



**IN THE HIGH COURT OF SOUTH AFRICA  
NORTH WEST PROVINCIAL DIVISION, MAHIKENG**

**CASE NO: 1404/2008**

**In the matter between:**

**SEHULARO DOMINIC SEDIKO**

**PLAINTIFF**

**And**

**MINISTER OF SAFETY AND SECURITY**

**DEFENDANT**

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**JUDGMENT**

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**Landman J:**

[1] The plaintiff, Mr S D Sediko ('Sediko'), a former Inspector in the South African Police Service, sues the Minister of Safety and Security for damages being R 200 000 for malicious arrest and detention, R33 858 spent on his defence in the criminal court and R500 000 for contumelia, deprivation of freedom and discomfort.

[2] The basis of the claim is that Superintendent Scholtz ('Scholtz') wrongly and maliciously set the law in motion by laying a false charge of theft of an amount of R 29 000 in cash against the plaintiff with the SAPS by giving false information. The information is that the plaintiff stole the money and that, when laying the charge and giving the information, Scholtz had no reasonable belief in the truth of the information given. See Paragraphs 4 and 5 of the particulars of claim.

[3] The Minister has defended the action. It is admitted that Scholtz laid the charge but it is pleaded that Scholtz had both reasonable and probable cause for laying a charge of theft against the plaintiff. Scholtz had an honest belief founded on reasonable grounds that the institution of proceedings against the plaintiff was justified, namely:

'(a) a suspect in the cash in transit heist was arrested and from whom money was seized namely, Tom Paul reported that the plaintiff and three other police officers, namely Inspector Matong, Inspector Lerefolo and Inspector Moatludi had taken some of the money that they had seized for themselves.

(b) Inspector Matong confirmed that he, the plaintiff and the others inspectors had taken some of the money which they had seized. Inspector Matong admitted that he had taken an amount of R 10 000. Inspector Lerefolo took R 5 000, Inspector Moatludi took R 10 000 and the plaintiff took R 4 000.

- (c) A search was conducted on Inspector Matong and the amount of R 10 890 was found in his possession.
- (d) The search was conducted on the plaintiff and the amount of R 3 800, was found in his position.
- (e) The plaintiff was unable to provide a reasonable explanation or to account for the money that was found in his possession.
- (f) The explanation furnished by the plaintiff was that inspector had given the plaintiff the amount of R 4000 on the morning of the 13 December 2002 and the plaintiff intended to hand over the money to captain Rhakudu.
- (g) The monies recovered from both inspector Matong and the plaintiff was marked.'

[4] It is common cause that the money was not marked.

[5] The parties have agreed and I have ordered that the liability of the defendant be separated from the quantum of any damages for which the defendant may be liable.

### **Sediko**

[6] Sediko testified that on 13 December 2002 he was a member of the South African Police Service. He held the rank of Inspector and was stationed at the Mafikeng Murder and Robbery branch. Captain Rakudu ('Rakudu') commanded

the branch. Superintendent Mabula ('Mabula') was the provincial commanding officer of all the Murder and Robbery branches.

[7] Sediko said that he was the second in command of the Murder and Robbery branch at Mafikeng. He was demoted and replaced by Inspector Alberts. Sediko said that this was ordered by Mabula because he fell into disfavour with him. This related to a case of murder of one Mothshiwane in 2002 at a place known as Ditakong. Mr Sediko was the investigating officer. He arrested one Segal, a child of Mrs Tiny Montshiwane, the deceased's stepmother. Mr Sediko subsequently released Segal without charging him.

[8] Mrs Montshiwane harboured suspicions concerning other members of the community that she suspected of being involved in the murder of her stepson. She was unhappy with the way in which Sediko investigated the case and complained to Mabula. The Superintendent said in his presence as well as that of Mrs Montshiwane and Rakudu that he, Sediko, looked like a person who did not want to investigate that case and he wanted to investigate it my own way. The Superintendent permitted him to investigate the matter as he thought fit and he, together with another Inspector, went to Johannesburg and effected six arrests. He informed Mabula and Rakudu telephonically of this.

