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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION

(FUNCTIONING AS LIMPOPO LOCAL DIVISION, THOHOYANDOU)

DATE: 21 January 2016

CASE NO: 002/2012

003/2012

215/2012

216/2012

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHERS JUDGES: NO

(3) REVISED

21/1/2016
DATE


SIGNATURE

In the matter between:

TS MEMUDZIVHADI

Plaintiff in Case No. 002/1012

TSHIFHIWA SAMUEL MASHAMBA

Plaintiff in Case No. 003/2012

TSHILIDZI PHINEAS SOGWADI

Plaintiff in Case No. 215/2012

ALUWANI STANLEY MULAUDZI

Plaintiff in Case No. 216/2012

and

MINISTER OF POLICE

First Defendant

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Second Defendant

MR MATHIVA

Third Defendant

JUDGMENT

SK HASSIM AJ

Introduction

- [1] The plaintiffs in case numbers 002/1012, 003/1012, 215/2012 and 216/2012 have each instituted a (separate) action against the Minister of Safety and Security (first defendant), the National Director of Public Prosecutions (second defendant) and MR Mathivha (third defendant) for compensation arising out of their alleged unlawful arrest and detention. The latter was the control prosecutor at the Vuwani magistrate's court where the plaintiffs appeared on various charges. These cases have been consolidated in view of the fact that the cause of action in each arose from the same incident

The two special pleas

- [2] Aside from challenging the merits of each plaintiff's claim, the second and third defendants raise two legal points in the way of a special plea. One is the non-joinder of the Minister of Justice and Constitutional Development¹ and the other is the misjoinder of the third defendant, the control prosecutor. It is not entirely clear whether the second and third defendants contend that there has been a misjoinder of the second defendant, the National Director of Public

¹ I have not overlooked the fact that the portfolio of Justice and Constitutional Development and that of Correctional Services is now one portfolio. This action commenced before the amalgamation of the two portfolios.

Prosecutions as well. The pleadings are not clear in this regard. I will assume that the second and third respondents are objecting to the joinder of the National Director of Public Prosecutions.

- [3] The same two special pleas are raised in each of the actions. The basis therefor is the same in each. This judgment covers all of the actions.
- [4] At the outset I say that I have reservations about whether the particulars of claim disclose a cause of action against all the defendants. I refrain from expressing myself on this issue. I am not called upon to do so. What I have to decide is whether the plea of the non-joinder of the Minister of Justice and Constitutional Development as well as the plea of the misjoinder of the National Director of Public Prosecutions and the control prosecutor are sound.

Non-joinder of the Minister of Justice and Constitutional Development

- [5] The case as argued before me for the second and third defendants in respect of the non-joinder is two-fold. First, because the Minister of Justice and Constitutional Development is the executive authority of the National Prosecuting Authority he must be cited as a defendant to the action. Second, because he is the employer of the third defendant who was acting within the course and scope of his employment at the relevant times.
- [6] The second and third defendants' case for the non-joinder of the Minister of Justice and Constitutional Development is based on section 1 read together with section 2(1) of the State Liability Act 20 of 1957 (as amended).
- [7] In Minister of Justice and Constitutional Development and Others v Moleko 2009 (2) SACR 585 (SCA) at para 18 it was found that the National Director of Public Prosecutions and not the Minister of Justice and Constitutional Development was responsible for the decision to prosecute the plaintiff, who also claimed damages for malicious prosecution. Ms Tsatsi, who appeared for the second and third defendants attempted to persuade me that the decision of the Supreme Court of Appeal in The Director of Public Prosecutions and the

Minister of Justice and Constitutional Development v Andrew Lionel Phillips² (as opposed to the decision in Moleko) is authority for a case that the Minister of Justice and Constitutional Development must be joined as a defendant to the action. She argued in the heads of argument and in her oral argument that in Phillips the Minister of Justice and Constitutional Development was held liable for the acts and omissions of the National Prosecuting Authority in that the Minister of Justice and Constitutional Development in that case was ordered to pay costs of an unsuccessful appeal. As I understand the decision in Phillips the question of joinder was neither raised nor decided. In any event Phillips dealt with the permanent stay of a prosecution. In my view Phillips does not assist the second and third respondents. Moleko is in point- it also concerns a malicious prosecution.

- [8] Based on the decision in Moleko I find that it was, and is, not necessary to join the Minister of Justice and Constitutional Development to the action. Accordingly the special plea of non-joinder must fail.

Misjoinder of the second defendant

- [9] Based also on the decision in Moleko I find that the special plea of the misjoinder of the National Director of Public Prosecutions must also fail.

Misjoinder of the third defendant

- [10] A wrongdoer is liable in delict to the person who suffers a loss arising out of his wrongful conduct. An employer is vicariously liable for the wrongful acts of its servants provided the elements for vicarious liability exist. This does not mean that the wrongdoer is absolved of liability. The plaintiffs seek to hold the alleged wrongdoer (namely the third defendant) liable for the alleged wrongful act/s committed by him. The plaintiffs also seek to hold the alleged wrongdoer's employer liable. Not only do the plaintiffs seek damages against the employer, the National Director of Public Prosecutions, they also seek

² Case No. 043/04 delivered on 30 November 2004.

damages against the third defendant personally. He therefore has a legal interest in the subject matter of the litigation which may be affected prejudicially by the judgment of the court.³ Accordingly the special plea of misjoinder of the third defendant must also fail.

[11] I therefore make the following order:

- (a) The special plea of the non-joinder of the Minister of Justice and Constitutional Development is dismissed.
- (b) The special plea of the misjoinder of the second and third defendants is dismissed.
- (c) The second and third defendants are ordered to pay the costs.



S K HASSIM
Acting Judge: Gauteng North High Court
21 January 2016

Date of Hearing:	31 August 2015
Date of Judgment:	21 January 2016
For plaintiff:	Adv GJ Scheepers
For second and third defendants:	Adv EK Tsatsi

³ Henri Viljoen (Pty) Ltd v Awerbuch Bros 1953 (2) SA 153 (O).