



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable
Case No: 198/2013

In the matter between:

GEORGE MAGWABENI

APPELLANT

and

CHRISTOPHER LIOMBA

RESPONDENT

Neutral citation: *Magwabeni v Liomba* (198/13) [2015] ZASCA 117 (11 September 2015)

Coram: Cachalia, Majiedt and Zondi JJA

Heard: 28 August 2015

Delivered: 11 September 2015

Summary: Delict - Malicious prosecution – requirements restated - whether plaintiff proved prosecution initiated without reasonable and probable cause and with malice.

ORDER

On appeal from: Limpopo Local Division, Thohoyandou (Kganyago AJ sitting as court of first instance):

1 The appeal is upheld with costs including the wasted costs occasioned by the postponement of the appeal on 10 March 2014;

2 The order of the court a quo, as it relates to the defendant, is set aside and replaced with the following order:

‘The plaintiff’s claim is dismissed with costs.’

JUDGMENT

Zondi JA (Cachalia and Majiedt JJA concurring):

[1] This appeal, with the leave of this Court, is against the judgment of the Limpopo Local Division, Thohoyandou (Kganyago AJ) finding the appellant (‘the defendant’) liable for damages for malicious prosecution. It arose from a complaint that he had lodged against the respondent (‘the plaintiff’) with the South African Police Service, which was followed by the latter’s arrest and detention. The plaintiff was charged following the complaint, but the charges were subsequently withdrawn and he was released after having spent a week in detention.

[2] Following the withdrawal of charges against him the plaintiff instituted two separate actions in the court a quo, one against defendant and the other against the Minister of Police (‘the Minister’). The basis of his claim against the defendant was predicated upon the allegation that the defendant had wrongfully and maliciously set the

law in motion by laying a false charge of ‘theft /fraud/trespassing’ with the Thohoyandou police. The plaintiff alleged that the defendant had no reasonable or probable cause for doing so, and that he had maliciously conveyed this false information to the police. The claim against the Minister was for his ‘unlawful’ arrest and detention. The two actions were consolidated. The action against the Minister was dismissed. The plaintiff does not appeal that outcome. This appeal by the defendant therefore concerns only the adverse finding against him.

[3] The plaintiff’s evidence was that he was an electrical contractor, working for the defendant, who ran a hotel business in Thohoyandou. He rented premises from the defendant. A dispute arose between them and on 13 December 2008 the defendant informed him by letter that he was terminating his services and that he had to vacate the premises by 15 December 2008. The plaintiff refused to do so because, according to him, he had not been paid for his work. On the morning of 17 December 2008 a large contingent of police officers accompanied by the defendant arrived at the premises and accused him of illegally occupying it. They told him that they were there to assist the defendant to evict him from the premises. Despite his protestations he was handcuffed, bundled into a police van and taken to the police station.

[4] There he was charged with malicious injury to property relating to damage to the defendant’s electrical distribution-box and water-pump. He appeared before a magistrate the following day, and was remanded in custody. A few days later the defendant accompanied by a police official, came to the prison and handed him a peace order dated 18 December. At his next court appearance on 23 December the charges were withdrawn and he was allowed to leave.

[5] The defendant’s evidence was that on 17 December, he received a report that his hotel was on fire. He proceeded to the hotel and on arrival detected a smell of smoke. His employee, Ms Stella Zwitwano Mathoma was standing at the distribution box. It

was open; the wires had been removed and burnt, and the water-pump was damaged. He suspected that the plaintiff was responsible for the damage because apart from himself, the plaintiff, with whom he was embroiled in a conflict, was the only person who had access to the distribution box.

[6] In his statement to the police following upon his complaint, he stated that he desired ‘further police investigation’ concerning the damage to his property. He also stated that the plaintiff had fraudulently compiled invoices, stolen items and connected the DSTV to his room without his permission. When asked whether he had requested the police to arrest the plaintiff, he insisted that he had not; he only wanted their assistance to evict him, because he was refusing to leave. He also sought and obtained a peace order from the magistrates’ court on 18 December which he believed the police required to effect the eviction.

