



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

Date: 16 February 2024

Status: Immediate

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Malala Geophrey Ledwaba v The Minister of Justice and Constitutional Development and Correctional Service and Others (Case no 947/2022) [2024] ZASCA 17 (16 February 2024)

Today the Supreme Court of Appeal dismissed an appeal by Mr Malala Godfrey Ledwaba against a judgment of the Gauteng Division of the High Court, Pretoria. That court dismissed Mr Ledwaba's damages claim for malicious prosecution against the Minister of Justice and Correctional Services, the National Director of Public Prosecutions and the head of the Specialised Commercial Crimes Unit.

Mr Ledwaba's claim for damages arose from more than twenty charges of fraud and theft that were preferred against him in relation to certain withdrawals from a secret fund known as the Confidential Fund (the C-Fund), allocated to the Directorate of Special Operations (the erstwhile Scorpions, also known as the DSO). In the ensuing criminal trial before the Specialised Commercial Crimes Court the state advanced a case that, while he was employed as the Deputy Head of the DSO Mr Ledwaba had, on various occasions, committed fraud by misrepresenting to the National Prosecuting Authority (the NPA) that certain withdrawals of money from the C-Fund were made for the purposes provided for under the policies governing the Fund.

The charges were based on sworn statements by functionaries of the DSO and investigations done by the Integrity Monitoring Unit of the NPA and Price Waterhouse Coopers. In the charges, the NDPP asserted that Mr Ledwaba had created and authorised fictitious projects and non-existent investigations; that he misrepresented to the NPA that the funds had to be used for these projects or for payment of informants/sources; and that he thereby committed fraud alternatively stole the moneys from the DSO C-Fund.

Included in these charges were allegations by the State that Mr Ledwaba had defrauded his business partners in a consultancy business that provided services to the Gauteng Department of Safety and Liaison (the Department). It was alleged that he misrepresented to his partners in the consultancy business, that the Department had not paid the consultancy business for services that Mr Ledwaba and one of his partners had rendered. The state's case was that this was untrue as the Department had made payment for the services rendered directly into Mr Ledwaba's personal bank account. Furthermore, it was alleged that Mr Ledwaba had committed fraud by failing to inform the NPA/DSO that he was doing remunerated work (not authorised by the NPA) whilst he was still employed by the NPA.

The criminal trial proceeded before the Specialised Commercial Crimes Court. At the end of the state's case, the court discharged Mr Ledwaba on seven of the charges. He was convicted on four of the six remaining charges, and was sentenced to 10 years imprisonment. However, all the convictions were reversed by the high court on appeal. The damages claim followed the successful appeal.

In his damages claim, Mr Ledwaba alleged that Ms Glynnis Breytenbach, Mr Willem Van Zyl; Ms Sandiswa Nkula-Nyoni and Mr Nash Ramparat, all members of the prosecution team appointed to prosecute him, wrongfully and maliciously laid false criminal charges of fraud/theft against him. He maintained that there was no reasonable and probable cause for his prosecution.

The high court dismissed Mr Ledwaba's claim, finding that he had failed to prove maliciousness or intention to injure on the part of the NDPP. That court took the view that because Mr Ledwaba had not shown malice or animus injuriandi (intent to injure) on the part of the NDPP, it was unnecessary for it to deal with the requirement of reasonable and probable cause which is also necessary to succeed in a claim of malicious prosecution.

On appeal to the SCA, it held that the correct approach to the issues before it was to first consider the question of whether Mr Ledwaba had shown absence of reasonable and probable cause on the part of NDPP prior to dealing with the issue of malice or intention to injure. That is because the law requires that for a defendant to have acted maliciously they must have been conscious of the wrongfulness of the prosecution but proceeded regardless.

The SCA, however, dismissed Mr Ledwaba's appeal. It held that the evidence in the docket in respect of counts 1 to 17 would have led a reasonable person to conclude that the appellant was probably guilty of fraud. It accordingly held that the NDPP had reasonable and probable cause to instigate the prosecution against Mr Ledwaba on the basis of the evidence that was in the docket. The evidence in the docket included sworn statements by various members of the DSO unit of the NPA, the investigation report of the IMU and the PWC forensic report.

