

IN THE HIGH COURT OF ESWATINI

• JUDGMENT

In the matter Between:

Case No. 1974/2016

SIPHO HEBRON MASANGO

Plaintiff

And

THE DIRECTOR OF PUBLIC PROSECUTIONS

1st Defendant

THE ATTORNEY GENERAL

2nd Defendant

Neutral citation

Sipho Hebron Masango v The Director of Public Prosecution and Another (1974/2016) [2022] SZHC 112 (2nd June, 2022)

Coram

M. Dlamini J

Heard

9th March, 2022

Delivered

2nd June, 2022

Claim for damages -

Malicious prosecution

Elements to be established

... once honest belief in the guilty of the accused is absent, then such establishes the third

requirement on malice. This was because if the accuser did not honestly believe that the accused was guilty, there would be no reasonable and probable cause for instituting the prosecution. Most South African case law, their Lordships highlighted, on malice speaks of animus injuria, the intention to cause harm or injury to the accused by setting the law in motion. This is an ill-will. [24]

Summary: Plaintiff's cause of action is founded on malicious prosecution. Defendants contend that plaintiff's prosecution was justified in the circumstances.

The Parties

- [1] The plaintiff is an adult male liSwati. He resides at Simunye in the Lubombo Region.
- [2] The 1st defendant is a statutory body responsible for prosecution in the Kingdom. Its head offices are at Mbabane, Justice Building, Hhohho region. The 2nd defendant is the legal advisor of the Government.

The Plaintiff's Particulars of Claim

- [3] The plaintiff has alleged that he was arrested on 27th May, 2015. He

was thereafter prosecuted on the charge of contravening section 89 (1) read with section 122(1) and (7) of the Road Traffic Act No. 6 of 2007. He stated:

"6,

The criminal proceedings were instituted by the First Defendant without any reasonable and probable cause.

7.

*At the time the First Defendant prepared the charges against Plaintiff, there was no reasonable evidence that the Plaintiff committed the same at all. The aforesaid prosecution was thus fought with malice. "*¹

[4] On the basis of the above the plaintiff pointed out that he was acquitted and discharged in terms of section 174 (4) of the Criminal Procedure and Evidence Act No. 67 of 1938. He further alleged:

"9.

Consequences and pursuant to the malicious prosecution, Plaintiff suffered damages in the sum of E410 000.00 (Four Hundred and Ten Thousand Emalangeni) which is computed as follows:

<i>Malicious prosecution</i>	<i>E 350 000.00</i>
<i>Legal fees in conducting</i>	<i>E 25 000.00</i>
<i>trial General Inconvenience</i>	<i><u>E 35 000.00</u></i>
<i>TOTAL</i>	<i><u>E 410 000.00</u></i> ¹²

¹ Page 5 paragraphs 6 and 7 of the Book

² Page 6 paragraph 9 of Book

Defendant's Plea

[5] The defendants denied any civil liability and stated as follows:

"The defendants deny the contents of these paragraphs. The charges preferred against the plaintiff in the Magistrate's Court were not without reasonable cause since the plaintiff was within the vicinity when the accident occurred and there was reason to believe the plaintiff played a major role in the causing of the accident. It is a known fact that negligent driving does not necessarily mean that your motor vehicle was involved in the accident. It may be that the motor-vehicle was not involved in the crash of vehicles but was nonetheless the cause of that accident, hence the reasonable belief in the involvement of plaintiff in the cause of the accident.

3. *The Defendants do not deny the contents of this paragraph. However, acquittal and discharge from criminal liability does not amount to a liability on the part of the Defendants. An acquittal verdict may be reached by a trial court from a number of factors. This acquittal does not confer liability for malicious prosecution on the Defendants. The failure to adduce evidence in a criminal trial does not mean that the Plaintiff prosecuted maliciously.*

[6] The defendants disputed the amount claimed as damages.