[7] Captain Tshivhuyahuvhi testified on behalf of the Minister. His evidence was that while patrolling the area he received a complaint regarding malicious damage to the defendant’s property. When he, together with nine other police officers, arrived at the property the defendant was present. He showed them the damage to the wires in the distribution box and to the water-pump. They then arrested the plaintiff and informed him that the charge was malicious damage to property. When asked whether his purpose was to evict the plaintiff, at the defendant’s behest, he denied this.

[8] The question before the court a quo was whether the defendant had initiated the prosecution of the plaintiff maliciously. In upholding the plaintiff’s claim the court a quo held, first, that the institution of criminal proceedings against the plaintiff by the defendant was not based on any reasonable suspicion, but rather on a statement made by his employee, Ms Mathoma. And since she was not called to testify, what she had said to the police was inadmissible as evidence. Secondly, it accepted the plaintiff’s evidence that his arrest had more to do with the defendant’s attempt to evict him rather than the

damage to his property. It reasoned that the defendant was aware that the plaintiff ‘. . . did not damage his property, but wanted to use the State machinery in order to evict [the plaintiff].’ It therefore concluded that the defendant had acted maliciously in initiating the prosecution against the plaintiff. It is against these findings that the appeal is directed.

[9] Malicious prosecution consists in the wrongful and intentional assault on the dignity of a person encompassing his good name and privacy.¹ To succeed with this claim, a claimant must allege and prove that:

- (i) the defendant set the law in motion (instigated or instituted the proceedings);
- (ii) the defendant acted without reasonable and probable cause;
- (iii) the defendant acted with malice (or *animo injuriandi*); and that
- (iv) the prosecution failed.

These requirements were set out by this Court in *Minister of Justice and Constitutional Development & others v Moleko* [2008] ZASCA 43; [2008] 3 All SA 47 (SCA) para 8 and later restated in *Rudolph & others v Minister of Safety and Security & another* [2009] ZASCA 39; (5) SA 94 (SCA) para 16. See also *Moaki v Reckitt and Colman (Africa) Ltd & another* 1968 (3) SA 98 (A).

[10] This Court in *Beckenstrater v Rottcher and Theunissen* 1955 (1) SA 129 (AD) at 136A-B set out the test for ‘absence of reasonable and probable cause’ as follows:

‘When it is alleged that a defendant had no reasonable cause for prosecuting, I understand this to mean that he did not have such information as would lead a reasonable man to conclude that the plaintiff had probably been guilty of the offence charged; if, despite his having such information, the defendant is shown not to have believed in the plaintiff’s guilt, a subjective element comes into play and disproves the existence, for the defendant, of reasonable and probable cause.’

[11] The test contains both a subjective and objective element, which means that there

¹ *Relyant Trading (Pty) Ltd v Shongwe & another* [2006] ZASCA 162 [2007] 1 All SA 375 (SCA) para 5.

must be both actual belief on the part of the defendant and also that that belief is reasonable in the circumstances (J Neethling, J M Potgieter and P J Visser *Neethling's Law of Personality* 2 ed (2005) at 176).

[12] The pleadings in this matter call for comment. The plaintiff's particulars of claim allege that the defendant maliciously set the law in motion by laying a false charge of 'theft/fraud/trespassing . . .' with the police, which gave rise to his arrest and detention. There is no allegation of malicious injury to property, even though he was, despite the defendant's protestations, permitted to lead such evidence at the trial. However, the issue was fully ventilated and we will decide the appeal on this basis.

[13] Another difficulty with the plaintiff's cause of action was that there is no allegation that the prosecution had failed, which rendered the pleading excipiable.² But it was clear from the evidence that the prosecution had terminated and the defendant's counsel was prepared to accept this.

[14] I therefore proceed to consider whether the evidence supports the allegation that the defendant set the law in motion by falsely accusing the plaintiff of trespassing on his property or of damaging the electrical wires in the distribution box and the water-pump. Put another way, did he make statements to the police regarding these allegations without an honest belief founded on reasonable grounds that they were true. This analysis involves an enquiry into the defendant's state of mind when he lodged his complaint against the plaintiff.

