IN THE HIGH COURT OF SOUTH AFRICA

[EASTERN CAPE LOCAL DIVISION: MTHATHA]

CASE NO. 1296/2016

Date heard: 16 October 2019

Date delivered: 05 November 2019

In the matter between:

SIPHELO FUNANI **Plaintiff**

And

NATIONAL DIRECTOR OF PUBLIC PROSECUTION **Defendant**

JUDGMENT

ZONO AJ

INTRODUCTION

[1] The plaintiff instituted an action for damages against the Minister of Police for unlawful arrest and detention on the one hand, on the other for malicious prosecution against the National Director of Public Prosecutions (NPA). In respect of the claim

for unlawful arrest and detention against the Minister of Police the claim was under two heads, namely:

(i) Contumelia - R 100 000-00

(ii) Loss of amenities of life - R10 000-00

In respect of the claim for malicious prosecution against NPA the claim is under two heads namely:

(i) Malicious prosecution - R300 000-00
(ii) Contumelia - R300 000-00

HISTRORY OF PLEADINGS

[2] Plaintiff's pleaded case is that he was unlawfully and wrongfully arrested and detained by members of the South African Police Service on 21 May 2012 and subsequently released on warning to appear at Ngqeleni Mgistrate's Court on 11 June 2012. He further avers that on 11 June 2012 and at Ngqeleni Magistrate's Court the prosecutor, acting within course and scope of his employment with the National Director of Public Prosecutions, wrongfully and maliciously set the law in motion by laying a false charge of a breach of a protection order against him without any reasonable and justifiable cause. The NPA, when prosecuting the plaintiff had no reasonable belief in the truth of the information given by his wife but nonetheless proceeded with the prosecution without investigation and with the sole intention of defaming the plaintiff which has a resultant effect of injuring his reputation and dignity. Lastly he avers that, as a result of lack of evidence the said charges could not be sustained and the plaintiff was found not guilty and was discharged on 10 September 2012. That concludes plaintiff's averments in the Particulars of claim.

[3] The claim is defended and in so doing on 12 September 2019 the defendants delivered their Plea. The defendants aver that a certain warrant officer Ntshongwane telephonically called the plaintiff advising him about the case his wife had opened against him and the officer arranged to meet with him as he was in Cape Town. On his return the plaintiff went to the police station and made a statement to the police about the incidents of the case. The docket was thereafter

referred to the prosecutor for decision and a decision was lawfully taken by the public prosecutor to prosecute the plaintiff on a charge of having contravened Section 17(A) read with Section 1, 7, 8 and 18(1) of the Domestic Violence Act 116 of 1998 in that the plaintiff breached or contravened a term of a Protection Order that was confirmed and made final on 30 April 2012. The plaintiff was subsequently warned to appear at Ngqeleni Magistrate's Court on 11 June 2012. Plaintiff's case was postponed on several occasions until 10 September 2012 when it was finalised.

[4] On 7 June 2018 the plaintiff effected amendment to his particulars of claim, in terms of which he jettisoned the claim against the Minister of Police for unlawful arrest and detention. All averments relating to the claim for unlawful arrest and detention were sifted out, leaving in the particulars of claim those averments relating to the malicious prosecution. Effectively what remained was a claim against the NPA. During trial the only party against whom the matter was proceeded with was the National Director of Public Prosecutions.

IN COURT

[5] At trial stage, the dispute between the parties narrowed itself down to the claim for malicious prosecution. Shorn of all other evidential issues, parties pre trial minute dated 3 September 2019 records Issues for determination as follows: *The issue for determination as whether there was probable cause for defendant to prosecute*. No application for separation of issues was made. Parties agreed to proceed on both merits and quantum. It was recorded that plaintiff bore duty to begin. Only plaintiff led evidence. After plaintiff led evidence, the plaintiff closed its case. The defendant did not lead any evidence. The matter was argued on the basis of plaintiff's evidence. I shall now turn to deal with plaintiff's evidence.

[6] The plaintiff testified that on 5 May 2012 he was at his Ngqeleni home when his first wife, Mangwanya Betriece Funani arrived, in the company of their son, Thozamile. At the time of arrival of the plaintiff's wife and Thozamile, the plaintiff

was with the herder, sitting in the sitting room. It was on a very cold day. On their arrival Thozamile left the door opened and the heater that was the source of warmth in the room was blown by the cold wind that was coming through the opened door. Upon instructing Thozamile to close the door, Thozamile became staborn and refused to close the door. Plaintiff instructed Thozamile to close the door three times but that instruction was never heeded. The plaintiff consequently stood up to close the door himself. As the plaintiff was going towards the door, Thozamile grabbed him and a struggle ensued as the plaintiff was closing the door, Thozamile was opening it. The plaintiff gave up and sat down in the cold room.

