THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case No: 437/13

In the matter between:

THE MINISTER OF SAFETY AND SECURITY N.O. **FIRST APPELLANT**

THE DIRECTOR OF PUBLIC PROSECUTIONS N.O. **SECOND APPELLANT**

and

LEONARD CHARLES SCHUBACH **RESPONDENT**

Neutral citation: *Minister of Safety and Security NO v Schubach* (437/13) [2014] ZASCA 216 (1 December 2014)

Coram: Navsa ADP, Shongwe, Zondi JJA and Schoeman and Meyer AJJA

Heard: 14 November 2014

Delivered: 1 December 2014

Summary: Malicious prosecution – what plaintiff must prove – plaintiff prosecuted on a number of charges including those for which there was no basis – assessment of damages – Prosecuting Authority – Powers and duties – s 42 of National Prosecuting Authority Act 32 of 1998 not applicable where powers unlawfully exercised.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Kruger AJ sitting as court of first instance):

1. The appeal is upheld to the extent reflected in the orders that follow.
2. The respondent is ordered to pay the appellants' costs of the appeal, including the costs of two counsel.
3. The order of the court below is set aside and replaced with the following order:

'(a) The first and second defendants are ordered jointly and severally, the one paying the other to be absolved, to pay the plaintiff a sum of R10 000.

(b) The first and second defendants are ordered to pay interest at the rate of 15.5 per cent *a tempore morae* from date of summons to date of payment.

(c) The first and second defendants are ordered jointly and severally, the one paying the other to be absolved, to pay the plaintiff's costs of suit.'

JUDGMENT

Zondi JA (Navsa ADP, Shongwe JA and Schoeman and Meyer AJJA concurring):

[1] This is an appeal against the judgment and order of the North Gauteng High Court, Pretoria (Kruger AJ) upholding the respondent's claim arising from an alleged malicious prosecution and awarding him damages. The appeal is with the leave of that court.

[2] The respondent, Mr Leonard Charles Schubach, held the rank of Colonel in the South African Police Service. He was the commanding officer of the Escort Unit of the SAPS, which unit was responsible for escorting money for the South African Reserve

Bank to various destinations in the country. As a result of information received from an informer various firearms and ammunition including weapons owned by the respondent, his wife and third parties as well as flares or explosives used by members of the SAPS for operational purposes were found in a walk-in safe at the offices of the Escort Unit on 14 March 2005 over which the respondent exercised control. The weapons, ammunition and explosives were seized and the respondent was arrested for the unlawful possession of firearms and ammunition despite his explanation that the firearms and ammunition found were all licensed and owned by either him, his wife or third parties for whom they were kept in safe custody and that the rest of the weapons and explosives were either found or owned by the SAPS.

[3] Notwithstanding his explanation, the respondent was arrested for the unlawful possession of all the firearms and ammunition and was detained at Pretoria Central Police Station until 15 March 2005. On that date the respondent appeared in court where he was released on R3000 bail. In due course the second appellant, the Director of Public Prosecutions (DPP), charged the respondent with possession of unlicensed firearms and ammunition, prohibited firearms and explosives in contravention of the Firearms Control Act.[1] The respondent made representations to the DPP in an attempt to persuade the DPP not to prosecute him.

[4] In the representations the respondent contended that his possession of the following set of firearms was not unlawful:

4.1 A firearm which had been issued to him by his employers, the South African Police Service (SAPS), as a service firearm;

4.2 Firearms which were licensed to him and to his wife;

4.3 Firearms which were recovered by members of the police diving unit in Roodeplaat Dam and kept in a police safe pending investigation;

4.4 Firearms which he had kept in the police safe on behalf of his friend, Mr van der

Merwe, who had bought them from Mr Storm; and

4.5 Weapons which he held in safe custody for his friend, Mr Kruger, who owned a security company. These weapons were to be collected from him in due course by Mr Kruger's business associate.

