REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,

MPUMALANGA DIVISION (MAIN SEAT, MBOMBELA)

(1) REPORTABLE: YES

(2) OF INTEREST TO OTHER JUDGES: YES

(3) REVISED: YES

SIGNATURE

24/05/2022
DATE

CASE NUMBER: **677/2018**

In the matter between: -

SIJOYI ROBERT MDHLOVU Plaintiff

and

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS Defendant

J U D G M E N T

DATES OF HEARING: 22 FEBRUARY 2022; 23 FEBRUARY 2022; 2 MARCH 2022

DATE OF JUDGMENT: 24 MAY 2022

SIEBERHAGEN AJ:

[1] The plaintiff, Mr Sijoyi Robert Mdhlovu, a regional court prosecutor for the Nelspruit (Mbombela), Mpumalanga region, instituted an action for damages in this court against the National Director of Public Prosecutions ("**NDPP**") based on his alleged malicious prosecution by the defendant acting, as a common cause fact, through its employees who acted within the course and scope of their employment with the defendant.

[2] By agreement between the parties, pursuant to an application in terms of Uniform Rule of Court 33(4) at the commencement of the trial, the trial before me was confined to the merits of the claim, with the question of quantum standing over for later determination.

THE PLEADINGS

[3] The plaintiff's particulars of claim reveal inattentiveness, but it can be gleaned therefrom, as amplified by the submissions by Mr Meintjies on behalf of the plaintiff when I at the commencement of the trial during the parties' application for a separation of issues (in terms of Uniform Rule of Court 33(4)) sought clarity thereon, that the plaintiff's claim is based on the *actio iniuriarum.*[1] In the particulars of plaintiff's claim the plaintiff claims R1 800 000.00 as follows:[2] -

"9.

As a result of the malicious prosecution, plaintiff suffered damages as follows:

9.1 R250 000.00 - being costs for future loss of income.

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1 A cause of action of considerable antiquity - vide *Institutiones Iustinianus*, 697 (*Codex Iustinianus, Liber IV Tituli III - IV*), as recepitated in South African law. Mr Meintjies, in the written heads of argument submitted on behalf of the plaintiff, confined the plaintiff's claim to the *actio iniuriarum*. No attempt was made to prove any other kind of loss.

2 Particulars of claim, § 9 and 10.

9.2 R550 000.00 - loss of promotion and/or advancement prospect.

9.3 R1 000 000.00 for contemelia,[3] good name, reputation, publication in the media and emotional trauma, suffered as a result of the unlawful prosecution.

10.

Defendant was unduly influenced to institute prosecution against the plaintiff, in so doing acting with an animus injuriandi and did not act upon a proper consideration of all the evidence to sustain the charges proffered against the plaintiff." (*sic*)

The *actio iniuriarum* is a remedy for the compensation of damages caused to the person of a plaintiff and the concomitant impairment of his/her *dignitas*. It does not extend to compensation for future loss of income (the basis whereof is to be found in the *actio legis aquiliae*)[4] or "publication in the media" (which will properly resort under an action for defamation, under the *actio iniuriarum*, but there is only one action in the hands of the plaintiff that the injury committed can give rise to[5]), as claimed by the plaintiff, but it need not be considered for reasons that will become apparent.

[4] The plea, equally perfunctory, displays a misconception of the law[6] in that the

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3 Incorrectly spelt in the particulars of claim as *"contemelia"*.

4 *Moaki v Reckitt & Colman (Africa) Ltd & Another* 1968 (1) SA 702 (W.L.D.) at 704E [confirmed on appeal 1968 (3) SA 98 (A)]; *Jansen van Vuuren & Another N.N.O. v Kruger* 1993 (4) SA 842 (A) at 849A-D.

5 *Le Roux & Others v Dey* 2010 (4) SA 210 (SCA) at [21] - [23]; confirmed on appeal 2011 (2) SA 274 (CC).

6 By pleading a conclusion that the existence of a *prima facie* case warranted a prosecution, whilst the law requires more - see *Patel v National Director of Public Prosecutions and Others* (*infra*) at [23] - [25]. Even, if I should conclude that the plea sustains a valid defence, which I do not, I cannot ignore the fact that the evidence on behalf of the defendant does not support the assertions pleaded, and, moreover, contradicts it.

defendant *inter alia* pleaded:[7] -

> *"5.3.2 The defendant avers that he lawfully set the law in motion against the plaintiff and there was sufficient prima facie evidence of the commission of offences by the plaintiff in the docket and the prosecutor acted reasonably with probable cause in proffering criminal charges against the plaintiffs in the circumstances.*
>
> *5.3.3 The defendant had an honest belief upon deciding to prosecute that the plaintiff was guilty of the offences that he had been charged with."*[8] *(sic)*

THE ISSUES

[5] In order to succeed, on the merits, with a claim for malicious prosecution, a plaintiff must prove:[9] -

[i] that the defendant set the law in motion, i.e. instigated or instituted the proceedings;

[ii] that the defendant acted without reasonable and probable cause;

[iii] that the defendant acted with "*malice*" or *animus iniuriandi*; and

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7 Incorrectly numbered under paragraph 7, as paragraph 5.3.2, in the defendant's amended plea, dated 23 August 2018 - evidently because of a mere carrying over thereof from paragraph 5 of the defendant's notice of intention to amend, dated 23 August 2018.

