

SOUTH AFRICA / JUDGMENT

Pavier v National Public Prosecutions and Another (63914/2021) [2022] ZAGPPHC 738 (29 September 2022) [2022] ZAGPPHC 738

COURT

North Gauteng High Court, Pretoria

BEFORE

P N Manamela

CASE / FILE NUMBER

63914/2021

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO.: 63914/2012

REPORTABLE:

NO
OF
INTEREST TO OTHER JUDGES: NO
REVISED
29
SEPTEMBER 2022
In

the matter between:

JOHANNA
PAVIER Plaintiff
and
NATIONAL
PUBLIC
PROSECUTIONS First
Defendant
MINISTER
OF SAFETY AND
SECURITY Second
Defendant

JUDGMENT

MANAMELAAJ

INTRODUCTION

[1.] This is a malicious prosecution case.

[2.] The plaintiff instituted an action for damages against the first Defendant, the National Director of Public Prosecutions ("NDPP"), and the Minister of Safety and Security, as the second Defendant, emanating from an arrest which took place around 2 August 2007, and the resultant prosecution of the case until its withdrawal on 29 January 2010.

ISSUES

OF DETERMINATION

[3.] The determination of liability is the subject matter of this trial, as agreed between the parties, and quantum is postponed sine die.

FACTUAL

BACKGROUND

[4.] The Plaintiff was arrested around 2 August 2007, she made her first appearance on 3 August 2007 and was thereafter remanded for several times before the cases were finally withdrawn on 29 January 2010.

[5.] The Plaintiff was charged on the basis of a confession made by a certain, Brian Sithole, who was arrested on or about 2 July 2007, and who implicated the Plaintiff to the offence of theft of electric cables which took place at around Rissik Street, near Zuitpansburg Golf Club, in Makhado Municipality. Brian Sithole informed the police officers that he was working for the Plaintiff, at whose instance he was stealing cables. He alleged that the Plaintiff delivers them at various sites where they are tasked to break the electricity transformers and steal copper wires. On the day of his arrest, 2 July 2007, Brian took the police offices to other sites and made a written confession that he was stealing cables on behalf of the Plaintiff.

[6.] Brian's confession statement dated 31 July 2007, states that -

'during 2007 (month and date forgotten) I together with Mr Vivo (Justice Monyai) went to Golf Club at Louis Trichard and cut the cable of copper with .. Deriek Booysen and with one so called mugegu/u [translation -elderly lady] came and collected us together with the copper to their scrapyard, on the other day we went to corner Pretorius and Grob/er at the electricity

power station were Vivo (Justice Munyai) and I cut the cable left away. I was left shocked with electric wire bleeding and left for dead. Also at Tshikulu next to the bridge I together with Vivo (Justice Munyai) transported by mugegulu [translation

- elderly lady] in her Toyota 4x4 were we cut electric cable and taken it to Mr Deriek Boysen and mugegulu's scrapyard at 111 President Street. The other people who used to cut cables ... Leeuw and van Wyk whom I can identify, who reside at Tshikota location".

[7.] The Plaintiff was born on the 3rd of December 1951, she was 59 years old at the time of the alleged commission of the offence and she is a pensioner.

[8.] From the date of the first court appearance, on 3 August 2007, the case was remanded on several occasions. In some instances on the basis of further investigations, other instances were on the basis medical reports sent by the Plaintiff, and in other instances a warrant of arrests were issued against the Plaintiff.

[9.] The Plaintiff had an alibi. She was in Pretoria on the alleged date of the offence, 2 July 2007.

[10.] There were more than one case, linked to the Plaintiff under prosecution, at least under cases LA1688/08 and 1839/2009,

respectively.

COMMON CAUSE FACTS

[11.] The following facts are common cause between the parties, the identity of the Plaintiff, the fact that the Plaintiff was charged by members of the SAPS on the 2nd of August 2007 at the Louis Trichardt Police Station. The first appearance was on the 3rd of August 2007, that the case was remanded on several occasions. On 7 December 2009 an order was issued in terms of section 342A[1] of the Criminal Procedure Act and thereafter on 29 January 2010 all charges against the Plaintiff were withdrawn.