[5] The DPP considered the respondent's representations and on the basis of his explanation decided not to prosecute him on charges relating to his own and wife's firearms. The DPP added a charge against the respondent relating to the explosives that were also found in the safe. At the same time the DPP instructed the Senior Public Prosecutor not to charge the respondent for firearms in respect of which he and his wife held licences and to forward the explosives to the forensic laboratory for analysis before the commencement of the trial. But the DPP's instruction was ignored and the respondent was nevertheless prosecuted also in respect of the firearms owned by him or his wife that were licensed. In due course the respondent was arraigned at the Pretoria Regional Court, but was acquitted of all the charges.

[6] The respondent instituted action in the North Gauteng High Court against the appellants for damages sustained as a result of what was alleged to be an unlawful arrest and malicious prosecution. The basis for his claim against the first appellant, the Minister of Safety and Security (the Minister), was that the arresting police officers wrongfully and maliciously laid false charges against him, first by providing false information that he was in unlawful possession of prohibited firearms, ammunition and explosives; secondly, by falsely representing that he was not authorised to be in possession of the firearms, ammunition and explosives; and thirdly, by falsely representing that he was unlawfully in possession of his own and service firearms.

[7] The allegations underpinning the damages claim against the DPP are that '[d]ie lede in diens van die Tweede Verweerder het geen gronde gehad om te glo dat die

[1] Firearms Control Act 60 of 2000.

besonderhede verskaf deur die Eerste Verweerder die waarheid is nie'. When the trial commenced in the court below the respondent abandoned his claim for damages for unlawful arrest and detention against the Minister, but persisted with his claim against the DPP and the Minister in respect of the malicious prosecution.

[8] Kruger AJ who heard the matter found that the prosecution of the respondent on the charges relating to the possession of explosives, his service pistol and the firearms and ammunition owned by him or his wife was not based on reasonable and probable cause and was malicious.

[9] In relation to the balance of the charges, namely those relating to the firearms which the respondent kept for safe keeping on behalf of Mr van der Merwe and Mr Kruger, and those which were recovered from a nearby dam, Kruger AJ found that there was a reasonable and probable cause to prosecute him on those charges and that the prosecution was not malicious.

[10] With regard to the amount of damages, Kruger AJ awarded the respondent R120 000 for general damages and R93 000 for the legal costs he had incurred in defending the legal proceedings terminated in his favour. He ordered the appellants jointly and severally, the one paying the other to be absolved, to pay the respondent for the damages and costs of suit. The appellants appeal against the findings and the order of Kruger AJ as set out above.

[11] The requirements for a successful claim for malicious prosecution as set out by this Court in *Minister for Justice and Constitutional Development v Moleko* [2008] 3 All SA 47 (SCA) para 8 were restated in *Rudolph & others v Minister of Safety and Security & another* 2009 (5) SA 94 (SCA) para 16:

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

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

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

(d) that the prosecution has failed.'

See also *Moaki v Reckitt & Colman (Africa) Ltd* 1968 (3) SA 98 (A); *Relyant Trading (Pty) Ltd v Shongwe* [2007] 1 All SA 375 (SCA).

[12] It is not in dispute in this matter that the DPP instituted the criminal proceedings against the respondent and that those proceedings were terminated in his favour (*Thompson v Minister of Police* 1971 (1) SA 371 (E)). What the DPP challenged is the court below's finding that its decision to prosecute the respondent on some of the charges was without reasonable cause and malicious. Counsel for the DPP submitted that the court below erred in its finding that the DPP's decision to prosecute the respondent on those charges was malicious, but not malicious on others. He argued that, as the decision to prosecute constitutes a single intent and a single act, its reasonableness had to be evaluated in its entirety, and it was thus wrong to conduct such an evaluation separately since it is inconceivable that the prosecutor would have a malicious intent for one set of charges and not for the other; he either has malicious intent (*animo injuriandi*) or not.

[13] I disagree with the DPP's contention. The set of charges are discrete and have to be considered separately in determining the absence of reasonable and probable cause. Considerations pertaining to the one set of charges cannot be transposed onto the other. In other words, the fact that there was a reasonable and probable cause to prosecute on one set of charges has no effect on the outcome of the enquiry in relation to the other set of charges. This is so, because the question whether reasonable grounds for the prosecution exist is answered only by reference to the facts of each case.

