning it to another Prosecutor especially the one from whom it originally came to take the decision.

[26] The paucity of answers to those questions points to the fact that the Public Prosecutor did not only act arbitrary and capricious, he also acted irrationally and unreasonably. The nature of the decision required to be taken required proper application not only of oneself but of an undivided mind to every detail contained in the docket. I therefore conclude that a decision that culminates from an arbitrary, irrational, unreasonable and capricious process can hardly be based on reasonable grounds. Public Prosecutor's failure to fairly

and objectively consider the docket contents *ipso facto* renders the decision, that is the outcome of that defective and unreasonable process, arbitrary. To rule otherwise would be inimical to the rule of law. The rule of law does not permit an organ of state to reach what may turn out to be correct outcome by any means. On the contrary, the rule of law obliges an organ of state to use the correct legal process¹⁴.

[27] In Patel¹⁵ the following dictum was made:

“[4.2.7] In my view, the duty of a prosecutor is to carefully consider all the versions of the witnesses, statements and determine whether the contradictions therein are material or not before a decision to prosecute is made.

[25] The second defendant should have been satisfied that there was reasonable and probable cause not just a **prima facie** case against plaintiff. The prosecutor should interrogate the docket in its entirety and apply his/her mind properly before taking a decision. Again, if I accept the version of Ms Nxele, it implies that Advocate Noko was not a credible witness and she fabricated the evidence. The defence failed to call the officer who commissioned Ms Nxele's statement, so that he could testify if the complainant understood the content of her statement and confirm the truthfulness thereof.

[27] A prosecutor should assess whether there is sufficient and admissible evidence to provide a reasonable prospect of a successful prosecutor(sic), otherwise the prosecution should not commence...”

[28] It requires emphasis that the Public Prosecutor is not obliged to take a decision, at the first available time the docket is placed before him or her. The provisions of section 20(1)(b) of the NPA Act give a clear expression and effect to the provisions of section 20(1)(a) which provide for power to institute and

¹⁴ ***Chief Lesapo v North West Agricultural Bank and another*** 2000 (1) SA 409 (CC); 1999 (12) BCLR 1420 CC at Para 17-18; ***Head of Department, Department of Education, Free stse Province v Welkom High School and another; Head of Department of Education Free State Province v Harmony High School and Another*** 2013 (9) BCLR 989 (CC); 2014 (2) SA 228 (CC) Para 86

¹⁵ *Patel v National Director of Public Prosecutions and others* 2018 (2) SCAR 420 (KZN) Paras 4.2.7, 25 and 27

conduct criminal proceedings. The alternative power statutorily prescribed by Section 20(1)(b) of the Act provides:

“(1) The power, as contemplated in section 179 (2) and all other relevant sections of the Constitution, to

(a).....

(b) carry out any necessary functions incidental to instituting and conducting such criminal proceedings....

vests in the prosecuting authority and shall, for all purposes, be exercised on behalf of the Republic.

[29] Public Prosecutor’s powers in terms of section 20(1) of the NPA Act includes those which are reasonably necessary or required to give effect to and which are reasonably or properly ancillary or incidental to the express powers that are granted.¹⁶ Implied powers cannot simply be determined with reference to the language of the empowering provisions; the rest of the provision of the enactment, the purpose of the provisions and the Act, the constitution (especially the bill of right) and the broader social and economic context, also to be taken into account in determining the scope of the powers of a public authority¹⁷. The above-mentioned exposition is compatible with the maxim of interpretation “*Ex Consequitibus*” meaning *inter alia* that “*where a provision permits a certain consequence, it permits, by implication, everything reasonably necessary- for and at the same time proscribes obstruction to- the achievement of the authorised consequence.*”¹⁸

[30] Proper exercise of section 20(1) powers includes thorough and holistic reading and understanding of the docket placed before a Prosecutor to take a

¹⁶ **Administrator Transvaal v Brydon** 1993 (3) SA 1 (A) at 9C-D. *Moleach v University of Transkei and others* 1998 (2) SA 522 (TK) 538

¹⁷ **Minister of public Works and others v Kyalami Ridge Environment Association and others** 2001(3) SA 1151 (CC) Paras 33-51I

¹⁸ LAWSA, Vol 25 , 2nd Ed Part 1 Page 389 Para 360

decision. Anything falling short of the entire and complete reading and understanding of the docket is antithetical to the provisions of section 20(1) of the Act. State functionaries, no matter how well- intentioned, may only do what the law empowers them to do. That is the essence of dispensation and legality, the bedrock of our constitutional dispensation, and has long been enshrined in our law¹⁹.Section 20(1) proscribes, by necessary implications, the taking of a decision to prosecute without thorough reading of the docket.