[7] Sequel to that Thozamile called the police who did not come and as a result of that plaintiff's wife and Thozamile went back to Mthatha. The plaintiff emphasized that during the whole ordeal between Thozamile and him, nothing was said between him and his wife. As the plaintiff and his wife are not living together, they had an appointment to discuss family finances, and the fact that they left caused him to be confused as he had not achieved the purpose of the meeting, namely to talk to his wife. He testified that he is not in good terms with Thozamile, especially after the plaintiff got married to the second wife. He testified that Thozamile does not like his second wife and her children. He further stated that as he is a man with some assets, Thozamile is so much concerned and jealousy about that and does not want them to be shared. He attributed sour relations between him and Thozamile to gluttony and greed on the part of Thozamile. Thozamile is concerned about the inheritance. Plaintiff described relations with his wife as sweet. He stated that Thozamile badly influenced his first wife against him.

[8] The plaintiff revealed that there is a protection order against him in terms of which his first wife was granted relief in the following terms: *not to assault, threaten to assault or kill, insult, shout, harass, intimidate applicant, not to evict or lock out the applicant from the premises……, not to destroy, damage, sell or dispose of any items, stock or property without consent of the applicant.* The court order was obtained on 30 April 2012. The plaintiff confirmed knowledge of the court order and its terms. It further transpired that there was a criminal case emanating from the breach or contravention of the term of a protection order dated 30 April 2012. It is

the aforementioned criminal proceedings that gave rise to the present proceedings. The plaintiff is of a strong view that it is Thozamile who influenced his first wife to open a criminal case against him. He mentioned that he at no stage, contravened a term of the protection order aforesaid. The plaintiff went on to explain the negative impact caused by the opening of the criminal case against him and stated that he suffered extreme humiliation to his family, neighbours and fellow congregants. His dignity was trumped upon. The fact of being called an accused person stigmatized him. That concluded his evidence in chief.

[9] The counsel for the defendant decided not to cross examine. Following from the question from then court, the plaintiff testified that the prosecutor should have shown that he was wrongly accused and should have foreseen that. He should have known that his wife was being influenced by Thozamile. No basis was laid for that notwithstanding probe to that effect. The plaintiff thereafter closed his case. The defendant chose not to call any witness and consequently closed its case. It is from this evidence that I have to determine whether or not the plaintiff has made out a case for judgment in his favour both on merits and quantum. Facts that are common cause and those that are in dispute were crystalized.

[10] It became a common cause that the defendant set the law in motion by instigating or instituting the criminal proceedings. The defendant made common cause with the plaintiff that criminal proceedings against the plaintiff terminated in plaintiff's favour. The plaintiff was altimately found not guilty. I need not deal any further with the aforesaid issues, save only when dealing with the law applicable in this case.

[11] It is very much in dispute that the defendant acted without reasonable and probable cause and with malice. Damages as they are a consequential requirement of liability, was a disputed fact.

[12] An anterior question has to be asked and answered with reference to applicable legal principles. Who bears the onus of proof? What is required to be proved in the light of the facts and nature of the present case and evidence already tendered? The basic rules governing the incidence of the onus of proof have been set out in the case of **Pillay v Kristine and Another 1949 AD 946 at 941-2.** The three rules are:

"(a) If a person claims something from another in a court of law, then he has to satisfy the court that he is entitled to it;

(b) ……

(c) He who asserts, proves and not he who denies, since a denial of a fact cannot naturally be proved provided that it is a fact that is denied and that the denial is absolute." This is a general legal principle generally applicable to matters serving before a court of law.

[13] In order to succeed in an action for malicious prosecution **the plaintiff must show the** following:

(a) That the defendant instituted or instigated proceedings;

(b) That the defendant acted intentionally or with animus iniuriandi;

(c) That the defendant acted without reasonable and probable cause;

(d) That the defendant was actuated by an improper motive or malice;

(e) That the proceedings terminated in the plaintiff's favour, and

(f) That plaintiff suffered damage.[1] ***Amler's precedents of pleadings, seventh edition at page 274 deals*** *with the incidence of onus of proof as follows: To succeed with a claim for malicious prosecution, a claimant must allege and* ***prove*** *that*

(a) the defendants set the law in motion – they instigated or instituted the proceedings;

[1] The law of South Africa. Vol 15, 2nd ad. Part 2 page 195.