[9] Mabula expressed his unhappiness with the report. He required Sediko to file a report giving an explanation of the circumstances under which he arrested

the suspects. Sediko furnished a report, but the Superintendent told him face-to-face at a workshop in Mafikeng that he had written nonsense. Sediko said that he told the Superintendent that he was not aware that such reports should be made and that normally only arrests statements are taken and filed in the docket. He asked the Superintendent whether he would teach him how to write a report.

[10] There was also some unhappiness about two itinerary reports; one for the High Court in Pretoria and the other for the High Court in Kimberley. A request for permission to undertake these journeys had been made and approved of by Mabula. Sediko learnt that the Murder and Robbery branch at Mafikeng was to be inspected on the Friday when he would be in Pretoria. Sediko arranged for Rakhudu to hand over his dockets for inspection. On Sediko's return he learnt that Mabula had claimed that he did not know of his whereabouts and that he was looking for Sediko. It was then that he was removed as second in command by Superintendents Mabula and Steyn.

[11] As Sediko was no longer second in command at the Mafikeng Murder and Robbery branch, he did not file the necessary returns for July 2002. His failure to do so was queried by Superintendent Steyn. Sediko provided this explanation to Superintendent Steyn who terminated the telephonic conversation abruptly.

[12] On 9 December 2002 Sediko attended court in Vryburg. A report was received of armed robbery in the vicinity of Ganyesa. Sediko and inspectors

Motowage and Maboitsega went to the scene of the incident, a case of a cash-in-transit robbery, where over a million Rand had been taken. But they returned to Mafikeng without any information. The following day Superintendent Scholtz (Scholtz) of Potchefstroom, Rakhudu and Inspectors Kader ('Kader') and Botha ('Botha') went to Vryburg to investigate the case. On 11 December 2002, Sediko and Matong also travelled to Vryburg at the instance of Rakhudu to assist with the investigation. These two detectives were instructed to obtain a police statement from a suspect in the cash-in-transit case, one Elliot Gaekgwathi in Vryburg.

[13] The two interviewed Gaekgwathi and recorded his statement. Thereafter Scholtz instructed them to take a statement from another suspect in the same case, one Tom Paul. During the interrogation of Tom Paul, Adam Moatludi ('Moatludi') and Jeff Lerefolo ('Lerefolo') arrived from Klerksdorp with instructions to assist them with the interrogation. The detectives felt that they needed to be alone with Tom Paul to interrogate him without interruption and they were provided with an office by the commander of the dog unit. Scholtz was aware of this development. The detectives travelled to the dog unit in two vehicles. They assembled there in an office and questioned Tom Paul about the robbery. Eventually Tom Paul told them that he had been hired as a driver for the commission of this crime. Sediko answered the question, what caused Tom Paul to tell them this, in the following way:

‘We then used the surgical glove which would close faces (sic), eyes, mouth. That would cause him to suffocate. Who pulled the glove over his face? It was Jeff Lerefolo, but I assisted him in the pulling over of the surgical gloves. Yes, and then when he was now suffocating, he requested us to release him and that he was going to show us where the money was.... So he would say I will take you, show you where the money is and then he will deny? Yes.’

[14] The results of this interview were not reported to Scholtz. The detectives went in two motor vehicles to take Tom Paul to point out the location of the money. They took the surgical glove with them. They did not have an official cellphone. They had personal cellphones but each one had exhausted his personal airtime. They did not take a photographer with them.

[15] They travelled in the direction of Kuruman and then took the turning to the Glenn red village until they reached the village of Letlakeng. Tom Paul showed them a tree where a plastic bag containing a dismantled Nokia cellphone and money was unearthed. The money, in notes, was not counted, but was placed in the boot of Sediko’s vehicle.

[16] Tom Paul took them to a second place, a one-roomed house, about 500 m away. And there, under a newly laid floor, they found money wrapped in a yellow T-shirt. They did not count the money. It was more than the R 5 000, which Tom

Paul said he was paid for his services. Sediko took the money and put it into the boot of his vehicle.