[31] What exacerbates Public Prosecutor's unjustified failure to read four statements referred to above is their respective contents which expose serious and material contradictions with the statement of A[...], who was the alleged victim. While other four statements corroborate each other about what happened at the relevant times on that day²⁰, I direct my attention for present purposes to the relevant parts of the statement of N[...] M[...]. She had the following to say:

2.

“ On Saturday 2017 .12.23 at about 09:00 I was at my homestead with A[...] M[...]. A[...] M[...] arrived. A[...] noticed that A[...] had swollen eyes. I looked at her and asked what really happened. When I asked her she cried and I continued asking her. She said she was raped by Mihle Ntobole and Mesuli Phama at Mesuli's homestead. She said they dragged her but I do not know where she was when they dragged her.

3.

I questioned her further, asking whether they did really had sexual intercourse with her. She then denied saying they nearly raped her. She said they undressed her clothes, of which she had no knowledge of whereabouts of her panty, trouser and shoes. I asked whether she was drunk when she was raped. She admitted that she was drunk but asked

¹⁹ **AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and another** 2007 (1) SA 343 (CC); 2006 (11) BCLR 1255 (CC) Para 68. **Head of Department, Department of Education, Free state Province v Welkom High School and another; Head of Department of Education Free State Province v Harmony High School and Another** 2013 (9) BCLR 989 (CC); 2014 (2) SA 228 (CC) Para 1

²⁰ Andisiwe was highly drunk and was complaining and crying to the plaintiff for his refusal to be initiate's attendant and mentor and that they left her without having done anything to her.

me not to tell her father.” (sic)

[32] It is apparent from N[...]’s statement that A[...] inexplicably contradicted herself when narrating the ordeal. At first instance she gave a narrative that she was raped at Mesuli’s homestead ²¹. When her narration was found to be unclear about the place where she was raped, N[...] probed further and elicited a different contradictory answer that she was nearly raped. No explanation seems to have been proffered for the mutually destructive versions given to N[...] by A[...]. The state of A[...] drunkenness is not an insignificant matter as it affects one’s senses and it talks to the impairment of one’s mind. That is conveniently not stated in A[...]’s statement. According to N[...]’s statement, A[...] sought to conceal her state of drunkenness especially from her father hence her father’s statement does not have anything about her state of drunkenness.

[33] Another discrepancy that would be revealed only by thorough and unbiased reading of the docket is that, in her statement she states that after the plaintiff finished raping, Konono arrived and told the plaintiff not to drag her and that is when she got a chance to escape from the incident. Fortunately for the Public Prosecutor, Alungile Konono Magula made his statement on 25th December 2017, where he sets out his account of the relevant events on that day. Konono narrates a completely different story and say nothing about the plaintiff dragging A[...]. In fact, Konono’s statement is exculpatory in favour of the plaintiff as it is clearly far from implicating him on any wrong doing. Konono plainly attests to the fact that he and the plaintiff left victim, A[...] at Mesuli’s homestead looking down as Mesuli was making a call outside. That is yet another serious contradicting obtaining in the docket.

²¹ It must be recalled that all other three statements are *ad idem* that nothing happened at Mesuli’s homestead until they parted with Andisiwe.

[34] A[...] states in her statement that she got a chance to run to Ayakha's home, from Ayakha's home she went to her home where she reported the incident to her father. Nothing A[...] is saying in her statement about reporting her ordeal to N[...] in the same morning. A[...] allegedly reported the incident to N[...] at about 08:00 am, exactly the same time her father was arriving from Johannesburg. A[...] might probably have reported the incident first to N[...]. The list of unclear narrations, discrepancies and contradictions is endless.

[35] With these unaccounted for discrepancies, mutually destructive versions or stories and corroborated case²² in favour of plaintiff, could it therefore be said that the Public Prosecutor, when setting the law in motion, had such information as would lead a reasonable person to conclude that the plaintiff had probably been guilty of the offence charge. Clearly not. He clearly acted without reasonable and probable cause.

[36] Public Prosecutor's choice of selecting only those statements that favoured the case of the victim or complainant is something to worry about. That conduct had a semblance of prejudice to those implicated. The conduct is clearly unconstitutional and unapologetically antithetical to the provisions of section 179(1) of the constitution which require all members of NPA to perform their duties and exercise their power without fear, favour or prejudice. It is basic principle of our law that a court can never lend its aid to the enforcement of an illegal act²³. It would be a promotion of a clearly unconstitutional conduct and an act of being complicit to a clear unlawful conduct to find nothing wrong in

²² At the level of statements.

