



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable
Case No: 947/2022

In the matter between:

MALALA GEOPHREY LEDWABA

APPELLANT

and

**MINISTER OF JUSTICE AND
CONSTITUTIONAL DEVELOPMENT**

FIRST RESPONDENT

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

SECOND RESPONDENT

**HEAD OF THE SPECIALISED CRIMES
COURT UNIT, PRETORIA**

THIRD RESPONDENT

Neutral citation: *Ledwaba v Minister of Justice and Constitutional Development and Others* (947/2022) [2024] ZASCA 17(16 February 2024)

Coram: DAMBUZA and MAKGOKA JJA and KATHREE-SETILOANE AJA

Heard: 23 August 2023

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, published on the Supreme Court of Appeal website, and released to SAFLII. The date and time for hand-down is deemed to be 11h00 on 16 February 2024.

Summary: Malicious prosecution – whether inquiry into absence of reasonable and probable cause to precede that of malice or *animus injuriandi*.

Assessment of reasonable and probable cause – at the time of proceeding with the prosecution.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Van der Westhuizen J sitting as court of first instance):

The appeal is dismissed with costs, including those of two counsel.

JUDGMENT

Kathree-Setiloane AJA (Dambuza and Makgoka JJA concurring):

[1] This is an appeal against the judgment and order of the Gauteng Division of the High Court, Pretoria (the high court), in which it dismissed the damages claim of Mr Malala Geophrey Ledwaba (the appellant). The appellant's claim arose from an alleged malicious prosecution by employees of the second respondent, the National Director of Public Prosecutions (the NDPP). In terms of s 179(1) of the Constitution,¹ the NDPP is the head of prosecuting authority in South Africa, under which all Directors of Public Prosecutions and prosecutors fall. The National Prosecuting Act 32 of 1998 is the national legislation envisaged in s 179(4) of the Constitution to 'ensure that the National Prosecuting Authority (the NPA) exercises its functions without fear, favour or prejudice.' Section 32(1)(a) of the NPA gives expression to that objective.

[2] The first respondent is the Minister of Justice and Constitutional Development (the Minister),² who exercises final responsibility over the NPA in terms of s 33(1) of the Constitution. The third respondent is the head of the Specialised Commercial Crimes Unit of the National Prosecuting Authority, Pretoria (head of the SCCU). Its mandate is to effectively investigate and prosecute complex commercial crimes

¹ Constitution of the Republic of South Africa, 1996.

² The first respondent is cited as Minister of Justice and Constitutional Development (the previous designation). With effect from 24 May 2014, the Minister's designation is Minister of Justice and Correctional Services. However, the respondents did not take issue with this and regard the first respondent as properly cited.

emanating from the South African Police Service (SAPS) Commercial Crime Branch. The appeal is with the leave of the high court. The appeal is opposed by only the NDPP.

Background

[3] On 1 March 2003, the appellant was appointed as Deputy Head of the Directorate of Special Operations (DSO), which was colloquially known as the Scorpions. This was a specialized unit of the NPA that was tasked with investigating and prosecuting high-level and priority crimes, including organized crimes and corruption. It was disbanded in January 2009. As Deputy Head of the Directorate of Special Operations, the appellant occupied the rank of Investigating Director in the Unit.

[4] The DSO operated a secret fund known as the Confidential-Fund (DSO C-Fund). DSO C-funds are described in the DSO Policy and Procedures document³ (Policy and Procedures document) as funds allocated out of the DSO budget that are used 'only when security considerations, timeliness, opportunity, or other exceptional circumstances, peculiar to the collection of court-directed investigative information, prevent the use of mainstream DSO funds'. Mr Casper Jonker was the administrator in the appellant's office responsible for the management of the DSO C-Fund.

[5] In relation to the allocation and administration of funds, the Policy and Procedures document states that:

'13. DSO C-Funds expenses necessitated in the ordinary course of DSO business and as such incurred before the DSO head of operations and the DSO C-Funds administrator have approved a particular project may be paid out of the DSO C-funds. The C-Funds Administrator must be informed of these expenses within two days after they were incurred. The following approval levels are required for the payment of each such DSO C-Funds expenditure:

(a) Greater than R100 000 and all expenses to be incurred outside the RSA must be approved operationally by the head of the DSO and fiscally, by the DSO C-Funds administrator;

³ Directorate of Special Operations Policy and Procedures DSO (DSO C-Funds), PP1-2001, 22 November 2004.

- (b) between R10 000 and R100 000 must be approved operationally by the DSO head of operations and fiscally, by the DSO C-Funds administrator;
- (c) below R10 000 must be approved operationally by the relevant DSO regional/ divisional head and fiscally, by the designated DSO C-Funds custodian.'

[6] Section G of the Policy and Procedures document sets out the request procedures for DSO C-Funds, amongst others, as follows:

'65. All DSO employees needing cash for DSO C- Funds expenses will submit an operationally approved (as per section F2 *supra*) **request for advance of DSO C-Funds form**, as per annexure 3, to his/her designated DSO C-Funds custodian. The justification for the expenditure must meet one of the approved usages of DSO C-Funds identified in section D *supra*.^[4]

In addition, DSO employees requesting to be imbursemented, must also bring, with their claim forms, corresponding receipt(s), or other supporting documentation, not later than 3 working days after the expenditure, or as soon as practicably possible.

66. Furthermore, all DSO employees requesting C-Funds for informants and/or agents must also ensure that the designated informant's/agent's custodian acknowledges such request before they forward their request(s) with the C-Funds custodian. The Informant's/agent's custodian must do such acknowledgement by attaching his/her signature on the request form itself.