LEGAL FRAMEWORK

[12.] It is trite that in order to succeed (on the merits) with a claim for malicious prosecution, a claimant must allege and prove the following elements:[2]

- "(a) that the defendants set the law in motion (instigated or instituted the proceedings);
- (b) that the defendants acted without reasonable and probable cause;
- (c) that the defendants acted with 'malice' (or animus injuriandi); and
- (d) that the prosecution has failed."

[13.] In *Eis v Minister of Law and Order and Others* 1993 (1) SA 12 (C) at 15 F the Court stated that the general acceptance in our law is that an action for malicious prosecution may not be instituted until criminal proceedings have been terminated in favour of the Plaintiff.

[14.] In *Minister for Justice and Constitutional Development and 2 Other v Sekele Michael Moleko*, Case Number 131107, (SCA), "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 justified. The concept therefore involves both a subjective and an objective element- 'Not only must the defendant have subjectively had an honest belief in the guilt of the plaintiff, but his belief and conduct must have been objectively reasonable, as would have been exercised by a person using ordinary care and prudence.'"

[15.] It is trite, that Wrongful arrest consists in the wrongful deprivation of a person's liberty. Liability for wrongful arrest is strict, neither fault nor awareness of the wrongfulness of the arrestor's conduct being required. An arrest is malicious where the defendant makes improper use of the legal process to deprive the plaintiff of his liberty. In both wrongful and malicious arrest not only a person's liberty but also other aspects of his or her personality may be involved, particularly dignity.

[16.] In *Newman v Prinsloo and another*⁴ the distinction between wrongful arrest and malicious arrest was explained as follows:

'[I]n wrongful arrest . . . the act of restraining the plaintiff's freedom is that of the defendant or his agent for whose action he is vicariously liable, whereas in malicious arrest the interposition of a judicial act between the act of the defendant and apprehension of the plaintiff, makes the restraint on the plaintiff's freedom no longer the act of the defendant but the act of the law.'

PLAINTIFF'S EVIDENCE

[17.] The Plaintiff testified in her own case, together with her son in law, Dirk Booysen, and her sister. Her evidence was that a week before the arrest the investigating officer, Sgt Ramathuthu, came to the house looking for her son-in-law, in relation to a case of theft of copper wires, and suddenly on 2 August 2007, some officers came to arrest her.

[18.] From the Plaintiff's version the police officers were unidentified and in unmarked vehicle when they came to her house, on the day of the arrest. She testifies that she resides with her daughter, son-in-law and grand-children. She was ordered to get into the police van, without being given any reason for the intended arrest, or warrant. Her son-in-law offered to take her to the police station instead of using the police van, where she arrived at approximately 13:30 and was charged with theft of electricity cable later that evening. Her son in law arranged a family doctor and a legal representative Mr Moosa, to visit her shortly after the arrest.

[19.] The Plaintiff's evidence is that she was bullied, insulted and threatened by the investigating officer, Sgt. Ramathuthu from the time of the purported arrest, she was threatened to get her raped by her co-accused, she was not informed of her rights, and she was forced to sign a confession statement, which she refused, and that she needed a translator. She indicated that she asked to make her statement in court.

[20.] Her description of the police cells and the treatment receive from the investigation officer was inhumane. She testified that she was detained for almost the entire night in a cold dirty police cell without a blanket and was only released in the early hours approximately at around 3am on 3 August 2007.

DEFENDENTS' EVIDENCE

[21.] From the defence two witnesses testifies, Sgt Ramathutu, and Makhado, from the prosecution. Ramathutu, testified that on 2 July 2007 he arrest of Mr Brian Sithole where he was caught at the crime scene. During investigations, Brian pointed other two sites were a similar crime was previously committed. Brian informed him that was working for the Plaintiff and provided the Plaintiff's names and address.