Oral Evidence

- [7] The plaintiff testified in his own case. He testified that he was a qualified driver. He was issued with a driver's license around 1980, 1981. He was the registered owner of a colt motor-vehicle, double cab, registered ISD 832 AM. On 27th May, 2015, he attended a church meeting at Matsapha. At about 1:00 p.m. when the meeting ended, he drove home, Siteki Farm 641 Moyeni, P01tion 39. He was using his colt motor-vehicle. He reached Mpaka shopping complex. From the main road on his right hand side, there was a market. He reduced the speed to 30 km/hour because he intended to off ramp to the market to buy some maize mealies. He put on his indicator, reflecting that he was taking the right direction. He then turned to the right. He did not get any maize mealies. He drove off taking his original route. He had travelled for about three to three and half kilometers when he suddenly noticed a police motor-vehicle approaching him. It came closer to him and he had to drive off the road, trying to avoid it.
- [8] The police officer introduced himself as a police officer from Tshaneni, mentioning his name as well. The police officer explained that at Mpaka, two motor-vehicles were involved in an accident. The people at Mpaka said that he was the cause of the accident as he off ramped from the road recklessly. The officer enquired if he was aware of the accident at Mpaka. He replied that he was not. He explained to the police officer that all that he did was to signal that he was moving away from the road to the right side. He entered the market place and left as there was no maize. He drove away without anyone informing him of any accident. As they were speaking, a Toyota motor-vehicle

arrived.

The driver alighted and pointed at him, saying this is the driver of the motor-vehicle that caused the accident. PWI turned to the police and said that that was what he was talking about when he told him that he could not go to the scene of the accident as he had informed him that the people were angry with him. The police officer told the driver of the Toyota to leave them alone. The driver obliged.

[9] The police officer told PWI that he should go and park at a safe place while he returned to the scene of the accident. He left and proceeded to parked at Siteki police station. The police officers at Siteki arrived after about an hour later as he had parked at about 4:00 p.m. He went to the charge office where he met the desk officer. The desk officer advised him to wait for the investigating officer who was still at the accident scene. The traffic police officers arrived at about 7:00 p.m. They recorded a statement from him. He left for home. The following day the police officer called him saying he had a case. He would be advised of the court appearance date.

[IO] PW I handed to court his charge sheet which was marked exhibit "A". He testified further that after a year of trial, he was acquitted and discharged. He was inconvenienced by the trial as the investigator told him to admit the offence on the basis that such offences often occur in the road. He had to move up and down attending his trial and at the close of the crown's case, he was not called to answer. He was diabetic. He had to pay out attorney's fees as he was represented. He

submitted exhibit "B" as a statement of account from his erstwhile attorney.

- [11] PWI continued to testify that the driver of the Toyota who was a police officer from OSSU caused the accident. There were many people in the motor-vehicle that the Toyota driver collided with. The said motor vehicle further had many bottles of beer. The people affected by the collision refused to go to hospital when the police attempted to take them. One of them even fled from the scene. PWI testified lastly that he suffered a total loss of E4 IO 000.00 as per the letter of demand.
- [12] The plaintiff closed his case. The defence called upon three witnesses.
- [13] DWI was **5446 Constable Thulani Lukhele**. He was the investigator who received a call on around 1635 hours on 14th February, 2015 about an accident at Mpaka. He proceeded to the scene of crime. He found the motor-vehicles that had collided with each other. He recorded statements from each driver. He also recorded a statement from an independent witness who was seated under a tree when the accident occurred.
- [14] He concluded from all three statements that the plaintiff who was driving a colt was the cause of the accident as he gathered that he turned to the right firstly without indicating and that the driver of the Toyota, an on-coming motor-vehicle was close by yet plaintiff was followed by an Opel cadet motor-vehicle. He further learned that the plaintiff never stopped after such accident but proceeded to drive away. He queried him on his failure to stop and plaintiff stated that he had feared for his life.

