



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**  
**JUDGMENT**

**Reportable**

Case no: 682/19

In the matter between:

**MINISTER OF SAFETY AND SECURITY**

**APPELLANT**

and

**ANDRÉ EDWARD LINCOLN**

**RESPONDENT**

**Neutral citation:** *Minister of Safety and Security v Lincoln* (Case no 682/19)

[2020] ZASCA 59 (5 June 2020)

**Coram:** CACHALIA, SALDULKER, VAN DER MERWE and  
DLODLO JJA and EKSTEEN AJA

**Heard:** 4 May 2020

**Delivered:** This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 5 June 2020.

**Summary:** Malicious prosecution – elements of the cause of action – onus – decision to prosecute taken by the office of the National Director of Public Prosecutions – whether police official set the law in motion by instigating the prosecution – whether police officials had reasonable and probable cause.

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## ORDER

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**On appeal from:** Western Cape Division of the High Court, Cape Town (Allie J and Parker J, Binns-Ward J (dissenting)), sitting as court of appeal: judgment reported *sub nom Minister of Safety and Security v Lincoln* [2018] ZAWCHC 133; [2019] 1 All SA 454 (WCC)

- 1 The appeal succeeds with costs, including the costs of two counsel.
- 2 The order of the full court is set aside and replaced with the following:  
‘The appeal is dismissed with costs, including the costs of two counsel.’

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## JUDGMENT

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**Eksteen AJA (Cachalia, Saldulker, Van der Merwe and Dlodlo JJA concurring)**

[1] At issue in this appeal is whether the employees of the appellant, the Minister of Safety and Security (the Minister), instigated the prosecution of the respondent, a Major-General in the South African Police Service (SAPS), Mr André Lincoln (Lincoln), and whether they had reasonable and probable cause to do so.

[2] Lincoln was charged in the Wynberg Regional Court (the criminal trial) on 47 criminal charges, including numerous counts of fraud. He was convicted

on 18 November 2002 on 17 counts, 15 of which related to fraud, and sentenced to nine years' imprisonment. In an appeal to the Western Cape Division of the High Court, Cape Town (Traverso AJP and Le Grange J), the convictions and sentence were set aside. Lincoln then instituted an action against the Minister, also in the Cape Town High Court, for the damages arising from an alleged malicious prosecution.<sup>1</sup> His claim was dismissed by the court of first instance (the trial court). On appeal to the full court, however, the majority (Allie J and Parker J, hereinafter 'the majority') entered judgment in his favour in respect of all of the charges brought against him, barring two.<sup>2</sup> The current appeal is against the judgment of the full court, with special leave having been granted by this court.

[3] The facts leading up to the present litigation are as follows. Prior to 1994, Lincoln had been an intelligence operative in the African National Congress (ANC). He was integrated into the newly formed South African Police Service (SAPS) pursuant to the 'Rationalisation Proclamation', as defined in s 1 of the South African Police Service Act 68 of 1995,<sup>3</sup> at the rank of Director. The integration process brought together members of the various liberation movements and police officers who had served in the former South African Police Force (and in the police of the various homeland republics) into one organisation, the South African Police Service (SAPS).

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<sup>1</sup> The judgment is reported as *Lincoln v Minister of Justice and Constitutional Development and Another* [2017] ZAWCHC 108. Initially, the action was against the Minister of Justice and Constitutional Development, as first defendant, and the Minister as second defendant. The claim against the first defendant was however withdrawn prior to trial.

<sup>2</sup> The full court held that he had not established his claim in respect of the charges of drunken driving and leaving the scene of the accident. In this judgment the facts relating to these charges are omitted.

<sup>3</sup> '[T]he South African Police Service Rationalisation Proclamation, 1995, published by Proclamation 5, 1995, dated 27 January 1995.'

Understandably, this was initially met with apprehension and distrust from both sides of the divide and became a recurring theme in the present dispute.

[4] During 1996 Lincoln received information relating to Mr Vito Palazzolo, allegedly a highly placed member of the Italian mafia, who was resident in Cape Town. It suggested the existence of mutually beneficial and corrupt relationships between him and a high ranking officer in the SAPS, and also a Minister in the National Cabinet. Lincoln prepared and delivered a presentation on the issue to the State President, Mr Nelson Mandela (the President), and the Minister of Safety and Security, Mr Sydney Mufamadi (Mufamadi). The outcome was that a Presidential Investigative Task Unit (PITU) was established. Lincoln was the commander of this unit. It comprised of a number of officers chosen by him, including Sergeant Abramn Smith (Smith), who had previous experience of investigations relating to the mafia.

[5] The mandate of the PITU was to investigate the affairs of Palazzolo and those associated with him, including his alleged links to the 'criminal underworld' of Cape Town. The investigation was assigned the code name 'Operation Intrigue'. By virtue of its sensitivity involving, as it did, a cabinet minister and a highly placed officer in the SAPS the unit operated covertly outside of the usual command structures of the SAPS. It was required to report directly to the President and the Commissioner of Police, General Fivaz (Fivaz), although it appears that Lincoln, at least during the initial period of its existence, did not report to Fivaz. In the exercise of its mandate the PITU believed that it was entitled to take over any investigations falling within the scope of its enquiry from other specialised units. This was met with resistance by officers in those units. They reported their concerns to Fivaz. In addition,

there was a complaint from the office of the erstwhile Attorney-General (the Attorney-General) to Fivaz, relating to the release of a sentenced prisoner, Mr Mangiagalli, from custody apparently at the instance of the PITU. Lincoln viewed the resistance as interfering with his mandate. He reported this to the Deputy President, Mr Thabo Mbeki (the Deputy President).

