

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

2022-09-14

DATE

SIGNATURE

Case Number: A169/2020

In the matter between:

NATIONAL DIRECTOR OF PUBLIC

PROSECUTIONS

First Appellant

MINISTER OF POLICE

Second Appellant

and

MOLEKO BEVAN KABELO

Respondent

JUDGMENT

POTTERILL J

Introduction

- [1] In the court *a quo* the respondent, Mr MB Kabelo [Kabelo] instituted claims for damages against the Minister of Police, the second appellant [the Minister] for unlawful arrest and detention as well as the National Director of Public Prosecutions, the first appellant [the NDPP] for malicious prosecution. The court *a quo* dismissed the claim for unlawful arrest and detention, but ordered the Minister to pay the costs despite the claim being dismissed. The claim for damages for malicious prosecution was granted by the court *a quo* with costs. The merits and quantum were separated in terms of Rule 33(4).
- [2] The court *a quo* dismissed an application for condonation and leave to appeal with a punitive costs order on an attorney and client scale.
- [3] This matter is before us pursuant to the Supreme Court of Appeal [SCA] on petition granting leave to appeal the claim for malicious prosecution to a Full Court. The SCA also set aside the punitive

costs order of the application for leave to appeal made by the court *a quo*.

The facts to the disposal of the Prosecutor

- [4] In the docket the regional court prosecutor Ms. Shivambu, with 13 years' experience, had the statement of the complainant, the statement of the husband of the complainant and statements of two police officers and a J88 medical report. There was also a warning statement wherein the accused had elected not to make a statement. She had consulted with the witnesses and both had said to her that Kabelo on the day of the incident wore a red Nike jersey.
- [5] The accused was charged with robbery with aggravating circumstances. The complainant averred she was robbed of a cellphone and her husband's hat. These items were not found on Kabelo. The complainant had sustained injuries on her hands where she averred Kabelo stabbed her with a broken bottle. The Savanna bottle was not found.
- [6] On 15 September the defence for the accused approached the prosecutor and requested mediation as an alternative to the trial. The prosecutor postponed this request also to 15 October when the complainant would attend trial and she could then be asked if she would be willing to mediate. The complainant refused mediation as she was upset that Kabelo had disrespected her. An inscription in the docket reflected the mediation request.

- [7] The prosecutor testified that not only was she satisfied that there was a good case, she was disappointed when the magistrate granted the section 174 application after the state's case as she thought there was a *prima facie* case that Kabelo had to come and answer.
- [8] In argument much was made of the fact that the hat, cellphone and bottle were not found, but that the prosecutor proceeded to prosecute. The fact that these items would not be exhibits before court could never influence the prosecutor not to prosecute. Any such suggestion would lead to countless matters not being prosecuted because a "*weapon*" or the stolen goods were not recovered; it is simply bad in law.
- [9] Much was made of the fact that the investigating officer had written in his statement that "*The complainant alleges that she never got back her phone, it got lost at the scene ...*" Nothing turns on this sentence; the complainant stated she did not get her cellphone back, she was robbed of the phone. The fact that the investigating officer wrote "*it was lost*", does not support a contention that this sentence would lead a reasonable person to conclude that the complainant was not robbed of her cellphone. The complainant confirmed that her cellphone was robbed and never found [lost]. No further investigation by the prosecutor was necessary.

- [10] In the court *a quo* the bulk of the cross-examination related to the descriptions or identity of Kabelo as evidenced in the trial court: i.e. the testimony of the complainant and her husband. This evidence testified to in Court is completely irrelevant to the issue at hand simply because it is at the wrong stage as to when the prosecutor had to make a decision whether the matter was to be prosecuted. The test is whether the prosecutor, before the trial started, had such information as would lead a reasonable person to conclude that the accused had probably been guilty of the offence charged.¹
- [11] In the statement of the complainant she presented eye-witness testimony and pointed Kabelo out to the police at the scene. The issue of the perpetrator's identity only arose during the trial. There was nothing in the statements of the complainant and her husband contradicting each other pertaining to the identity of Kabelo. The fact that he was arrested close in proximity and time after the robbery, coupled with the complainant identifying Kabelo at the scene, would not require any further investigation. Pertaining to identity the complaint that Kabelo's height, complexion and the clothes he was wearing was not detailed under these circumstances is unfounded and required no further investigation. Reasonable grounds for prosecution is to be assessed contemporaneously having regard to the evidence that was available at the time and not retrospectively having regard to matters that had come to light.

¹ *Beckenstrater v Rottcher and Theunissen* 1955 (1) SA 129 (A) at 136A-B

- [12] The prosecutor studied the case docket and consulted with the witnesses at court. The view of the prosecutor that she had a good case cannot be faulted by this court or be branded as reckless and no malice can be found.
- [13] The reliance by the respondent on the matter of *Minister of Justice and Constitutional Development v Moleko* 2009 (2) SACR 585 (SCA) is misplaced. In that matter the prosecutor simply ignored the content of a statement in the docket, she misinterpreted material information in the accused's warning statement and never considered the dockets of the matters linked to the docket before her. In this matter nothing in the docket was ignored or misinterpreted and Kabelo had not provided his version for her to test against the complainant's version.

The requirements for malicious prosecution

- [14] It was common cause that the law was set in motion and that the prosecution had failed. The respondent however did not prove that the prosecution acted without reasonable or probable cause and had acted with malice.
- [15] There is no reason not to follow the trite principle that the costs must follow the successful party.
- [16] I accordingly propose the following order:

16.1 Prayer 2 of the court *a quo*'s order is set aside and replaced with:

"The claim for malicious prosecution is dismissed with costs."

16.2 Prayer 4 of the court *a quo*'s order is set aside and replaced with:

"The plaintiff is to carry the costs of the claim for the unlawful arrest that was dismissed."

16.3 The appeal is upheld with costs, such costs to include the costs occasioned for the employment of two counsel.



S. POTTERILL

JUDGE OF THE HIGH COURT

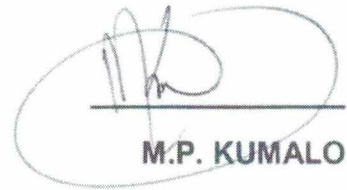
I agree

P.P. 

M.P.N. MBONGWE

JUDGE OF THE HIGH COURT

I agree

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M.P. KUMALO
JUDGE OF THE HIGH COURT

CASE NUMBER: A169/2020

HEARD ON: 11 May 2022

FOR THE APPELLANTS: ADV. H.O.R. MODISA SC

ADV. B.J. NODADA

INSTRUCTED BY: State Attorney, Pretoria

FOR THE RESPONDENT: ADV. M. MTHOMBENI

INSTRUCTED BY: Nobela Attorneys

DATE OF JUDGMENT: 14 September 2022