

SOUTH AFRICA / JUDGMENT

## Ndabeni v Port St Johns Municipality and Another (2803/2016) [2017] ZAECMHC 52 (5 December 2017) [2017] ZAECMHC 52

COURT

Eastern Cape High Court, Mthatha

BEFORE

S M Mbenenge

CASE / FILE NUMBER

2803/2016

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### Source record

IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE LOCAL DIVISION, MTHATHA)

Case

No: 2803/2016

In

the matter between:

ZAYEDWA  
NDABENI  
Plaintiff  
and  
PORT  
ST JOHNS MUNICIPALITY  
1st  
Defendant  
FUNDISILE  
GULENI  
2nd  
Defendant

## JUDGMENT

MBENENGE JP:

[1] On 31 December 2014 the plaintiff was arrested by a member of the South Africa Police Service, pursuant to a complaint that had been lodged by the second defendant in his official capacity as Senior Manager: Corporate Services of the first defendant, at the Port St Johns Police Station, that the plaintiff had dug sand from municipal ground at Main Grove, Port St John, without the requisite permit<sup>[1]</sup> and refused to off-load the sand from a truck when called upon to do so. Upon his arrest, the plaintiff appeared in court and his case was remanded on no less than two occasions. The state prosecutor decided not to prosecute the plaintiff having been of the view that there was “insufficient evidence” warranting such prosecution.

[2] Aggrieved at what he perceived to have been unbecoming treatment, and having been of the view that he had been subjected to malicious prosecution, the plaintiff resorted to the instant action wherein he is seeking payment of damages in the sum of R70 000.00 as and for “costs reasonably expended ... in defending himself against the aforesaid charge for contumelia, deprivation of liberty, diminished prospects of employment and discomfort”. It is the plaintiff’s case that the second defendant “wrongfully and maliciously set the law in motion by laying a false charge against the plaintiff with the Port St Johns Police by

giving [them] the false information [that the plaintiff unlawfully mined the sand at Main Grove, Port St Johns],” without “reasonable belief in the truth of the information given.”

[3] Besides specially pleading that the action was barred for failure on the part of the plaintiff to comply with the provisions of section 3 of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 and for his failure to join the Minister of Police, the defendants contended, in their plea, that they were not liable towards the plaintiff because:

*“4.1 On the 31st December 2014, the second defendant received information that there is a truck whose owner is mining sand at/or near Main Grove, Second Beach, in the district of Port St Johns.*

4.2 The second defendant visited the scene of the crime and found the plaintiff mining sand.

4.3 The second defendant requested the plaintiff to furnish the mining permit which mining permit, the plaintiff refused and/or failed to produce.

4.4 Upon failure to produce the mining permit, the second defendant went to the Port St Johns Police station to open a case docket for investigation by the police.

4.5 The members of the South African Police Service obtained the statement from the second defendant, opened the case docket and the second defendant left the police station.

4.6 The defendants have no knowledge of the further developments beyond the 31st of December 2014.

4.7 Anything inconsistent thereto is denied and the plaintiff is put to proof thereof.”

[4] Whilst, at trial stage, it was common cause that the plaintiff had been arrested by the police after the second defendant had laid a complaint of unlawful behaviour on the part of the plaintiff, it became clear when the proceedings unfolded, that the defendants

disputed that the second defendant had set the law in motion, and contended that it was in fact the police that had set the law in motion.

[5] The plaintiff testified to how he was arrested. He said he had been seated in his bakkie at Main Grove when a policeman approached him summoning him to attend upon the police station so as to respond to charges that had been laid against him by the second defendant whom he had known to be an official in the employ of the first defendant. He proceeded to the police station, where he was confronted with an allegation that he had been involved in illegal sand mining. He disputed having committed the offence, but was arrested and charged. He appeared in court on 5 and 28 January

2015. The charges were eventually withdrawn due to insufficient evidence. He stated that the whole process, resulting from the second defendant having laid false criminal charges against him without reasonable and probable cause, caused him pain and lowered his dignity in the eyes of the public that knew him to be a businessman in Port St Johns. He said nothing about costs he expanded on defending himself and diminished prospects of employment and “discomfort”. He also provided no detail of how the aborted proceedings received publicity.

[6] When the statement deposed to by the second defendant implicating the plaintiff of having acted in concert with some men who had been seen loading sand on to a truck that he owned, the second defendant denied having been at the scene of the alleged offence on the day in question.