[6] In mid-1996 Fivaz instructed Senior Superintendent Bouwer (SS Bouwer) and Superintendent Senekal (jointly referred to as ‘the evaluation team’) to conduct an efficiency assessment of the PITU. The assessment included an investigation into the unit’s efficiency in its use of state resources. In the course of this investigation, Smith made contact with the evaluation team and had a series of meetings with them. Smith had had an unhappy tenure with the PITU. He had numerous altercations with Lincoln and had left the PITU earlier on the day on which he contacted the evaluation team. During the interview Smith made a number of serious incriminating allegations against Lincoln and the PITU. Senekal prepared a detailed affidavit from Smith recording these allegations.

[7] The allegations and the other findings of the evaluation team were orally reported to Fivaz prior to the submission of a written report on 19 August 1997. The team identified a number transgressions by the PITU which they considered to be of a criminal nature and recommended that these be investigated. It suggested Director Knipe conduct the investigation. The investigation resulted in a number of charges in the criminal trial. Only two sets of charges were raised in Smith’s affidavit. The first related to charges of drunken driving and leaving the scene of an accident, which is not material for purposes of the present appeal. The second set of charges related to

Mangiagalli.<sup>4</sup> After submitting their written report to Fivaz neither SS Bouwer nor Senekal had any further involvement in the investigation or the prosecution which followed. They did not testify at the criminal trial either.

[8] In view of these developments, including the oral report from the evaluation team, Fivaz summoned Lincoln to a meeting in his office in Pretoria on 15 August 1997. The Deputy President, however, intervened to cancel the meeting. In its stead he set up another meeting at his residence. This was attended by the Deputy President, Mufamadi, Fivaz and Lincoln, who was accompanied by Inspector Piet Viljoen (Viljoen), an officer in the PITU. At the meeting both Lincoln and Fivaz raised their concerns arising from the operation and reporting structures of the unit. Fivaz reported the complaints of misconduct by Lincoln and made clear that he was obliged to investigate these. The allegations included those made by Smith to the evaluation team. It was resolved that Knipe would lead the investigation into the complaints and he was duly appointed.

[9] Knipe enlisted the assistance of Superintendent Rossouw, an experienced investigator, to conduct the investigation. By virtue of the sensitivity of the investigation Knipe and Rossouw were required to do their work under the supervision and direction of the Attorney-General. Advocate Bouwer (Bouwer),<sup>5</sup> a member of the staff of the Attorney-General, was appointed for this purpose. During the course of the investigation he met them regularly.

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<sup>4</sup> The evaluation team identified a number of other matters that were raised in the affidavit as potentially criminal and worthy of investigation. However, no prosecutions resulted from these allegations.

<sup>5</sup> That Adv Bouwer and SS Bouwer have the same surname is merely coincidental.

[10] The affidavit attested to by Smith provided the foundation for their investigation. Knipe was alive to Smith's difficult history with Lincoln, which was recorded in the affidavit, and of his recent departure from the PITU. He therefore did not accept Smith's allegations at face value. He also considered some of them 'incredulous'. He accordingly interrogated Smith intensively in order to verify the allegations. The investigation that followed was extensive. Numerous dockets were opened, some having their origin in Smith's affidavit and some from other sources. Fivaz stated, however, that no docket was opened in respect of Smith's allegations until they had been corroborated. Approximately 200 witnesses were interviewed and affidavits were taken from them. On a number of occasions, Bouwer was not satisfied with the content of the affidavits and the investigators were instructed to return in order to obtain further affidavits from the same witnesses.

[11] Once the individual dockets were complete, the evidence obtained was subjected to a thorough review by Bouwer, Advocate Niehaus, the Deputy Attorney-General, and Advocate Kahn, the Attorney-General. In some cases they declined to prosecute. However, where they were satisfied that a sound case was made in the docket they decided to proceed with a prosecution. Each docket which proceeded to trial was signed off by Bouwer.

[12] Once the Attorney-General had instituted charges, Lincoln made further representations on why the prosecution should not proceed. By virtue of the involvement of Kahn in the decision, and at the request of Lincoln, the representations were made to the National Director of Public Prosecutions (NDPP), Mr Bulelani Ngcuka. He received written representations from Lincoln's legal representatives and from the office of the Attorney-General

and he then afforded both side the opportunity to address him orally. Whilst the evidence did not reveal the content of the representations made to the NDPP, the only logical inference that can be drawn from this is that the NDPP was satisfied that the content of the dockets revealed reasonable prospects for a successful prosecution. He therefore rejected Lincoln's representations and directed that the prosecution proceed.