[17] Tom Paul then told them that there was some more money in possession of Thomas Gaekgwathi, Elliot's younger brother. Elliot confessed to being part of the planning of the crime, but had not said anything about the money. Tom Paul told them that Thomas would know where the money was. They then followed up information which led them to Thomas's home. This was about 400 m away from Tom Paul's home.

[18] They drove there and found Thomas's mother, who told them that Thomas had gone to the shop. They drove in the direction of the shop and stopped a young man matching Paul's description of Thomas. Tom Paul confirmed his identity. He agreed to show them where the money was. They crossed into maize field, which had been ploughed over, and Thomas dug up a plastic bag containing a trunk (described as a "trommel") 40 x 25 x 15cm. Jeff carried the trunk and it was put in the boot of Sediko's vehicle. They did not open the trunk. They left Thomas at his home, dropped off the spade and travelled in the direction of Vryburg.

[19] Before joining the tarred road both vehicles stopped. No one alighted. They discussed the fact that none of them had accommodation for the night and it was agreed that Matong and Moatludi would seek accommodation while Sediko, Jeff



and Tom Paul would drive to the Vryburg Police Station. Sediko drove into the yard of the Vryburg Police Station at about 18:15.

[20] Sediko and Lereforo found Scholtz, Rakhudu, the station commander Vryburg and Director Tautsile in the yard. They reported what they had been doing. The money was first laid out on the ground in the sequence that it was recovered, and then taken to the boardroom to be counted. The money from the first scene amounted to R 680. The money from the second scene amounted to R 23 900. The trunk was opened and found to contain R 1 000. Tom Paul did not say that any money was missing. Photographs were taken of the money, yellow T-shirt and trunk.

[21] Moatludi and Matong were not there when the money was counted. But they arrived in time for a meeting that was held in the yard. Lerefolo and Moatludi were instructed to take two suspects to Hartbeesfontein. Sediko and Matong were to stay over in Vryburg and meet the other members of the team at Derby before proceeding to Rustenburg.

[22] Matong arrived the next morning at Ngulubu Lodge where Sediko was staying. He asked Sediko to keep some money for him. He had won the money through gambling. Sediko, who was bathing, gave him the keys of the vehicle. Matong was to put the R3 800 in the boot. He wanted to buy a secondhand

vehicle. Matong said he wanted to leave the money with Sediko as he might be tempted to spend it.

[23] The next morning Sediko and Matong went to the Vryburg Police Station. Sediko and Rakhudu then traveled together while Kader and Matong traveled with Tom Paul and booked him into the cells at Lichtenburg. At some point they were ordered to go to Derby. Eventually Sediko and the Rakhudu arrived at the Derby Hotel.

[24] On their arrival Scholtz inquired from Sediko whether Matong had given him any money. Sediko confirmed this and then Scholtz took the keys to his vehicle and opened the boot. Sediko pointed out his bag and a plastic bag containing money was taken out. Then Scholtz placed him under arrest. Rakhudu was close by. Sediko tried to explain his possession of the money but the Superintendent would not listen.

[25] Matong had also been arrested. They were taken to Lichtenburg. The money in Sediko's bag was counted. It amounted to R 3 800. He signed for the money. Sediko was taken to the charge office. His rights were read to him and he was detained. He was told he had been arrested for theft of R 29 000. He elected not to make a statement

[26] Sediko saw Rakudu the following day who told him to confess as Matong had done so. Sediko said that he knew nothing about this. The next day he was allowed to phone his home. His wife, a Superintendent in the SAPS, and his three children knew of his arrest. Rakudu had delivered his belongings to them and gave them the news. On the following day, a Sunday, he was visited by his wife and two elder brothers. On 17 December he was taken to the Vryburg Police Station. He and Matong were placed in a cell. They were later joined by Lerefolo and Moatludi. They appeared in the Vryburg Magistrate's Court. The case was postponed and they were remanded in custody until 27 December 2002. On 27 December bail of R 2 000 each was set and the case was postponed further. Sediko paid his bail and was released.