[7] Under cross examination when he was pointed to a statement he made to the police admitting having been at Main Grove. He denied having taken “part in the mining of sand on the 31st December 2014.” When subjected to further cross examination the pendulum swung, resulting in him conceding that:

*“I was hired there ... in order to fence the area. And then one day when I came I found that there was a trench that had been dug. And then I phone one member of Caguba Community and informed him that there was a trench that had been dug. And then the member suggested that I should hire a TLB in order to have that trench closed again ... to have the soil then taken back.”*

[8] The second defendant also testified in pursuit of his defence to the action. He had been at the Second Beach, Port St Johns. It was New Year’s Eve and he was part of a joint operation whose task was to be on the lookout for anything that would crop up “involving the municipality on that day”. He received a report of illegal mining of sand on municipal land. He made a follow up and upon arrival at the scene found the plaintiff driving in his twincab and some workers that were busy digging up sand at Main Grove. The truck had been almost

full of sand at that point. He explained that the plaintiff had stood next to his bakkie whilst his workers were digging sand. He knew the people who did the digging to be the plaintiff's workers because it was not the first time that the plaintiff and the municipality had had a brush with each other concerning the digging of sand. On a previous occasion, said the second defendant, the municipality had brought a TLB to dig a trench to prevent the plaintiff from driving into Main Grove. He had hired his own TLB to close down the trench. On the occasion in question he decided to report the matter to the police. He summoned the police to the scene after he had persuaded the plaintiff to offload the sand, to no avail.

[9] According to the second defendant the police arrived at the scene. They, too, persuaded the plaintiff to offload the truck, but he refused. The plaintiff was thereupon arrested. The second defendant stated that all he did was to report to the police that the plaintiff has been mining sand in municipal ground at Main Grove and had refused to offload the truck; he never instructed the police to arrest the plaintiff; they decided on their own accord to arrest. The police had subsequently eye-witnessed, for themselves, the sand being loaded to the truck. He made the statement referred to above only after the police had been to the scene.

[10] In *Selamolele v Makhoda*[2] it was held that in order to give judgment for the plaintiff the court must be satisfied on adequate grounds that sufficient reliance

can be placed on the story of the plaintiff and his witnesses, showing that the plaintiff's version is more probable than that of the defendant. But one still has to go through the process of considering the credibility of the witnesses and of ensuring their weight or cogency and after these processes have been completed the probabilities arising from the evidence and all the circumstances of the case should be weighed.[3]

[11] I found the plaintiff to be an incredible witness. His initial stance that he had not been at the scene on the day in question was, in no time, shown to be untruthful under cross examination. Once he unleashed his version of what happened on the day in question and placed himself at the scene, it became clear that there had been some digging at the instance of the plaintiff, albeit that his version was that he had been involved in closing trenches that had been dug.

[12] The second defendant testified in a coherent consistent manner. He was also not shaken under cross examination. He provided a welter of detail concerning how the plaintiff got to be arrested. He even explained the circumstances under which a trench had been dug at Main Grove. Followed to its logical conclusion, the second defendant's version, which I find more probable than that of the plaintiff, makes it plain that the arrest of the plaintiff was a sequel to the police, upon receiving a report from him, attending upon the scene and seeing for themselves what the plaintiff had been up to. Indeed, it is trite law that:

*“[w]here a person merely gives a fair statement of the facts to the police, and leaves it to the latter to take such steps thereupon as they deem fit, and does nothing more to identify himself with the prosecution, he is not responsible, in an action for malicious prosecution, to a person whom the police may charge. But if he goes further, and actually assists and identifies himself with the prosecution, he may be held liable.”[4]*

[13] In hoc casu there is not the slightest evidence that the second defendant associated himself with the arrest and the prosecution of the plaintiff.

[14] In all the circumstances, I am of the view that the second defendant did nothing more than informing the police of the facts and leading him to act on his own judgment. Therefore, the first requisite for liability for malicious prosecution namely, instigation of the proceedings, has not been satisfied.

[15] In the result, the order that I make is that the action is dismissed with costs.

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S M MBENENGE

JUDGE PRESIDENT,

EASTERN CAPE DIVISION

Counsel for the plaintiff : M Mhambi

Instructed by

: S Booi & Sons Attorneys

MTHATHA

Attorneys for the Defendants : L Malala

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Date action heard

: 24 October 2017

Date judgment delivered : 5 December 2017

[1] There is a maze of statutes dealing with illegal sand mining. It is not clear from the papers as to what dispensation the anticipated charged was based on (e.g. whether it is the Natural Environmental Management Act of 1998 which regulates certain environmental aspects of sand mining or the Mineral and Petroleum Resources Development Act of 2002 which places all mineral resources in South Africa, including natural sand, under the custodianship of the State or some other statutory dispensation).

[2] 1988 (2) SA 372 (V) at 374 D

[3] Hoffman and Zeffert, SA Law of Evidence (4th Ed) at 527

[4] Waterhouse v Shields 1924 CPD 155 160.

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Prepared on 12 October 2026 · Esheria