[13] The relevant charges which were prosecuted may be summarised as follows:

- (i) Counts 1-10: Fraud – arising from the hiring of motor vehicles at State expense;
- (ii) counts 11-32: Fraud, alternatively theft – arising from claims for subsistence and travelling (S & T) allowances whilst living with his family in a 'safe house' rented by the PITU for witness protection;
- (iii) counts 33-34: Fraud – arising from the successive hiring of two 'safe-houses' for the PITU which were allegedly not used for their sole intended purposes;
- (iv) counts 35-37: Fraud – arising from claims submitted for payment of money to Ms Zoey Gillot (Gillot), a registered source of the PITU, allegedly for services which were not performed;
- (v) count 38: Fraud – arising from the submission of a claim for payment of money to an informer whom it was alleged did not exist;
- (vi) count 39: Fraud, alternatively theft – arising from a claim for the payment of S & T for living expenses while in Angola, when these expenses were allegedly fully paid by Palazzolo;



- (vii) count 40: Theft – arising from the alleged removal, with the intent to steal, of furniture purchased at state expense to furnish the ‘safe-house’ rented for the PITU;
- (viii) count 41: Fraud – arising from the expenditure of state funds to fly Ms Alvera Williams (Williams), a friend of Lincoln’s wife, from East London to Cape Town and her hotel accommodation;
- (ix) counts 42-43: Fraud – relating to a claim for S & T during a visit to Pretoria;<sup>6</sup>
- (x) counts 44-45: Fraud and/or obstructing or defeating the ends of justice – arising from a claim submitted for money to be paid to Mangiagalli as an informer, and facilitating his unauthorised release from prison, respectively.<sup>7</sup>

[14] Following his acquittal, Lincoln claimed damages arising from an alleged malicious prosecution. In the particulars of his claim (as amended) he alleged that during October 1998, SS Bouwer, Smith, Knipe and Rossouw (the employees of the SAPS) wrongfully and maliciously set the law in motion by instigating the aforesaid charges against him when they had no reasonable or probable cause for doing so, nor a reasonable belief in the truth of the charges. In respect of the alleged absence of reasonable and probable cause for the prosecution, he alleged that false statements against him were procured in terms of s 204 of the Criminal Procedure Act 51 of 1977 from junior officers, informers and other witnesses after they had been subjected to duress.

[15] The Minister, in his plea, admitted that the members of the SAPS were involved in investigating charges against Lincoln, but denied:

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<sup>6</sup> Count 42 was however withdrawn.

<sup>7</sup> Counts 46 and 47 were the counts related to drunken driving and leaving the scene of an accident.

- (a) That the persons referred to instigated the charges or that they wrongfully or maliciously set the law in motion;
- (b) that they knowingly procured false statements from witnesses;
- (c) that they acted without reasonable and probable cause, and
- (d) that they had no honest belief in the truth of the charges.

[16] Prior to the commencement of trial, counsel for the Minister requested further particulars. They requested Lincoln to indicate on what basis it was alleged that employees of the SAPS 'instigated' charges against him and asked him to indicate which statements, allegedly procured by the SAPS, were false and which were given in circumstances where the witness did not wish to make a statement on a voluntary basis. The request required Lincoln to explain the basis on which he alleged that statements received from witnesses were made under duress by providing details of the witnesses, the nature of the alleged duress and the circumstances under which this occurred.

[17] In response it was asserted on behalf of Lincoln that Knipe and Rossouw procured false statements, from Captain Thea van der Westhuizen (Van der Westhuizen), Smith, Palazzolo, Captain Benn (Benn), Gillot and Williams. It was alleged that the duress was that Knipe and Rossouw threatened these witnesses with prosecution in the event of them refusing to furnish incriminating statements against Lincoln.

[18] In particular, the reply on behalf of Lincoln alleged:

- (a) That Smith was placed under enormous pressure and intimidated by Knipe and Rossouw to 'frame' Lincoln by forcing him to change his earlier statements to the investigators;

- (b) Gillot made various conflicting statements during the Knipe and Rossouw investigation and Knipe and Rossouw made false assertions that she had never worked for the PITU, when she had in fact deposed to many affidavits confirming the various reports she had compiled;
- (c) Benn made nine inconsistent statements to the investigators;
- (d) Benn was a s 204 witness and was threatened with prosecution if he did not change his statements to incriminate Lincoln;
- (e) Van der Westhuizen made various matters 'clear to Knipe and Rossouw';
- (f) over the course of eight meetings Knipe placed enormous pressure on Palazzolo to deny that he was ever reimbursed by Lincoln for the trip to Angola but that notwithstanding such pressure, he deposed to an affidavit confirming that Lincoln had offered to reimburse him;<sup>8</sup>
- (g) Williams confirmed that she had been threatened and intimidated by Rossouw and that she had made two written statements to Rossouw.<sup>9</sup>

[19] Lincoln's case essentially was that it was Knipe and Rossouw who had set the law in motion without reasonable and probable cause. In this court, however, counsel for Lincoln argued that Smith – not Knipe and Rossouw – had instigated the charges against him without reasonable and probable cause and that SS Bouwer, Knipe and Rossouw had perpetuated the wrongful conduct. I shall revert to this issue later.

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<sup>8</sup> The undisputed evidence was that Palazzolo declined to favour Knipe with any statement at all.

<sup>9</sup> The undisputed evidence is that Williams made only one statement to Rossouw.