[14] This Court in *Beckenstrater v Rottcher and Theunissen* 1955 (1) SA 129 (A) at 136A-B set out the test for 'absence of reasonable and probable cause' as follows:

'When it is alleged that a defendant had no reasonable cause for prosecuting, I understand this to mean

that he did not have such information as would lead a reasonable man to conclude that the plaintiff had probably been guilty of the offence charged; if, despite his having such information, the defendant is shown not to have believed in the plaintiff's guilt, a subjective element comes into play and disproves the existence, for the defendant, of reasonable and probable cause.'

[15] 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).

[16] It is common cause that there was no probable cause to prosecute the respondent on the charges relating to the firearms and ammunition for which he and his wife had licences because the DPP had given instructions that those charges had to be withdrawn. The prosecution on these charges was malicious.

[17] With regard to the charges relating to explosives and a service pistol, Ms Meintjies, who testified for the DPP, explained in relation to the former that 'daardie klagte was aanvanklik nie gestel nie, maar by heroorweging het Mnre Mashile and Ngobeni besluit maar daar moet so 'n klagte wees en ek kon nie daarmee fout vind nie', and secondly she reasoned that the fact that the respondent had these items in the same safe as other items was sufficient for her to conclude that there was unlawful possession. It is difficult to understand her first explanation having regard to the fact that she had, on 2 October 2006, instructed the Senior Public Prosecutor to send the explosives 'to forensic science laboratory for forensic report before the commencement of the trial' and her evidence was that she had no knowledge of what happened thereafter because she did not follow it up. Moreover Mr Hartell's statement (the arresting officer), which I assume formed part of the material placed before the DPP on the basis of which a decision to prosecute was taken, makes no reference to the explosives. There is a reference to explosives in a statement in the docket, but it is not clear if it had anything

to do with his decision to arrest the respondent. All that he said in his statement is that he arrested the respondent 'for being unlawfully in possession of firearms and ammunition'. Neither of them testified in the court below.

[18] Ms Meintjies' latter explanation goes to show that there was no reasonable and probable cause to prosecute the respondent, bearing in mind that the explosives and the service pistol were found in a police safe and are used by the police. In these circumstances there can be no basis for the contention that the DPP's decision to prosecute the respondent on those charges was based on reasonable and probable cause. Also the court below's conclusion that the respondent's prosecution on those charges was malicious cannot be faulted. The ineluctable inference to be drawn is that those responsible for initiating the prosecution against the respondent on the charges under consideration were aware of what they were doing in initiating the prosecution and foresaw the possibility that they were acting wrongfully, but they nevertheless acted, reckless as to the consequences of their conduct (*dolus eventualis*). See: *Rudolph & others v Minister of Safety and Security & another* 2009 (5) SA 94 (SCA) para 18.

[19] In its heads of argument the DPP raised, and relied on, s 42 of the National Prosecuting Authority Act 32 of 1998 (the Act) as the basis for its denial that its prosecution of the respondent was malicious. This section provides that '[n]o person shall be liable in respect of anything done in good faith' under the Act. The DPP's argument therefore was that, since the Senior Public Prosecutor acted in good faith in prosecuting the respondent, he cannot be liable for the damages suffered by the respondent. It was contended that this section creates a legal immunity in favour of a person who in good faith exercises a power conferred under the Act even in cases where that person is negligent. This argument was not raised in the appellant's pleadings, but was only raised when the application for leave to appeal was made. It was not persisted with in oral argument before us.

