

Summary: Luyanda Nkeke v The National Prosecuting Authority and Others

The plaintiff brought an action for malicious prosecution and unlawful arrest and detention. The matter was set down to commence on 23 May 2023. However, on 22 May 2023 Mr Sekgatja, the plaintiff's representative, informed the court that the matter had to be removed from the roll because the plaintiff had been incarcerated and would not be able to attend the hearing. The defendants objected to the matter being removed from the roll on the basis that significant costs had been incurred in preparing for trial, all their witnesses were ready and available to testify, the matter had been running for six years and that the matter had previously been removed from the roll in 2019 for the same reason.

Given these developments, the court convened a virtual pre-trial with the parties on Monday 22 May 2023. At that pre-trial Mr Sekgatja submitted that he had learnt about the plaintiff's incarceration on that day from the plaintiff's sister and was due to be released in September 2023. The defendants objected to the fact that no facts on affidavits were put up verifying any of this or setting out the circumstances of the plaintiff's arrest. The court decided to provide Mr Sekgatja with an opportunity to ascertain the whereabouts of the plaintiff, find out whether he was eligible for bail and if not whether he could be present for a virtual hearing on 23 May 2023. The court also asked the parties to make submissions on whether the matter ought to be postponed.

Mr Sekgatja's submissions was that he could not trace the plaintiff at any of these facilities. In short, Mr Sekgatja had no idea where his client was and had no instructions. The defendants' counsel submitted that a postponement ought not to be granted in these circumstances. They asked that the matter be allowed to proceed in terms of Uniform Rule 39(3), and be permitted to seek absolution from the instance. During the virtual hearing on 23 May, Mr Sekgatja left the hearing after dropping off from the Teams link.

On 24 May 2023 Mr Sekgatja sent an email apologising for leaving the 23 May hearing due to attending to the family emergency and confirmed that he had no instructions to proceed to trial. On 24 May 2023, Mr Nqcaweni confirmed that he was instructed by Sekgatja Attorneys on the issue of seeking a postponement or removal from the roll only and not on the merits of the matter. The court found that the balance of convenience favoured the defendant and the application for postponement was dismissed with costs. The defendants were permitted to proceed in terms of rule 39(3).

The court, having regard to the that Sgt van Rensburg had responded to a call while on duty; made reasonable enquiries and did not merely act on the say so of the complainant; and had sight of evidence in the form of the CCTV footage which placed the plaintiff in the premises of the complainant, concluded that there were objectively reasonable grounds for Sgt van Rensburg to suspect that the plaintiff had committed the alleged Schedule 1 offence. The court observed that the plaintiff, who bears the onus in the malicious prosecution claim, was not present and was unable to testify or lead any witnesses. Since the plaintiff was not present, the defendants requested that they be granted absolution from the instance in accordance with rule 39(3).

In this regard, the court opined that when a trial is called and there is only appearance for the defendant, he is entitled to satisfy the court that final judgment should be granted in his favour. If

so, satisfied the court may grant such final judgment in favour of the defendant. However, the right to grant a final judgment should be exercised with caution and only in special circumstances. The usual order is one of absolution from the instance. The court found that in this case it was clear that the plaintiff's whereabouts were unknown. Furthermore, it might be that at a future date Mr Sekgatja could locate him and obtain fresh instructions. The plaintiff could still re-institute the action should further evidence become available. Accordingly, defendants were granted absolution from the instance with costs.