8 The evidence of Adv Moonsamy on behalf of the defendant, that I deal with later in this judgment, contradicts these assertions in the plea and she was insistent that she took the decision to prosecute (and not "the Prosecutor" or the DPP) based on her view that there existed a *prima facie* case for the prosecution of the plaintiff. This she testified in answer to a pertinent question enquiring from her whether she should not have had a reasonable and probable cause for instigating the prosecution.

9 *Amerasinghe Defamation and other aspects of the actio iniuriarum in Roman-Dutch law* (in Ceylon & South Africa) [1968], referred to as *Amerasinghe Defamation*, at 239; *Lederman v Moharal Investments (Pty) Ltd* 1969 (1) SA 190 (A) at 196G-197F; *Thompson and Another v Minister of Police* 1971 (1) SA 371 (E) at 373F-374F; *Relyant Trading (Pty) Ltd v Shongwe and Another* [2007] 1 All SA 375 (SCA) at [5]; *Minister for Justice and Constitutional Development v Moleko* [2008] 3 All SA 47 (SCA) at [8] [also reported at 2009 (2) SACR 585 (SCA)]; *Patel v National Director of Public Prosecutions & Others* 2018 (2) SACR 420 (KZD) at [5]; *Khumalo v Minister of Police and Another* 2021 (1) SACR 551 (WCC) at [34]; *Malebe-Thema and Another v Minister of Safety and Security and Others* 2021 (2) SACR 233 (EP) at [10].

[iv] that the prosecution has failed.

[6] The facts in this matter are common cause and, on the pleadings and the evidence, what were in issue before me are whether: -

[i] the defendant acted with reasonable and probable cause; and

[ii] the defendant acted with "*malice*" (or *animo iniuriandi*).

In this case, it was not in dispute that: -

[a] the defendant set the law in motion (instigated the prosecution of the plaintiff); and

[b] the defendant instigated the prosecution against the plaintiff on the alleged basis that "… there was sufficient *prima facie* evidence of the commission of offences by the plaintiff in the docket and the Prosecutor acted reasonably with probable cause in proffering criminal charges against the plaintiffs in the circumstances";[10]

[c] the prosecution has failed (the plaintiff was discharged on all the charges against him, on 30 August 2017, in terms of section 174 of the Criminal Procedure Act[11] at his criminal trial which commenced on 29 August 2017 in the Nelspruit Regional Court).[12]

THE FACTS

[7] The plaintiff, Mr Mdhlovu, who bore the onus, testified as a sole witness, and on behalf of the defendant testified Sergeant B Nkambule[13] and the Deputy Director

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10 The defendant's amended plea, dated 23 August 2018, § 5.3.2.

11 Act 51 of 1977.

12 Judgment, by regional court magistrate, Mr Jonker, case number RC61/2017, in the Magistrates' Court for the Regional Division of Mpumalanga held at Mbombela.

13 The investigating officer in Nelspruit CAS246/05/15 in respect of which case the plaintiff, on or about the 12th of June 2015, withdrew the charges against the accused therein, contrary to an alleged

of Public Prosecution, Mpumalanga ("**DDPP**"),[14] Adv Moonsamy. There is no need to, and I do not, make any credibility findings in respect of these witnesses.

[8] Moreover, the proven facts are either common cause, or not in dispute. Except for the facts that I find relevant from this evidence, and where necessary to evaluate the evidence, I will not deal with the evidence of each witness in detail.

[9] I will, for the sake of continuity and chronological order,[15] deal with the facts in accordance with its different stages. The first dealing with the facts pertaining to the events that gave rise to the charging of the plaintiff, the second relating to the steps taken in the investigation of the charge laid by the defendant against the plaintiff, the third the decision to proceed with prosecution against the plaintiff and, the fourth, the failure of the prosecution.

FACTS AND CIRCUMSTANCES THAT LED TO THE CHARGE

[10] The plaintiff, a regional court prosecutor with almost 26 years' experience, on or about 12 June 2015 dealt with, *inter alia*, two police case dockets investigated by the investigating officer, Sergeant Nkambule, of the specialised Trio Unit, Nelspruit, relating to serious crimes involving *inter alia* armed robbery, a firearm and attempted murder (in four, respective, "linked-cases").

