



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

Case No: 55530/2011

In the matter between:

26/8/2016

SIPHO MATUKANE

Plaintiff

and

**NATIONAL PROSECUTING AUTHORITY OF
SOUTH AFRICA**

Respondent

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
26/8/2016	
DATE	SIGNATURE

JUDGMENT

HF JACOBS, AJ:

[1] On Friday 24 September 2010 the plaintiff was arrested and detained at Musina on suspicion of illegal possession of a firearm and ammunition. In his possession he had a Lorcin 9mm Parabellum pistol and ammunition. He also had a licence to possess that firearm. It was an old order "green licence" issued to him on 15 May 2001. At the time of the plaintiff's arrest a new licensing system for firearms was being implemented

in South Africa. I will deal in more detail with the statutory provisions applicable to licence applications at that time presently. At this stage it would suffice to mention that by September 2010 the holder of a firearm in South Africa had to apply for the renewal of an old order firearm licence. On application for the renewal of a licence the new licence could not be issued immediately by the Police Service. In terms of the prevailing legislation an existing licence would be valid provided that the holder thereof can produce proof in the form of a document issued by the SAPS that he or she had applied for renewal of his or her old order firearm licence.

[2] When the plaintiff was arrested he did not present proof of application for the renewal of his firearm licence.

[3] The plaintiff was thereafter detained from the time of his arrest on 24 September 2010 until his release on 6 October 2010, 11 days later.

[4] On Monday 27 September 2010 the plaintiff was brought before the Magistrate's Court at Musina and charged for the possession of a firearm and ammunition without holding a licence, permit or authorisation in terms of the Firearms Control Act, 60 of 2000. The plaintiff did not apply for bail and remained in custody until his release 6 October 2010 after Warrant Officer Van Vuuren, the designated police officer in terms of the Firearms Control Act (DPO), the previous afternoon at 16h00, made an entry or was instrumental in the making of an entry in the investigation diary to the effect that *"he does not see anything wrong on the side of the plaintiff"*.

[5] The plaintiff later instituted action against the defendant for payment of R809 000.00 being an amount inclusive of R9 000.00 for loss of income and R800 000.00 for *contumelia* and related infringements of his person.

[6] When the matter was called counsel for the defendant alleged, *inter alia*, that the plaintiff was not present on the day and that the matter cannot proceed. The plaintiff's counsel, however, assured me that he is ready to proceed with the action and would be in a position to proceed with the evidence in the absence of the plaintiff.

[7] The plaintiff at some stage (before the hearing commenced) delivered an amended particulars of claim. The defendant, I was told by counsel for the plaintiff, did not bother to amend its plea following the amendment to the particulars of claim. In the defendant's plea it admitted that the plaintiff was arrested and that his arrest was unlawful. The defendant however denied liability and denied all the factual allegations contained in the particulars of claim made in support of liability of it as Prosecuting Authority.

[8] What I was unaware of when the plaintiff called his first witness was that the plaintiff also instituted action against the South African Police Service for the unlawful arrest and detention of the plaintiff. During evidence of Mr Du Plessis, a witness called by the plaintiff, and argument, it appeared that the claim of the plaintiff against the South African Police Service for his

arrest and detention had been settled between the plaintiff and the South African Police Service. I will return to this aspect later in this judgment.

[9] The only witness called during the proceedings was Mr Du Plessis, the State Prosecutor in the employ of the defendant at Musina responsible for the keeping of the docket. Mr Du Plessis was not personally involved in the prosecution or the later withdrawal of the charge against the plaintiff.

[10] After Mr Du Plessis had testified, counsel for the plaintiff applied from the Bar for a separation of the merits and the quantum of the claim in terms of Rule 33(4). I granted the application after which the plaintiff closed his case. The defendant thereupon closed its case without calling further evidence.

[11] It was common cause from the outset as recorded in the pre-trial conference that the plaintiff bears the onus to prove on a balance of probability its claim pleaded in the form of one based on malicious proceedings. To succeed with a claim for malicious prosecution a claimant must allege and prove that: (1) the defendant set the law in motion or stated differently that it instigated or instituted the proceedings; (2) that the defendant acted without reasonable and probable cause; (3) that the defendant acted with malice or the required *animus iniuriandi*; and (4) that

the prosecution eventually failed.¹ The plaintiff's cause of action was formulated as follows:²

"7.