[22.] Around 2 August 2007, Brian informed Ramathuthu that there are copper cables being loaded at the Plaintiff's premises into a trailer which is being transported to Mpumalanga. Upon arrival, at the premises, the Plaintiff denied the officers access to the premises and charged her dogs loose on the police officers. The very next day on, 2 August 2022 the police returned again and were given access to enter the Plaintiff's premises without resistance. Ramathuthu further testifies

that there were some copper debris in the Plaintiff's yard, but could not explain, under cross-examination, why was it not recorded in the police investigation book. Ramathuthu testified that the places pointed out by Brian Sithole corresponded with the several complaints received from the local municipality.

[23.] The police took Brian to hospital to be treated for his injuries. Upon being discharged, Brian repeated the allegations that he works for the plaintiff in stealing copper cables around Louis Trichardt and pointing out[3] all the places where they had previously stole copper cables on the instructions of the plaintiff. Ramathutu testified that Brian gave a confession because the Plaintiff refused to pay him for his amputated arm. It is apparent from the evidence that this Brian Sithole, lost his arm in course of the commission of these offenses, and stated the Plaintiff's address.

[24.] Prosecutor Makhado also testified for the defence. Mr. Makhado gave an illustration of how prosecution cases are processed. He stated that no docket/case is ever assigned to a particular prosecutor, as they work on rotation basis. According to Mr. Makhado, the matter was enrolled at court on the bases of Brian Sithole's statement, Inspector Ramathuthu's statement, a pointing out statement, statement from the municipality regarding stolen copper cables around Louis Trichardt and the evidence that debris of copper cable was found in and outside the plaintiff's home.

[25.] According to Mr Makhado there was a reasonable and probable cause against the plaintiff hence the matter was enrol at court. There was a prima facie case for the matter to be prosecuted.

[26.] Mr Makhado further confirmed that numerous dockets in respect of the subject matter was opened against the plaintiff. In addition there was nothing wrong with issuing of summons on another docket as this were different dockets. Also summons complaint about was authorised by a different prosecutor. He further testified that had the summons being issued on the same docket that a section 342A order was issued, then this would have been irregular.

[27.] He further stated that the plaintiff in fact had not appear in court on numerous times which at some point a warrant of her arrest was issued. He also confirmed that on some occasions the Plaintiff provided medical certificate for her none appearances.

[28.] He further mentioned that the charges were subsequently withdrawn at court on 29 January 2010 as co-accused could not be traced.

ANALYSIS

[29.] In the determination of liability, the events leading to the arrest and prosecution of the Plaintiff have to be considered carefully against the general test of probability, as measured against the four elements of malicious prosecution.

[30.] There is no question about the first element 'that the defendants set the law in motion'. It is common cause that the first Defendant instituted legal proceedings against the Plaintiff. In *Lederman v Moharal Investments (Pty) Ltd* 1969

(1) SA 190 (A) at 196 - 197 the Court stated the following:

"In the present instance, however, as will appear, the enquiry relates to the first requisite only. Inherent in the concept 'set the law in motion', 'instigate or institute the proceedings', is the causing of a certain result, i.e. a prosecution."

[31.] The one disputed element is 'that the defendants acted without reasonable and probable cause'. Whether a prosecution is wrongful or lawful depends on whether there was a reasonable and probable cause coupled with the animus iniuriandi of the defendant in instigating, initiating or continuing it.

[32.] It is not whether the prosecutor possessed evidence to secure a conviction since that is for the trial court to decide after the conclusion of evidence; but, the honest belief by the prosecutor that, having carefully collected and objectively assessed the available information, the plaintiff was probably guilty of the crime. In coming to that decision the prosecutor must have grappled with both the subjective and objective elements in the exercise of that discretion.

[33.] The inference to be drawn from the state of mind of the prosecutor as to whether he or she genuinely intended to bring the accused person to justice, or that he or she operated from the angle of vengeance, ill will, improper purpose, targeted malice or other unlawful purpose.