[20] The cause of action relied upon is the *actio iniuriarum*.<sup>10</sup> In order to succeed in a claim for malicious prosecution a plaintiff must establish that:

- (i) The defendant:
  - (a) Set the law in motion (instituted or instigated the proceedings);
  - (b) acted without reasonable and probable cause; and
  - (c) acted with malice (or *animo injuriandi*); and
- (ii) that the prosecution failed.<sup>11</sup>

[21] Whilst there may be a measure of overlap between the first three requirements, they remain separate elements of the cause of action and the plaintiff (Lincoln) bore the onus to establish each distinctly.<sup>12</sup>

[22] In this case the criminal proceedings failed. I have some doubt about the full court's finding of malice. It seems to me that the majority confused and conflated the requirement for *animus injuriandi* with motive.<sup>13</sup> However, by virtue of the conclusion that I have reached it is not necessary to make a finding on this issue. I shall assume for purposes of this judgment that *animus injuriandi* was established.

[23] Notwithstanding the denial in the pleadings that members of the SAPS had instigated the prosecution, the trial court found that it was common cause

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<sup>10</sup> *Lederman v Moharal Investments (Pty) Ltd* 1969 (1) SA 190 (A) at 196H *et seq.*

<sup>11</sup> See *Minister for Justice and Constitutional Development and Others v Moleko* [2008] ZASCA 43; 2009 (2) SACR 585 (SCA); and *Woji v Minister of Police* [2014] ZASCA 108; 2015 (1) SACR 409 (SCA) para 33.

<sup>12</sup> See *Beckenstrater v Rottcher and Theunissen* 1955 (1) SA 129 (A) at 136A-C; *Van der Merwe v Strydom* 1967 (3) SA 460 (A) at 467C-E; and *Groenewald v Minister van Justisie* 1973 (2) SA 480 (O) at 482G-H. See also *Relyant Trading (Pty) Ltd v Shongwe and Another* [2006] ZASCA 162; [2007] 1 All SA 375 (SCA) para 14.

<sup>13</sup> See *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (2) SA 277 (SCA) paras 37-38; and *Relyant Trading* *ibid* para 14.

that members of the SAPS had done so. This she concluded from a reference in the heads of argument on behalf of the Minister in argument for absolution at the end of Lincoln's case that he accepted that 'they initiated the criminal prosecution'. She made no finding in respect of who in the SAPS had instigated the prosecution or in what manner. The majority merely noted and accepted the findings of the trial court in this regard. The minority in the full court (the minority) did not find it necessary to consider the issue. In respect of the reasonable and probable cause the trial court and the minority held that Lincoln had failed to establish that members of the SAPS did not have reasonable and probable cause for the prosecution. The majority did not find it necessary to delve into this question. The majority judgment concluded:

'The requirements of malice and *animus injuriandi* has to be inferred from the conduct of Smith, bearing in mind that Smith ought reasonably to have known that the allegations of fraud that he levelled against [Lincoln] as well as the allegation that [Lincoln] had colluded with Palazzolo, were false. Despite that knowledge, Smith proceeded to depose to an affidavit in which he made those allegations. The misconduct of Smith was perpetuated by the investigators, primarily because of their suspicions which they failed to test against objective facts and with reference to the *modus operandi* of a covert unit that was investigating sensitive matters, namely, allegations of possible criminal activity between Palazzolo, a cabinet minister and a high ranking police commissioner.

In *Minister of Justice and Constitutional Development v Moleko* para 20 the Supreme Court of Appeal held that there had to have been an honest belief in the guilt of the plaintiff held on reasonable grounds to prove reasonable and probable cause.

I am not persuaded that Smith could have had a reasonable and honest belief in the guilt of [Lincoln].

If the dockets did indeed contain evidence capable of proving beyond reasonable doubt that [Lincoln] had committed fraud, the state would have been remiss in not adducing that evidence in the regional court and in conceding the merits of [Lincoln's] appeal in the criminal case.

The alleged malice of Smith and the investigators would clearly not have been found in the dockets themselves. Malice would have to be inferred based on what the court *a quo* had been presented with in the evidence of [Lincoln] supported by documents that he relied on and on the candid evidence of Knipe, Senekal, Rossouw and Smith which confirm that they held a bias against [Lincoln] and the PITU and a lack of appreciation for the need to be discreet in the submission of claims for the payment of informants and witnesses. The nuance that appears to have been overlooked by the court *a quo*, is the fact that even if, on the information contained in the dockets, reasonable and probable cause to prosecute may have been apparent, it does not necessarily follow that reasonable and probable cause had not been contrived.’

[24] The decision to prosecute in this matter, as I have said, was made by the NDPP. The prosecution was instituted by the State, hence the reliance in the particulars of claim on the allegation that the employees of the Minister had ‘instigated’ the prosecution. In *Waterhouse v Shields* 1924 CPD 155 at 160 Gardiner J stated:

‘The first matter the plaintiff has to prove is that the defendant was actively instrumental in the prosecution of the charge. This is a matter more difficult to prove in South Africa, where prosecutions are nearly always conducted by the Crown, than it is in England, where many cases are left to the private prosecutor. Where a person merely gives a fair statement of the facts to the police, and leaves it to the latter to take such steps thereon as they deem fit, and does nothing more to identify himself with the prosecution, he is not responsible, in an action for malicious prosecution, to a person whom the police may charge. But if he goes further, and actively assists and identifies himself with the prosecution, he may be liable. “The test,” said Bristowe J in *Baker v Christiane* 1920 WLD 14, “is whether the defendant did more than tell the detective the facts and leave him to act on his own judgment”’.<sup>14</sup>

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<sup>14</sup> This passage in *Waterhouse* was approved by this court in *Lederman* op cit at fn 9.