The prosecutor, alternatively prosecutors, who were employed by the defendant and conducting their duties at or in regard to the Musina Magistrate's Court, Limpopo Province, set the law in motion by instituting criminal proceedings against the plaintiff on a charge of possession of an unlicensed firearm as from his first appearance in court and continued the prosecution of the plaintiff until the Head Control Prosecutor at Musina Magistrate's Court declined to continue the prosecution of the plaintiff on or around 11 October 2010 when the charge against the plaintiff was withdrawn and the prosecution effectively terminated in the plaintiff's favour.

8.

The said prosecutor(s) was/were at all relevant times acting within the course and scope of their employment as prosecutor(s) with the defendant.

9.

The prosecutor(s) who dealt with the case of the plaintiff and who had, at all relevant times, had control over and access to the

¹ *Minister of Justice & Constitutional Development & Others v Moleko* 2009 (2) SACR 585 (SCA); *Minister of Safety & Security N.O. v Schubach* [2014] ZASCA 216; *Rudolph & Others v Minister of Safety and Security* 2009 (5) SA 94 (SCA).

² Plaintiff's amended particulars of claim pp 18-22 of the pleadings bundle.

contents of the relevant police docket regarding the plaintiff's case and who dealt with the plaintiff from time to time during his court appearances:

- 9.1 were aware that no objectively reasonable grounds or justification existed for the prosecution of the plaintiff, alternatively they failed in his/her/their duty to acquaint himself/herself/themselves with the contents of the relevant police investigation docket from which it would have been obvious that there were no objectively reasonable grounds or justification for the prosecution of the plaintiff and the continued detention of the plaintiff;*
- 9.2 did not act with an honest belief, founded on reasonable grounds, that the institution of the criminal proceedings against the plaintiff was justified;*
- 9.3 accordingly, did not subjectively have an honest belief in the guilt of the plaintiff and his/her/their conduct was not objectively reasonable, as would have been exercised by a person(s) using ordinary care and prudence;*
- 9.4 accordingly further, failed to take such reasonable measures as could be expected of someone in his/her/their position to inform himself/herself/themselves fully with the facts of the case against the plaintiff and whether those facts provided reasonable and probable cause for the plaintiff's prosecution;*
- 9.5 therefore acted without reasonable and probable cause for the plaintiff's prosecution;*

- 9.6 *failed in his/her/their duty to timeously withdraw the charge against the plaintiff;*
- 9.7 *failed in his/her/their duty to inform the presiding officer(s) timeously that there was no objectively reasonable justification for the plaintiff's continued prosecution and detention for the alleged offence of possession of an unlicensed firearm;*
- 9.8 *in any event, failed in his/her/their duty to ascertain independently that no objectively reasonable grounds or justification existed for the continued detention of the plaintiff;*
- 9.9 *failed to take steps to ensure that the plaintiff was released from detention as soon as possible.*

10.

At all material times, the said prosecutor(s) acted with animus injuriandi. He/she/they intentionally directed his/her/their will to prosecuting the plaintiff in the awareness that reasonable grounds for the prosecution were absent and that his/her/their conduct was wrongful. He/she/they was/were fully aware that, by prosecuting the plaintiff, he would in all probability be injured in his corpus and dignitas.

11.

Alternatively, the said prosecutor(s) had foreseen the reasonable possibility that he/she/they was/were wrongfully and that his/her/their conduct could reasonably possibly injure the plaintiff in his corpus and dignitas. He/she/they however reconciled himself/herself/themselves with that possibility and nevertheless continued to act, regardless of the consequences of his/her/their conduct, namely the reasonable possibility that their conduct could injure the plaintiff as aforesaid.

- 11.1 The reasonable possibility that the plaintiff could be injured as aforesaid by the conduct of the said prosecutor(s) was not too remotely removed for delictual liability to be attracted on the part of the defendant.*

12.

