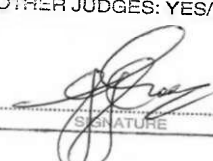


IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.

23/09/11
DATE


SIGNATURE

CASE NUMBER: A565/2010

27
13 September 2011

In the matter between:

SUNNY KLEINBOY MZIZA

First Appellant

AGNES MATLOU

Second Appellant

and

MINISTER OF POLICE

Respondent

JUDGMENT

HEADNOTE

Appeal – absolution – wrongfully issuing ticket – can be considered as malicious prosecution if warranted by the circumstances – issuing of ticket setting process in motion – process can be legal or wrongful or malicious.

GOODEY AJ:

(Reference is made to the parties' heads of argument. This is acknowledgement thereof).

[1] **INTRODUCTION:**

(1.1) The Appellants instituted action against the Respondent in the Seshego Magistrate's Court for three claims or causes of action.

(1.2) The particulars are as follows:

1.2.1 In the first claim the appellants claimed payment of the amount of R6 700,00 (six thousand seven hundred rand) in respect of – money stolen from the First and Second Appellants shop. In this regard the Appellants allege that on/about the 27th April 2007 the respondent's employees, one Superintendent Mukwebu, and other employees of the respondent who are to the appellants unknown forced the first appellant's employee, the second appellant, from the shop or tavern to accompany them to her residential

place. The respondent's employees were aware that the second appellant was the only attendant at such tavern and they failed to give her the opportunity to lock the said tavern. At the time when the police officers left with the second appellant to her residential place, the tavern was left unattended and as a result an amount of R6 700.00 was stolen;

1.2.2 In the second claim the appellants claimed payment of the amount of R20 000,00 (twenty thousand rand) in respect of – damages as a consequence of unlawful arrest, alternatively unlawful deprivation of freedom. In this regard the Appellants allege that that on the 27th April 2007 one Superintendent Mukwebu, and other employees of the respondent who are to the appellant unknown arrested alternatively kidnapped the second appellant in that they forced her to accompany them to her residential area to provide them with her identity document;

1.2.3 In the third claim the appellants claimed payment of the amount of R11 000,00 being for malicious prosecution in that the respondent maliciously prosecuted the second appellant and causing her to be publically humiliated.

(1.3) **The facts in this case can briefly be summarized as follows:**

1.3.1 The appellants are the owners of a bottle store with a general dealer adjacent thereto. (At least the first appellant is the owner and the second appellant the employee of the first appellant);

1.3.2 On/about the 27th April 2007 the respondent's employees, one Superintendent Mukwebu, and other employees of the respondent who are to the appellants unknown forced the first appellant's employee, the second appellant, from the shop or tavern to accompany them to her residential place. The respondent's employees were aware that the second appellant was (so she says) the only attendant at such tavern and they failed to give her the opportunity to lock the said tavern. At the time when the police officers left with the second appellant to her residential place, the tavern was left unattended and as a result an amount of R6 700.00 was stolen;

1.3.3 The second appellant was, as aforesaid, forced to be taken to her home in order to fetch her ID document;

1.3.4 The second appellant was also issued a ticket (based on a non-existing law) for allegedly not having a license to sell liquor to be consumed outside the said premises;

1.3.5 She (second appellant) never appeared in court, though she initially (through the ticket) was summoned to do so.

[2] AD: CONDONATION:

(2.1) The Appellants also lodged a substantive application for condonation in order to prosecute the appeal.

(2.2) I am of the view that this aspect has properly been explained and that it should be granted.

(2.3) The following order is thus made:

"The Appellants application for condonation is granted."

[3] **THE LAW:**

(3.1) **Arrest and detention:**

3.1.1 The onus is on the Defendant. In this regard **HARMS: Precedents of Pleadings** (2nd Ed) says the following on page 46:

*"**Wrongfulness:** An arrest or detention is prima facie wrongful. It is not necessary, therefore, to allege or prove wrongfulness. It is for the Defendant to allege and prove the lawfulness of the arrest or detention."*

3.1.2 **HARMS** says on page 47:

*"Thus, when police have arrested and detained a person, once the arrest **and detention are admitted the onus of proving lawfulness rests on the State**"*
(My emphasis)

