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GROENEWALD v. MINISTER VAN JUSTISIE.

(ORANGE FREE STATE PROVINCIAL DIVISION.)

1972. *April* 25; *May* 19; *July* 24. 1973. *January* 18. KUMLEBEN, A.J.

Malicious prosecution and unlawful imprisonment.—Unlawful arrest. —Damages claimed.—Unlawful conduct of public prosecutor relied on.—Onus *on plaintiff.—Nature of.—Failure to discharge.—Absolution from the instance granted.*

In an action against the Minister of Justice for damages for unlawful arrest, the plaintiff relied on unlawful arrest by the public prosecutor, or on his unlawful conduct leading to the arrest. Plaintiff alleged (1) that plaintiff had been unlawfully arrested; (2) that the arrest and retention was caused by the unlawful conduct of the prosecutor; (3) that he had asked for a warrant "without there being reasonable grounds for suspecting plaintiff of having committed the offence named in the warrant"; and (4) that the prosecutor acted *cum animo injuriandi.*

Held, that the *onus* was on the plaintiff to prove the characteristic elements of the *actio injuriarum,* namely *animus* and unlawfulness.
Held, further, as the plaintiff had not discharged the *onus* on him, that absolution from the instance should be granted with costs.

Action for damages. The facts appear from the judgment.
A. P. Van Coller, for the plaintiff.
J. J. Hefer, S.C., for the defendant.

Cur. adv. vult.

Postea (January, 18th).

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KUMLEBEN, A.J.: On 14th October, 1969, and in Port Elizabeth, sergeant Krause, a member of the South African Police Force, arrested plaintiff. He was detained in prison in Port Elizabeth and Bethlehem from the above date until 27th November, 1969, on which date he was released on bail. Afterwards he had to appear from time to time before the regional court in Bethlehem until he heard on 6th March, 1970, that the case against him had been withdrawn. On 26th June, 1970, the administrative regional court prosecutor informed him formally that the Attorney-General had decided not to institute a prosecution against him. During the period of arrest he had to endure considerable inconvenience and humiliation as a prisoner awaiting trial. The incident also had certain irreparable consequences concerning his family relations, about which he testified. Consequently plaintiff sued the defendant for the payment of R33 007, being the damage he allegedly suffered. It also appeared from the evidence that sergeant Krause arrested plaintiff on the instructions of colonel Truter of the South African Police and in terms of a warrant handed in as an exhibit. The warrant was issued by the magistrate at Bethlehem in terms of sec. 28 of the Criminal Procedure Act, 56 of 1955, after request in writing by the State Prosecutor.

The Court has already given two judgments in this case. In the first judgment (see 1972 (3) S.A. 596) an application for absolution from the instance was dismissed. The relevant parts of the pleadings were quoted there and the points at issue were analysed and discussed as well. It was pointed out in that judgment that the pleadings were somewhat vague concerning plaintiff's actual cause or causes of action which were not clarified at that stage by admissions on behalf of plaintiff or by any other means. This vagueness also to a certain extent gave rise to the second application (see 1972 (4) S.A. 223). After both parties had closed their cases, Mr. *Van Coller,* who still acted on behalf of the plaintiff, put it clearly that he only relied on unlawful arrest by the public prosecutor, or on his unlawful conduct leading to the arrest. The evidence totally justified this point of view. From this it appeared

that any cause of action based on possible unlawful conduct by the two police officials—sergeant Krause and colonel Truter—had become prescribed in terms of sec. 32 of Act 7 of 1958. Consequently plaintiff was compelled to limit his cause of action to the prosecutor's conduct.

Before dealing with this, it is expedient to refer briefly to the particulars of the case concerning the submission of evidence. At the commencement of the case Mr. *Van Coller* called plaintiff as witness only to prove his damage, after which he closed his case in terms of Rule of Court 39 (13). After the application for absolution was refused, sergeant Krause testified about the arrest to show that he acted within the ambit of the said sec. 32 (which he in fact proved). Finally, plaintiff was recalled to give further evidence. The purport thereof was that he denied committing the offences mentioned in the warrant. He also added that he knew of no information which could have made the prosecutor think that he had committed any of the offences. During cross-examination he conceded, however, that he could not say on what information or facts the prosecutor had applied for a warrant.