[34.] The requirement that the plaintiff in an action for malicious prosecution must prove a lack of reasonable and probable cause to initiate, instigate or continue the prosecution on the part of the instigator or prosecutor is one of the four elements of that cause of action. It is a vital link between the lawfulness of the prosecution and the state of mind of the defendant.

[35.] In the Relyant[4] case, this Court stated the following in regard to the requirement of malice:

"Although the expression "malice" is used, it means, in the context of the *actio iniuriarum*, *animus iniuriandi*. In *Moaki v Reckitt & Colman (Africa) Ltd and another* Wessels JA said:

"Where relief is claimed by this *actio* the plaintiff must allege and prove that the defendant intended to injure (either *do/us 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."

[36.] There is a suggestion in the judgment of the court below that the effect of the decision in *National Media Ltd and others v Bogoshli* has been to introduce negligence on the part of the defendant as a sufficient basis for a claim for malicious prosecution but that

mistakes the effect of *Bogoshi* and in my view is not correct.

[37.] To succeed in an action based on wrongful arrest the plaintiff must show that the defendant himself, or someone acting as his agent or employee deprived him of his liberty.¹⁰ Generally, where the defendant merely furnishes a police officer with information on the strength of which the latter decides to arrest the plaintiff the defendant does not effect the arrest.¹¹

[38.] The plaintiff has by her own testimony only succeeded to prove court appearance for 03 August 2007, 01 December 2009 and 29 January 2010. The son-in-law and the sister all failed to demonstrate the date the plaintiff was at court other than the dates mentioned above. She had largely been absent at court and at some point a warrant of her arrest was issued for none appearance at court. The decision to withdraw charges could have been reached earlier.

[39.] It is apparent from Plaintiffs evidence that, the Plaintiff had an alibi, which was not mentioned until November 2008 in that on the alleged date of offence the Plaintiff was in hospital in Pretoria, which was also corroborated by two witnesses. Proof of the plaintiffs hospital admission card, appears to be transmitted by fax to an unknown number, and by a statement made by the son in law dated 2 February 2019. There is no evidence as to when was this evidence provided. The earliest date this evidence could have been produced or mentioned is upon arrest or first appearance on 3 August 2007. The Plaintiffs counsel argues that the Defendants completely ignore the alibi defence, failed to verify it despite being informed about it and proceeded with the charges against the Plaintiff.

[40.] On 7 December 2009, an order in terms of section 342A of the Criminal Procedure Act was issued under case number LA4468/2009. There were approximately three difference cases were the Plaintiff was linked to the crime of theft of electrical cable.

[41.] I found that the evidence given on behalf of the defendant that, there were more than one police docket for similar or related offences of theft of electric cable against the Plaintiff, the defendants were entitled to summon the Plaintiff to appear in court notwithstanding the issuance of a section 342A order in one of the cases.

[42.] From the police docket, it is apparent from the Statement regarding interview with suspect, that the Plaintiff was interviewed in the presence of her legal representative, and was informed of her rights, when she ultimately refused to make a statement and opted to make a statement in front of a magistrate in court. The Plaintiff denies that she was informed of her rights, and that repeatedly testifies that she needed a translator during interview.

[43.] The plaintiff's evidence paints a picture of a vindication by the officer, Ramathuthu, and to an extent of reference to it as a racist attack on her. Under cross-examination, when she was asked to confirm whether an agent can execute a mandate in the absence of his principal, referring to the co-accused's deeds, she gave denied that it was ever possible. That response was found to be misleading.

[44.] Most of the witnesses who testified, including the Plaintiff have lost clear and precise recollection of the facts relating to the occurrences of this case, the times when incidents occurred.

[45.] I find it improbable that the Plaintiff's version is true, that she was arrested for nothing. What I accept to be probable is the second defendant's evidence that the arrest was effected on the strength of a confession statement made by Brian Sithole which implicated the Plaintiff to the cases of theft of copper cables. Furthermore, the Plaintiff has a history of being a wife of a scrap metal dealer, who passed on some few years from the date of the offence.

