

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)

CASE NO:5505/2019

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO THE JUDGES: YES / NO
(3) REVISED.

Signature

Date: 22 APRIL 2025

In the matter between:

LESIBA SIMON MOKHONOANA

PLAINTIFF

And

MINISTER OF POLICE

1ST DEFENDANT

LIMPOPO PROVINCIAL COMMISSIONER OF POLICE

2ND DEFENDANT

NATIONAL DIRECTOR OF PUBLIC PROSECUTION

3RD DEFENDANT

INDEPENDENT POLICE INVESTIGATIVE DIRECTORATE

4TH DEFENDANT

JUDGMENT

MPHAHLELE AJ:

A. INTRODUCTION

[1] The court is tasked with answering the question whether the action taken by the defendants amounted to malicious prosecution against the plaintiff. The plaintiff instituted the action for malicious prosecution against the first, second, third and fourth defendants. The matter proceeded on merits only by agreement between the parties, in terms of Rule 33(4) of the Uniform Rules of Court.

[2] The plaintiff Mr. Lesiba Simon Makhonoana instituted action for damages against the defendants which is based on alleged malicious prosecution by the defendants who acted within the scope of their employment. It must be noted that Mr. Lesiba Simon Makhonoana is a former Police Officer stationed within the same district.

B. BACKGROUND

[3] The facts which led to the prosecution was as a result proceedings which transpired in line with the Criminal Procedure Act 51 of 1977(CPA)were the plaintiff was charged with murder of Collen Ramashala who was found deceased in his bed at his home on the 08th September 2014.

[4] On the 01st December 2016, the prosecution made a decision to prosecute the plaintiff and 2 others on a charge of murder, where the plaintiff had pleaded not guilty to the charge. On the 25th February 2019, the plaintiff was discharged in terms of Section 174 of the Criminal Procedure Act 51 of 1977.The proceedings in the Criminal court are common between the parties.

C. MERITS

[5] The plaintiff submitted that the prosecution was malicious in that:

5.1. The police, including the complainant, had no probable cause in setting in motion the plaintiff's prosecution and were actuated by malice/or acted in the context of *dolus eventualis*;

5.2. The prosecutor including the Police and/or complaints who set the law in motion against the plaintiff, acted without reasonable and probable cause,

acted *animus niuriandi* because the prosecution terminated in favour of the plaintiff.

- 5.3. The police and or/prosecutors unreasonably neglected, failed and/or refused to apply their minds to the criminal case levelled against the plaintiff.
- 5.4. The Police had in their investigations misled the prosecutions and/or neglected or failed to disclose to the prosecutors that the evidence was not material enough against the plaintiff because if disclosed it could have abated prosecution of the plaintiff.
- 5.5. The employees and or agents of the third defendant had no probable and or reasonable cause for proceeding with the prosecution, nor did the third defendant and or his employees have any reasonable belief and or evidence in truth of the information at its disposal.
- 5.6. The criminal prosecutions of the plaintiff endured at least two years and at all material times the plaintiff suffered serious emotional stress and trauma due to an anticipation of possible lengthy imprisonment if convicted.
- 5.7. The plaintiff was at all material times a long serving member of the South African Police Service and held a particular rank within Police Force.
- 5.8. The plaintiff was all times when appearing in court, the plaintiff appeared in full view of members of the public of the community within which the plaintiff worked as a Police Officer.

- 5.9. That the plaintiff has acquired himself a good reputation and name within the community and or the society that he serves as a Police Officer. His arrest and or criminal prosecution levelled against him tarnished his reputation.

D. EVIDENCE

[6] The court heard the evidence of the plaintiff Mr. Simon Lesiba Mokhonoana, who testified that:

- 6.1. He was called by Mma Mabena, who told him that there were certain people involved in a fight, He was called by virtue of him being a Police Officer. He was met by his nephew Mpho Mokhonoana who had been injured by certain people while at the tavern.
- 6.2. He stated that he went to investigate why his nephew was injured, upon his arrival the deceased and another started to run and his testimony is that he did not chase them.
- 6.3. He further stated that he took his nephew to the deceased home where he was advised that he take his nephew to the hospital. He disputed that upon being called to the tavern, he had any encounter with the deceased or anyone at the tavern, he further disputed assaulting or running the deceased down with his motor vehicle.

[7] The defence called the 2 witnesses for the defendants, the first witness was Lesiba Comfort Molawa and Mosima Jane Mahloma.

7.1. The first witness Lesiba Comfort Molawa testified that He had relied on the statements of eye witnesses' statements of Daniel Mahlatse Movalo and Mosima Jane Mahloma who stated that they saw the Plaintiff assaulting the deceased person by kicking him on the ribs.

7.2. That as a prosecutor he could not cross-examine the affidavits and the only way to test the evidence was to bring the accused person in the criminal court, who is the plaintiff in this action to court. By proceeding with the criminal charge, the intention was not to injure the plaintiff and had not acted in bad faith.

7.3. According to him the criminal process was not successful due to factors like, unavailability of witnesses whom one was one Mr. Muvalo who could not make it to court due to a terminal illness. The prosecutor further led evidence that at the time he believed that the plaintiff had a case to answer and not putting the matter on the roll was going to be a dereliction of his duties.

7.4. The second witness Mosima Jane Mohloma testified that she saw the plaintiff assaulting the deceased, this testimony was interrogated in court.