[27] Sediko was suspended from his employment and ultimately dismissed. His salary was paid to him while on suspension. He and the other three detectives attended a joint disciplinary hearing. Scholtz testified and told the chairperson that Matong had made a confession. Matong, when he testified, disputed this. Lerefolo and Moatludi were acquitted. He and Matong were dismissed. Sediko appealed against the dismissal but was unsuccessful. He referred a dispute to the CCMA but was referred to the relevant bargaining council. Apparently he was refused condonation for the late referral and he then sought to review the ruling in the Labour Court. This application, he said, is still pending.

[28] Tom Paul and Gaekgwathi testified at the criminal trial. On 4 July 2004 Sediko and his colleagues were found not guilty of theft and discharged in terms

of section 174 of the Criminal Procedure Act 51 of 1977. He expended R 33 858 on legal fees for his defence. He attempted to obtain a transcription of the court proceedings but the tapes could not be found.

[29] Sediko alleges that Scholtz was malicious when he laid the charge against him because Kader ought to have taken the suspects to lay a charge against him but instead Scholtz acted on the hearsay information conveyed to him by Kader.

[30] Scholtz's statement (A13) was read to him. He said he did not say that he was going to hand the R 4 000 in his possession to Rakhudu when they returned home. He also said that the Superintendent did not read his rights to him.

[31] Rakhudu asked him whether the money aroused any suspicions. He said they did not. The money was in R 10 notes but was not packed or bundled as Scholtz recorded it in his statement. He knows this because he peeked into his bag and looked at the money before going to the Vryburg Police Station.

[32] Sediko says that there was a time when they were taken from Lichtenburg to Potchefstroom where the money was counted and photographed in his presence.

[33] Sediko was asked to comment on a passage in Rakhudu's statement (Bundle B page 13) that he told Rakhudu that Matong handed him R 2 000 and that he was still going to ask Matong where the money came from. Sediko said he said this to Rakhudu after his arrest when Rakhudu asked him what he would have done 'if he suspected the money'.

[34] Sediko also referred to a passage in a handwritten statement by Tom Paul commissioned on 14 December 2002 (Bundle B page 34). Tom Paul says that on the way to Vryburg they stopped three times, leaving him alone and going to the vehicle where the money was. Sediko said that they had only made one stop and they did not alight from the vehicles.

[35] Sediko confirmed that he did not count the money because 'he would not be aware should someone take some of the money' so he decided the money should be counted at the police station.

[36] Sediko was shown a statement by Gaekgwathi (Bundle B page 139-140) but he said that Gaekgwathi did not speak of R 30 000 only that he was part of the planning. When Gaekgwathi's brother assisted them in unearthing the trunk it contained R 1 000.

[37] Sediko said it pained him that he had been prosecuted and dismissed as he is the head of his family and he had to maintain his children.

[38] Sediko maintains that Scholtz maliciously prosecuted him because he laid the charge using the hearsay evidence of Tom Paul. He would not have had a problem had Tom Paul laid the charge.

[39] The following emerged under cross-examination. Mabula had ill-feeling towards him. But this has nothing to do, says Sediko, with the charge of theft. But then he said he could see Mabula's influence in the criminal trial. Mabula said after his arrest "I have caught big fishes". Sediko believes that Mabula was involved in the decision to dismiss him. Sediko thinks that Sholtz was antagonistic to him because of the way he went about arresting him. The detectives went to recover the money but they were not qualified to conduct a pointing out or take a confession. They did not have a photographer because he says Tom Paul was blowing hot and cold so they could not inform Scholtz. Scholtz would have arranged for a photographer. It was not irregular not to count the money.