[20] In my view, s 42 does not protect the officials of the National Prosecuting Authority who in the performance of their duties under the Act exercise act maliciously from civil liability. The s 42 defence relates to a bona fide mistake. In the instant matter the DPP's decision to prosecute the respondent on some of the charges was malicious, which conduct by its very nature negates bona fide. The DPP's s 42 defence must therefore fail. Furthermore, it has not been established that the prosecutors involved in this matter have taken all reasonable precautions to avoid or minimize injury to the appellant and the DPP's s 42 defence must therefore fail. In *The Minister of Justice and Constitutional Development v X* (196/13) [2014] SASCA 129 (23 September 2014) para 52, Fourie AJA said the following:

'Returning to s 42 of the NPA Act and in view of the principles outlined above, it has to be borne in mind that, in terms of s 20 of the NPA Act, the prosecuting authority and accordingly also the prosecutor involved in this matter are clothed with the statutory power to institute and conduct criminal proceedings and matters incidental thereto on behalf of the State. Where s 42 refers to "anything done . . . under this Act", it by necessary implication refers to the powers conferred in terms of s 20 of the NPA Act. A prosecutor exercising this power and wishing to avail him or herself of the immunity afforded by s 42 is required to show that he or she acted within the authority conferred by the power in question, which, in turn, requires him or her to have taken all reasonable precautions to avoid or minimize injury to others. A failure to do so would render his or her conduct unlawful and the reliance on s 42 of the NPA Act would therefore fail.'

[21] With regard to damages, there is no doubt that the respondent was entitled to damages for both injury to personality and pecuniary loss suffered (*Law v Kin* [1966] 3 All SA 84 (W); 1966 (3) SA 480 (W) at 483), but the question is whether the amount of damages awarded to him was justified. The former are awarded as a solatium under the *action injuriarum*, while the latter constitute compensation under the *actio legis aquilia*.

[22] As regards the quantum of damages the court below awarded damages in the amount of R120 000 for injury to the respondent's personality rights and R93 000 for the legal costs he incurred in defending the criminal proceedings in the regional court

and seeking the setting aside in the high court of the first appellant's decision to suspend him without pay. Counsel for the DPP contended that the damages awarded were excessive having regard to the fact that the respondent abandoned his claim for damages arising out of unlawful arrest and detention, that his criminal trial in any event proceeded in respect of the charges for which there was reasonable and probable cause to prosecute and furthermore that there was no evidence to support his claim for R93 000. I agree with the DPP's counsel. An amount of R93 000 for legal costs should not have been awarded in the absence of proof that those costs were in fact incurred. The evidence adduced by the respondent in support of that claim is very vague, flimsy and devoid of substance. Although the respondent claimed to have spent R93 000 on legal costs he admitted that 'ek het geen bewyse daarvoor nie'. In any event it is unknown how much of the legal costs he allegedly expended related to that part of the case in respect of which there was probable cause to prosecute and in relation to representation connected to his challenge in the high court against his suspension from his duties as a police officer.

[23] As regards the award of R120 000 the court below, in my view, erred in failing in its assessment of damages to take into account the fact that the respondent's prosecution on charges relating to the other weapons was based on reasonable and probable cause and not malicious. In other words, the infringement of the respondent's rights was not wrongful as his prosecution on those charges was based on reasonable grounds. The appellant would in any event have been arrested in respect of the charges for which there was probable cause, spent time in custody and faced the prosecution. These facts were ignored by the court below. The damages were thus assessed at an amount too generous. A reasonable amount in my view would be an amount of R10 000.

[24] In the result I make the following order:

1. The appeal is upheld to the extent reflected in the orders that follow.
2. The respondent is ordered to pay the appellants' costs of the appeal, including the

costs of two counsel.

3. The order of the court below is set aside and replaced with the following order:

'(a) The first and second defendants are ordered jointly and severally, the one paying the other to be absolved, to pay the plaintiff a sum of R10 000.

(b) The first and second defendants are ordered to pay interest at the rate of 15.5 per cent *a tempore morae* from date of summons to date of payment.

(c) The first and second defendants are ordered jointly and severally, the one paying the other to be absolved, to pay the plaintiff's costs of suit.'

D H Zondi
Judge of Appeal

Appearances

For the Appellants:	E M Coetzee SC (with him Marisa Barnard)
	Instructed by:
	State Attorney, Pretoria
	State Attorney, Bloemfontein
For the Respondent:	G C Muller SC
	Instructed by:
	Du Toit Attorneys, c/o Opperman Attorneys, Pretoria
	Honey & Partners, Bloemfontein