[11] The plaintiff testified that: -

[11.1] He was a regional court prosecutor in Nelspruit with almost 26 years' experience, when he received two case dockets from the South African Police Services (SAPS);

[11.2] In the course of his duties as a prosecutor he, during the morning of

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agreement between him and Sergeant Nkambule, which "breach of agreement" appears to have been the spark that set fire to the events causing him to have laid a complaint against the plaintiff.

14 At the time that she took the decision to instigate proceedings which gave rise to this suit.

15 *Patel v National Director of Public Prosecutions & others (supra)* at [3].

12 June 2015, still in his office, pointed out to the investigating officer, Sergeant Nkambule, that the matter, under CAS246/05/15, was not trial ready for reason that the “chain evidence had been broken” in relation to the identification of the firearm that linked the four, respective, cases, and after Sergeant Nkambule has left his office, he later during the day in court withdrew the charges in the matter;

[11.3] He was, at the time, of the view that the matter was not trial ready due to insurmountable contradictions in the facts caused by the lack of proper identification of the firearm by the forensic investigation department in Pretoria of the SAPS;

[11.4] It became apparent to him that Sergeant Nkambule was not satisfied with his action and laid a complaint against him for alleged breach of the “agreement” that they reached earlier that morning;

[11.5] He was, as a prosecutor, mandated, to take decisions in his discretion for the management of the cases that he put before court;

[11.6] Though there was no duty upon him to consult anyone before withdrawing a matter, he did discuss these matters with the control prosecutor, Mr David Mashego, before withdrawing the matter;

[11.7] He was not aware of any unwritten rule of practice in Mpumalanga that in matters of a serious nature the prosecutor must first discuss the matter with the senior prosecutor before withdrawing it, as suggested by Adv Moonsamy and exhibit “B” (a letter wherein the senior prosecutor, Nelspruit, Ms K M Mashapa, confirmed that she did not grant the plaintiff permission to withdraw the matter in certain case numbers Nelspruit

CAS29/07/2015 & Nelspruit CAS30/07/2015);[16]

[11.8] Later on, an attorney and manager directed to him by the Deputy Director of Public Prosecutions' ("**DDPP**") office, approached him to make a representation before he would be charged criminally. He elected not to make any representations as in his view he had done nothing wrong;

[11.9] More than a year later, he was arrested at his office on 26 October 2016, taken to the Nelspruit police station where he was charged, brought before court where he was granted bail, and all of that occurred in the presence of his colleagues and other personnel working in the same office. He felt humiliated by this arrest and being brought to court whilst in custody;

[11.10] On 29 August 2007 he appeared for his trial wherein he was on the 30th of August 2017 found not guilty and discharged in terms of section 174 of the Criminal Procedure Act;[17]

[11.11] In his view his prosecution was malicious, which caused him discomfort and humiliation at his work for having to "… look behind his back …". He, further, experienced tension and a palpable atmosphere at work causing him to eventually request to be transferred to Nkomazi Court for colleagues were viewing him differently at Nelspruit where he was prosecuted in the same court wherein he acted as prosecutor;

[11.12] When he withdrew the charges, he did so in terms of the prosecutor's policy manual[18] and took decisions, as he was required to do, within his

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16 Her letter, significantly, does not address the Nelspruit CAS246/05/15 matter, forming the subject matter of the present suit; moreover, the reference to her letter constituted hearsay and the contents thereof have not been sought to be proven by the defendant.

17 No 51 of 1977.

18 National Prosecuting Authority of South Africa Policy Manual, clauses 3 - 4, affording a prosecutor a wide discretion, without which, in my view, prosecutors in our lower courts would not be able to

discretion. He had no agreement or arrangement with the investigating officer in the matter, could not be influenced by the views of the investigating officer before independently taking decisions on the merits appearing from case dockets and, in any event, the decisions that he took did not affect the final outcome of the matter;

[11.13] There was no criminal conduct on his part and he was not afforded a disciplinary hearing;

[11.14] He was not aware of the decision, or the reasons therefor, by Adv Moonsamy, resulting in his arrest and prosecution.

[12] Sergeant Nkambule was, understandably, upset for he, who struck me as an astute policeman who approached the serious matters that he investigated with genuine devotion, reported what he regarded as a "breach of agreement" by the plaintiff, the plaintiff having earlier on the 12th of June 2015, according to him, undertaken to postpone the case (under CAS246/05/15) for further investigation. He, consequently, reported the "breach" to his superior officer with a view of action to be taken against the plaintiff. However, Sergeant Nkambule's disappointment does not render the actions by the plaintiff wrongful or unlawful.

