IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, (PRETORIA)

26/2/15

CASE NO: A997/13

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

26 February 2015 .....

In the matter between

DU TOIT, S.J.H	**1st APPELLANT**
PREMIER FOODS LTD	**2nd APPELLANT**
and	
SEBAKENG, SELEKA NELSON	**RESPONDENT**

JUDGMENT

MUDAU, AJ

[1] The respondent, Mr Sebakeng, instituted an action for damages in the Pretoria Magistrates' Court against Mr Du Toit (the first appellant) and Premier Foods Ltd (the second appellant), based on his alleged malicious prosecution by the appellants. The trial in the court *a quo* dealt with the merits of the claim as well as the question of quantum. The trial court held that Mr Sebakeng had established that he was the victim of a malicious prosecution and that, as a result of such prosecution; "*all the elements of the delict*" had

been proven and awarded the respondent R90 000-00 claimed as well as costs. The learned magistrate ordered the appellants to pay the costs of the matter. The issue in this appeal is whether the respondent had discharged the onus of proof on a balance of probabilities.

FACTUAL BAGROUND

[2] It is common cause that on 25 January 2005 the respondent was arrested without a warrant by members of the South African Police Services, acting in the course and scope of their employment, on suspicion of having committed theft. The arrest followed a complaint by the 1st appellant, to the police, that a package of 3KG wheat flour had been stolen from the 2nd appellant's premises. The respondent was detained for 3 days before his 1st appearance at court. The respondent was charged with theft. Upon his release on warning, the matter was postponed from time to time until the charge was withdrawn by the prosecutor after the magistrate had refused a postponement for the docket, which was not at court. On the occasion that the charge was withdrawn against the respondent, the state witnesses (including the 1st appellant) were at court.

[3] At the trial in the court below regarding this matter, it was the respondent's version briefly that he was employed by a company named Suburban and seconded to the 2nd appellant's premises as a painter. He earned R1200-00 per month. On the day of his arrest and by 4 PM, he had finished work. He was on his way out when he was stopped by the security guard at the exit point. The 1st appellant was telephoned by the security guard and asked to come to the scene. A packet of wheat which he allegedly stole was pointed out. It is his version that he never stole any wheat. During cross-examination, he conceded that the 1st appellant and he had no grudges against each other. He further conceded that he had since lost his job with Suburban after a disciplinary hearing.

[4] In his defence the 1st appellant testified essentially as follows. At the time of the respondent's arrest, he worked for the 2nd appellant's branch in Waltloo, Pretoria, as acting manager. He was contacted telephonically by the Suburban services contract manager, Mr Pitzer, who informed him that one of his (Pitzers's) employees was caught by the security people at the gate. He went to the scene where he found the security guard and the respondent. The respondent's carry bag was on the floor. Inside the bag was the respondent's overall. Underneath the overall was the packet of wheat flour that according to the security guard, the respondent took out of their premises.

[5] When he questioned the respondent why he took the packet, the respondent explained that he wanted "*to go and make pap or bake something*". When the respondent was told that he had no permission to do so, the respondent more or less got aggressive with his tone. The police were called and as a result, the respondent was arrested.

[6] On the day that the charge was withdrawn, the trial magistrate apologised to him and the security guard that the system had failed them. Further, that, they could reinstate the charge if the docket could be found. The magistrate also informed the respondent that he was lucky that the system failed the witnesses. During cross-examination, the 1st appellant denied a suggestion put to him that the charge against the respondent was withdrawn because there was no prima facie case.

THE APPLICABLE LAW

[7] Malicious prosecution consists in the wrongful and intentional assault on the dignity of a person comprehending also his or her good name and privacy (*Heyns v Venter* 2004 (3) SA 200 (T) 208B). The requirements are that the arrest or prosecution be instigated without reasonable and probable cause and with 'malice' or *animo iniuriarum* (*Thompson & another v Minister of Police & another* 1971 (1) SA 371 (E) 373F-H; *Lederman v Moharal*

Investments (Pty) Ltd 1969 (1) SA 190 (A) 196G-H.) Although the expression 'malice' is used, it means, in the context of the *actio iniuriarum*, *animus iniuriandi* (*Heyns v Venter* above 208EF; *Moaki v Reckitt & Colman (Africa) Ltd and another* 1968 (3) SA 98 (A) 104A-B; and see the discussion in J Neethling JM Potgieter and PJ Visser *Neethling's law of personality* 2 ed (2005) 124-5).