[25] As recorded earlier, in this court it was argued that Smith was the root of all evil, that he set the law in motion and that he had no reasonable and probable cause to do so. His statement formed the foundation for the investigation which followed in which he made serious allegations about Lincoln, many of which have no bearing on the charges in the criminal trial.

[26] The concession on behalf of the Minister that employees of the SAPS had initiated the process does not equate to ‘setting the law in motion’ or ‘instigating’ a prosecution. In *Relyant Trading* Malan JA noted that the concept of ‘instigation’ is one of some complexity.<sup>15</sup> In *Lederman*, this court noted that inherent in the concept of ‘set the law in motion’, ‘instigate’ or ‘institute the proceedings’, is the causing of a certain result, namely a prosecution, which involves the vexed question of causality.<sup>16</sup> Furthermore, in *Lederman* this court noted a similar approach reflected in the *American Restatement of the Law of Torts* Vol III s 563, comment g, which records:

‘A private person who gives a public official information of another’s supposed criminal conduct, of which the official is ignorant, obviously causes the institution of such subsequent proceedings as the official may begin on his own initiative, but giving such information or making an accusation of criminal misconduct does not constitute a procurement of the proceedings initiated by the officer if it is left entirely to his discretion to initiate the proceedings or not. Where a private person gives to a prosecuting officer information which he believes to be true, and the officer in the exercise of his uncontrolled discretion initiates criminal proceedings based upon that information, the informer is not liable under the rule stated in this section even though the information proves to be false and his belief therein was one which a reasonable man would not entertain. The exercise of the officer’s discretion makes the initiation of the prosecution his own and protects from

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<sup>15</sup> *Relyant Trading* op cit at fn 11 para 9.

<sup>16</sup> *Lederman*, op cit at fn 9, at 196H-197A. See also *Minister van Polisie v Van der Vyver* [2013] ZASCA 39 para 29.

liability the person whose information or accusation has led the officer to initiate the proceedings.’<sup>17</sup>

[27] As observed in *Baker*<sup>18</sup> the test is whether the informer did more than tell the police the facts and leave him to act on his own judgment. Thus, in *Lederman* at 197 Jansen JA quoted with approval from the judgment of Price J in *Madnitsky v Rosenberg* 1949 (1) PH J5: ‘[W]hen an informer makes a statement to the police which is wilfully false in a material particular, but for which false information no prosecution would have been undertaken, such an informer “instigates” a prosecution’. This passage reaffirms the requirement for a causal connection between the false information provided and the institution of the prosecution.

[28] In considering the ‘instigation’ of proceedings in Australia, in *Skrijel v Mengeler* [2003] VSC 270 para 199, Nettle J stated:

‘The defendant must have been “actively instrumental” in setting the law in motion. Merely supplying information, however incriminating, to the police on which they eventually decide to prosecute is not the equivalent of launching a prosecution; the critical decision not being his, (the stone set rolling) is simply a matter of suspicion. These days one should hesitate to credit an informant with having overcome the scepticism of a police trained to test the reliability of complaints. On the other hand, an informant may be regarded as a prosecutor if his information virtually compels the police to prosecute, even more when he deliberately deceives the police by supplying false information without which they would not have proceeded.’

The statement accords with the legal position in this country and is apposite to the facts in this case where Knipe did not accept Smith’s affidavit at face

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<sup>17</sup> *Lederman*, op cit at fn 9, at 197G-198A.

<sup>18</sup> *Baker v Christiane* 1920 WLD 14.



value. He vigorously challenged the veracity of Smith's assertions to the extent that Smith had felt threatened. Lincoln's case was firmly founded, as it had to have been, upon the statement contained in the final sentence of the dictum of Nettle J.

[29] I turn to consider the facts in this case. Many serious and incriminating allegations made by Smith in his affidavit had no bearing on any of the charges instituted. While those allegations may have had some relevance to the enquiry into *animus injuriandi*, they were irrelevant to the present enquiry as they did not result in any prosecution. I shall accordingly confine myself in what follows to the issues that were material to the charges instituted.

[30] Where multiple charges have been brought against a plaintiff, as in this case, each charge is discrete and must be evaluated independently.<sup>19</sup> As recorded earlier, in compiling its report to Fivaz the evaluation team identified numerous matters which had come to their attention as a result of the information from, amongst others, Smith. They had identified a number of matters which, they believed, constituted prima facie evidence of criminal conduct. The only charges referred to in Smith's affidavit, amongst those identified by the evaluation team as having warranted criminal prosecution, were those relating to Mangiagalli. In this regard Smith stated as follows:

'I know that Mark (Ontong) had involvement with Jacques Mangiagalli and took care of Mangiagalli's needs during Director Lincoln's visit to Angola with Vito Palazzolo.

