REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT

JOHANNESBURG

CASE NO: 03416/2013

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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In the matter between:

TLOU KLEINBOOI CHOLO Plaintiff

And

MINISTER OF SAFETY AND SECURITY Defendant

JUDGMENT

WEINER J:

Introduction

1. The plaintiff, who is a police officer, claims an amount of R940 000 from the defendant based on an alleged malicious prosecution by members of the South African Police Services ("SAPS"). The plaintiff initially also claimed damages in respect of unlawful unrest and detention but this claim was previously dismissed.

2. The claim relates to the plaintiff's arrest and prosecution for involvement in a breaking-in and theft at the SAPS offices in Germiston in which precious stones were stolen.

The test for malicious prosecution

3. In order to succeed, the plaintiff must prove:-
    a. That the defendant instigated or instituted the proceedings against him;
    b. That the defendant acted without reasonable and probable cause;
    c. That the defendant acted *animo iniuriandi*; and
    d. That the prosecution against the plaintiff has failed.

    See ***Minister of Justice and Constitutional Development and Others v Moleko*** 2009 (2) SACR 585 SCA at [8].

The facts

4. The first investigation officer, Warrant Officer Fritz ("Fritz"), gave the following evidence, which is common cause:-

4.1. He acted upon a complaint by a JA Pretorius, a member of the SAPS, who had opened a case in respect of an incident of breaking in at the SAPS offices in Germiston;

4.2. The plaintiff's motor vehicle with registration number KDX917GP was identified by a security guard who was on duty when the incident occurred. The security guard made a statement in which the registration number was contained, and it was ascertained that the vehicle belonged to the plaintiff.

4.3. On the 3rd of October 2005 the plaintiff, who was on duty as a police officer, was asked to report to the Norwood police station.

4.4. The plaintiff was questioned and he, with the SAPS, went to the plaintiff's friend's, Daniel Magau's (Magau), house where the plaintiff's vehicle was parked.

4.5. In the vehicle, at Magau's house in Roodepoort, tools and two grinders, and other "housebreaking" tools were found.

4.6. The plaintiff was thereafter arrested.

5. The new investigation officer Meshak Naohikwa Makhubo ("Makhubo"), testified that:-

5.1. He received a docket with certain exhibits, which were handed in and registered under the SAP 13.

5.2. The grinder that was found in the plaintiff's car was sent for forensic investigation and he received a report that this was the grinder used in the breaking in.

The above factors are common cause.

6. The plaintiff, in his particulars of claim, sets out that on or about the 4th of October 2005 and at or near Germiston police station, Inspector Fritz and other servants of the defendant wrongly and maliciously set the law in motion by laying false charges against the plaintiff, that of housebreaking and theft and illegal possession of precious stones, by giving the following false information to the prosecutor:-

6.1. That the plaintiff's vehicle was involved or used in the commission of a crime at the premises of the gold and diamond unit of the SAPS;

6.2. That the plaintiff was involved in the breaking in of the premises of such unit and that he stole precious stones that were being kept there;

6.3. That when laying these charges and getting such information, the defendant had no reasonable and probable cause for so doing, nor did he or they have any reasonable belief in the truth of the information given;

6.4. As a result thereof, the plaintiff was unlawfully detained on the 3rd of October 2005, and released on bail on or about the 10th of October 2005.

6.5. As a result of the defendant's conduct, the plaintiff was prosecuted in the Germiston Magistrates Court, but was acquitted on the 23rd of June 2009.

7. In regard to the evidence of Fritz and the plaintiff, the main factual dispute is whether or not, at the time Fritz asked the plaintiff where his vehicle was, the plaintiff immediately told him that it had been used by his friend, Daniel Magau (the plaintiff's version), or whether, as the defendant states, it took some two hours before the plaintiff gave this information. The relevance of this dispute is that Fritz bases one of the reasons for the arrest of the plaintiff on the fact that the plaintiff did not cooperate by telling them where his vehicle was. This therefore laid suspicion at the door of the plaintiff. In addition, it appears that the plaintiff did not offer any information as to where he was at the time that his vehicle was used in the break-in.