[8] In order to succeed with a claim for malicious prosecution, a claimant must allege and prove –

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

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

(c) that the defendants acted with 'malice' (or *animo injuriandi*);-and

(d) that the prosecution has failed. [In this case, of course, it is common cause that Mr Sebakeng's charge was withdrawn due to the unavailability of the docket].

[9] It accordingly follows that a defendant will not be liable if he or she held a genuine belief founded on reasonable grounds in the plaintiff's guilt (*Prinsloo and another v Newman* 1975 (1) SA 481 (A) 498H-499C; *Fyne v African Realty Trust Ltd* (1906) 20 EDC 248 256; *Ramakulukusha v Commander, Venda National Force* 1989 (2) SA 813 (V) 844J–845B; *Madnitsky v Rosenberg* 1949 (1) PH J5 (W)) Where reasonable and probable cause for an arrest or prosecution exists the conduct of the defendant instigating it is not wrongful (*Neethling's Law of Personality* 178).

[10] The requirement for malicious arrest and prosecution that the arrest and prosecution be instituted 'in the absence of reasonable and probable cause' was explained in *Beckenstrater v Rottcher and Theunissen* (1955 (1) SA 129 (A) 136A-B) by Malan J 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 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."*

This requirement is sensible: *"For it is of importance to the community that persons who have reasonable and probable cause for a prosecution should not be deterred from setting the criminal law in motion against those whom they believe to have committed offences, even if in so doing they are actuated by indirect and improper motives."* (*Beckenstater v Rottcher and Theunissen* above 135D-E); and *Relyant Trading (Pty) Ltd. v Shongwe and Another* (***472/05) [2006]*** *ZASCA* ***162; [2007] 1 All SA 375 (SCA)*** *(26 September 2006).*

EVALUATION

[11] It is clear from the facts in this case that the 1st appellant had set the law in motion when he called for the police. The learned trial magistrate found that in doing so, the 1st appellant had no reasonable and probable cause in setting the law in motion. However, this is not supported by the probabilities of this case in that according to the 1st appellant the respondent's bag contained what was alleged to be the stolen item. Consideration being had to the statement attributed to the respondent (above at para 5) that he was "*going to*

make pap or bake something", which was never seriously challenged during cross-examination, there is no support therefore that the 1st appellant did not act on reasonable grounds and with an honest belief, with regard to the respondent's guilt when he set the law in motion. In this regard, and in my view, the trial magistrate misdirected himself.

[12] By the respondent's own version, the 1st appellant bore no grudge against him. A proper reading of the record in this matter does not suggest that the appellants acted with *'malice'* (or *animo injuriandi*). In the contrary, the record shows that the 1st appellant and the security guard, who stopped, searched and found the allegedly stolen item attended at the respondent's trial at all relevant times until the magistrate refused a postponement for the docket. On the probabilities, it would seem to me that this was a conduct by witnesses who wanted to see justice done.

[13] The last aspect with regard to the required elements that, the prosecution has failed should not detain us longer than it is necessary. The respondent was not acquitted on the merits of the trial as the charge was simply withdrawn for the reasons indicated above (at para 6). Neither was this a *nolle prosequi* on the part of the prosecution authorities. In Lemeu v Zwartbooi (1896 13 SC 403 at 405) De Villiers CJ stated the position as follows with regards to the results (of a pending prosecution):

> *"cannot be allowed to be prejudged by the civil action, but as soon as the Attorney- General, in the exercise of his quasi-judicial function, has decided not to prosecute, there is sufficient determination of the original proceedings to allow the civil action being tried"*. (Also alluded to by Foxcroft J in *Els v Minister of Law and Order and Others 1993 3 All SA 467 (C)).*