(3.2) **Malicious proceedings:**

3.2.1 **HARMS** says on page 273:

*“Cause of action: The cause of action of a claim for damages caused by malicious criminal or civil proceedings is the actio iniuriarum. The **Plaintiff bears the onus in respect of all the elements of the delict, including that of animus iniuriandi.**”*

3.2.2 **HARMS** on page 275:

*“Wrongful legal proceedings: A claim for **malicious legal proceedings** differs materially from one based on **wrongful legal proceedings**. Examples of wrongful legal proceedings include attachment or execution of property or an arrest which is wrongful because it took place without a writ or warrant. These cases have two special features: first, the **Defendant must allege and prove the lawfulness of the execution or arrest** and, second, the absence of animus iniuriandi is no defence.”*

(My emphasis)

{3.3} **Absolution:**

3.3.1 ERASMUS: Superior Court Practice at B1 – 292/293:

“At the close of the case for the Plaintiff.” It is to be noted that where the Defendant adduces his or her evidence first, either because he or she bears the burden of proof or because, by reason of an admission or presumption, the duty to adduce evidence is on him or her, there can be no question of absolution from the instance being granted. If the Defendant fails to discharge the burden of proof or the duty to adduce evidence, the proper order would be judgment for the Plaintiff.”

(My emphasis)

“When absolution from the instance is sought at the close of the Plaintiff’s case, the test to be applied not whether the evidence established what would finally be required to be established but whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might (not should, or ought to) find for the Plaintiff...”

In deciding whether absolution should be granted at the close of the Plaintiff's case, it must be assumed that in the absence of very special considerations, such as the inherent unacceptability of the evidence adduced, the evidence is true."

3.3.2 **HARMS** defined the **test** for absolution in ***Gordon Lloyd Page & Associates v Rivera & Another* 2001 (1) SA 88 (SCA)**:

*"This implies that a Plaintiff has to make out a **prima facie** case - in the sense that there is evidence relating to all the elements of the claim - to survive absolution because without such evidence no court could find for the Plaintiff (*Marine & Trade Insurance Co Ltd v Van der Schyff* 1972 (1) SA 26 (A) at 37G - 38A; *Schmidt Bewysreg* 4th ed at 91 - 2). As far as inferences from the evidence are concerned, **the inference relied upon by the Plaintiff must be a reasonable one, not the only reasonable one** (*Schmidt* at 93).*

(My emphasis)

3.3.3 In ***Ruto Flour Mills (Pty) Ltd v Adelson* (2) 1958 (4) SA 307 (T)** at 309, Boshoff J stated the following:

"If the evidence tendered by the Plaintiff is not only not convincing, but actually found by the trial Court to be an utter fabrication... or, if it be a fact that is too vague and contradictory to serve as proof of the question in issue... then it would be evidence on which a reasonable man would not find, and the Court would be perfectly justified in granting absolution from the instance at the close of the case for the Plaintiff.

Prima facie evidence is defined as evidence requiring an answer, or evidence that will be conclusive if the opponent does not adduce an answer in rebuttal."

(3.4) **Thus it is clear from the aforesaid:**

- 3.4.1 When there is an arrest or detention the onus to prove lawfulness is on the Defendant.
- 3.4.2 In order for the State to bear the onus, arrest or detention must have been admitted or proved.
- 3.4.3 In the case of **malicious proceedings**, the **Defendant** must **prove** the lawfulness of the **arrest**.

3.4.4 If the onus is on the Defendant, there is **no room** for **absolution** at the end of the Plaintiff's case.

3.4.5 It must be **assumed** (as to absolution) that the **evidence is true**.

[4] **IN CASU:**

(4.1) Only the Appellants evidence is before the Court.

(4.2) Absolution on all three claims were granted at the close of Appellants' case.

[5] **ARGUMENT ON BEHALF OF THE PARTIES:**

(5.1) **The first claim:**

5.1.1 In this regard the Appellants submit in paragraphs 5.1, 5.2 and 5.4 of their heads:

"5.1 With regard to the first claim, it is submitted that the Honourable Magistrate erred in finding that

there was no evidence to substantiate that an amount of R 6700.00 existed in the relevant shop at the time of the incident.

