



**THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA MAIN SEAT**

CASE NO: 494 / 2021

In the matter between:

PHUTI PETER KUTU

APPLICANT

and

**THE MINISTER, DEPARTMENT OF JUSTICE
AND CORRECTIONAL SERVICES**

RESPONDENT

Coram: RATSHIBVUMO AJ

Heard: 21 JUNE 2021

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email and release to SAFLII. The date and time for hand-down is deemed to be 10H00 on 05 JULY 2021.

JUDGMENT

- [1]. This matter came before me on unopposed roll for 21 June 2021. It is a default judgment application following an action for damages in which the Respondent did not enter a notice to defend. The action is based on malicious prosecution out of a disciplinary hearing which resulted in the Applicant's dismissal. An appeal against the dismissal was unsuccessful. The process was then subjected to an arbitration which resulted in a finding that the Applicant's dismissal was unfair. An arbitration award was granted in favour of the Applicant reinstating him and awarding him an equivalent of 24 months' salary in back-pay to be paid by the Respondent.
- [2]. Two issues form the basis of the action by the Applicant. First is malicious prosecution of the disciplinary hearing in that Ms. M Sithole, the Assistant Master and an employee of the Respondent, set the instigation of the disciplinary proceedings in motion without a reasonable or probable cause, and as such acted with malice or *animo injuriandi*.
- [3]. The second issue is what the Applicant calls, "consequential claim" emanating from the instruction given by Mr. Mzwayine, the Director, Employees Relations in the employ of the Respondent; to the effect that the Applicant should not be allowed entry at the offices of the Department of Justice at the time he was dismissed as an employee. As a result, he could not earn an income with the law firms that were willing to hire him. R500 000.00 is claimed from the consequential claim while R1 000 000.00 is claimed in respect of the malicious prosecution. Both Ms. Sithole and Mr. Mzwayine are not parties to this litigation as they have not been cited. Only the Respondent is cited as the employer of the two based on vicarious liability it would seem.

- [4]. On the day of the hearing, I asked counsel for the Applicant to address me on whether this case does not fall within the exclusive jurisdiction of the Labour Court in accordance with the Labour Relations Act, no. 66 of 1995 (the Act) and why there was no evidence proving the damages in the pleadings. Counsel for the Applicant responded reading from the heads of argument which were later made available to me. In essence the response was to the effect that the action is not based on labour issues that fall within the Labour Court's jurisdiction, but malicious prosecution of the disciplinary hearing. More on this, I was referred to the heads of argument which counsel submitted, contained the relevant authorities.
- [5]. As for the second question, counsel indicated that there would normally not be such evidence as he expected to address the court on judicial precedence on what damages have been awarded for similar claims in the past.

Jurisdiction of the High Court / Labour Court.

- [6]. Section 158 of the Act provides,

“158. Powers of Labour Court

- (1) The Labour Court may -
 - (a) make any appropriate order, including -
 - (i) the grant of urgent interim relief;
 - (ii) an interdict;
 - (iii) an order directing the performance of any particular act which order, when implemented, will remedy a wrong and give effect to the primary objects of *this Act*;
 - (iv) a declaratory order;

(v) an award of compensation in any circumstances contemplated in *this Act*;

(vi) an award of damages in any circumstances contemplated in *this Act*;
and

(vii) an order for costs; [*Own underlining*].

[7]. Not only does the Labour Court have the powers to review and set aside or modify any award granted by the Arbitrator, but it can also award damages and/or compensation in any circumstances contemplated in the Act. The question before the court is whether unfair dismissal found by the Arbitrator in this case is one of the circumstances contemplated in the Act. In this case, the Arbitrator found that the dismissal of the Applicant was unfair. Whether the basis of such finding is malicious hearing as argued by the Applicant in this application or different reasoning; is not an issue for consideration for now. What is to be considered is whether the disciplinary hearing and the subsequent dismissal is one of the circumstances contemplated in the Act.

[8]. Counsel for the Applicant submitted that this Court has jurisdiction to hear the action brought against the Respondent as this is an action for damages based on malicious prosecution. The only authority submitted in support of this view is *Mahlangu v Minister of Police*.¹ In *Mahlangu*, the plaintiff who was a member of the South African Police Services (SAPS) was arrested on account of false charges instigated by a senior police officer. As a result of the pending criminal charge, he was also suspended pending a disciplinary hearing. Both the criminal charges and the charges in a disciplinary hearing were withdrawn without a trial or a hearing.

¹ Case no. 66326/2010 [2017] ZAGPPHC 13 *per* Fourie J.

[9]. The victimised plaintiff found himself against the wall in that though he was arrested and dragged into a disciplinary hearing, there was no relief to seek through the labour avenues availed by the Act as there was no hearing and/or finding made against him for him to challenge. For reasons that he suffered some indignity through his arrest and disciplinary charges which were not proceeded with, he felt that there should be some legal recourse in the form of litigation in the High Court based on malicious prosecution.