(b) the defendants acted without reasonable and probable cause;

(c) the defendants acted with malice (or animo iniuriandi); and

(d) the prosecution has failed[2] *. This put hand paid to the question of onus of proof in the present case, whether or not parties have agreed, plaintiff bears onus of proof.*

[14] I have, in the preceding paragraphs indicated that it was conceded by defendant's counsel during argument that instigation of criminal proceedings was at the instance of the defendant, and that the proceedings terminated in plaintiff's favour. That concession accords with the defendant's plea. Having made that concession defendant's counsel went further and submitted and that the plaintiff still has a duty to prove to the court that the defendant, when instigating the criminal proceedings did that without any reasonable and probable cause; that the defendant acted with malice or with the intention to injure the plaintiff. He argued strongly that the plaintiff has failed to prove the elements, and therefore the claim must fail.

[15] On the other hand plaintiff's counsel seem to have pinned his faith on the fact that the plaintiff was acquitted of the criminal charges against him. He further submitted that the fact of the acquittal was enough a proof that the defendant did not have enough information in the first place and should not have prosecuted the plaintiff. That showed, so the argument went, that the defendant acted without reasonable and probable cause. The upshot of his submission is that the plaintiff has succeeded to prove, by reason of the acquittal, that the defendant acted without reasonable and probable cause, and ultimately has proved all the necessary elements of a claim for malicious prosecution. With regard to the question of malice, he submitted that it exists side by side with the element of acting without reasonable and probable cause. He understood, so he argued, the element of malice to be part of the element of acting without reasonable and probable cause.

[2] Minister of Justice and Constitutional Development v Moleko 2008(3) ALL SA 47 (SCA)

[16] Submissions by counsels depend entirely on whether or not they are congruent with the evidence and the law. I may at this stage state that I had fully set out plaintiff's evidence deliberately without sifting salient facts so that the nature, quality and its relevance may be viewed objectively side by side with the applicable law.

[17] Nowhere in the whole tenor of evidence in chief did the plaintiff criticise the action and motive of the relevant member of prosecution. I say evidence in chief because there was no cross examination. Absence of reasonable and probable cause can only be proved with reference to subjective and objective elements. Not only must the defendant has subjectively had an honest belief in the guilt of the plaintiff, but his or her belief and conduct must have been objectively reasonable, as it would have been exercised by a person using ordinary care and prudence.[3] The plaintiff must prove that the proceedings were instituted without reasonable and probable cause.[4] The test is objective in that when it is alleged that a defendant had no reasonable cause for prosecution it means that he or she did not have such information as would lead a reasonable person to conclude that the plaintiff had probably been guilty of the offence charged.[5] I was never referred to any information by the plaintiff that was at the disposal of the defendant at least at the time of instigation of the proceedings. I am unable to objectively say the information at the disposal of the defendant when criminal proceedings were instituted was insufficient as I am not privy to what was or was not at the disposal of the defendant at the relevant time. I find that the plaintiff has failed to discharge a duty rested on him to prove that the defendant at the relevant time did not have such information as would lead a reasonable person to conclude that the plaintiff had probably been guilty of the offence.

[18] With regard to the subjective element, if despite his or her having such information the defendant is shown not to have believed in plaintiff's guilt the subjective element comes to play and disproves the existence of the reasonable and probable cause. Again it is underscored that it is the plaintiff who bears onus to

[3] LAWSA (supra) Page 199; Moleko (supra) Page 20.
[4] Prinsloo and Duette v Newman 1975(1) SA 481(A).
[5] LAWSA Vol 15 Part2 (supra) Page 201.

prove that this did occur. It is difficult if not impossible to prove this element without first have regard and reference to the first element of absence of reasonable and probable cause (objective element). These two elements feed off each other. One does not exist without the other. To prove absence of reasonable and probable cause the plaintiff must prove that the defendant either did not honestly believe that the plaintiff was guilty of the offence charged or if the defendant did have such belief and even if he or she held it honestly, that such belief was not based on information which would persuade a person of ordinary discretion and prudence to believe in the plaintiff's guilt. The plaintiff did not even attempt to deal in his evidence with the belief the defendant had when instigating proceedings. I am unable to discern from plaintiff's evidence whether or not defendant harboured honest belief in the guilt of the plaintiff. The plaintiff has failed to prove the subjective of element as well. The upshot of that failure to prove this element is that the plaintiff has failed to prove that the defendant acted without reasonable and probable cause.