In relation to counts 18, and 19 to 21, the SCA held that the sworn statement of Mr Ledwaba's business partner and invoices and other relevant documents attached thereto which formed part of the docket, coupled with the appellant's resignation from the NPA with effect from 31 July 2005, would have led a reasonable person to conclude that Mr Ledwaba: (a) probably committed fraud in failing to inform the NDPP that he was doing remunerated work whilst he was still employed by the NPA, and (b) probably stole money that belonged to the consulting business on four separate occasions; and (c) probably committed fraud against the members of the consulting business when he represented that the project was terminated and that no payment was received for the work done. The documentation revealed that Mr Ledwaba had submitted four invoices, made out in the name of the consultancy business, to the Department for services rendered. The PWC forensic report demonstrated that payments amounting to R496,127.94, from the Department to the consultancy business, were deposited into the appellant's personal bank account on four occasions during the first quarter of 2005.

Mr Ledwaba's letter of resignation dated 15 June 2005 in terms of which he resigned from the NPA with effect from 31 July 2005, showed that even though he claimed that he had tendered his resignation from the NPA in 2004 and, therefore, did not require the permissions of the NPA to carry out paid work for the consultancy business, he withdrew that letter of resignation after being persuaded to do so by his superior at the time, and continued to provide his services to the NPA. Thus, he was still employed by the NPA/DSO when he carried out paid work for the consultancy business.

The SCA also found that there was no substance in Mr Ledwaba's argument that the state's withdrawal of 10 charges, prior to the start of the new trial, demonstrated that the NDPP had no reasonable and probable cause to prosecute him. The State's reason for withdrawing these charges, as explained by one of the prosecutors, was that it was too expensive to call the forensic expert from PWC to prove those charges. The SCA held that the State's explanation for withdrawing the charges was not

implausible, because there was no evidence to gainsay it. In the circumstances, it held that no adverse inference could be drawn from the prosecution's decision to withdraw these charges. The SCA held that neither did it matter that the appellant was discharged, in terms of s 174 of the Criminal Procedure Act, in respect of seven other counts because what mattered was that when the NDPP took the original decision to prosecute the appellant on those charges, it was of the honest belief, based on the contents of the docket, that there was reasonable and probable cause for his prosecution.

Mr Ledwaba's case in relation to the requirement of malice or animus injuriandi, was that his prosecution emanated from a conspiracy instigated by his direct superior, Mr Leonard McCarthy, to destroy his career with the assistance of Ms Breytenbach of the Specialised Commercial Criminal Court. The SCA found that although Mr Ledwaba might have had an acrimonious relationship with Mr McCarthy and Ms Breytenbach, it failed to see how this could have led to a conspiracy by at least four officers of the Court to destroy his career. The SCA found that: although Mr Ledwaba named four prosecutors in his particulars of claim, he did not name Mr McCarthy; yet in his testimony, in the trial, Mr McCarthy was the main perpetrator; Mr McCarthy had, however, relocated to Washington DC in 2007/8 and could not have driven the prosecution as it proceeded even after he had left the country. The SCA also found that the decision to institute criminal proceedings against Mr Ledwaba was made by Mr Chris Jordaan (Mr Jordaan), the head of the Specialised Commercial Crime Unit. He appointed all the prosecutors including Ms Breytenbach. They took their instructions directly from Mr Jordaan. Ms Breytenbach was only involved in the first trial and the original charges. By the time the trial de novo commenced, she had been suspended from the NPA and had subsequently resigned.

The SCA concluded that the NDPP did not act with malice or intent to injure Mr Ledwaba when it took the decision prosecute Mr Ledwaba, as he presented no credible evidence to demonstrate that when the prosecution took the decision to prosecute him, they directed their will to prosecuting him in the awareness that reasonable grounds for the prosecution were absent. For all these reasons, the SCA dismissed Mr Ledwaba's appeal.

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