[13] The plaintiff testified that he acted within his discretion as a prosecutor, in accordance with the "National Prosecuting Authority of South Africa - Policy Manual".[19] The plaintiff testified that he exercised his discretion in accordance with the policy carefully, and because of the "break in the chain evidence" and the, ultimate, failure of the correct firearm having been properly linked pursuant to forensic investigation by the Forensic Department of SAPS, Pretoria, and that because of this lack of evidence, and contradictory facts, it would have been non-

perform their duties to ensure a proper functioning of those courts that are, already, functioning under severe constraints.

19 The determination and observance whereof is mandatory in terms of section 179(5)(a) - (d) of the Constitution, and appears to have been observed in the instance.

sensical to prosecute the case any further at that stage. He, further, testified that given the same facts, in the same circumstances, he would have exercised his discretion exactly the same (in his words, even an inexperienced prosecutor would not have prosecuted the matter), and that for these reasons he, at the time of being charged, elected not to accept the invitation to make representations before being criminally charged.

[14] It might be apposite, for the benefit of Sergeant Nkambule, and other interested parties, such as the victims in those serious cases where the charges had been withdrawn in the instance, to be reminded of the following *dicta* by Slomowitz AJ in *S v Khubeka:*[20] -

> *"The rule that the State is required to prove guilt beyond a reasonable doubt had on occasion been criticised as being anomalous. On the other hand, the vast majority of lawyers (myself included) subscribe to the view that in the search for the truth it is better that guilty men should go free than that an innocent man should be punished. More especially is this so in capital cases. It should be borne in mind, however, that a court seeks to do justice not merely to the accused but to society as a whole. If then the police do not fully and properly investigate crimes, especially of the type with which I am here concerned, as a result of which insufficient evidence is made available to the prosecution and in consequence put before the court, guilty men will go free, not because of the existence of the rule to which I have referred, but simply because cases have been inadequately investigated. The consequence will be that the administration of justice will fall into disrepute."*

Moreover, the fact that the plaintiff (prosecutor) withdrew the charges at the time, did not mean that the case could not come before court again; indeed, thereby the risk "… and in consequence put before the court, guilty men will go free, …"

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[20] 1982 (1) SA 534 (WLD) at 538G - 539A.

was averted and upon proper further investigation he or the next prosecutor would have been put in a better position to successfully prosecute the case. As it turned out, it seems that these cases, for unclear and unexplained reasons, did not come before the appropriate court again.

INVESTIGATION OF THE COMPLAINT AGAINST PLAINTIFF

[15] Adv Moonsamy is known to this court as an officer of the court with the highest repute. However, it would appear that in the circumstances of this matter she got carried away by her sense of duty as influenced by a general adoption of the presupposition that corruption and fraud should be "stamped out" in the Mpumalanga Province. Which approach in itself, of course, cannot be criticised, but should as this case demonstrates always be approached and implemented with circumspection.

[16] The detailed facts, which I regard relevant, appearing from the evidence of Adv Moonsamy, are: -

[16.1] Adv Moonsamy was appointed as the Deputy Director of Public Prosecutions, Mpumalanga ("**DDPP**") during October 2015 and less than a month thereafter received the complaints and case dockets, concerning the conduct of the plaintiff in the regional court on 12 June 2015, when he withdrew the charge in one matter and did not oppose bail in the other in the alleged *"breach of the agreement"* earlier that day with Sergeant Nkambule, from Captain Nkwanyana on 6 November 2015. It is necessary to interpose in order to observe that these case dockets, and their contents, despite the obvious pivotal importance thereof, have not been produced nor adduced into evidence by the defendant.

[16.2] Adv Moonsamy was at pains to state that she carefully considered the matter, because the plaintiff was "… one of their own …", meaning that

he, at the time, functioned under her auspices in the lower courts, and, further, that she, as a measure of extra caution, has had the case documents concerning the complaints against the plaintiff considered by five further professional personnel (including, advocates, the senior State prosecutor and members from her office).

[16.3] She, after receipt of the complaints and case dockets, requested the input from *inter alia* the senior prosecutor, Mr Van Heerden, and the senior public prosecutor for the Nelspruit Magistrates' Court, Ms Mashapa, but having not received proper input from them, she considered the contents of the case dockets, made recommendations thereon to the DPP, and after having received the comments of the DPP on 28 December 2015, she elected to have the plaintiff prosecuted on charges of fraud and defeating or obstructing the administration of justice.

[16.4] The "motivation" for her recommendation to the DPP is contained in an internal memorandum by her to the Director of Public Prosecutions, North Gauteng Division, dated 15 December 2015, which reads as follows: -

> *"**MOTIVATION***
>
> *I have gone through the case dockets as well as annexures A1 and A2, which are self-explanatory, and I am of the view that the Prosecutor must be prosecuted on **TWO (2) COUNTS OF DEFEATING THE ENDS OF JUSTICE**.*
>
> *We have heard at the recent PEEC meeting with the judge-president, the Honourable Justice Mlambo, that there are huge concerns relating to corruption on the part of Prosecutors in the Mpumalanga province.*
>
> *It is incumbent that we send out a message that the NPA has a zero*

tolerance approach to corruption. And although one is unable to prove corruption herein, the dockets as well as annexure "E" contain evidence that has the hallmark of corrupt tendencies."