[15] The evidence shows that there was a dispute between the parties, which led the defendant to terminate the plaintiff's service contract and to give him an eviction notice to vacate the premises he was renting. The plaintiff refused to leave believing that he was entitled to stay until the dispute regarding the amount that was owing to him was

settled. At the same time the defendant discovered that the electrical wires and a water-pump on his property had been damaged. And after Ms Mathoma informed him that she had seen the plaintiff near the electricity distribution box, he inferred that the plaintiff was the person responsible for the damage.

[16] He testified that he went to the police because he believed that they would help him with the eviction and he made a statement to the effect that he desired an investigation regarding the damage to his property, for which he believed the plaintiff was responsible. The police, who went to the property, saw the damage, and the statement they subsequently obtained from Ms Mathoma confirmed this.

[17] The defendant was incorrect in his belief that the police could help him evict the plaintiff from his property, even though he appeared to believe genuinely that the plaintiff was unlawfully refusing to move from the property. This was a civil dispute for which he should have gone to court to obtain an eviction order, rather than solicit the assistance of the police in this cause. But this does not mean that he had no honest belief in the truth of the allegations he made against the plaintiff regarding the trespassing and the damage to his property.

[18] Once he had placed the allegations before the police they ought to have investigated the case properly before merely arresting the plaintiff as Captain Tshivhuyahuvhi incorrectly believed was his duty. But the fact that the police acted hastily and possibly unlawfully in effecting the plaintiff's arrest does not carry with it the implication that the defendant instituted the proceedings without honestly believing that the allegations against the plaintiff were true.

[19] In the circumstances it cannot be said that the defendant had no reasonable and probable cause for the prosecution of the plaintiff, much less that he was malicious in

² *Thompson & another v Minister of Police & another* 1971 (1) SA 371 (E) at 375.

instituting the investigation against him. In his mind he honestly believed that he had a case for trespassing against the plaintiff when the latter refused to vacate his premises upon the termination of the lease. And regarding the case of malicious injury to property, he believed that the plaintiff was responsible because, apart from him, the plaintiff was the only person who had keys for, and access to, the distribution box. And the information conveyed to him by Ms Mathoma, whilst only circumstantial, confirmed his belief. In short, his belief was founded upon an honest, though probably mistaken, belief that the plaintiff had damaged his property. The court a quo erred therefore in holding that the plaintiff had proved that his prosecution was malicious.

[20] The next aspect to consider is the order that was made by this court on 10 March 2014 in terms of which the plaintiff's erstwhile attorneys, Erwee Attorneys, were called upon to show cause why they should not be ordered to pay *de bonis propriis* the wasted costs occasioned by the postponement of the matter caused by their alleged failure to comply with rule 16(4) of the Uniform Rules of Court. This rule provides that where an attorney acting in any proceedings for a party ceases so to act, he shall forthwith deliver notice thereof to such party, the registrar and all other parties. It now appears that the plaintiff's erstwhile attorneys served and filed with the registrar of Limpopo High Court, Thohoyandou a notice of withdrawal as the plaintiff's attorneys of record on 31 May 2013, presumably before the appeal was placed on roll on 10 March 2014. I am therefore satisfied that the plaintiff's erstwhile attorneys complied with Rule 16(4) of the Uniform Rules of Court. But this finding does not absolve the plaintiff from liability for the wasted costs for the postponement.

[21] Finally, the court wishes to extend its gratitude to Mr Nel and Mr Mofokeng from Bloemfontein Justice Centre who appeared on behalf of the plaintiff following the withdrawal of his erstwhile attorneys.

[22] In the result the following order is made:

1 The appeal is upheld with costs including the wasted costs occasioned by the postponement of the appeal on 10 March 2014;

2 The order of the court a quo, as it relates to the defendant, is set aside and replaced with the following order:

‘The plaintiff’s claim is dismissed with costs.’

D H Zondi
Judge of Appeal

Appearances

For the Appellant: M S Sikhwari

Instructed by:

Mathobo Rambau & Sigogo Inc, Thohoyandou
c/o Matsepes Inc, Bloemfontein

For the Respondent: P W Nel (with him L M A Mofokeng)

Instructed by:

Legal Aid SA, Bloemfontein Justice Centre