²³ *Cool Ideas 1186 CC V Hubbard and another* 2014(4) SA 474 (CC); 2014 (8) BCLR 869 (CC) Para 77

the conduct of Public Prosecutor. To find in his favour would amount to awarding him for his unconstitutional conduct.

[37] The prosecution policy was determined and issued in terms of section 21(1) of the NPA Act. The prosecution policy revised on June 2013 is the one that is effective to date. Section 2 of the prosecution policy deals with the purpose of the policy provisions and it provides in relevant parts as follows:

“The aim of this prosecution policy is to set out, with due regard to the law, the way in which the NPA and individual prosecutors should exercise their discretion. The purpose of this prosecution policy is therefore to guide prosecutors in the way they should exercise their powers, carry out their duties and perform their functions. This will serve to make the prosecution process more fair, transparent, consistent and predictable”

Facts of this case demonstrate that the process leading up to the decision to prosecute was clearly not fair to the plaintiff.

[38] Section 3 of the prosecution policy provides for the role of prosecutors. In relevant parts it provides thus:

“... They should ensure that the interests of victims and witnesses are promoted, without negating their obligation to act in a balanced and honest manner.... A member of the NPA must serve impartially and exercise, carry out or perform his or her powers, duties and functions in good faith and without fear, favour or prejudice and subject only to the constitution and the law.”

Selective consideration and reading of the docket epitomized partial and biased exercise of powers, performance of duties and functions, and the only inescapable conclusion to that is, such was not done in good faith.

[39] Section 3A of the Prosecution Policy provides *inter alia* that:

“The process of establishing whether or not to prosecute usually starts when the police present a docket to the prosecutor. This often happens after the suspect has been arrested. The case needs to be studied to make sure that it is properly investigated. The prosecutor must consider whether to—

- request the police to investigate the case further;
- institute a prosecution;
- enter into a plea or sentence agreement; decline to prosecute and to opt for pre-trial diversion or other non-criminal resolution;
- or decline to prosecute without taking any other action\

whole.
used

The decision whether or not to prosecute must be taken with care, because it may have profound consequences for victims, witnesses, accused persons and their families. A wrong decision may also undermine the community's confidence in the prosecution system and the criminal justice system as a Resources should not be wasted pursuing inappropriate cases, but must be to act vigorously in those cases worthy of prosecution. In deciding whether or not to institute criminal proceedings against an accused person, prosecutors must assess whether there is sufficient and admissible evidence to provide a reasonable prospect of a successful prosecution. There must indeed be a reasonable prospect of a conviction, otherwise the prosecution should not be commenced or continued. This assessment may be difficult, because it is never certain whether or not a prosecution will succeed. In borderline cases, prosecutors should probe deeper than the surface of written statements. Where the prospects of success are difficult to assess, prosecutors must consult with prospective witnesses in order to evaluate their reliability. The version or the defence of an accused person must also be considered, before a decision is made."

With all of this I come to a conclusion that the Public Prosecutor set the law in motion without reasonable and probable cause, as the docket was not entirely studied, plaintiff's defence/statement and other relevant statements were not considered.

Malice

[40] This now leads me to a requirement of malice. Mr Calaza submitted strenuously that it is impermissible to use an evidence used to come to a conclusion that there was absence of reasonable and probable cause to support a finding that there was a malice in setting the law in motion. I do not entirely agree. It depends on the facts of the case and nature of the evidence led. In law, context is everything²⁴. Mr Calaza, in developing this point, strongly submitted that malice cannot be inferred on the evidence of Public Prosecutor's failure to

²⁴ Minister of Home Affairs and others v Scalabrini Centre Cape Town and others 2013 (6) SA 421 (SCA); 2013 (4) ALL SA 571 SCA Para 89

read the entire docket. No authority was submitted for that proposition. One needs an evidence pointing out clearly that there was malice, so it was submitted. In what follows I deal with the aforesaid submissions.

[41] Malice means either absence of an honest belief in the guilt of the accused or an improper or indirect motive. If either of these is missing there can be no reasonable and probable cause. Were the subjective element of absence of an honest belief in the guilt of the accused is present it is relevant both to absence of reasonable and probable cause and malice. Absence of reasonable and probable cause is only a circumstance from which malice may be deduced, provided the other circumstance of the case concur or are not inconsistent with such a deduction²⁵. I set out to demonstrate that the circumstances of this case concur and are also consistent with a deduction of malice. An element of malice feed of with the element of absence of reasonable and probable cause.