In my view, this "motivation" by Adv Moonsamy on the 15th of December 2015 underscores the subjective element[21] of her decision to prosecute.[22]

[16.5] She had this view notwithstanding the fact that in the same memorandum she expressed the view that "The Prosecutor must be prosecuted on **two (2) counts of defeating the ends of justice**", and, further, indicated to the Director of Public Prosecutions, North Gauteng Division, that it would not be possible to prove corruption on the evidence contained in the dockets that she forwarded to him.

[16.6] In reply to Adv Moonsamy's memorandum, the Director of Public Prosecutions, Gauteng Division, Pretoria (the "**DPP**"), on the 28th of December 2015 addressed a letter to her, wherein he remarked as follows: -

"1.1 I am in agreement that there appears to be a prima facie case against Robert Ndhlovu on 2 counts of fraud, alternatively defeating or obstructing the administration of justice.

1.2 The following further investigation must be completed before a final decision regarding prosecution is made:

1.2.1 The warning statements of Robert Ndhlovu pertaining to both dockets opened against him must be obtained;

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21 *Minister for Justice and Constitutional Development v Moleko* (*supra*) at [20].

22 She, ultimately, took the final decision, and on 8 September 2016 gave the instruction for the plaintiff to be charged criminally on charges of fraud and defeating or obstructing the administration of justice.

1.2.2 The statement of the senior prosecutor must be filed in the case dockets; and

1.2.3 Affidavits must be obtained from the respective magistrates who completed the relevant J15 charge sheets, confirming that Robert Ndhlovu was the prosecutor who withdrew the matters and the contents noted on the respective J15 charge sheets.

1.3 You are hereby authorised to dispose of the matter as you deem fit, but the case dockets may be submitted to this office again for further guidance if so required."

DECISION TO PROCEED WITH THE PROSECUTION

[17] On the evidence of Adv Moonsamy relating to her decision to prosecute, the following facts were established: -

[17.1] She, on receipt of the letter, dated 28 December 2015, by and on behalf of the DPP, Gauteng Division, Pretoria, and despite being in disagreement with the DPP's view that the case dockets (CAS29/7/2015 and 30/7/2015) provided sufficient grounds for instituting charges on two counts of fraud, elected to issue an instruction for the prosecution of the plaintiff on charges of fraud and, in the alternative, the crime of defeating or obstructing the administration of justice.

Although she in answer to able, courteous, cross-examination by Mr Meintjies on behalf of the plaintiff, at first, attempted to indicate that it had been on the instruction of the DPP that she issued the instruction for prosecution on the charges of fraud, she eventually conceded that she exercised her discretion to instruct prosecution of the plaintiff on charges of fraud and, in the alternative, charges of obstructing and defeating the

administration of justice.

[17.2] In answer to a pertinent question, Adv Moonsamy stated that it was not necessary for her to have had sufficient evidence before her to show that the prosecution of the plaintiff had a reasonable and probable cause, and that it had only been necessary for her to have had established that there had been a *prima facie* case against the plaintiff. This amounts to a material misconception of the law.[23]

[17.3] She, when considering the plaintiff's actions, did not regard the compromised chain of evidence and lack of identification of the firearm which had been retrieved (a Star pistol) in contradiction to the firearm entered into the SAP13 register (a Star, Taurus) aggravated by a further contradiction in respect of the firearm forensically analysed (a Norinco) which had been the crucial exhibit linking the four dockets, as a factor which had been duly considered by the plaintiff when taking his decision to withdraw the charges. The distinct impression gained from her evidence in relation thereto, is that she realised these discrepancies for the first time when she was confronted with it during cross-examination.

[17.4] Nothing (in the form of the contents of the case dockets concerning the plaintiff, considered by Adv Moonsamy), was put before me, on behalf of the defendant, establishing reasonable and probable cause to prosecute the plaintiff. Indeed, Adv Moonsamy testified that in her view it was not necessary for her to have had reasonable and probable cause to institute the prosecution and all that she had to establish was whether a *prima facie* case could be established from the information and evidence considered by her. Even if she was correct, which she was not, neither she nor the defendant adduced any evidence whereon she made her

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23 *Patel v National Director of Public Prosecutions and Others* (*supra*) at [25].

decision. The high-water mark of her evidence was that she resolved that, on the contents of the case dockets put before her, a *prima facie* case against the plaintiff existed.