The reasonable person in the position of the said prosecutor(s) –

- 12.1 would foresee the reasonable possibility of his/her/their conduct injuring the plaintiff in his person or property and causing him patrimonial loss; and*
- 12.2 would take reasonable steps to guard against such occurrence; and*
- 12.3 the prosecutor(s) failed to take such steps.*

13.

There existed no valid reason why the said prosecutor(s) would or could not have taken such reasonable steps."

[12] When the plaintiff was brought before Court on 27 September 2010 and charged as mentioned earlier he could not produce proof that he made application for renewal of his old order licence. During cross-examination of Mr Du Plessis it was suggested by counsel for the plaintiff that the defendant (and its staff) must have had knowledge of a judgment of the High Court declaring old order licences as valid pending applications for renewal of those licences. It was suggested by counsel for the plaintiff that on authority of that judgment the old order licence remained valid even in the absence of proof of an application for renewal of that licence and that the defendant's staff should have been aware thereof and should not have prosecuted the plaintiff. I requested counsel for the parties to supply me with a copy of the judgment referred to.

[13] The Prosecuting Authority in South Africa is a statutory institution provided for in Chapter 8 of the Constitution of the Republic of South Africa, 1996. Section 179 of the Constitution affords the Prosecuting Authority with the power and authority to institute criminal proceedings on behalf of the State and to carry out any necessary functions incidental to instituting criminal proceedings and provides for promulgation of national legislation to ensure that the Prosecuting Authority exercises its functions without fear,

favour or prejudice.³ The National Prosecuting Authority Act 32 of 1998 was promulgated to give effect to section 179 of the Constitution. Our Courts have recognised the professional independence of the staff of the National Prosecuting Authority.⁴

[14] On the authorities cited it is clear that the National Prosecuting Authority, regionally represented in terms of applicable legislation, is obliged to exercise its functions without fear, favour or prejudice. When the defendant's staff were faced with the information that the plaintiff was arrested as aforesaid and unable to prove that he had applied for the renewal of his 2001 firearm licence his possession of the licence was *prima facie* in contravention of the Firearms Control Act, 60 of 2000 and more in particular section 24 thereof. Under the circumstances the South African Police Service was entitled to detain the plaintiff until he was brought to Court on Monday 27 September 2010. There was *prima facie* evidence available to the prosecutor at the Musina Magistrate's Court to prosecute the plaintiff on 27 September 2010 which the defendant's staff did. The plaintiff was at liberty to produce proof of his application for renewal of his firearm licence and to apply for bail on the 27th of September 2010. He chose not to do so. The plaintiff, I was told from the Bar, is at present serving a prison sentence

³ Sections 179(1) – (4) of the Constitution.

⁴ *S v Yengeni* 2006 (1) SACR 405 (T); *Moussa v S & Another* [2015] 2 All SA 565 SCA; *Pikoli v President of the Republic of South Africa & Others* 2010 (1) SA 400 GMP; *Democratic Alliance v President of the Republic of South Africa & Others* 2012 (1) SA 417 (SCA); *Democratic Alliance v President of the Republic of South Africa & Others* 2013 (1) SA 248 (CC).

in the Pretoria Central Prison and his attorney has been unsuccessful in applying for his requisition to Court.

[15] In my view the plaintiff's prosecution on 27 September 2010 was not unlawful and in the absence of an explanation by the plaintiff why he failed to apply for his release on bail at the time and to explain the reasons for his failure to produce proof of an application for the renewal of his licence constitute a fatal hiatus in the plaintiff's case.

[16] For the plaintiff to succeed with a claim based on malicious proceedings or malicious prosecution requires proof of the absence of reasonable and probable cause on the part of the defendant, the onus of which the plaintiff attracted with the formulation of its particulars of claim. The plaintiff also failed to prove any *animus iniuriandi* on the part of the defendant.

[17] In my view the plaintiff failed to lead evidence that establishes a claim for malicious prosecution.

ORDER:

The defendant is absolved from the instance with costs.



H F JACOBS
ACTING JUDGE OF THE HIGH COURT
PRETORIA

Date: 26 August 2016

MATUKANE V NATIONAL PROSECUTING AUTHORITY OF SA_JUDGMENT