[42] At the risk of repetition, the unjustified selective reading of the contents of the docket is unequivocally arbitrary, irrational and unreasonable. That was done only with a particular purpose to understand only what the victim and complainant's case was about. That was done in total disregard of plaintiff's interest and his side of the story. The Public Prosecutor was clearly disinterested on anything that would negate what the complainant and the victim were saying. His conduct was clearly partial and was embarked on with clear intention to prejudice the plaintiff. It is a constitutional imperative that members of NPA must serve impartially and perform their duties in good faith without favour or prejudice. Oxford Dictionary defines the word good faith to mean

²⁵ LAWSA, Vol 15, 2nd edition, page 209-210 Para 342

“honesty or sincerity of intention”. Sincerity means “*the absence of pretence, deceit or hypocrisy.*” Sincerity requires genuineness.

[43] In *Patel*²⁶ Ledwaba DJP quoted with approval the dictum of the Supreme Court of Appeal in *Du Plessis*²⁷ when accepting that arbitrary actions and lack of objectivity amount to malice. He had the following to say:

“[21] To determine whether there was malice or not, it will be worth recalling what the Supreme Court of Appeal said when it dealt with the duty of the prosecutor in Minister of Police and Another v Du Plessis footnote(omitted):

“... A prosecutor has a duty not to act arbitrarily. A prosecutor must act with objectivity and must protect the public interest.

[44] The real question is whether the Public Prosecutor when reading and considering the docket on 27th December 2017 did that in good faith. When a decision setting the law in motion was taken, was it taken in good faith. The prerequisite for acting in good faith is the sincerity of intention; an intention that is free of pretences, deceit and hypocrisy. The Public Prosecutor pretended to be considering the contents of the docket when in fact he was picking up only on the complainant’s and victim’s version or story solely to glean what may support a decision to set the law in motion. As the concept of good faith requires the genuineness of the undertaking, the Public Prosecutor dismally failed to genuinely perform his functions, with a purpose to arrive at a genuine decision. Reading of only two statements out of six statements was a sham. With all of this having been said, I come to conclusion that the Public Prosecutor’s decision was not taken in good faith, but in bad faith and was mala fide. All of these are attributes of malice. Arbitrariness, unreasonableness and irrationality are incidents of malice.

²⁶ *Patel v National Director of Public Prosecutions and Others* 2018 (2) SACR 420 (KZN) Para 21

²⁷ *Minister of Police and another v Du Plessis* 2014 (1) SACR 217 (SCA) at Para 28

[45] It is hard to think that a conduct and a consequent decision that was undertaken and taken in bad faith; that was manifestly biased and partial and that was clearly prejudicial with intention to injure can amount to an honest performance of duties and taking of decision. I am alive to the fact that malice requires an honest belief in the guilt of the accused or an improper or indirect motive to exist. An honest belief in the guilt of the accused can only arise after a thorough, fair, impartial and genuine consideration of facts and information at the disposal of the Public Prosecutor. The word honest in the requirement of malice is an adjective naming an attribute of a noun. It is the belief that must be honest. No amount of belief can be honest if the process that was followed was not honest. I therefore come to a conclusion that, on facts and evidence of this case the requirement of malice was satisfied.

[46] In any event, even if it can be found that I am wrong in the analysis I gave or made above, I would still find that the Public Prosecutor was reckless and was grossly negligent when he was dealing with the docket and when he was taking a decision to set the law in motion on 27th December 2017. A Malice can be inferred on recklessness. Where proof of malice is founded on recklessness it must be shown that the recklessness included the element that the defendant could have ascertained the true facts but deliberately refrained from doing so; or where knowing that it was doubtful whether or not his or her belief was well founded, he or she was indifferent as to whether or not it was in fact well founded. Malice may be inferred where the defendant acted in a grossly negligent and reckless way, in furtherance of his or her own interest, without due regard to the rights of others and careless as to whether he or she interfered with the liberty of another. Reference to recklessness or reckless disregard of the rights of others is explicable as a way of describing absence of an honest

belief.²⁸ It scores high against the Public Prosecutor that he neglected to read and consider four statements that were readily in the docket which were clearly casting doubt on the guilt of the plaintiff. The amount of his carelessness and prejudice to the plaintiff's rights is immeasurable. Public Prosecutor's conduct clearly conduced to malice.

