THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no**:** 356/09

In the matter between:

No precedential significance

RUSSEL BRENT DE BEER **Appellant**

and

MINISTER OF SAFETY AND SECURITY **Respondent**

Neutral citation: **De Beer v Minister of Safety and Security (356/09) [2010] ZASCA 97 (3September 2010)**

Coram: Harms DP, Nugent, Lewis and Bosielo JJA and K Pillay AJA

Heard: **19 August 2010**

Delivered **3 September 2010**

Summary: Appeal against dismissal of action for malicious prosecution: decision of high court confirmed: reasonable belief that offence committed and no animus injuriandi on part of police.

ORDER

On appeal from North Gauteng High Court (Pretoria) (Mavundla J sitting as the court of first instance):

The appeal is dismissed with costs including those of two counsel where so employed.

JUDGMENT

LEWIS JA (HARMS DP, NUGENT AND BOSIELO JJA AND K PILLAY AJA concurring)

[1] The appellant, Russel de Beer, was a cannabis farmer at the Kameeldrift farm near Rustenburg. He purported to cultivate cannabis (known generally as dagga) for research purposes in terms of a permit acquired by the Agricultural Research Centre. It came to the attention of police in the area (at the Assen police station) that he was growing cannabis plants and they were informed that he was selling dagga.

[2] Inspector Westmaas, the branch commander of the Assen police station, who had been informed that De Beer was growing dagga on the farm, and whose informant claimed to have bought some from him, was told that the appellant claimed to be operating in terms of a permit. He thus tried to establish whether a permit to cultivate dagga did exist and whether permits of this nature were ever issued. His research yielded no information.

[3] Westmaas duly obtained a search warrant from a magistrate and visited the appellant's farm with fellow officers on 9 February 2004. I shall describe the events on that day more fully in due course. Suffice it to say for the moment that De Beer could not produce a permit, and Westmaas arrested him and took him to the Assen police station. He was charged with contravening various provisions of the Drugs and Drug Trafficking Act 140 of

1992 and was detained overnight. On 10 February 2004 De Beer was released on bail. He appeared six times in court thereafter but eventually a permit – of which more later – was found and the charges against him were withdrawn a year later.

[4] De Beer instituted action against the respondent for malicious prosecution, claiming damages in respect of legal expenses incurred and for damages suffered as the result of the unlawful conduct of the police responsible for arresting and charging him. The North Gauteng High Court (Mavundla J) dismissed the action, finding that the respondent had shown that there were reasonable grounds justifying Westmaas's suspicion that De Beer was committing an offence and that he was not activated by malice (having no animus injuriandi). The appeal to this court is with the leave of the trial court.

[5] The questions to be determined on appeal are whether Westmaas acted without probable cause and animo injuriandi; and if so, the quantum of damages. The latter was not considered by the high court since it found that no wrong had been committed by the police. I shall deal first with probable cause: whether Westmaas reasonably believed that De Beer was acting in contravention of the Act by cultivating dagga.

[6] When Westmaas and his colleagues arrived at De Beer's farm they were shown the dagga plants which were growing openly on the farm: De Beer explained that his activity was legitimate because he had a permit. He was experimenting with hemp for various commercial purposes, he said. He did not have a permit on the farm but showed Westmaas a file (referred to as a book as well) reflecting 'research' done from 2000 to 2001.

[7] De Beer informed Westmaas that he should contact a Dr Joubert at the Agricultural Research Centre who would explain the nature of the permit. Dr Joubert proved to be uncontactable that day. Westmaas took advice from the local police legal adviser who also made enquiries. While attempts were made to find out more about the permit Westmaas started to count the dagga plants and also searched the premises. He found dagga seed in a bath, and dagga

leaves in containers in the kitchen and in a variety of other places. Photographs of all these things were taken and were exhibits at the trial. The premises did not appear to him to be a research centre, and he suspected that no permit existed.

[8] This suspicion was supported when he found an envelope addressed to a person overseas: it contained cardboard protecting dagga seeds. Westmaas, who had initially been under the impression that the alleged permit was for the cultivation of cannabis, was confused by De Beer's assertions first that he was growing it for commercial purposes, but later that the farm was a research facility. Other than the book relating to 2000 and 2001 there was no evidence at all that any research was being conducted on the farm or in the farmhouse. It was conceded that it was reasonable for Westmaas to have believed that no research was being conducted on the farm.

[9] Eventually, when the legal adviser was unable to establish anything about the existence of a permit he advised Westmaas to arrest De Beer and charge him. It is noteworthy that De Beer appeared to make no effort to contact anyone who could enlighten the police, but did contact a journalist – a 'dagga activist'.

[10] Westmaas duly arrested the appellant, who, as I have said, was released the following day on bail. And the charges were withdrawn months later when a permit to conduct research, issued to the Agricultural Research Centre by the Department of Health, was found. Although on the face of it the permit appeared to have expired, it subsequently transpired that at the time of the arrest it had in fact been in existence. Whether De Beer was complying with its terms ('to create a gene pool of well adapted cultivars . . . for hemp production') is irrelevant to the question whether Westmaas reasonably believed that De Beer's activities were criminal.

[11] In considering this question the trial court dealt comprehensively with all the evidence, including the photographs of the plants and the premises in

which dagga seeds and leaves were stored, and concluded that Westmaas had indeed had a reasonable suspicion that offences were being committed. Its conclusion in this regard cannot be faulted.

[12] The second question is whether the respondent, through Westmaas, acted animo injuriandi. Again, the high court concluded that this was not the case. Any police officer, the court said, faced with evidence of possession of dagga in substantial quantities, would have been irresponsible had he not effected an arrest.

[13] Where a plaintiff sues for malicious prosecution he must prove malice in the form of intention to injure. It is trite that this requires that the defendant acted with knowledge that what he was doing was wrongful or at least that he was reckless as to the consequences of his conduct. (See, most recently, *Relyant Trading (Pty) Ltd v Shongwe & another* [2007] 1 All SA 375 (SCA) para 5; *Minister for Justice and Constitutional Development v Moleko* [2008] 3 All SA 47 (SCA) paras 61 to 65 and *Rudolph v Minister of Safety and Security* 2009 (5) SA 94 (SCA) para 18.)

[14] There was no evidence at all that Westmaas had acted with knowledge that his conduct was unlawful. On the contrary: he believed, reasonably, that De Beer was contravening the law and that he had a duty to arrest and charge him. Furthermore, he acted on the advice of the police legal adviser. Both of them had made concerted attempts to establish whether De Beer was in fact acting lawfully. When they could not do so they considered that there was a duty to arrest De Beer. Malice (animus injuriandi) was certainly absent. Even recklessness could hardly be claimed given the efforts made to ascertain whether De Beer was correct in asserting that he had a permit to grow hemp for commercial purposes. De Beer himself did not assist in this regard: nor did his wife or father who were present.

[15] De Beer's argument that Westmaas acted over-hastily and should have made greater efforts to find the permit does not bear scrutiny. Westmaas had made attempts before visiting the farm to establish whether there was a

permit. On the day of the arrest he tried to contact Dr Joubert, at De Beer's suggestion, in vain. The legal adviser's attempts to do so were also futile. And in the end the permit was produced only four months after the arrest.

[16] The trial court found correctly that there was no animus injuriandi – and therefore no malicious prosecution. The action was in my view correctly dismissed.

[17] The appeal is dismissed with costs including those of two counsel where so employed.

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C H Lewis

Judge of Appeal

APPEARANCES

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