- [15) DW2 was **Nompumelelo Thandekile Msibi**. She was the prosecution's Counsel. She testified that **Constable Lukhele** came to her chambers with a docket. She perused the statements thereto and concluded that the plaintiff who was the driver of a Colt motor-vehicle caused the accident. A statement by the driver of an Opel Astra motor vehicle was to the effect that the plaintiff failed to give him a right of way. By reflex action he swerved to the left lane attempting to avoid a collision with him. Unfortunately he collided with the oncoming vehicle, Toyota on the right lane towards Manzini.
- [16) There was also a statement of **Mr. Matsebula** who was seated a distance from the road. His statement corroborated that of **Mr. Zikalala**. The Colt failed to give the right of way to the Opel Astra. The three witnesses were led in evidence at the close of the Crown's case, the court acquitted and discharged plaintiff.
- [17) DW3 was **Petros Michael Matsebula**. Like all the witnesses herein, he testified under oath. He told the court that he witnessed the accident under issue. A van Toyota drove from the Manzini direction towards Siteki. It was followed by a Colt VW motor-vehicle. There was also an Astra motor-vehicle coming from Siteki direction. The Colt entered the right direction where there was maize sold. It entered in front of the Astra. The Astra tried to run away from the Colt. It met up with the Toyota which was coming from Manzini direction. The driver of the Colt did not stop. DW3 was later called to testify on the accident. He

testified similarly.

Analysis of the Evidence

- [18] The plaintiff's version of the accident of 14th February, 2015³ was that he had signaled that he was turning to the right. He then turned to the right. The defence witnesses' evidence was however, that the plaintiff failed to keep a proper look-out before turning to the right. He failed to signal his turn as well.

Issue

- [19] Was prosecution malicious in arraigning the plaintiff on a charge of negligent driving under the above circumstances?

Legal Principles on Malicious Prosecution

- [20] The legal requirements for establishing malicious prosecution was well canvassed in **Professor Dlamini V The Attorney General Civil Appeal No: 27/2007. P.H. Tebbutt JA**, writing the unanimous judgment authored firstly, that the claim for damages based on malicious prosecution was part of our law. He then eloquently espoused on the elements of such a claim with reference to **Beckenstrater V Rottcher and Theunissen 1955 (1) SA 129 (A)** at 134H-135A:

"A plaintiff had to show that the respondents in such an action had set the prosecution proceedings in motion and that the prosecution had ended in his or her favour. In addition, and 111ore important, the plaintiff must establish that the

³ Although PWI spoke of 27th May, 2015 in chief.

respondents, in setting the proceedings in motion, had no reasonable and probable cause for doing so and were actuated by mi indirect or improper motive."

[21] The court further pointed out that the onus to establish such elements rest upon the plaintiff. The court proceeded on the second ground:

"The inclusion of proof of an absence of reasonable and probable cause among the matters to be proved by the plaintiff has been said in England in the Corea case, supra, to be a "most sensible one" and similar sentiments were expressed by Schreiner J.A. in the Beckenstrater case supra at 135 D where he said:

"For it is impossible to the community that persons who have reasonable and probable cause for prosecution should not be deterred from setting the criminal law in motion against those whom they believe to have committed offences."

[22] The court further added:

"even if in so doing they are actuated by indirect or improper motive."

[23] They futiher expatiated:

"It seems to me to be logical that if there was reasonable and probable cause for the police and the DPP to believe that the appellant had committed the offences with which they charged him, they would not have been acting from some indirect or improper motive in instituting the prosecution against him. It would however, require an honest belief on the part of the instituter. If it is proved by a plaintiff that the defendant in a malicious prosecution case did not believe that the plaintiff was probably guilty of the offences concerned he would not have had reasonable and probable cause for instituting the prosecution. Reasonable and probable cause" means

"an honest belief in the guilt of the accused founded upon reasonable grounds on circumstances which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed."