It requires to be pointed out that, during this portion of Adv Moonsamy's testimony, she attempted to refer to documents contained in a file that she brought with her to the witness stand (without it being disclosed to me or Mr Meintjies on behalf of the plaintiff), and upon my raising the inadmissibility thereof with Adv Ngumane, on behalf of the defendant, and his mere stating "… I am in the hands of the court M'Lord …",[24] I requested him and Mr Meintjies to see me in chambers, where I invited him to do whatever advised, and procedurally and regularly required, to have, whatever documents Adv Moonsamy was referring to, admitted properly. However, except for adhering to my direction that I would not allow her to refer to any documents not properly discovered or to refresh her memory without a proper foundation having been laid therefor, he didn't attempt to adduce the documents or any other evidence in that regard.

Moreover, I don't need to consider whether Adv Moonsamy had sufficient evidence before her that enabled her to have had established that she had reasonable and probable cause to initiate the prosecution, because she says that she did not establish it to the extent. On the facts, therefore, she did not consider the existence or not of reasonable and probable cause.

PROSECUTION FAILED

[18] It is common cause that the prosecution failed, and the learned magistrate

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[24] A mediocre approach ever so often resorted to in recent times by counsel when faced with difficulties in properly presenting their clients' cases.

discharged and acquitted the plaintiff in terms of section 174 of the Criminal Procedure Act.[25] I am not influenced, or bound by the reasons for his discharge of the plaintiff in the criminal matter, and, in any event, do not find it necessary to refer thereto. Of importance, in that procedure, is that the record thereof reflects that the prosecutor acting on behalf of the State, Adv Pudikwabekwa, conceded that the plaintiff should have been called before a disciplinary hearing as opposed to criminally charged.

THE LAW

Actio iniuriarum

[19] *"Generaliter iniuria dicitur omne quod non iure fit"* (in general one understands under the *iniuria* anything committed unlawfully).*[26]* Though not as wide an action anymore as enacted by Caesar Iustinianus I (527-565), the *actio iniuriarum* (as developed in Roman law, Roman-Dutch law and recepitated in South African law) is still the action protecting the rights entrenched in the Bill of Rights as contained in sections 10 (human dignity), 12 (freedom and security) and 14 (privacy) of the Constitution. A claim based on the violation of any of these rights must not be founded on the constitutional right, for in our constitutional order no sharp line can be drawn between the actions for claims for injuries to reputation (*fama* and *dignitas* concerning the individual's own sense of self-worth, and including a variety of personal rights, for example, privacy),[27] and the cause of action should be pleaded on the elements sustained by the *actio iniuriarum*.

[20] The *actio iniuriarum* is a cause of action whereby a plaintiff can claim for injuries to her person, dignity or reputation, where the injury is committed wrongfully and

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25 Act 51 of 1977.

26 *Institutiones Iustinianus*, *Liber IV Tituli IV*, translated by A C Oltmans, 4th reprint, 1967, H D Tjeenk Willink & Zoon N.V. - Haarlem, Amsterdam at 225.

27 *Khumalo and Others v Holomisa* 2002 (5) SA 401 (CC) at [27].

with the *animus iniuriandi*[28] (intentionally).[29]

[21] It is not sufficient for a defendant to merely deny *animus iniuriandi*; she must allege and prove the factual basis for the absence of *animus iniuriandi*.[30]

Malicious prosecution

[22] Malicious prosecution is an abuse of the process of court by intentionally and wrongfully setting the law in motion on a criminal charge.[31] In order to succeed in an action for malicious prosecution, a plaintiff must prove: -

[22.1] that the defendant instituted or instigated the proceedings;[32]

[22.2] that the defendant acted intentionally or with *animus iniuriandi*;[33]

[22.3] that the defendant acted without reasonable and probable cause;[34]

[22.4] that the defendant was actuated by an improper motive or malice;[35]

[22.5] that the prosecution has failed or has been terminated in the plaintiff's favour;[36] and

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28 *Moaki v Reckitt & Colman (Africa) Ltd & Another* (*supra*) at 704E; *Bennett v Minister of Police* 1980 (3) SA 24 (C) at 34H; *Dendy v University of Witwatersrand, Johannesburg* 2005 (5) SA 357 (W) at [27]; 2007 (5) SA 382 (SCA) at [15] - [16]; *Relyant Trading (Pty) Ltd v Shongwe* [2007] 1 All SA 575 (SCA) at [9].

29 *Dolus eventualis* is sufficient. See *Heyns a Venter* 2004 (3) SA 200 (T) at [13] - [14]; *Minister for Justice and Constitutional Development v Moleko (supra)* at [64].

30 *Ramsay v Minister van Polisie* 1981 (4) SA 802 (A) at 820A-C; *Jansen van Vuuren v Kruger* 1993 (4) SA 842 (A) at 856A - 857G.

31 LAWSA, 2nd edition, vol 15, part 2, § 315.

32 *Lederman v Moharal Investments (Pty) Ltd* (*supra*) at 197; *Heyns v Venter (supra)* at [8]; *Amerasinghe, C F Defamation and other Aspects of the Actio Iniuriarum in Roman-Dutch law*, Colombo Lake House 1968 at 20.