[10]. The question the court had to consider was whether the disciplinary proceedings as envisaged by the South African Police Service Disciplinary Regulations fall within the ambit of malicious proceedings as a cause of action, assuming that all the elements of the delict were present. The court concluded,

“The facts in the case before me are different. A formal charge of assault with the intent to do grievous bodily harm was laid against the plaintiff at the Sunnyside police station. The plaintiff was then charged departmentally with misconduct for having committed "a common law or statutory offence". These are serious allegations of a criminal nature formulated as a charge in terms of the Regulations. This charge (assault with intent to do grievous bodily harm) as an offence can, depending on the circumstances, constitute an *iniuria* where not only the *fama* or good name, but also the dignity of the person concerned are infringed. It is therefore difficult to accept, from a principle point of view, that a plaintiff can suffer this kind of harm only when he or she was an accused in criminal proceedings, but not also in disciplinary proceedings of this kind. I conclude that the disciplinary proceedings instituted against the plaintiff on 28 July 2009, as provided for in the South African Police Service Discipline Regulations of 3 July 2006 (R643), fall within the ambit of malicious proceedings as a cause of action. It is important to bear in mind that not all disciplinary proceedings are of a similar nature. It should therefore be pointed out that I have attempted to apply the law as it is

found to be, or should be, in the case before me, without suggesting that it should necessarily also apply to all other cases of disciplinary proceedings.”²

[11]. Facts of this case are clearly distinguishable. Fourie J may have had circumstances of this case in mind when he concluded that his approach should not necessarily apply to all other cases of disciplinary proceedings.³ *In casu*, no criminal charges were laid against the Applicant and as such, he was not arrested. Unlike *Mahlangu*, he had full recourse of the labour avenues availed to him by the Act and he used them. He faced a disciplinary hearing which ran in course and he was found guilty. He appealed and only scored success in an arbitration which awarded him backdated salary payment for 24 months.

[12]. The same facts that were placed before the Arbitrator are now placed before this Court. As the old saying goes, a rose by any other name is still a rose, or at least smells like one. Surely the Applicant wants damages that were not awarded by the Arbitrator from the same set of facts. I have no doubt that if the Labour Court was to hear this litigation, it would be in a better position to decide if damages should have been awarded, if it is in a position to award the same and whether the backdated salary payment awarded to the Plaintiff should be used to calculate the second claim which is based on loss of or inability to generate income.

[13]. The Applicant also submitted *Mandela v Amsterdam*⁴ as his authority to support malicious prosecution claim based on a disciplinary hearing proceedings. This judgment does not in support the Applicant’s contention in that, as Fourie J observed⁵, the appellant relied on

² *Mahlangu, supra*, at paragraphs 26 and 30.

³ *Mahlangu, supra*, at para 30

⁴ Case no. CA102/2010 [2010] ZAECGHC 72.

⁵ See *Mahlangu supra*, para 14.

malicious prosecution as a cause of action with regard to internal disciplinary proceedings instituted against him by the Department of Correctional Services. The issue was whether the appellant's claim had prescribed. Chetty J (Beshe J concurring) had to determine the date upon which the appellant's cause of action arose. When concluding that the claim did not prescribe, it was not necessary for the Court to also consider the question whether malicious prosecution as a cause of action also includes the institution of disciplinary proceedings.

[14]. *Mandela* and *Mahlangu* bore similarities in that charges against them in disciplinary hearings were withdrawn without a hearing thereby making the avenues available through the Act, pointless to invoke. They are distinguishable from this case where the Applicant went through the whole disciplinary hearing process and still has avenues of approaching the Labour Court available to him. This is not one of those circumstances where the High Court has concurrent jurisdiction with the Labour Court.⁶ I therefore conclude that this court lacks jurisdiction to hear this matter. Even if I was wrong in this conclusion, the Applicant has another hurdle to cross as pointed out hereunder.

Evidence to prove damages.

[15]. Covid-19 Directive no. 7 of this Division dated 13 July 2020 provides,

“There shall be no judgment by default in damages claim matters without evidence in whatever form having been tendered on both merits and quantum.”

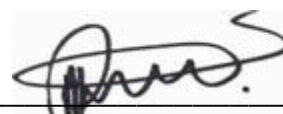
⁶ See Sec 157(2) of the Labour Relations Act, no. 66 of 1995 and *Baloyi v Public Protector and Others* 2021 (2) BCLR 101 (CC) which deal with limited circumstances where the High Court has concurrent jurisdiction with the Labour Court.

[16]. To illustrate the above in light of this case, in a letter sent to the Director-General of the Respondent⁷, the Applicant alleged that he incurred “loans and interests in the amount of about R250 000.00 and [missed] an opportunity to earn an income of about R150 000.00 and had sustained general damages (*contumelia*) [of] R1 000 000.00...” One would have expected the Applicant to, in compliance with this directive, to provide evidence in support of these damages as opposed to a mere paragraph in which he alleges he “believes an amount of R1 000 000.00 will be fair and reasonable to compensate me for the harm suffered as a result of these malicious proceedings” without breaking this down and providing supporting proof. The argument that the damages would be argued based on *stare decisis* cannot even help in circumstances where there is no precedence on damages on malicious prosecution flowing from a disciplinary hearing.

[17]. In light of the above, I make the following order:

17.1 The matter is hereby struck from the roll.

17.2 I make no order as to costs.



TV RATSHIBVUMO
ACTING JUDGE OF THE HIGH COURT
05 JULY 2021

DATE HEARD : 21 JUNE 2021

DATE OF JUDGMENT: : 05 JULY 2021

⁷ See a letter dated 09 December 2020 on p. 66, para 8 sent in compliance with sec 3 of Act no. 40 of 2002.

FOR THE APPLICANT

: MR. DM MASHEGO

INSTRUCTED BY

**: DIMA MASHEGO ATTORNEYS
MBOMBELA**