5.2 *The common cause fact are, it was testified on behalf of both the 1st and 2nd appellant that an amount of R6700.00 was present in the shop at the time of the incident, that the same amount was stolen and that the event transpired whilst the Respondent's employees were with the 2nd Appellant.*

5.4 *The testimony of both appellants was the same with regard to the amount, and evidence was further led that receipts for the amount was in fact available, even though not at court. The fact that reference to such receipts were made by both witnesses, even though the documents were not at court, shows that the evidence is not vague or contradictory. It also shows that theft of the amount is a reasonable inference, even though it might not be the only reasonable inference based on the evidence and facts before Court."*

5.1.2 The Respondent submits in this regard (in paragraph 6, 7 and 8 *inter alia* as follows):

“However when one analyses his testimony it is apparent that when the R6 700.00 allegedly disappeared he was nowhere at the shop. In fact even before the question of the disappearance of the R6 700.00 was raised the first plaintiff had already left the shop. The first plaintiff correctly states that when he came back Agnes told him that the police were harassing her, she even lost her money. As far as this claim is concerned the first plaintiff’s evidence sheds no light as to the disappearance of the R6 700.00, if the said amount indeed disappeared in the first place. His lawyer correctly indicates to the first plaintiff that “Ok, that is hearsay.”

See: page 32 at par 25 of the record”

7.1 *Whilst Superintendent Mukwevo was busy requesting her identity document she followed at the counter where she was*

working. He even stood behind the counter behind the second plaintiff requesting the second plaintiff to give him the identity document;

See: page 53 at par 1- 10 of the record

7.2 *when Superintendent Mukwevo found her at the counter the money was over there and he was harassing her and according to her he might have seen the money.*

See: page 56 at par 1- 5 of the record"

"8.

When one carefully analyses the evidence of the second plaintiff there is nowhere in her testimony where she says she saw Superintendent Mukwevo taking the money. In fact when specifically asked whether she saw Superintendent Mukwevo taking that money she correctly conceded that she never saw him with her naked eyes taking the money but that Superintendent Mukwevo was with her at the counter."

(5.2) **The second claim:**

5.2.1 The Appellants submit in paragraph 6.1 to 6.3 of their heads:

"6.1 *With regard to the second claim, it is submitted that the Honourable Magistrate erred in finding that the 2nd Appellant was not at the very least unlawfully deprived of her freedom. No evidence was led on behalf of the Respondent's employees and as such the Appellants' version was never disputed by contrary evidence.*

6.2 *As is clear from the Honourable Magistrate's judgement, only the question of whether an arrest was made was considered.*

6.3 *The 2nd Appellant's testimony was clearly to the effect that she was harshly grabbed, pulled and forced into a police vehicle without being*

lawfully arrested and with the only intent being to obtain an identity number."

5.2.2 The Respondent submits *inter alia* in paragraph 9 of his heads:

"The second plaintiff on the second claim alleges that she was arrested or abducted by the police. But during cross-examination following important questions were put to her and the answers thereto:-

"So you were arrested on the day in question? No this, they just said they want the identity document.

And you agree with me that is not a wrongful arrest? They want it by force, I was saying I do not have it".

See: page 103 at par 25 of the record"

(5.3) **The third claim:**

5.3.1 In this regard the Appellants argue as follows in paragraph 7 of their heads:

“7.1 With regard to the third claim, it is submitted that the Honourable Magistrate erred in finding that there was no basis for malicious prosecution, as the 2nd Appellant was never in fact called to testify in open court.

7.2 To be successful in a claim for malicious prosecution, the following would have to be proven, as set out in *Ochse v King William’s Town Municipality 1990 (2) SA 855 (E)* at 857.

7.2.1 That the Respondent’s employee instigated or instituted the prosecution;

7.2.2 That in so doing he was acting without reasonable and probable cause;

7.2.3 *That he was actuated by an improper motive (malice);*

7.2.4 *That the proceedings terminated in the 2nd Appellant's favour.*

7.3 ***No reference is made to a requirement that a person must physically and actually appear in court for a claim for malicious prosecution to be valid. It is thus on this basis that the 2nd Appellant's prosecution for an alleged transgression of a section of an act, which has in fact been repealed, cannot be interpreted in any manner other than malicious prosecution, unless the Respondent's employees in fact testified to the contrary, which never occurred.***

7.4 ***With regard to the requirements for malicious prosecution, the Respondent's employees were clearly the instigators of the prosecution, that such prosecution was in***

fact without reasonable or probable cause, that according to the evidence led by the 2nd Appellant the Respondent's employees acted with malice, and that the prosecution terminated in favour of the 2nd Appellant.