[46.] The plaintiff missed all the chances to raise an alibi defence from the time of arrest, and even the earliest court appearance on 3 August 2007. It is not clear to whom was the proof of alibi provided and that leave out the question as to why it was not investigated. The documentary proof was transmitted to an unknown fax number, around November 2008.

[47.] From the onset when the Plaintiff unleashed her dogs on the officers when they attempted to search her premises after being referred to her by the accomplice, Brian Sithole, that the copper is being loaded, that creates a justifiable suspicion. The evidence that Brian informed the officers that some cables are being loaded into a trailer at the Plaintiff's premises and are transported to Mpumalanga, is found to be acceptable. There Plaintiff is linked to more than one case relating to stolen copper cables. It also corresponds with the complaints by the Municipality. Defendant had reasonable grounds for the prosecution.

[48.] Evidence relating to the existence of debris within the plaintiff's yard, was not corroborated by any written statement in the police record book, however, the conduct of the Plaintiff, as described by officer The alleged defence was that copper debris was found at the Plaintiff's property this should be rejected outright as it is incompatible with the pleadings.

[49.] There is no evidence that the defendants acted with 'malice' (or animus injuriandi).

[50.] The reasons for not proceeding are acceptable, however the manner in which were withdrawn are questionable,

CONCLUSION

The plaintiff has failed to prove her case for malicious prosecution that there is absence of reasonable and probable cause, and that the necessary jurisdictional element of malice exists, and as such the claim has not met test.

ORDER

The plaintiff's claim is dismissed with costs.

P N MANAMELA

ACTING JUDGE OF THE HIGH COURT

Date of hearing: 28

July 2022

Judgment

delivered: 29

September 2022

APPEARANCES:

Counsels for the Applicant: Adv.

RA BRITZ

Attorneys for the Applicant: ERWEE

Attorneys

Counsels for the Respondents: Adv.

L Tshigomana

Attorneys for the Respondents: The State Attorney, Pretoria

[1] Section 342A(1) Criminal Procedure Act - A court before which criminal proceedings are pending shall investigate any delay in the completion of proceedings which appears to the court to be unreasonable and which could cause substantial prejudice to the

prosecution, the accused or his or her legal adviser, the State or a witness. The State (2) In considering the question whether any delay is unreasonable, the court shall consider the following factors: (a) The duration of the delay; (b) the reasons advanced for the delay; (c)

whether any person can be blamed for the delay; (d) the effect of the delay on the personal circumstances of the accused and witnesses; (e) the seriousness, extent or complexity of the charge or charges; (f) actual or potential prejudice caused to the State or the defense by the delay, including a weakening of the quality of evidence, the possible death or disappearance or non-availability of witnesses, the loss of evidence, problems regarding the gathering of evidence and considerations of cost; (g) the effect of the delay on the administration of justice; (h) the adverse effect on the interests of the public or the victims in the event of the prosecution being stopped or discontinued; (i) any other factor which in the opinion of the court ought to be taken into account. (3) If the court finds that the completion of the proceedings is being delayed unreasonably, the court may issue any such order as it deems fit in order to eliminate the delay and any prejudice arising from it or to prevent further delay or prejudice, including an order- (a) refusing further postponement of the proceedings; (b) granting a postponement subject to any such conditions as the court may determine; (c) where the accused has not yet pleaded to the charge, that the case be struck off the roll and the prosecution not be resumed or instituted de nova without the written instruction of the attorney-general; (d) where the accused has pleaded to the charge and the State or the defense, as the case may be, is unable to proceed with the case or refuses to do so, that the proceedings be continued and disposed of as if the case for the prosecution or the defense, as the case may be, has been closed.

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- (g) the effect of the delay on the administration of justice;
- (h) the adverse effect on the interests of the public or the victims in the event of the prosecution being stopped or discontinued;

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- [2] The Minister for Justice and Constitutional Development and 2 Others v Sekele Michael Moleko, Case Number 131/07, (SCA) at par. 8.
- [3] Bundle F2 - page f2-7 - f2-41
- [4] 2006 JDR 0720 (SCA) at p. 5.

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