### **Matong**

[40] Matong says that he won the R 10 890 by gambling at a place on Market Street, Vryburg on the evening of 12 December 2002. He entrusted R 3 800 to plaintiff on the morning of 13 December and, after plaintiff agreed to keep it for him, he opened the boot of the vehicle and put it in a side pocket of plaintiff's bag. This money, he said, was entrusted to the plaintiff as he was worried he

would spend or gamble it away. This is when they were leaving Vryburg to return home in Mafikeng. This money had been brought with him to Vryburg to purchase a used engine from a scrapyard. When he testified, Matong led me to believe that he entrusted the money to the plaintiff before arriving at Vryburg but it may have been an error in interpretation.

[41] He travelled in his vehicle with Kader on 13 December and they eventually arrived at Derby. Scholtz was there. He asked Sediko how much money he had in his pocket. But then he opened the boot and found R10 890 in Matong's bag. He asked where Matong had got the money and Matong replied that he had acquired it from a gambling machine. Scholtz arrested him.

### **Scholtz**

[42] Scholtz testified that while he was at Brits conducting further investigations into the case of armed robbery, he received a call from Kader who informed him that Tom Paul had told him that four members of the Investigation unit had taken some of the money that they had recovered and had not handed in all the money. The four policemen were named including the plaintiff and his colleague Matong. Scholtz instructed him to meet him at Derby together with the plaintiff and Matong.

[43] Scholtz related his encounter with first Matong and then the plaintiff. Matong's confession, which implicated the plaintiff and the others, was part of the material on which he based his decision.

[44] When Matong and Kader arrived, he took Matong aside and informed him that he was a suspect and informed him of the allegations against him. He explained his rights to Matong and asked Matong how much money he had in his wallet. Matong produced about R 350. He asked Matong whether he had any other money and Matong produced some R 100 notes from his pocket. On the way to inspect the boot, Matong confessed that he and other investigating officers had taken some of the money which they had seized. Matong admitted that he had taken an amount of R 10 000. Lerefolo took R 5 000, Moatludi took R 10 000 and the Sediko took R 4 000.

[45] Matong opened the boot of his vehicle and Scholtz found new notes amounting to R 10 890 in his bag. Scholtz placed Matong under arrest.

[46] Scholtz says that when Sediko and Rakhudu arrived he informed Sediko that he is a suspect and read him his rights and Sediko showed him his bag in which R 3 800 in R 10 notes was found. He inquired about the money. Sediko said that Matong had given the money to him. Sediko said that he wanted to inform Rakhudu that Matong had given him money to keep. Scholtz asked him why he had not told Rakhudu who travelled with him from Vryburg to Derby. Sediko said



he wanted to wait until they arrived in Mafeking before making this report. Scholtz said that after the arrest he handed the docket to Mabula who was the investigating officer.

### **Kader**

[47] Kader explained his part in the investigation which took place in the vicinity of Vryburg on 13 December 2002. He and Rakhudu had booked Tom Paul out and found one Thomas. They took them to the Detective's office. Tom Paul had told him that he was scared of some of the investigating officers and made a report that the investigating officers had not handed in all the money. Kader informed Rakhudu of this and Tom Paul related his statement to Rakhudu. Kader was present. He travelled with Matong and was diverted to Derby. He explained what he saw at Derby. Kader is uncertain whether he had telephonic contact with Scholtz that day but Rakhudu did contact Scholtz.

### **Resolution of factual disputes**

[48] Before considering whether the plaintiff has been maliciously prosecuted, it is essential to resolve the factual disputes. This requires me to make some findings on the credibility of the witnesses.

[49] Sediko's description of the torture of Tom Paul and his embarking on a pointing out without a photographer and without being competent to conduct the pointing out marks him as someone who has no scruples about following rules. His version that Matong gave him the money to keep which he obtained from gambling is improbable.

[50] Even making allowances for the long lapse of time Matong was an evasive witness.