33 *Prinsloo v Newman* 1975 (1) SA 481 (AD) at 492; *Lederman v Moharal Investments (Pty) Ltd (supra)* at 196.

34 *Beckenstrater v Rottcher & Theunissen* 1955 (1) SA 129 (AD) at 135; *Heyns v Venter (supra)* at 211.

35 *Amerasinghe (supra)* at 55-56.

36 *Thompson and Another v Minister of Police and Another* 1971 (1) SA 371 (E) at 375.

[22.6] the plaintiff suffered damages.[37]

[23] The *locus classicus* on the requirements for the delict of malicious prosecution, is the judgment by the Supreme Court of Appeal in *Minister for Justice and Constitutional Development v Moleko*,[38] and a clear statement of the law, with due deference to Ledwaba DJP, in regard to the test to be applied by the prosecutor, i.e. "reasonable and probable cause", before instigating prosecution against an accused, is set out in *Patel v National Director of Public Prosecutions and Others*.[39] The statement of the law, and principles laid down, in these two judgments, are not only of significant guidance, but make it clear that the applicable legal principles can now be regarded as settled law.

[24] On what were in issue before me,[40] I shall refer to these judgments where they deal with "reasonable and probable cause" and "malice" (or *animo iniuriandi*), only.

[25] In respect of the requirement of malice, Ledwaba DJP stated thus:[41] -

> *"[21] To determine whether there was malice or not, it will be worth recalling what the Supreme Court of Appeal said when it dealt with the duty of the prosecutor in Minister of Police and Another v Du Plessis:[10]*
>
> > *'A prosecutor has a duty not to act arbitrarily. A prosecutor must act with objectivity and must protect the public interest. In S v Jija and Others 1991 (2) SA 52 (E) at 67I-68B the following appears:*

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37 If the plaintiff is successful, he will be entitled to damages for both injury to personality and pecuniary loss suffered. See *Heyns v Venter (supra)* at 213-214. Compensation for damages caused by injury to the personality, will be awarded as a *solatium* under the *actio iniuriarum*, whilst compensation for pecuniary loss will be under the *actio legis Aquiliae*. However, a plaintiff has only one action for compensation under the *actio iniuriarum* - see *Le Roux and Others v Dey (supra)* at [21] - [23]. In the instance, the plaintiff confined his claim to the *actio iniuriarum*.

38 *Supra.*

39 *Supra.*

40 § [6] above.

41 *Patel v National Director of Public Prosecutions and Others (supra)* at [21] - [25].

'I must also mention that the court had an uneasy feeling that state counsel had misconceived his function. It appeared to the court from the nature of his address and attitude that he regarded his role as that of an advocate representing a client. A prosecutor, however, stands in special relation to the court. His paramount duty is not to procure a conviction but to assist the court in ascertaining the truth (R v Riekert 1954 (4) SA 254 (SWA) at 261D-G; R v Berens [1985] 176 ER 815 at 822). See also R v White 1962 (4) SA 153 (FC); R v Tapera 1964 (3) SA 771 (SRA); S v Van Rensburg 1963 (2) SA 343 (N); R v M 1959 (1) SA 434 (A) at 439F.'

[22] In Democratic Alliance v President of the Republic of South Africa and Others[11] *this court, after a discussion concerning prosecutorial independence in democratic societies, quoted, with approval, the following part of a paper presented at an international seminar by Mr James Hamilton, then substitute member of Venice Commission and Director of Public Prosecution in Ireland:*

'Despite the variety of arrangements in prosecutor's office, the public prosecutor plays a vital role in ensuring due process and the rule of law as well as respect for the rights of all parties involved in the criminal justice system. The prosecutor's duties are owed primarily to the public as a whole but also to those individuals caught up in the system, whether as suspects of accused persons, witnesses or victims of crime. Public confidence in the prosecutor ultimately depends on confidence that the rule of law is obeyed.'

We should all be concerned about the maintenance and promotion of the rule of law. Given increasing litigating involving the NDPP, these principles cannot be repeated often enough. We ignore them at our peril.

[23] A prosecutor exercises discretion on the basis of the information before him or her. In S v Lubaxa[12] *this court said the following:*

'Clearly a person ought not to be prosecuted in the absence of a minimum of evidence upon which he might be convicted, merely in the expectation that at some stage he might incriminate himself. That is recognised by the common law principle that there should be reasonable and probable cause to believe that the accused is guilty of an offence before a prosecution is initiated (Beckenstrater v Rottcher and Theunissen 1955 (1) SA 129 (A) at 135C-E), and the constitutional protection afforded to dignity and personal freedom (s 10 and s 12) seems to reinforce it. It ought to follow that if a prosecution is not to be commenced without that minimum of evidence, so too should it cease when the evidence finally falls below that threshold.'