8. The plaintiff was not identified at an identification parade by the security guard. The plaintiff accordingly relies on the fact that the police did not have sufficient evidence to refer the matter to a prosecutor for decision on whether to prosecute or not, and in so doing, they used the false statement of Tshabalala to implicate the plaintiff.

9. According to the plaintiff, the investigation officer, Fritz, and other members of the SAPS, did more than one would expect from police officers, in that they, *inter alia,* furnished the prosecutor with a false statement of one Mr. David Tshabalala (Tshabalala), which implicated the plaintiff.

10. Alternatively, it is alleged that Fritz ought to have known that there was no evidence to prove the plaintiff's guilt, because there was no evidence linking the plaintiff to the crime scene other than the fact that his car was suspected of being involved in the crime.

<u>The law</u>

11. In ***Relyant Trading (Pty) Ltd v Shongwe*** [2007] 1 ALL SA 375 (SCA), the SCA stated the following at [14]:-

> *"The requirement for malicious arrest and prosecution, that the arrest and prosecution be implemented "in the absence of reasonable and probable cause", was explained in* ***Beckinstrate v Rocher*** *1955 (1) SA 129 A at 136A-B as follows:-*
>
> > *'When it is alleged that a defendant had no reasonable cause for prosecuting, I understand this to mean that he did not have such*

> *information as would lead reasonable man to conclude that the plaintiff had probably been guilty of the offence charged; If despite his having such information, the defendant in shown not to have believed in the plaintiff's guilt, the subjective element comes into play and disproves the existence, for the defendant, of reasonable and probable cause.'*

12. The plaintiff relies on the decision of Hawkins J in ***Hicks v Faulkener*** 8 QBD 171, cited with approval by Gardener J in ***Waterhouse v Shields*** 1924 CPD 155 at 162:-

> *"I should define reasonable and probable cause to be an honest belief in the guilt of the accused based upon a full conviction founded upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinary, prudent and cautious man, placed in the position of the accused, to the conclusion that the person charged was probably guilty of the crime imputed."*

13. Further, in ***Waterhouse*** *(supra)* at 168, in dealing with malice and improper motive constituting malice:-

> *"If a man acts in a grossly negligent and reckless way, acting in the furtherance of his own interest without due regard to the rights of others, and careless as to whether he interferes with the liberty of another person or not, I infer that he has been actuated by an improper motive".*

14. The plaintiff has submitted that Fritz's conduct was perpetuated by an improper motive, or that he must have foreseen the possibility that he was acting wrongfully, but nevertheless continued to still act, reckless as to the consequences of his conduct and that he therefore arrested the plaintiff without

sufficient evidence linking him to the crime. As such, he was initiating the prosecution against the plaintiff, which might lead to the plaintiff's right to liberty and dignity being infringed.

15. The evidence against the plaintiff upon which the defendant relied was the following:-

15.1. His vehicle was used in the commission of the offence;

15.2. According to the investigating officer, it took some two hours before he informed the police where his vehicle was;

15.3. The implements and tools involved in the breaking in at the SAPS unit were found in his car;

15.4. Certain cell phone records of the plaintiff (which were not proved in the case and are not therefore accepted as the truth of their contents) were put to the plaintiff in enquiring whether he was in Germiston on the date in question. The plaintiff denied being in Germiston. He however admitted that he had been asked by investigating officer Makhubo if he had been in Germiston, and in evidence he did not explain where he was at the time in question.

15.5. Makhubo testified that after further investigation he took a statement in terms of Section 204 of the Criminal Procedure Act

from Tshabalala who implicated the plaintiff (Tshabalala was not called to dispute either the taking of the statement or the truth of its contents).