[51] Scholtz's evidence was criticized on several counts. It was put to him that Matong had not made a confession to him. But there is some slight support for this in Sediko's evidence when he says Rakhudu told him, while he was detained, that Matong had confessed and that he should do the same. The second is that this confession was not reduced to writing and signed by Matong. This is common cause. The third issue is that Scholtz did not mention this fact in his first statement. There was some confusion about what was Scholtz's first statement. It is trite that the first statement in a docket is always marked A1. But the statement marked A1 and dated 2003 in Bundle B, representing the content of the docket, (the original was not produced) seems not to have been the statement which founded the charge. Rather a statement by Scholtz dated 14 December 2002 and marked A13 (Bundle B page 116) was the first statement. Scholtz records Matong's confession in A13.

[52] Kader has retired he has no reason to fabricate evidence. I accept his evidence as credible.

[53] I reject the evidence of Matong that he handed money to Sediko for safekeeping and that this money was acquired by gambling or or brought from Mafikeng. It is improbable that he would hand R 3 800 to Sediko for safekeeping, after gambling the previous evening, on the morning of their anticipated return to Mafikeng. I am satisfied that Matong confessed his part in misappropriating the money found as a result of the pointing-outs. I do not accept the evidence of Sediko. In particular I do not accept that he was not given an opportunity to explain his possession of the R 3 800 found in his bag.

### **Malicious prosecution**

[54] A plaintiff claiming damages for malicious prosecution must prove:

- (a) that the defendant set the law in motion (instigated or instituted the proceedings);
- (b) that the defendant acted without reasonable and probable cause;
- (c) that the defendant acted with malice (or *animo injuriandi*); and
- (d) that the prosecution has failed.

See **Minister for Justice and Constitutional Development v Moleko** [2008] ZASCA 43; [2008] 3 All SA 47 (SCA) para 8, **Rudolph & others v Minister of Safety and Security & another** 2009 (5) SA 94 (SCA) para 16, **Moaki v Reckitt & Colman (Africa) Ltd** 1968 (3) SA 98 (A); and **Relyant Trading (Pty) Ltd v Shongwe** [2007] 1 All SA 375 (SCA). The onus rest on the plaintiff to prove this. See **Olgar v Minister of Safety and Security** (unreported Eastern Cape case no 608/07).

[55] It is common cause that Sediko was acquitted. The last requirement has been met. This leaves the first three requirements.

[56] The setting in motion of the prosecution was effected when the plaintiff was arrested by Scholtz at Derby on 13 December 2002. In the course of preparing to hear argument I came across the judgment in **Kotswana v Minister of Safety and Security** (3587/09) [2012] ZAECGHC 10 (1 March 2012). There the plaintiff sued for damages for his unlawful arrest and detention as well as for malicious prosecution. The plaintiff was arrested without a warrant. The court seemed to have separated the arrest from the decision to formally prosecute the plaintiff. The arrest by the arresting officer (Els) was found to be unlawful as his suspicion that the plaintiff had committed the alleged offences was not reasonable and the defendant failed to discharge the onus of proving that the plaintiff's arrest and detention were justified.

[57] The court then turned its attention to the claim for malicious prosecution and said:

‘[18] The remaining elements of the claim of malicious prosecution which the plaintiff was required to prove were that the defendant’s servants set the law in motion without reasonable and probable cause and acted with malice.

[19] It was alleged in the plaintiff’s particulars of claim that “in consequence of the said arrest the SAPS members set the law in motion and instituted a prosecution against the plaintiff on a charge of theft.” I interpret this allegation to mean that the arresting officers set the law in motion.

[20] With regard to the requirement of setting the law in motion, the plaintiff was required to prove that Els did something “more than one would expect from a police officer, namely to give a fair and honest statement of the facts to the prosecutor, leaving it to the latter to decide whether to prosecute or not.” It was not put to Els that he had gone further than expected of him and there was no reason to infer that he had done so. He took the statement from Schoeman, and gave his own statement to the effect that he had attended the complaint, interviewed Schoeman, questioned the plaintiff, and after viewing documentation had arrested and detained the plaintiff. Els seems to have had nothing further to do with the case. His evidence that the docket would have been given to the crime office and allocated to a detective was not challenged. There was therefore no evidence that Els or any other police officer involved in the arrest of the plaintiff had set the law in motion. The claim for damages for malicious prosecution cannot succeed.’