E. ANALYSIS OF EVIDENCE

[8] The plaintiff submitted that prosecution failed in the criminal court where the learned magistrate discharged and acquitted the accused, the plaintiff in this matter in terms of Section 174 of the criminal procedure Act. While the defence submitted that the state acted on eye witness affidavits which led to prosecution. The acquittal of the plaintiff in the criminal court does not mean that the duty to this court is waived as the plaintiff still had the duty to prove the malicious prosecution and malice on balance of probabilities.

[9] I need to state that both plaintiff and defendants' evidence which was testified as if this court is the criminal court and majority of the time plaintiff failed to adduce the necessary evidence in this court. Majority of the evidence in chief and cross-examination focused the plaintiff referred to incidents of the particular day of the 8th September 2014, where the plaintiff disputed to assaulting the deceased and to running over the deceased with a car. This approach did not assist the plaintiff's case as the witness kept on focusing on whether the plaintiff assaulted and later run the deceased with the car.

[10] Looking at the evidence presented the court is tasked with the question whether the prosecution of the plaintiff was without probable cause and

malicious, According to the Potchefstroom Law journal (2013)¹ *"In order to succeed in an action for malicious prosecution, the plaintiff must prove all four requirements; namely, that the prosecution was instigated by the defendant; it was concluded in favour of the plaintiff; there was no reasonable and probable cause for the prosecution; and that the prosecution was actuated by malice"*.

[11] *"A combination of both the subjective and objective tests means that the defendant must have subjectively had an honest belief in the guilt of the plaintiff and such belief must also have been objectively reasonable"*.

[12] According to the evidence which was presented in court by both the plaintiff and the defendants that the first two elements are common cause, that the prosecution was instigated against the plaintiff, and that the prosecution was instigated by the defendant however the third and fourth elements became difficult to prove by the defendant.

[13] The defendants submitted that the prosecutor acted on the affidavits taken from the witnesses who deposed to wrong action taken by the plaintiff on the day, and had to test the evidence. There was a genuine believe that the accused at the time being the plaintiff was at the scene of a crime when Mr. Collen Ramashala ultimately died. It is not the responsibility of this court to test the evidence of the eye witnesses who made statements made, but the court has to examine whether

¹ (C.Okpaluba, 2013)

the plaintiff adduced evidence that the defendants acted without reasonable and probable cause and whether there existed malice on the part of defendants when instituting prosecution.

[14] *Ledwaba v Minister of Justice and Constitutional Development and Correctional Service and Others*.²The court in *Beckentrader* cited in the *Ledwaba* Case held a view that: *'There would, thus, be reasonable and probable cause for the prosecution where a defendant is of the honest belief that the facts, available at the time of taking the decision to prosecute the plaintiff, constituted an offence which would lead a reasonable person to conclude that the person against whom charges are brought, was probably guilty of such offence. This question must not be confused with whether there is sufficient evidence upon which the accused may be convicted'*.

[15] The absence of reasonable and probable cause' was explained in *Beckenstrater v Rottcher and Theunissen* ^{as} cited in *Relyant* case as follows: *"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*

² *Ledwaba v Minister of Justice and Constitutional Development and Correctional Service and Others* (947/2022) [2024] ZASCA 17 (16 February 2024)

of the offence charged; if, despite his having such information, the defendant is shown not to have believed in the plaintiff's guilt, a subjective element comes into play and disproves the existence, for the defendant, of reasonable and probable cause".

[16] The learned Justice Malan AJA in the case of *Relyant Trading Pty Ltd v Shongwe*³ stated that *"such a defendant will not be liable if he/she held a genuine belief in the plaintiff's guilt founded on reasonable grounds. The requirement of reasonable and probable cause is a sensible one, for it is of importance to the community that persons who have reasonable and probable cause for a prosecution should not be deterred from setting the criminal law in motion against those whom they believe to have committed offences"*

[17] On the *animus niuriandi* the plaintiff submitted that he was a long serving member of the South African Police Service and has a particular rank within the Police Force. At all material times when appearing in court the plaintiff appeared in full view of the members of the public of the community within which plaintiff worked as a Police Officer. He stated that he later retired. This aspect I find its ordinary in that, it is the nature of proceedings to be heard in open courts and the fact that the plaintiff was a Police Officer at the time does not make him to be above the law.

³ *Relyant Trading (Pty)Ltd v Shongwe and Another* (9472/05) [2006] ZASCA 162; [2007]1 All SA(SCA)

[18] Based on the evidence presented in court and the above, I find that the plaintiff failed to present evidence to support the claim that the defendants acted without probable cause and with malice.

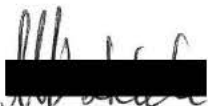
F. COSTS

[19] It is trite law that costs follow suit and the plaintiff and the defendant did not make any submissions as to why the court should deviate from the norm.

G. ORDER

[20] I make the following Orders:

- i. The plaintiff's claim does not succeed
- ii. The plaintiff's claim is dismissed
- iii. Costs of suit



M.A MPHAHLELE
ACTING JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE

APPEARANCES

Heard on : 26th NOVEMBER 2024

Judgement delivered on : 23rd APRIL 2025

For the Plaintiff : ADV.HLAKUPI MPE
ADV.JT MAKHENE

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