



THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

31 March 2008

STATUS: Immediate

Minister for Justice and Constitutional Development and others v S. M. Moleko

Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal

The Supreme Court of Appeal today dismissed an appeal by the Director of Public Prosecutions against a judgment of the Transkei High Court holding that the respondent had established that he was the victim of a malicious prosecution by the DPP. The respondent was charged with defeating or obstructing the course of justice, but was subsequently acquitted in the regional court. This gave rise to his claim for damages for malicious prosecution. The SCA upheld the appeal by the first and third appellants (the Minister for Justice and Constitutional Development and the Minister of Safety and Security, respectively) holding that neither Minister was responsible for the decision to prosecute the respondent.

The respondent, a magistrate at Engcobo in the Eastern Cape, had released accused persons charged with Schedule 6 offences on warning without any evidence being led contrary to the provisions of section 60(11)(a) of the Criminal Procedure Act 51 of 1977. Respondent submitted that he did so because the accused had been in custody since their arrest some four months earlier. Furthermore, one of the accused was ill and no-one could inform the respondent whether this accused was in the holding cells or in hospital and he did not want anybody to die in the police holding cells. Respondent also held that his actions were not taken in bad faith but were taken in the interests of both the state and of the accused.

The Supreme Court of Appeal held that a decision taken by the office of the DPP to prosecute a judicial officer must be taken with the utmost caution, due regard being had to the fundamental principle of judicial independence, but also to the related principle that judicial officers are subject to the Constitution and the law and thus cannot be completely immune from criminal prosecution,

in appropriate cases, for their acts and/or omissions in the exercise of their judicial functions.

Taking into account the requirements to be proved in order to establish malicious prosecution, the Court held that, objectively, it could not be said that the DPP took such reasonable measures as could be expected from that office to inform itself of the events of the day in question and whether these provided 'reasonable and probable cause' for the respondent's prosecution. Furthermore, the respondent proved *animus injuriandi* (intention to injure) on the part of the DPP. The DPP clearly intended to prosecute the respondent, being fully aware of the fact that, by so doing, the respondent would in all probability be injured and his dignity in all probability negatively affected. Despite this knowledge, it took the decision to prosecute, acting in a manner that showed recklessness as to the possible consequences of its conduct.

ends.