[47] The last requirement which should not detain us long is that of termination of proceedings in plaintiff's favour. While Mr Calaza seemingly accepted that the withdrawal of criminal proceedings on 12th April 2018 brought about termination of the proceedings, he however submitted that there was no evidence led in terms of which the plaintiff was exonerated. He therefore concluded that the proceedings may be restarted therefore this requirement has not been satisfied. I honestly struggle to follow this submission. If it means that only when there is evidence led in terms of which the plaintiff is exonerated that the criminal proceedings would be regarded as terminated, it means that the word termination must have another meaning. No authority was relied upon for this proposition, notwithstanding that I requested supplementary heads of arguments after it was clear that Mr Calaza was unable to orally support his submission.

[48] The grammatical, ordinary meaning of the word terminate is "*1. Bring to an end. 2 (of a thing) have its end at (a specified place or of (a specified form))*". It is common cause that what is required is termination of proceedings. Once termination is proved, it must also be proved that such termination was in favour of the plaintiff. Mr Calaza was constrained to accept that the termination of proceedings that occurred on 12th April 2017 was in favour of the plaintiff.

²⁸ LAWSA, Vol 15, 2nd Edition, Page 210, Para 343

The termination of proceedings brought about the removal of a cloud of criminal process and investigation hanging over his head. The anxiety that came with the existence of criminal proceedings went away. A possibility of criminal sanction diminished. The criminal proceedings were truly terminated in favour of the plaintiff especially that there are no new criminal proceedings against the plaintiff based on the same facts. The withdrawal brought about a sigh of relief to the plaintiff and his family.

[49] In fact withdrawal of criminal proceedings signals the termination thereof. The authority for that proposition is Patel's case²⁹, where criminal proceedings were withdrawn approximately after 13 months.

Conclusion on merits / liability

[50] The plaintiff has succeeded in the claim for malicious prosecution to prove all the elements or requirements of the claim. Accordingly, the defendant is liable for all the proven damages the plaintiff has suffered.

[51] There is an interface between Intention, Malice and absence of reasonable and probable cause. In some cases, malice has been referred to as *animus iniurundi*,³⁰ while in others the courts have also said that malice may be evidence of *animus iniurundi*. Malice may sometimes be evidence of absence of reasonable and probable cause³¹.

²⁹ *Patel v NDPP (Supra)* Para 37

³⁰ *Moaki v Reckitt and Colman (Africa) Ltd* 1968 (3) ALL SA 242 (A); 1968(3) SA 68 AD at 104

³¹ LAWSA (Supra) page 199 Para 322

[52] The fact that Public Prosecutor's conduct and actions were arbitrary and unreasonable, it stands to reason that they were malicious. The fact that the Public Prosecutor undertook his duties with bad faith means that he acted without reasonable and probable cause. Because an element of good faith requires honesty and sincerely of intention, it is inherent therein that the Public Prosecutor acted with intention to injure. Deliberate disregard of the contents of the docket satisfied these three requisites for a successful claim of malicious prosecution.

[53] It is now crystal that the element that the defendant did not honestly believe that the plaintiff was guilty of the offence charged is present or shared by the requirement of malice and absence of reasonable and probable cause. Having reached a conclusion that both requirements of malicious prosecution share the same attribute or element, intention to injure readily inheres in the conduct outlined above.

[54] The Public Prosecutor should have observed the provisions of Section 7(2) of the Constitution, which provides as follows:

"The state must respect, protect, promote and fulfil the rights in the Bill of Rights."

The Public Prosecutor's decision had negative implications not only to the dignity of the plaintiff, but also to his freedom as envisaged in Section 12(1) of the Constitution. The enrolment of the matter had a bearing on the freedom of the plaintiff. The Public Prosecutor adopted a cavalier attitude towards plaintiff's rights and interests. The Constitutional Court³² emphasized the responsibility bestowed upon the organs of the State as follows:

³² MEC for Health Eastern Cape and another v Kirland Investment (Pty)Ltd 2014(3) SA 481(CC) para 82

“....On the Contrary, there is higher duty on the State to respect the law, to fulfil procedural requirements and tread respectfully when dealing with rights. Government is not an indigent or bewildered litigant, adrift on a sea of litigious uncertainty, to whom the courts must extend a procedure-circumventing lifeline. It is the Constitution’s primary agent. It must do right, and it must do it properly”.