16. Makhubo confirmed that he did object to bail being granted to the plaintiff on the basis that:-

    16.1. The plaintiff was a police officer and there was reason to believe that he might interfere with the investigation;

    16.2. The serious nature of the crime committed in the police building by police officers;

    16.3. The tools and implements that were found in the plaintiff's motor vehicle.

17. At the criminal trial, for reasons totally unknown to this court, and presumably the magistrate court which heard the trial, neither Fritz nor Makhubo were called to testify. Both the security guard and Tshabalala denied the evidence contained in their statements. Again for reasons unknown, the matter was left as such and the accused were acquitted. There was no attempt by the prosecution to examine the witnesses on their previous inconsistent statements, nor was there an attempt by the prosecutor to call Makhubo and other witnesses as to the circumstances under which the statements were taken.

18. Although the claim for unlawful arrest and detention was dismissed, it forms background to the malicious prosecution as it is one of the elements in the chain of events.

19. In ***Duncan v Minister of Law and Order*** 1986 2 SA 895 A the court held that the police officer must have reasonable suspicion in terms of Section 40 of the Criminal Procedure Act. It is sufficient if the person affecting the arrest intends to deal with the arrested person under the provisions of Section 50. It follows that for the purpose of lawful arrest, it is sufficient that the person affecting the arrest should do so with the intention of conducting further investigation and, depending on the result of such investigation, to charge or release the arrestee. Section 40(1)(b) provides that the arresting officer must have a reasonable suspicion that the suspect had committed an offence referred in Schedule 1 of the Act. The test as to whether a reasonable suspicion could have existed is an objective one – that of the reasonable person with the knowledge and experience of a peace officer, based upon the facts and circumstances then known to the arresting peace officer.

20. The defendant submitted that on the evidence of the defendant's witnesses, more particularly Fritz, the fact that the whereabouts of the plaintiff's vehicle were concealed from the police for approximately two hours and tools thereafter being found in the plaintiff's vehicle, in an offence which was considered to be serious involving a police officer, there was a reasonable suspicion that the plaintiff had committed an offence.

21. Further investigation then conducted by Makhubo, involved the forensic evidence of the grinder being used in the offence, the plaintiff's failure to give a satisfactory answer in regard to his cell phone being used in the Germiston area on the date of the incident, and the statement of Tshabalala. These together gave him sufficient information to hand over to the prosecutor, for the prosecutor to decide whether or not to prosecute. It is apparent that the prosecutor believed that there was sufficient evidence based upon what he received.

22. Tshabalala's statement is in very precise detail describing dates, times, various persons by name, amounts of money, makes of cars, security codes, etc. He places the plaintiff on the scene and describes him as a participant in the planning and execution of the robbery.

23. Makhubo gave evidence that he had taken this statement from Tshabalala. Tshabalala was not called by the plaintiff to dispute either the taking of the statement or the contents thereof. Accordingly, one must accept, for the purposes of this action, that Makhubo obtained this statement, which he had no reason to disbelieve, having taken into account the additional factors set out in paragraph 15 above, Makhubo believed that there was sufficient evidence to hand over to the prosecuting authorities to enable them to decide whether or not to prosecute.

24. The plaintiff needs to prove, in regard to the liability of the defendant, that the police officers did more than one would expect from a police officer in the circumstances, in the sense of acting their own interests, against those of the

plaintiff, and falsifying affidavits. In the present case, it appears that what the police officers did was to give, what they believed to be, a fair and honest statement of the relevant facts to the prosecutor, leaving it to the latter to decide whether to prosecute or not. See ***Prinsloo and Another v Newman*** 1975 (1) SA 481 A at 492 C-F and 495A.

25. In this regard, in ***Minister of Justice and Constitutional Development and Others v Moleko*** *(supra)* it was held:-

25.1. That the plaintiff has to prove that the defendant instigated or instituted the proceedings against him. The plaintiff alleges that the defendant instigated the proceedings by providing the officers and the prosecutor with information that was not a fair and honest statement of relevant facts.

25.2. In addition, the plaintiff must show that the police acted without reasonable and probable cause.

25.3. That the plaintiff acted *animus iniuriandi*. The onus is on the plaintiff to prove malice in the form of intention to injure. This requires that the defendant/police officer acted with knowledge that what he was doing was wrongful or at least that he was reckless as to the consequences of his conduct. See ***Relyant Trading Ltd v Shongwe*** *(supra)* para 5 and ***Minister of***

Justice v Moleko *(supra)* at para 61 to 65. The plaintiff has failed to prove this.