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Seeing that plaintiff eventually limited his cause of action to the prosecutor's conduct, I again refer to the allegations in the pleadings relating to the prosecutor's conduct. They have already been quoted in the previous judgment. (See 1972 (3) S.A. 596 (O) at p. 597 and 598). It is alleged in short:

(i) that plaintiff was unlawfully arrested;
(ii) that the arrest and retention were caused by the unlawful conduct of the prosecutor;
(iii) that he asked for a warrant "without there being reasonable grounds for suspecting plaintiff of having committed the offence named in the warrant";
(iv) and that the prosecutor acted *cum animo injuriandi.*

Two characteristic elements of the *actio injuriarum* are *animus injuriandi* and unlawfulness. See *Whittaker and Morant* v. *Roos and Bateman*, 1912 A.D. 92 at p. 130 and p. 131. (By *animus injuriandi* in this judgment is meant *dolus malus* or "wrongful intention"—see *Voet*, 47.10.1; *W. A. Joubert, "Grondslae van die persoonlikheidsreg"* at p. 95; *Nydoo en Andere* v. *Vengtas*, 1965 (1) S.A. 1 (A.D.) at p. 20C). This *animus injuriandi* is an essential component of the cause of action which consequently must be proved by a plaintiff, although admitted or proved facts may put an *onus* of rebuttal in this respect on the defendant. (Cf. *Lederman* v. *Moharal Investments (Pty.) Ltd.*, 1969 (1) S.A. 190 (A.D.) at p. 196G-H; *Moaki* v. *Reckitt & Colman (Africa) Ltd. and Another*, 1968 (3) S.A. 98 (A.D.) at p. 104E and p. 105H). As to the second element—the requisite of unlawfulness—I respectfully agree with the following remarks by Prof Boberg: "....."

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(1971 *Annual Survey of South African Law* at p. 147).

Although these remarks refer to the *lex Aquilia,* they are, in my opinion, equally applicable to the present cause of action, which is basically a form of the *actio injuriarum.* Therefore it can be said on general principles that the *onus* rests on the plaintiff to prove these two elements of his cause of action, viz., that the prosecutor requested the warrant unlawfully ("without there being reasonable grounds for suspecting plaintiff") and that he acted *cum animo injuriandi.*

Mr. *Van Coller* submitted, however, that seeing that his case was based on unlawful arrest, the *onus,* or at least an *onus* of rebuttal, rested on the defendant to submit grounds of justification for the prosecutor's conduct and to rebut the inference of *animus injuriandi.* Consequently

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—according to his argument—defendant had to show that the prosecutor had reasonable grounds for suspicion. Merely for the purposes of this argument I am prepared to assume in plaintiff's favour that in the case of arrest the *onus,* in the accepted and accurate sense of the word, rests on defendant to prove on a balance of probabilities a ground of justification for such conduct (cf. *Thompson and Another* v. *Minister of Police and Another,* 1971 (1) S.A. 371 (E.C.) at p. 374H; *Newman* v. *Prinsloo and the State,* 1972 (2) P.H. H146). But before such an *onus* (or even an *onus* of rebuttal) can arise, it must first be proved that the person concerned infringed plaintiff's freedom of movement by arresting him. In the present case sergeant Krause in fact performed the arrest. The prosecutor requested the warrant in the exercise of his rights and duties. Only in this indirect manner did he participate in the consequent arrest. The magistrate, by exercising his judicial and discretionary powers granted in terms of sec. 28 of the Criminal Procedure Act, authorised the arrest by issuing the warrant. Therefore, it can be said rightly, in my opinion, that "....."

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(*Newman*'s case, *supra* at p. 257).

In the *Newman* case the difference between unlawful arrest and malicious prosecution is set out clearly and the quoted passage relates thereto. Mr. *Hefer,* in his argument to the contrary, also submitted that plaintiff's cause of action is in fact based on malicious prosecution. This premise is substantiated by plaintiff's allegations in his pleadings. Although he emphatically denies therein any cause of action based on malicious arrest or prosecution, the components of this cause of action are nevertheless set out in his particulars of claim and further particulars, viz., the absence of reasonable grounds of suspicion and *animus injuriandi.* (Cf. *Moaki's* case, *supra* at p. 104). Although it is un-

necessary to describe the present case as one of "malicious prosecution", I agree that it is analogous and especially that the underlying distinction between unlawful arrest and malicious prosecution is also applicable to the present case. This distinction is described as follows in *Cohen Lazar & Co.* v. *Gibbs*, 1922 T.P.A. 142 at p. 149: "....."

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And at p. 146: "....."

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(See also McKerron, *The Law of Delict*, 7th ed., p. 159, 160).

For the above reasons I am of the opinion that the *onus* rested on plaintiff to prove the two said elements of his cause of action. Ob-

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viously he did not discharge the *onus*. Mr. *Van Coller* also did not contend that the necessary evidence was submitted. Plaintiff's cryptic evidence, when he was recalled, that he had not committed any of the offences and that he knew of no information which could implicate him, is of course in no way proof that the prosecutor had no reasonable ground for suspicion. Neither is there any evidence to show —even *prima facie*—that the prosecutor had the required *animus injuriandi*.

It is common cause that the application for absolution requires no separate order for costs. The Court orders absolution from the instance with costs in favour of the defendant.

Plaintiff's Attorneys: *Symington & de Kok*. Defendant's Attorney: *Deputy State Attorney*.