[24] The test is an objective one. Their Lordships pointed out that once honest belief in the guilty of the accused is absent, then such establishes the third requirement on malice. This was because if the accuser did not honestly believe that the accused was guilty, there would be no reasonable and probable cause for instituting the prosecution. Most South African case law, their Lordships highlighted, on malice speaks of *animus injuria*, the intention to

cause harm or injury to the accused by setting the law in motion. This is an ill-will.

Case at hand

- [25) Turning to the case at hand, the question is whether the plaintiff has established the elements for him to succeed in the claim. It is common cause that the plaintiff was prosecuted. It is further common cause that the plaintiff was acquitted and discharged at the close of the Crown's case in his trial before the Magistrate. In brief, plaintiff has successfully established the two elements, namely that the 1st defendant set the law in motion and that the proceedings concluded in his favour.
- [26) I now turn to the third element which was described in the **Beckenstrater** case (*supra*) as the main important one *viz*, whether the setting in motion of the law by the 1st defendant was not based on a reasonable and probable cause. Was there an honest belief in the guilt of the plaintiff? An honest belief is tested against the evidence available to the prosecution's counsel.
- [27] Evidence of three witnesses was given under oath in an endeavor to show that the plaintiff's prosecution was based on an honest belief of his guilty. All three witness testified that the plaintiff abruptly turned to the left and thereby hindered the right of way of the driver of the Astra motor-vehicle. The driver of the Astra was compelled by reflex action to swerve to his left lane in order to avoid a collision with the plaintiff who was driving a Colt. Unfortunately he knocked the Toyota that was in front of the Colt.

[28) The court noted that both in plaintiff's evidence-in-chief and under cross-examination, plaintiff never testified that he did satisfy himself

before turning to the right that there were no on-coming motor-vehicles. His emphasis was that he signaled by using his motor-vehicle indicator that he was turning to the right. An astute driver is expected to keep a proper look-out before taking the next lane for either a turn or over taking over and above signaling by either an indicator of the motor vehicle or hand.

[29) Plaintiff testified under cross-examination that one of the drivers was overloaded and drinking at the same time. In- chief, he testified that he drove smoothly and never witnessed any accident. When asked to go to the scene of the accident he declined on the ground that the officer that stopped him three kilometres away from the accident informed him that the peoples' tempers at the scene of the accident were high.

[30) One wonders how plaintiff was privy on the state of sobriety of the drivers and their overloading. According to his evidence-in-chief, he was never at the scene of accident and never aware of any accident while on his journey back home. The sho1t of it is that plaintiff could not testify on the state of sobriety and overloading of either the Astra or Toyota as it were from his own evidence.

[31) The evidence of the three witnesses by the defence show an honest belief on the guilty of the plaintiff. It cannot be held therefore that the prosecution of plaintiff was motivated by malice. That his motor vehicle was not actually involved in the collision is neither here nor there for purposes of establishing his negligence. Further, that he was

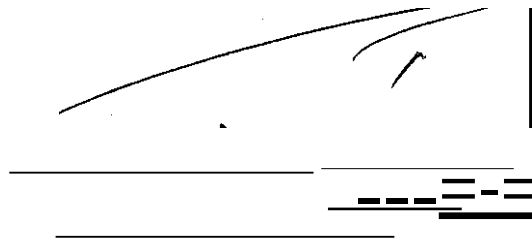
acquitted and discharged at the close of the Crown's case does not assist

him in light of the evidence presented which informed prosecution on his charge.

[32] In the final analysis, I enter as follows:

32.1 Plaintiffs cause of action is hereby dismissed.

32.2 Plaintiff is ordered to pay costs of suit.

A handwritten signature in black ink, appearing to be 'M. Dlamini', is written over a horizontal line. Below the signature, there are several horizontal lines of varying lengths and styles, including a solid line, a dashed line, and a thick solid line, which likely represent a signature block or a stamp.

M. DLAMINI

For Plaintiff

S. Mngomezulu of Mngomezulu Attorneys

For Defendant

M. M. Diamini of the Attorney General's Chambers