I was not involved with Mangiagalli at all. The only information that Mangiagalli supplied was a couple of Italian names and telephone numbers which had no value at all. Substantial

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<sup>19</sup> *Minister of Safety and Security NO and Another v Schubach* [2014] ZASCA 216 para 13.

amounts of money was processed through our office in recruiting Mangiagalli. I did not confront or express my concern about him to the director.

When it became known in the press about Mangiagalli's dubious release, I was summoned to the Attorney-General's office on instructions of the Attorney-General. Mr Jasper Tredoux questioned me about Mangiagalli. I told him that I had no knowledge of that matter and that he was handled by Director Lincoln and Captain Benn. Mangiagalli did not provide any information relating to project "Intrigue". To my knowledge he is still seen by Director Lincoln and Captain Benn.'

[31] Smith said that the issue relating to Mangiagalli's release was exposed while Lincoln was in Angola. Upon his return, he continued, Lincoln had attended a meeting with Commissioner Blaauw. He thereafter informed him that Blaauw had been appointed by the Attorney-General to investigate the matter but that it was not a matter of concern as Mangiagalli's release had apparently been arranged at 'ministerial level'. Lincoln also told him that the information which emerged about his release 'fits in our alley', as Mangiagalli's life would have been in danger had he returned to jail. Smith complained about what he perceived were overly generous rewards paid to Mangiagalli for information provided to the PITU.

[32] Smith did not, however, lay any charge in this matter. He merely provided an account of what he said had occurred at the unit. So, even if it is accepted that he was motivated by his resentment for Lincoln, as the trial court found, and that he may have exaggerated certain aspects of his evidence, he testified that he believed that the content of his account was true. There was no evidence to the contrary, at least not in respect of the averments which gave rise to this charge. The allegations made in respect of Mangiagalli could never on their own have given rise to charges of fraud. In any event, it is apparent

that the question of his release was already under investigation before Smith had deposed to his affidavit and Senekal testified that he had previously been involved in that investigation.

[33] In respect of the motor vehicles (charges 1-10), Smith recorded in his affidavit that a number of vehicles had been allocated to the PITU at the commencement of its mandate. This included a Nissan Sentra for Lincoln. He stated that Lincoln had also arranged a 2.8l Audi A4 for his own use. The Nissan Sentra was thereafter used by Captain Engelbrecht and Viljoen. Later, when Inspector Wright left the PITU his vehicle, a red Toyota Corolla, was allocated to Mark Ontong, who was registered as a source with the PITU. Smith questioned whether Ontong was authorised, in that capacity, to drive a State vehicle without having to fund its petrol expenses.

[34] Smith said that Ontong had been involved in an accident with the vehicle and he did not know whether he had disclosed this. These averments, concerning the apparent misuse of the resources allocated to the PITU, were pertinent to the evaluation function which the evaluation team was mandated to perform. They are suggestive of maladministration. However, Smith had not alleged fraud or any other criminal offence in respect of the vehicles, nor did the evaluation team consider his allegations in respect of the motor vehicles to amount to criminal offences. The facts alleged by Smith in this regard were substantially true, save that Lincoln testified that he did not specify the type of vehicle which was to be obtained. Lincoln's defence was that the PITU had the necessary authority to hire the vehicles, a matter to which Smith did not allude.

[35] In respect of counts 11-31 and 33-34 Smith recorded the following:

‘At the same time we took occupation of the office, the safe house was obtained. Captain(f) Van der Westhuizen made arrangements per motivation to Head Office to purchase and furnish the said “Safe House”. Furniture to the amount of R37 000-00 was purchased.

Director Lincoln immediately occupied the “Safe House” when the furniture was delivered and his wife and three children joined him in the house when the Gauteng schools closed in December 1996.

All the expenses of the “Safe house” were paid on a month to month basis from the police’s open account.

Director Lincoln and his family stayed in this “Safe house” until January 1997 when they moved to another vacant dwelling . . . . The initial “safe-house” was rented at R2 500 per month. The latter “Safe House” was rented at R5 000-00 per month.’ (*sic*)

[36] Smith alleged that during Lincoln’s residence in the safe house he had claimed monthly subsistence, which were submitted by Van der Westhuizen on his behalf and thereafter paid to him in cash. Again, these facts are not in dispute and are, on Lincoln’s own version, substantially true. Smith had not alleged any dishonesty or fraud. In the criminal trial Lincoln’s defence was that he was entitled to claim the subsistence.

[37] In respect of counts 35-37, Smith had not made any allegation in respect of payments made to Gillot. In his affidavit Smith referred to an operation which occurred in Johannesburg where Lincoln had allegedly advised the Italian authorities that he had tracked an Italian fugitive who they had kept under close observation. Members of the Italian police had flown to South Africa to witness the operation where a house would be searched. Smith had also flown to Johannesburg where he met Lincoln and Benn. He alleged that Lincoln had shared a bedroom with Gillot, a registered source of the PITU

and also a known prostitute. These were serious allegations. However, they had no causal connection with the charges against Lincoln in respect of payments made to Gillot.