[58] As I understand the authorities on the question of ‘setting the law in motion’ or causation, where a plaintiff is arrested without a warrant of arrest and charged that is one way of setting the law in motion and not the later decision by the Director of Public Prosecution (DPP) to prosecute the case against the defendant. See **Rudolph and Others v Minister of Safety and Security and Others** (supra) at para 19. This distinction is particularly relevant to the matter at hand as there is no claim for wrongful arrest and detention. If **Kotswana v Minister of Safety and Security** is correct then it is the DPP’s decision that is crucial and the fulcrum rests on the effect of Scholtz’s statement, which was one of many statements filed in the docket comprising some 261 pages. On the other hand if the prosecution was initiated by the arrest and laying of a charge against the plaintiff by Scholtz then the Scholtz evidence must be evaluated on its own basis.

[59] I am of the view that the arrest of Sediko by Scholtz constitutes the setting in motion of the prosecution and that it is unaffected by the DDP’s decision to continue with the prosecution of the plaintiff. In view of my decision only the hearsay communication made to Scholtz by Rakhudu or Kader (I accept that it was Kader as Sediko also testified to this effect) and Scholtz’s own observations and what was said by Sediko and Matong are relevant.

[60] I am satisfied that the first requirement of the claim has been established.

[62] I turn to consider whether Scholtz, for whose acts the Defendant is vicariously liable, acted without reasonable and probable cause. In evaluating this question there are several helpful *dicta*. **Beckenstrater v Rottcher and Theunissen** 1955 (1) SA 129 (A) at 136A-B set out the test in the following way:

‘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.’

[63] This test was examined in **Minister of Safety and Security N.O. and Another v Schubach** (437/13) [2014] ZASCA 216 (1 December 2014) at para 15. It was observed that the test contains both a subjective and objective element which means that there must be both actual belief on the part of the prosecutor and that that belief must be reasonable in the circumstances (J Neethling, JM Potgieter & PJ Visser **Neethling’s Law of Personality** (2 ed, 2005) at 176).

[64] In **Mabona and Another v Minister of Law and Order and Others** 1988 (2) SA 654 (SE) at 658E-H Jones J considered the approach to this issue, in the context of an arrest, in the following manner:

“Would a reasonable man in the second defendant's position and possessed of the same information have considered that there were good and sufficient grounds for suspecting

that the plaintiffs were guilty of conspiracy to commit robbery or possession of stolen property knowing it to have been stolen? It seems to me that in evaluating his information a reasonable man would bear in mind that the section authorises drastic police action. It authorises an arrest on the strength of a suspicion and without the need to swear out a warrant, i.e something which otherwise would be an invasion of private rights and personal liberty. The reasonable man will therefore analyse and assess the quality of the information at his disposal critically, and he will not accept it lightly or without checking it where it can be checked. It is only after an examination of this kind that he will allow himself to entertain a suspicion which will justify an arrest. This is not to say that the information at his disposal must be of sufficiently high quality and cogency to engender in him a conviction that the suspect is in fact guilty. The section requires suspicion but not certainty. However, the suspicion must be based upon solid grounds. Otherwise, it will be flighty or arbitrary, and not a reasonable suspicion.”

[65] Did Scholtz at the time he arrested the plaintiff on 13 December 2002 have such information as would lead a reasonable man to conclude that Sediko was probably guilty of the offence of theft? In assessing this requirement I must disabuse my mind of the plaintiff’s evidence prior to his arrest in evaluating the Scholtz’s state of mind. This knowledge was not available to Scholtz.

[66] Scholtz knew that Tom Paul had been arrested in connection with the robbery and that a million Rand had been stolen. He knew that the plaintiff and Matong and the two others had followed up a lead (without informing him) and he had met them on their return to Vryburg when they exhibited the money that they had recovered. He was present when it was counted. So was Tom Paul. He knew that Tom Paul had not said that this was not all the money recovered.



