IN THE COURT OF APPEAL OF LESOTHO

Held at Maseru

C of A (CIV) NO. 50/2016

In the matter between:

'MAMPAI LESUPI	**APPELLANT**
and	
THE DIRECTOR OF PUBLIC PROSECUTION	**1ST RESPONDENT**
THE DIRECTORATE ON CORRUPTION AND ECONOMIC OFFENCES	**2ND RESPONDENT**
MINISTRY OF LAW AND CONSTITUTIONAL AFFAIRS	**3RD RESPONDENT**
THE ATTORNEY GENERAL	**4TH RESPONDENT**

CORAM : FARLAM, A.P.
LOUW, A.J.A.
CHINHENGO, A.J.A.

HEARD : 28 APRIL, 2017

DELIVERED: 12 MAY, 2017

SUMMARY

Malicious Prosecution – requisites for cause of action – prosecution must have terminated in plaintiff's favour – defendant must have acted without reasonable and probable cause and have been actuated by malice.

JUDGMENT

FARLAM A.P

[1] The appellant in this case brought an action for damages in the High Court against the respondents, in which she claimed a total of M162 million for malicious prosecution and malicious deprivation of liberty. The prosecution which was allegedly maliciously instituted related to two charges of defeating the ends of justice brought against the appellant in the High Court and to the sentence of imprisonment imposed by this Court on the appellant when it confirmed her conviction on one of the two counts, her appeal against her conviction on the other count having been upheld.

[2] She now appeals to this Court against the dismissal by **Peete J** of her claims.

[3] The appellant, who appeared in person, contended that the learned judge had misdirected himself in a number of material respects. In view of the fact that Counsel for the Crown accepts that the judge misdirected himself it is not necessary to set out

the misdirections complained of and it is clear that this Court will have to decide the case itself on the record.

[4] A plaintiff seeking the judgment in an action for malicious prosecution has to establish the following requirements, viz.

(a) that the prosecution of which he or she complains was instigated by the defendant;
(b) that it was terminated in his or her favour;
(c) that the defendant acted without reasonable and probable cause; and
(d) that the defendant was actuated by malice.

[5] It is clear that those parts of the appellant's claim which related to the charge on which her conviction was upheld by this Court and the consequent sentence of imprisonment which this Court substituted for the sentence imposed by the High Court are, as counsel for the respondents submitted, fatally flawed because its second requirement listed above has not been established: See further **Kolane v Attorney General LAC** (1990-1994) 73 at 74H.

[6] It remains to consider the appellant's malicious prosecution claim in so far as it relates to the court on which she was acquitted on appeal.

[7] The case against the appellant concerned two false entries made in the pre-trial remand record of a pending criminal case,

one made by the appellant, who was a serving magistrate on the staff of the Maseru Magistrate's Court at the time, and the other made by a colleague of hers, Mrs Itumeleng Letsika, who, so the Crown alleged, had acted pursuant to a common purpose with the appellant.

[8] All the relevant facts are set out in the judgment of this Court delivered by **Howie JA** in the appellant's appeal, *viz* **M Lesupi** and **I Letsika v the Crown (C of A (CRI) 10 of 2011)**, delivered on 27 April 2012. The judgment is reported see **Lesupi and Another v the Crown** LAC (2011-2012) 276 but only in respect of the question as to the appropriate sentence to be imposed on the appellant.

[9] The entries in question were to the effect that the charges in case 764/05 were withdrawn against accused no. 3, one Tseliso Steven Dlamini. The appellant admitted that she had made the first entry on page 17 of the record by inserting the words *'But charges withdrawn vs A3 only'* between the notations made on 25 August 2005 by the magistrate before whom the case came, Mrs Ralebese, (which read to the effect that the three accused were remanded to *'27/08/05'* [it was accepted that she had mistakenly written *'08'* but this had correctly replaced by *'09'*] and Mrs Ralebese's signature). The second entry, which was made on the next page of the remand record, page 18 by Mrs Letsika below the words *'Rem to 27/10/05'* and her signature, read *'Charges withdrawn against A3'* and was signed by Mrs Letsika. As a consequence of these entries Dlamini, who was on bail, wrongly

received a refund of his bail money, despite the fact that the charges against him had not really been withdrawn.

[10] In his judgment in the appellant's appeal **Howie JA** found that the Crown had not established the alleged common purpose between Mrs Letsika and appellant for this second entry to be made and her conviction on his count was accordingly set aside.

[11] In order for the appellant to succeed on this part of her case she had to show that the respondents, in fact the first and/or second respondents, acted without reasonable and probable cause and were actuated by malice.

[12] The main facts which were proved at the criminal trial relevant on this part of the case may be summarised as follows:

[13] At some point after 27 September 2005 Dlamini came to the magistrate's court and requested Mrs Mantsebo Abia, a clerk of the court employed in the criminal registry to refund his bail money. She asked her to put his request in writing, which he did, writing the date 10 January 2006.