[38] In respect of count 39, Smith had set out his knowledge of Lincoln's visit to Angola together with Palazzolo, which was not in dispute. Lincoln had advised Smith that he had business in Zaire with the Deputy President. But he had not disclosed his visit to Angola. When Smith discovered these facts he confronted Lincoln, who then informed him of the trip. Smith stated:

'He produced a letter dated 1997-04-30 which was for a visa for Director Lincoln to go to Angola. The letter is on a letterhead of Cape International Holdings which is a front company used by Vito Palazzolo. The letter is addressed to Mr Rafael of the Angolan Consulate and is a close associate of Palazzolo. The letter is also signed by Vito Palazzolo under his alias Robert von Palace.'

[39] Smith alleged that Lincoln had not applied for official leave during this period of absence. There is no reference to S & T claims, or to any fraud in this respect, and the averments in the affidavit could never have founded grounds for any prosecution.

[40] There was no reference at all to the facts that gave rise to counts 38, 40, 41 or 42 in the affidavit. Whilst the evidence suggests that Smith made further affidavits after the initial account, they were not introduced in evidence.

[41] The further investigation which followed as a result of Smith's affidavit gave rise to the charges that Lincoln faced. Clearly his affidavit was the trigger that gave rise to the investigation. However, the facts alleged in the charge

sheet relating to fraud could only have been obtained from other sources. Smith had not laid any charge against Lincoln. Nor had he made any allegation of fraud against him. And no evidence was presented to establish that any allegation contained in his affidavit, in respect of the charges against Lincoln, was wilfully false. The findings of the majority in this regard are not supported by the content of the affidavit. Smith's allegations of Lincoln's collusion with Palazzolo were not causally connected to any of the charges. Quite simply, the evidence did not establish that Smith had 'instigated' any of the prosecutions.

[42] The evaluation team were instructed to carry out their task prior to receipt of any information from Smith. Much of the information that Smith had to share was relevant to their investigation. They were obliged, as police officers, to receive the information. The potentially criminal conduct identified by the evaluation team which emerged from the evidence made available to them, largely from the affidavit of Smith, related to allegations of *crimen injuria*, attempted murder, driving under the influence of alcohol, reckless and negligent driving and one instance of fraud, arising from Mangiagalli's release from custody. In this respect, as recorded earlier, a docket had previously been opened and Senekal had in fact been involved in that investigation. It had not originated from Smith's affidavit, nor was there any evidence to suggest that the prosecution would not have ensued but for Smith's allegation. On the contrary his affidavit records that he had not been involved in the release and has no knowledge thereof. The evaluation team merely recorded their findings and recommended that those issues be investigated. This they were duty bound to do so. Neither Senekal nor SS Bouwer were in any way involved in the investigation or the prosecution

thereafter. They did not make common cause with the prosecution, nor did they assist in the further investigation. SS Bouwer had not instigated the prosecution as required to sustain a cause of action under the *actio iniuriarum*.

[43] Knipe and Rossouw had carried out the detailed investigation on the instruction of Fivaz. They had opened numerous dockets, some of which related to matters which had their origin in Smith's affidavit, and which resulted in prosecution. This, without more, could not found a claim for malicious prosecution. Lincoln's case, as recorded earlier, was that they had procured false statements and placed witnesses under duress to implicate him. On this basis he contended that they had instigated the prosecution; that they had wilfully presented information to Bouwer which they knew to be false and had been obtained under duress, and that this information had caused the prosecution.

[44] Lincoln (as plaintiff) was required to prove that members of the SAPS – in particular Knipe and Rossouw – had acted without reasonable and probable cause. The phrase has been held to mean an honest belief founded upon reasonable grounds that the institution of proceedings is justified. The concept involves both a subjective and an objective element.<sup>20</sup>

[45] The material portions of the affidavit of Smith which relate to the charges brought against Lincoln are set out earlier. The facts set out in Smith's affidavit which relate to the charges instituted were not seriously contested. What Lincoln set out to achieve in the trial was to establish his innocence. It

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<sup>20</sup> *Beckenstrater*, op cit at fn 11, at 136B-C; *Prinsloo and Another v Newman* 1975 (1) SA 481 (A) at 495G-H; *Relyant Trading* op cit at fn 11 para 14; and *Moleko* op cit fn 10 para 20.

is to this end that his evidence was directed. But this fell far short of establishing the absence of reasonable and probable cause in respect of which he bore the onus. Knipe and Rossouw had obtained statements from numerous witnesses in respect of each docket. Some incriminated Lincoln but others were favourable to him. All of this – incriminatory and exculpatory – were placed before Bouwer. It was Bouwer’s assessment of all the material before him in the dockets that led to the ultimate decision by first the Attorney-General and secondly, the NDPP to proceed with the charges. Objectively reasonable and probable cause can only be gleaned from an analysis of the contents of the dockets. It involved the weighing up of the evidence favourable to Lincoln against that incriminating him and testing the averments contained therein against the objectively established facts and the real evidence contained in the docket. There is no evidence that Knipe and Rossouw actively sought to persuade the Attorney-General to institute the prosecution. To the extent that they may have expressed their views as to the case made in the dockets, there is nothing untoward about such conduct.<sup>21</sup> More was required.