[67] Scholtz probably knew that a formal statement had not been taken from Tom Paul. He knew that the information transmitted to him was hearsay. He knew Rakhudu and Kader had worked with them in the past and evidently trusted them and he knew that they had interviewed Tom Paul.

[68] Scholtz knew that the evidence of a suspect arrested for armed robbery would have to be treated extremely cautiously for good reason.

[69] Scholtz had just arrested Matong and Matong's confession that he and the other three members including Sediko had stolen the money was fresh in his mind. He had also recovered R 10 890 in new uncirculated notes in serial order from Matong's luggage.

[70] Scholtz was aware, as he testified that the confession by Matong would not constitute admissible evidence against Sediko and the others by virtue of section 219 of the CPA. He was not asked whether he intended reducing the confession to writing at a later stage.

[71] Scholtz was decidedly influenced by the discovery in Sediko's luggage of the unissued notes, in serial order, that had been pointed out to him by Sediko. In 2002, R 3 800 represented about double Sediko's take home pay. And in Matong's

case it would have been about three times his net pay. This was a considerable amount of money in the context of the two inspectors.

[72] It is fair to say that whatever doubts Scholtz may have harboured about the authenticity and credibility of the statement of Tom Paul, he asked first Matong and then, separately and subsequently Sediko for an explanation. The discovery of the new notes and the implausible explanation of Sediko would have disposed of his concerns about the truth of Tom Paul's allegations. This was sufficient to arrest Matong and Sediko on a charge of theft and to lay a charge of theft against them. Scholtz believed that Sediko committed theft. His belief is higher than the degree of suspicion that he was required to form namely that 'the information at his disposal must be of sufficiently high quality and cogency to engender in him a conviction that the suspect is in fact guilty.'

[73] A reasonable person in Scholtz's position with knowledge of the same information would have acted in the same way. If the reasonable person was a police officer he may or may not have arrested Sediko but where the reasonable person is the commanding officer he would, as Scholtz did, consider it his duty to arrest Sediko and Matong. I cannot fault Scholtz.

[74] I am of the opinion that the plaintiff has not proven the second requirement.

[75] As to the third requirement, proof of '*animus iniuriandi*', the Supreme Court of Appeal in **Rudolph and Others v Minister of Safety and Security and Others** (*supra*) said:

[18] The requirement of 'malice' has been the subject of discussion in a number of cases in this court. The approach now adopted by this court is that, 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*. See **Moaki v Reckitt & Colman (Africa) Ltd & another** and **Prinsloo & another v Newman**. By way of further elaboration in **Minister for Justice & Constitutional Development v Moleko** (131/07) [2008] ZASCA 43 (31 March 2008) it was said:

'The defendant must thus not only have been aware of what he or she was doing in instituting or initiating the prosecution, but must at least have foreseen the possibility that he or she was acting wrongfully, but nevertheless continued to act, reckless as to the consequences of his or her conduct (*dolus eventualis*). Negligence on the part of the defendant (or, I would say, even gross negligence) will not suffice.' (Para 64).

[76] Sediko has denied that what Tom Paul and Gaekgwathi have said was true. I am not called upon to decide whether Tom Paul's allegations are true or not; I must merely consider whether Scholtz believed them to be true. Sediko has not shown that Scholtz did not believe them. Scholtz did no more than a conscientious police officer would have done. There is simply no merit in the allegation that Sediko has made that Scholtz knew that the information supplied by Tom Paul was false. So, when Scholtz says he believed them to be guilty of theft there is ample proof that he honestly believed this.

[77] The plaintiff has not proven the third requirement.

[78] In the result the action falls to be dismissed.

### **Costs**

[79] There is no reason why costs should not follow the result.

[80] In the premises I make the following order:

The action is dismissed with costs.

**A A Landman**

**Judge of the High Court**

## **Appearances**

**Date of hearing:** 3 August 2015

**Date of Judgment:** 20 August 2015

**For the Plaintiff:** Adv Zwiegelaar instructed by Herman Scholtz  
Attorneys

**For the Respondent:** Adv MMolawa instructed by State Attorneys,  
Mafikeng

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