25.4. That the prosecution against the plaintiff has failed.

26. In regard to the first requirement the plaintiff must show what part the police played in the alleged malicious prosecution. As was held in ***Prinsloo*** *(supra)* if the police officer simply gives a fair and honest statement of the relevant facts to the prosecutor, it cannot be held that he has gone further and actively assisted the prosecution beyond his duty as a police officer. Having regard to the statement made by Tshabalala (even though he reneged on same at the trial) and the other factors referred to in paragraph 15 above, in my view, there was sufficient evidence before the police at the time for them to have a reasonable belief in the matter and to therefore hand it over to the prosecution.

27. In dealing with the absence of reasonable and probable cause, as was explained in ***Depenstrater v Rocher and Churnison*** *(supra)* at 136A-B:-

> *"When it is alleged that a defendant had no reasonable cause for prosecuting, I understand this to mean that he did not have such information as would lead a reasonable man to conclude that the plaintiff had probably been guilty of the offence charged; if, despite his having such information, the defendant is shown not to have believed in the plaintiff's guilt, a subjective element comes into play and disproves the existence, for the defendant, of reasonable and probable cause."* See also ***Relyant Trading (Pty) Ltd*** *(supra)* at [14].

28. It follows that a defendant will not be liable if he held a genuine belief, founded on reasonable grounds, in the plaintiff's guilt. See ***Relyant Trading*** *(supra)* at [14].

In my view, any reasonable person in the position of both Officers Fritz and Makhubo, on the information available to them, would have had a reasonable suspicion that the plaintiff was involved in the commission of the offence.

29. It follows from ***Beckinstrate v Rocher*** *(supra),* as confirmed in ***Relyant Trading v Tshongwe*** *(supra)* that a defendant will not be liable if he or she held a genuine belief founded on reasonable grounds, in the plaintiff's guilt. Where reasonable and probable cause for an arrest or prosecution exists, the conduct of the defendant instigating it, is not wrongful.

30. In regard to *animus iniuriandi*, this includes not only the intention to injure, but also consciousness of wrongfulness. In this regard "*animus injuriandi (intention) means that the defendant directed his will to prosecuting the plaintiff (and thus infringing his personality), in the awareness that reasonable grounds for the prosecution were (possibly) absent, in other words, that his conduct was (possibly) wrongful (consciousness of wrongfulness). It follows from this that the defendant will go free where reasonable grounds for the prosecution were lacking, but the defendant honestly believed that the plaintiff was guilty. In such a case the second element of dolus, namely of consciousness of wrongfulness, and therefore animus injuriandi, will be lacking. His mistake therefore excludes the existence of animus injuriandi."* See ***Minister of Justice and Constitutional Development and Others v Moleko*** *(supra)* at [63].

31. In my view, the plaintiff has failed to prove any of the elements of the offence other than that the prosecution failed.

32. I do not have to deal with quantum in view of my decision but the following observations in this regard, are made:-

    32.1. Although the plaintiff claimed R45 000 in respect of legal expenses, his evidence did not support this claim. He could not show any evidence of what he paid, how much he paid and when he paid. All he could say was that he paid a total amount of about R40 000 in cash to the attorney. The attorney was not called to confirm this.

    32.2. The plaintiff claims damages for emotional and psychological stress but provided no evidence other than that he was upset/stressed when he was arrested in front of his colleagues. There was no medical expert to assess precisely what emotional stress he had suffered or at all, and there was no quantification of this claim at all.

33. In my view, even if he had succeeded on the merits, he has failed to prove the basis upon which damages should be awarded, or the amount thereof.

Accordingly, the following order is made:-

1. The plaintiff's action is dismissed with costs.

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WEINER J

Counsel for the Plaintiff: Adv N Zwane

Plaintiff's Attorneys: Manugeni Inc.

Counsel for the Defendant: Adv S Mathabathe

Defendant's Attorneys: The State Attorney

Date of Hearing: 5 August 2014

Date of Judgment: 21 October 2014