[19] I turn to deal with plaintiff's submission that malice does not have to be proved because it is part of the absence of reasonable and probable cause. I disagree. As I have outlined in this judgment, malice or improper motive on the part of the defendant is an independent or standalone requirement of malicious prosecution claim. It is incumbent upon the plaintiff to prove that the defendant was actuated by an improper motive or malice. This submission was a manifestation and recognition of plaintiff's failure to prove this element. The plaintiff did not seek to argue that this element was proved, but only argued that it is piggy backed by and implied in the requirement of absence of reasonable and probable cause. Even if I was wrong in my analysis of requirement of absence of reasonable and probable cause, plaintiff's case would still fail on this point and implied concession.

[20] Although the expression "*malice*" is used, the claimant's remedy in a claim for malicious prosecution lies under the *actio injuriarum* and that what has to be proved in this regard is *animus injuriandi.* [6]

[21] A person who acts in a gross negligent and reckless manner*, and does so in* the furtherance of his or her own interest without due regard to the rights of others and careless as whether he or she interferes with the liberty of another, will be regarded as having been influenced by improper motives equivalent to malice.[7] If the defendant had any motive other than that of having the plaintiff convicted he or she was actuated by malice. The plaintiff did not in his evidence suggest that the defendant had motive other than of getting plaintiff arrested. Even during argument no suggestion or what so ever was made to that effect. If plaintiff failed to prove his case against the defendant who else should have? It is the plaintiff who must face the consequences of not having enough evidence to hold the defendant liable.

[22] Quite apart from other elements, the plaintiff must prove that the defendant had the necessary *animus iniuriandi*.[8] *Animus iniuriandi* includes not only the intention to injure but also consciousness of wrongfulness.[9] No attempt was made both in evidence and in argument that defendant had intention to injure plaintiff, accompanied by consciousness of wrongfulness. Plaintiff's evidence was devoted to the squabbles and relations the plaintiff had with his son Thozamile on one hand, on the other with his first wife. The remainder of it was spent on speculation and conjecture. It was based on no version of fact that the prosecutor concerned should have known that plaintiff's first wife was influenced by his son Thozamile to lay criminal complaint against him.

[23] Plaintiff's submission that because the plaintiff was acquitted or found not guilty is evidence enough to prove that the defendant acted without reasonable and

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[6] Matshabane v Minister of Police and Another (967/2018;CA99/2018) [2019] ZAECMHC 63 (4 October 2019)
[7] Heyns v Venter 2004(3) SA 200(T) at 208 – 209.

[8] Prinsloo v Newman (supra) at 492; Moaki v Reckitt and Colman (Africa) Ltd 1968(3) SA 98 (AD) 105.
[9] LAWSA Vol15 (supra) Page198.

probable cause is devoid of any merit. The failure of a case both in Civil and Criminal proceedings is not by itself a proof that a party who brought those proceedings acted in absence of reasonable and probable cause. To the contrary authorities show that a person who instigates a prosecution will not be liable of the wrong offence.[10] The termination of proceedings in plaintiff's favour is a requirement on its own, independent of any other, which needs to be proved.

[24] Having found that some requirements have been conceded by the defendant and others have not been proved by the plaintiff, a party on whom the entire onus lie, I find that the concession of other requirement is not helpful to plaintiff's case. The test of proving requirements is conjunctive and not disjunctive. For a successful claim of malicious prosecution plaintiff must prove that all the requirements are cumulatively in existence. They must co exits with each other as they are inextricably linked to or dependent upon one another for a successful claim of this nature. Failure to prove one requirement will lead to a dismissal of plaintiff's case. Having found that not all the requirements of the claim have been satisfied, I accordingly find that plaintiff's claim cannot succeed with costs.

[25] **In the result the following order shall issue.**

(a) Plaintiff's claim is dismissed with costs.

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A.S ZONO

JUDGE OF THE HIGH COURT (ACTING)

APPEARANCES

For the plaintiff : Adv Mhlawuli

[10] Sinkwa v Koning Kramer 1994 NPD 321 at 418; LAWSA Vol 15 (supra) Page 196.

Instructed by	:	Mgxaji Zazaza Attorneys MTHATHA
For the defendant	:	Mr Mbiko
Instructed by	:	The National Director of Public Prosecution c/o State Attorney MTHATHA