Quantum

[55] The plaintiff testified that criminal case of rape he was facing changed the way people were looking at him. The plaintiff in an action for malicious prosecution may claim a *solatium* for infringement of his or her personality rights, including bodily integrity, reputation, dignity ³³

[56] In *Diljan*³⁴ Makaula AJA had the following to say:

“[18] The acceptable method of assessing damages includes the evaluation of the plaintiff’s personal circumstances; the manner of the arrest; the duration of the detention; the degree of humiliation which encompasses the aggrieved party’s reputation and standing in the community; deprivation of liberty; and other relevant factors peculiar to the case under consideration.

[19] Whilst, as a general rule, regard may be had to previous awards, sight should, however, not be lost of the fact that previous awards only serve as a guide and nothing more. As Potgieter JA cautioned in Protea Assurance Co. Ltd v Lamb:

‘It should be emphasised, however, that this process of comparison does not take the form of a meticulous examination of awards made in other cases in order to fix the amount of compensation; nor should the process be allowed so to dominate the enquiry as to become a fetter upon the Court’s general discretion in such matters. Comparable cases, when available, should rather be used to afford some guidance, in a general way, towards assisting the Court in arriving at an award which is not substantially out of general accord with

³³ LAWSA, Vol 15, Page 206 Para 334

³⁴ *Diljan v Minister of Police* (746/2021) [2022] ZSCA 103 (24 June 2022) 22 JDR 1759 SCA Para 18-19.

previous awards in broadly similar cases, regard being had to all the factors which are considered to be relevant in the assessment of general damages. At the same time, it may be permissible, in an appropriate case, to test any assessment arrived at upon this basis by reference to the general pattern of previous awards in cases where the injuries and their sequelae may have been either more serious or less than those in the case under consideration.”

[57] In Tyulu³⁵ the Supreme Court of Appeal held:

“[26] In the assessment of damages for unlawful arrest and detention, it is important to bear in mind that the primary purpose is not to enrich the aggrieved party but to offer him or her some much-needed solatium for his or her injured feelings. It is therefore crucial that serious attempts be made to ensure that the damages awarded are commensurate with the injury inflicted. However, our courts should be astute to ensure that the awards they make for such infractions reflect the importance of the right to personal liberty and the seriousness with which any arbitrary deprivation of personal liberty is viewed in our law. I readily concede that it is impossible to determine an award of damages for this kind of injuria with any kind of mathematical accuracy. Although it is always helpful to have regard to awards made in previous cases to serve as a guide, such an approach if slavishly followed can prove to be treacherous. 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 (Minister of Safety and Security v Seymour 2006 (6) SA 320 (SCA) 325 para 17; Rudolph & others v Minister of Safety and Security & others (380/2008) [2009] ZASCA 39 (31 March 2009) (paras 26-29).

[58] It has to be taken into account that the plaintiff was placed under a tremendous pressure when the law was set in motion. He went through criminal litigation in the district court which was ultimately withdrawn. The length of time when the plaintiff was subjected to prosecution is an important consideration. The anxiety, uncertainty and anguish he went through when he was still under prosecution is a relevant factor to be taken into account. The Prosecution had negative impact on dignity, reputation and esteem of the

³⁵ *Minister of Safety and Security v Tyulu* 2009 (5) SA 58 (SCA); 2009 (2) SCAR 282 (SCA); 2009 (4) ALL SA 38 Para 26.

plaintiff³⁶. The element of malice weighs heavily when considering the quantum as well. I am therefore satisfied that an amount of **R250 .000.00** is a fair and reasonable compensation for a claim of malicious prosecution³⁷.

Costs

[59] The general rule is that costs should follow the result. I have not been told that there is a ground or basis for deviation from the general rule. The defendant is liable to pay the costs of suit.

Order

[60] In the result the following order shall issue:

[60.1] The defendant is liable to the plaintiff in the amount of R250 000.00 in respect of the claim of malicious prosecution.

[60.2] The defendant shall pay interest on the capital amount of R250 000.00 referred to in paragraph 60.1 above at a prescribed legal rate calculated from the date of this judgment to the date of final payment.

[60.3] The defendant shall pay costs of suit.

A.S ZONO

JUDGE OF THE HIGH COURT (ACTING)

³⁶ *Patel v NDPP (Supra)* Para 37 and 39

³⁷ *Hassien v Minister of Police for the Republic of South Africa and others* (612/2019) [2025] ZAECHMC 120 (18 November 2025) Para 69

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Matter heard on

: 23 February 2026

Delivered on

: 17 March 2026