[24] Courts are not overly eager to limit or interfere with the legitimate exercise of the prosecutorial authority. However, a prosecuting authority's discretion to prosecute is not immune from the scrutiny of a court which can intervene where such discretion is improperly exercised. See generally National Director of Public Prosecutions v Zuma.[13]

The following was held in Du Plessis:[14]

'Indeed a court should be obliged to and therefore ought to intervene if there is no reasonable and probable cause to believe that the accused is guilty of an offence before a prosecution is initiated.'

[25] The second defendant should have been satisfied that there was reasonable and probable cause, not just a prima facie case against the plaintiff. The prosecutor should interrogate the docket in its entirety and apply his/her mind properly before taking a decision. Again, if I accept the version of Ms Nxele, it implies that Adv Noko was not a credible witness and she fabricated the evidence. The defence failed to call the officer who commissioned Ms Nxele's statement, so that he could testify if the complainant understood the content her statement, and confirm the truthfulness thereof."

[26] In *Relyant Trading (Pty) Ltd v Shongwe and Another*[42] the Supreme Court of Appeal stated the following in regard to the requirement of "malice" of *animus iniuriandi*: -

> *"Although the expression 'malice' is used, it means, in the context of the actio iniuriarum, animus iniuriandi. In Moaki v Reckitt & Colman (Africa) Ltd & another, Wessels JA said:*
>
> > *'Where relief is claimed by this actio the plaintiff must allege and prove that the defendant intended to injure (either dolus directus or indirectus). Save to the extent that it might afford evidence of the defendant's true intention or might possibly be taken into account in fixing the quantum of damages, the motive of the defendant is not of any legal relevance'."*

With reference to this passage in the *Relyant Trading* case, Van Heerden JA, in *Minister for Justice and Constitutional Development v Moleko,*[43] stated the following: -

> *"[62] In doing so, the court decided the issue which it had left open in Lederman v Maheral Investments (Pty) Ltd*[29] *and again in Prinsloo and Another v Newman,*[30] *namely that animus iniuriandi, and not malice, must be proved before the defendant can be held liable for malicious prosecution as injuria.*[31]
>
> *[63] Animus injuriandi 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*

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42 *Supra* at [5].
43 *Supra* at [62] - [65].

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 consciousness of wrongfulness, and therefore, animus injuriandi, will be lacking. His mistake therefore excludes the existence of animus injuriandi.'[32]

[64] 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).[33] *Negligence on the part of the defendant (or, I would say, even gross negligence) will not suffice.*[34]

[65] In this case, I am of the view that Mr Moleko did prove animus injuriandi on the part of the DPP. Ms Neveling clearly intended to prosecute Mr Moleko and was fully aware of the fact that, by so doing, he would in all probability be 'injured' and his dignity ('comprehending also his … good name and privacy')[35] *in all probability negatively affected. Despite this knowledge, she took the decision to prosecute without making any of the enquiries which cried out to be made, thus acting in a manner that showed her recklessness as to the possible consequences of her conduct."*

CONCLUSION

[27] There can be no doubt that both the requisite objective and subjective elements in respect of Adv Moonsamy's *animus iniuriandi* were present in this matter. Particularly so, when regard is being had to her memorandum to the DPP wherein she expressly recorded that a charge of corruption would not have been sustainable against the plaintiff. Further, on the defendant's version (and "a lack

of evidence" that might have supported a more benevolent inference), the defendant did not have reasonable and probable cause.

[28] I find that the plaintiff proved on a balance of probabilities that Adv Moonsamy acted with *animus iniuriandi*, and that the defendant failed to prove the defence raised in the pleadings.

[29] I, accordingly, find for the plaintiff that the defendant is liable to the plaintiff, under the *actio iniuriarum*, for the damages caused to the plaintiff's personality and *dignitas* through his malicious prosecution by the defendant.

[30] There is no reason why the ordinary rule, that costs should follow the result, should not be applied.[44]

ORDER

[31] The following order is made: -

1. The defendant is to pay the plaintiff any such amount, as the plaintiff might be able to prove, as compensation for damages to his person and *dignitas* caused through his malicious prosecution by the defendant.

2. The defendant shall pay the plaintiff's costs.

P SIEBERHAGEN
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION (MAIN SEAT, MBOMBELA)

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[44] *Treatment Action Campaign v Minister of Health* 2005 (6) SA 363 (TPD) at 371C-E.

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date and time for hand-down is deemed to be _____ 2022 at 10:00.

APPEARANCES:

For the plaintiff:	**Mr Meintjes**
Instructed by:	**Meintjies & Khoza Attorneys, Nelspruit**
For the defendant:	**Adv Ngumane**
Instructed by:	**The State Attorney, Pretoria**
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