[14] The following was stated in *Thompson & Another v Minister of Police & Another* 1971 (1) SA 371 ECD at 375 A – C:

> *"In an action based on malicious prosecution it has been held that no action will lie until the criminal proceedings have terminated in favour of the plaintiff. This is so because of the essential requisites of the action is proof of a want of reasonable and probable cause on the part of the defendant, and while a prosecution is actual pending its result cannot be allowed to the prejudged by the civil action (Lemue v Zwartbooi, supra at p 407). The action therefore only arises after the criminal proceedings against the plaintiff have terminated in his favour or where the Attorney-General has declined to prosecute. To my mind the same principles must apply to an action based on malicious arrest and detention where a prosecution ensues on such arrest, as happened in the present case. The proceedings from arrest to acquittal must be regarded as continuous, and no action personal injury done to the accused person will arise until the prosecution has been determined by his discharge". (Bacon v Nettleton, 1906 T.H. 138 at pp 142-3).*

[15] In argument before us, counsel for the respondent contended that the withdrawal of the charge under these circumstances where nothing has been done since the withdrawal should constitute termination of prosecution. Termination is described in the Oxford English dictionary, "*as the action of putting an end to something or bringing something to a close*". Whereas, "end (in time) means "*cessation, close, conclusion*". It also includes "*outcome*" or "*result*".

[16] Mhlantla JA put it aptly in Mashinini and Another v S 2012 (1) SACR 604 (SCA) at para [15] where the following is stated:

> *"It is a well-known fact that the State is dominus litis. After the police have concluded their investigations, the docket is given to the prosecutor. He or she gains access to all documents and statements in the docket. Based on this, he or she decides on which charge(s) to prefer against an accused person. The latter plays no role in this critical choice by the prosecutor. It follows that any wrong decision regarding the choice of an appropriate charge(s) cannot be put at the accused person's door"* (I may add, the complainants and in this case, the appellants' door).

[17] It is trite that a prosecutor has a duty to prosecute a matter if there is a prima facie case and if there is no compelling reason for refusal to prosecute. In this context therefore, "*prima facie case*" means the following: the allegations, as supported by statements and where applicable combined with real and documentary evidence available to the prosecution, are of such a nature that if proved in a court of law by the state on the basis of admissible evidence the court should convict (Freedom Under Law v National Director of Public Prosecutions & others 2014 (1) SA 254 (GNP); 2014 (1) SACR 111 (GNP); [2013] 4 All SA 657 (GNP).

[18] As correctly pointed out by the magistrate seized with the criminal trial, the charge could be reinstated if the docket was traced. In my view, and on this aspect alone, the trial court in this matter misdirected itself in finding that all the prerequisites or elements for the damages claimed have been met. The conclusions by the court below in this regard are not supported by the facts. Neither are they supported by the relevant legal principles referred to above (at para 8). The criminal proceedings that were instituted against the respondent in the criminal court were not terminated in his favour. The withdrawal of the matter is not akin to an acquittal or the termination of the matter against him. They may be sound reasons why the matter has not been enrolled again. It is not necessary for this court to embark on a speculating exercise.

[19] Because of the conclusions arrived below, it is not necessary to deal with the aspect of the award.

CONCLUSION

[20] For the foregoing reasons, it follows that the appeal falls to be upheld. In the result, the following order is proposed:

1. The appeal is upheld.

2. The order of the court a quo is set aside and replaced with the following order:

2.1 'The respondent's claims against both defendants are dismissed with costs'.

MUDAU TP
ACTING JUDGE OF THE HIGH COURT

I agree and it is so ordered.

KOLLAPEN J
JUDGE OF THE HIGH COURT

Date of hearing: 19 February 2015
Date of judgment: 26 February 2015

Appearances:

For the appellants: Adv J Rust
Instructed by: Maluleke, Msimang and associates
For the respondent: Adv A Louw (SC)
Instructed by: Madiba Attorneys