[14] Mrs Abia drew the record of the case (together with the record of case 765/05, in which Dlamini was also an accused) and took it to the accounts office. The clerks in that office were not prepared to act on the appellant's note on page 17 of the record and wanted a record written more clearly. Mrs Abia

observed that the last entry in the record was one dated 27 September 2005 by Mrs Letsika, so she went to Mrs Letsika's office (which she shared with the appellant) in order that she could make a clearer re-recording of the withdrawal. Mrs Letsika was not in the office when Mrs Abia arrived. She told the appellant what the accounts clerks required and the appellant said that the entry was clear enough. Mrs Abia later returned to the office. When Mrs Letsika arrived Mrs Abia told her of the situation and she thereupon made the entry on page 18 of the record which has been quoted above. When this happened the appellant was not present.

[15] On 23 October 2006 the Director General of the second respondent, the Directorate of Corruption and Economic Offences, Mr Borotho Matsoso, interviewed the appellant. The record of the questions he put and the answers she gave reads as follows:

> *'With regard to the entry made by Letsika I was with her, I and Letsika checked the record and found that charges were withdrawn against A3 in another record which was always paired together with this one on which I wrote. I made this entry on the 27/09/05 after realizing that Mr. Kotele had applied for withdrawal of charge against A3.*
>
> *Question:* *Were you in Court when this was done?*
>
> *Answer:* *Yes but it was Magistrate Letsika who was presiding, I repeat that the withdrawal was made on the 27/09 and would like to stress that it is proper and normal that a magistrate can correct another magistrate's record and this does not matter whether one is sitting or not. There is no need to explain to the sitting magistrate, when this is made I did this change in the Court of Law and the accused and the Lawyers were there.*
>
> *Question:* *What actually happened on this day?*

Answer: *After an application, by the first accused in that case for [excusal] from remands was rejected by Magistrate Letsika, she asked if the accused were all in attendance, one of the accused said that Accused N0. 3 was not properly before the court because charges have been withdrawn against him. Magistrate Letsika noted then that charges have been withdrawn against Accused 3. It was then that I took the record and made an entry against Magistrate Ralebese's signature that the charges have been withdrawn against Accused No.3. What I did was just a reflection of what Letsika had already made in her record of that day's proceedings. I did this just to correct Magistrate Ralebese's omission.*

Question: *What do you know of the entry made in the record that A 3 in that record is Liteboho Pulumo and for that matter is clearly spelled out in the record?*

Answer: *To my understanding, Accused 3 was Stephen Dlamini, the Pulumo mentioned there could have been the prosecutor to my judgment not the accused, above all, the records have been mutilated and I want to see my entries or these entries that I made in these records. All of them should be here so that things could be clear.'*

(In the context it is clear that the other record referred to is the record in case 765/05.)

[16] As **Howie JA** pointed out in paras [23] to [29] of his judgment the account given by the appellant to Mr Matsoso was false in several important respects.

(1) The appellant did not inscribe her entry after Mrs Letsika made hers (it was the lack of clarity of the appellant's entry on page 17 which made Mrs Abia go to the office of the appellant and Mrs Letsika);

(2) Mrs Letsika's entry must have been made at some stage after 27 September 2005;

(3) Mrs Letsika's entry was made in the absence of the appellant;

(4) On 27 September only the first accused in case 764 was present and nothing was said about the withdrawal of charges against a co-accused;

(5) On Mrs Abia's evidence no reference was made by the appellant or Mrs Letsika to the record in case 765.

(6) The appellant's allegation that she checked the record in case 765 and found that the charges were withdrawn against Dlamini is not credible. In that record it was said that the charges were withdrawn against another accused, Sesoane.

(7) The entry made by Mrs Letsika was made in chambers, and not *'in the Court of Law and the accused and the Lawyers were there'.*

[17] Against this evidential background and especially in the light of the appellant's assertion, although it turned out to be false, that she and Mrs Letsika checked the record and that she was present when Mrs Letsika made her false entry, whereupon the appellant made her entry, I do not think that it is possible to

hold that the essential requirement of a lack of reasonable and probable cause on the part of the instigators of the prosecution has been established.

[18] In the light of this finding it is also clear in my view that the element of malice has not been established.

[19] In the circumstances I am satisfied that the appellant must fail on this part of the case also.

[20] The following order is made.

The appeal dismissed with costs.

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I.G. FARLAM
ACTING PRESIDENT

I agree: _____

W.J. LOUW
ACTING JUSTICE OF APPEAL

I agree:

_____

M. H. CHINHENGO

ACTING JUSTICE OF APPEAL

For Appellants	**:**	The appellant in person
For Respondents	**:**	Adv G.H. Penzhorn SC and Adv S A Seema