[46] All the dockets relating to the prosecution were duly discovered and in possession of Lincoln’s representatives at the time of the trial. This notwithstanding, they did not produce these to the court and when Knipe, Rossouw and Bouwer testified, the dockets were not put to these witnesses in order to enable them to identify the evidence contained in the docket which justified the prosecution. This fatal shortcoming was compounded by the fact that the witnesses had testified some 22 years after the event.

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<sup>21</sup> See *Prinsloo* ibid at 494C-E and *R v Patel* 1944 AD 511 at 519.



[47] In his evidence, and in his cross-examination of Knipe and Rossouw, Lincoln referred to selected statements which favoured him. But despite having had his attention specifically drawn to the need to present evidence contained in the dockets as a whole, to obtain the full picture, counsel for Lincoln chose not to do so. The court was therefore unable to assess whether Knipe and Rossouw, objectively viewed, had reasonable grounds to believe that a prosecution was justified. Lincoln accordingly failed to establish the objective requirement of reasonable and probable cause. Indeed as a matter of fact, at least three advocates in the office of the Attorney-General and the NDPP all formed the view that the dockets exhibited reasonable and probable cause to prosecute those charges which were instituted. And there was no suggestion before us that they were all party to a conspiracy to prosecute him despite the absence of reasonable and probable cause.

[48] As far as the subjective element of this requirement is concerned, Knipe and Rossouw testified that they believed that the evidence which they had obtained made a proper case to support the charges. This was confirmed by Bouwer. The majority is of course correct that the reasonable and probable cause which may be apparent from the docket could have been contrived. That was Lincoln's case. But what the majority lost sight of was that Lincoln bore the onus to prove this, as I have pointed out earlier. He did not even attempt to do so. In my view the minority was therefore correct in holding that Lincoln had not *prima facie* established the absence of reasonable and probable cause and that the Minister ought to have been absolved from the instance.

[49] The thrust of Lincoln's case related to the conduct of Knipe and Rossouw, as set out in the particulars for trial, and was aimed at establishing

that they acted with *animus injuriandi* without an honest belief in Lincoln's guilt. The case which the Minister came to court to meet was that Knipe and Rossouw had procured false statements under duress to dishonestly implicate him. The deponents to the objectionable statements were identified in Lincoln's particulars for trial, but were inexplicably not called to testify in support his case. There was no suggestion that any of them, save for Palazzolo, were not available to testify.<sup>22</sup> This justifies the inference that they would not support his case.<sup>23</sup>

[50] Smith was called to testify on behalf of the Minister. He testified that he was indeed placed under very considerable pressure by Knipe. This Knipe acknowledged. Knipe explained that he had not accepted the evidence of Smith at face value and had placed him under pressure to verify the facts. Smith acknowledged that he was aware of his obligation to speak the truth and maintained that he believed that the content of his affidavit was true. This was supported by the evidence of Knipe that he ensured that no docket was opened until corroboration was found for Smith's averments.

[51] Lincoln had failed to adduce in evidence, in particular, the witness statements of Van der Westhuizen, Benn and Gillot (or an affidavit by Palazzolo) which he alleged to have been false or procured under duress. He had also failed to identify any aspect of the statements made by these witnesses which falsely implicated him. Under cross-examination, when asked to identify the witnesses who had been coerced to lie, Lincoln was unable to do so. Moreover, he was constrained to acknowledge that none of

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<sup>22</sup> As set out earlier, the undisputed evidence is that Palazzolo did not favour Knipe with any affidavit.

<sup>23</sup> *Elgin Fireclays Limited v Webb* 1947 (4) SA 744 (A) at 749-750.

these witnesses testified in the criminal trial that they had been pressurised to furnish untruthful evidence. It was not suggested to either Knipe or Rossouw that they had placed pressure upon any witness to lie or that they had intimidated witnesses to implicate Lincoln. For their part, they denied that they had prevailed on any witness to do so.

[52] Lincoln was also constrained to acknowledge that each of the persons whom he alleged had been pressurised to make false statements against him denied this when testifying in the criminal trial. Those who made contradictory statements during the investigation testified in the criminal trial that they had initially made false statements of their own accord in order to protect Lincoln. Both Smith and Van der Westhuizen, who testified for the Minister denied that they had been pressurised to make false statements against Lincoln.

[53] Lincoln accordingly failed to establish the alleged conduct attributed to Knipe and Rossouw in his pleadings. It follows that he did not establish that they had wilfully placed false evidence before the Attorney-General or that they had no honest belief in the credibility of the statements presented. They left the decision to prosecute or not to the Attorney-General. On these additional grounds the Minister cannot be held liable.<sup>24</sup>

[54] In the result:

1 The appeal succeeds with costs, including the costs of two counsel.

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<sup>24</sup> See *Moleko* op cit fn 10 paras 16 and 17.

- 2 The order of the full court is set aside and replaced with the following:  
‘The appeal is dismissed with costs, including the costs of two counsel.’

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J W EKSTEEN  
ACTING JUDGE OF APPEAL

## Appearances

For appellant: C Webster SC (with him M Adhikari)

Instructed by: State Attorney, Cape Town  
State Attorney, Bloemfontein

For respondent: J A Nortje (with him A J Krige)

Instructed by: Catto Neethling & Wiid Inc, Cape Town  
Neuhoff Attorneys, Bloemfontein