7.5 *It is clear that the Honourable Magistrate, on the evidence before court, erred in not finding that a reasonable person could find in favour of the 2nd Appellant."*

(My emphasis)

5.3.2 The Respondent submits in paragraph 10 *inter alia* as follows:

"The second plaintiff alleged that she was maliciously prosecuted. She however conceded that she never appeared before court going through the normal criminal court proceedings. The presiding magistrate also posed a very important question to Mr Smit. In simple he asked him that if a traffic officer issues you with a fine ticket for violating a traffic rule but it later transpires that such fine ticket was wrongly issued,

can we say that the person who was wrongly issued with the fine ticket was maliciously prosecuted.

See: page 124 of the record

The second plaintiff was simply issued with a ticket and not prosecuted. Even if one was to agree that issuing of a fine ticket falls within the meaning of prosecution the question still needs to be answered as to whether there was any element of malice on the part of the police?"

(My emphasis)

(6) DISCUSSION:

(6.1) Ad: First Claim – R6 700,00:

6.1.1 There is no *prima facie* evidence that there was R6 700,00 present in the shop – **see par 5.1.2 above.**;

6.1.2 The fact that they (appellants) did not produce receipts in Court, but testified that same were available, is very

suspicious. They are *dominus lites* and should have realized the importance of the receipts.

6.1.3 The testimony of the Second Appellant that when Superintendent Mukwevo "found" her at the counter the money was over there and he was harassing her and according got her he **might have seen the money**, calls for no explanation. It is so improbable that it can only be regarded as false or farfetched.

6.1.4 Counsel on behalf of the appellants conceded that there is no evidence as the money ever being in the shop or having been stolen as alleged.

6.1.5 In view of the aforesaid, I am of the opinion that the appeal should be dismissed.

(6.2) **Ad: Second Claim – unlawful deprivation of freedom:**

6.2.1 There is at least *prima facie* evidence (**paragraph 5.2.2 above**) that the identity document was wanted by force, with the *prima facie* evidence that the Second Appellant was forced to be taken home to fetch it, resulting in her being deprived of her freedom.

6.2.2 That being the case, the onus is on the Respondent in which case absolution can never be granted.

6.2.3 However, if I am wrong as to the onus (paragraph 6.2.3) then the evidence of the Second Respondent (paragraph 6.2.1) that she was forced home, warrants a reply, in which case absolution should also have been refused.

6.2.4 Consequently, I am of the opinion that the appeal should be upheld in this regard.

(6.3) **Ad: Third claim – malicious prosecution:**

6.3.1 In this instance it is not a requirement that a person must physically appear in Court – see **paragraph 5.3.1 above.**

6.3.2 The issuing of the ticket sets the process in motion and may be opposed in Court.

6.3.3 Since the issuing of the ticket which sets the process in motion (and leads to the principle that it may be

opposed in Court) it can either be legal, wrongful or malicious.

6.3.4 In the latter instance the **onus** is on the Respondent to allege and prove the lawfulness thereof in which case absolution is not possible.

6.3.5 Fact is that a ticket was issued.

6.3.6 Even if I accept in favour of the Respondent that the issuing was merely **wrongful** (as the ticket was based on an incorrect law) then the **prima facie** evidence (which I must accept as true as find same not inherently false or farfetched) an answer is called for.

6.3.7 In view of the aforesaid, this ground should also be upheld.

(6.4) In the premises, I make the following order:

1. *The appeal is upheld with costs.*

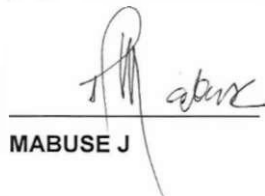
2. *The Magistrate's order is substituted with the following:*

*"The Defendants application for absolution is refused
with costs."*



GOODEY AJ

I agree



MABUSE J

Date of hearing: 13/09/2011

Date of Judgment: 23/09/2011

On behalf of the Appellants:

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