67. Where applicable, change brought back by the requestor, must be acknowledged in writing, by both the C-Funds custodian and the requestor on the original request form itself.

68. The request for reimbursement of DSO C-Funds form is also used to claim reimbursements for DSO C-Funds expenditure made **without** a prior advance of funds.

69. The DSO employee requesting the DSO C-Funds is responsible for obtaining **accredited receipts** (provided by widely known and recognized entities, the existence of which can be verified objectively, without compromising any security or other considerations that necessitated the use of DSO C-Funds in the first instance), whenever practical.

70. If an accredited receipt cannot be obtained, the DSO employee requesting the DSO C-Funds is responsible for the attainment of an **official DSO C-Funds receipt**, as per annexure 5. This DSO C-Funds receipt is to be signed by the DSO employee requesting the DSO C-Funds, the depository/beneficiary as well as another DSO employee in the capacity of a third party witness to the transaction.

⁴ Under section D policy approved usages of DSO funds are for: DSO undercover agents, rewards, inducements, operational remuneration expenditure, occasional operational contact expenses, evidence purchases, surveillance related expenses, interception and monitoring expenses, and 'emergency/miscellaneous expenses'.

71. If, in exceptional circumstances, the depository/beneficiary of the requested DSO C-Funds cannot sign an official DSO C-Funds receipt or another DSO employee cannot co-sign an official DSO receipt, the DSO employee, who requested the DSO C-Funds, must submit a **sworn statement** in support of the particular expenditure. A further sworn statement of either the beneficiary/depository of the DSO employee as a third party witness to the transaction, must be obtained and attached to the request. These sworn statements must explicate the reasons why a depository of another DSO employee could not have co-signed the official DSO receipt. This would classically be the case with the unwitting DSO informant.’ (emphasis in the original text).

[7] In early 2004, the Integrity Monitoring Unit of the NPA (IMU) commenced an investigation into allegations of misuse or abuse of the DSO C-funds by two members of the DSO. During this investigation, the investigation team submitted a report to the head of the IMU indicating possible misuse or abuse of the DSO C-funds by the appellant. On 25 January 2005, the IMU invited the appellant to comment on the allegations, which he did on 14 April 2005.

[8] On 16 May 2005, the NDPP placed the appellant on special leave pending the finalization of the investigation and disciplinary proceedings into the allegations against him. On 25 July 2005 a meeting of senior officials of the NDPP was held. Amongst those in attendance were Mr Leonard McCarthy, then head of the DSO, and Mr Chris Jordaan SC, the head of the SCCU. Mr McCarthy and others briefed Mr Jordaan on the facts of the appellant’s matter, and requested him (Mr Jordaan) to consider the available evidence with a view to recommend to the NDPP on the way forward. The appellant resigned from the NPA with effect from 31 July 2005. This was before he could be charged with misconduct. The IMU referred the matter to the Serious Economic Offences Unit of the South African Police Service (the SAPS) to investigate possible criminal charges against, the appellant, among others. On 23 August 2005, pursuant to the meeting of 25 July 2005, Mr Jordaan forwarded a memorandum to the NDPP in which he (Mr Jordaan) stated, among other things, that he was of the view that there was prima facie evidence of criminality on the part of the appellant. He therefore recommended that criminal investigations be pursued against the appellant under the guidance of an experienced prosecutor. Ms Glynis Breytenbach was later identified and designated by Mr Jordaan for that purpose. On

3 April 2006, the SAPS appointed Price Waterhouse Coopers (PWC) to investigate the allegations against the appellant. On 12 February 2007 and 17 August 2007 respectively, PWC submitted its forensic report and the addendum thereto (the PWC report) to the SAPS and the NPA. The PWC report concluded that there was a shortage of R294 000 between the moneys advanced to the appellant from the DSO C-Fund and those which the appellant had reimbursed.

[9] On 13 October 2006, the appellant was arrested and charged with 23 counts of fraud and theft (the original charges), and brought before the Special Commercial Crimes Court, Pretoria (the SCC Court).⁵ In the first seventeen counts the State alleged that the appellant had defrauded the NPA when he misrepresented to the employees of the NPA that certain amounts/advances/transactions against the DSO C-Fund were real and valid transactions that could be undertaken in terms of the policies governing the DSO C-Fund. In the alternative it was alleged that the appellant stole those monies. In counts 18 to 23 it was alleged that the appellant stole monies belonging to a close corporation of which he was a member with two others. The essence of the counts was that the appellant received payment in terms of his contract with his co-members and misrepresented to them that no payment had been received for the work done by the close corporation. The trial commenced in 2008 in the SCC Court (the first trial). Ms Glynnis Breytenbach led the prosecution in the first trial. She was assisted by Mr Willem van Zyl and Ms Sandiswa Nkula-Nyoni. This trial was discontinued on 31 May 2010, as the presiding Regional Magistrate had recused himself.

[10] On 20 July 2010 the appellant made detailed representations to the NDPP, then Mr Simelane, in which he (the appellant) sought that the trial be discontinued as this would not be in the best interests of justice. He thus requested the NDPP to withdraw all charges against him. He further submitted that there were no reasonable prospects of successfully prosecuting him on the charges. The appellant pointed to the strained relationship between himself and Mr McCarthy as the reason why he was prosecuted. He alleged that Mr McCarthy had verbally declared his intention to destroy his professional career. The appellant also identified Ms Breytenbach as part of Mr

⁵ The Special Commercial Crimes Court has the same status as a Regional Court.

McCarthy's plan. He accused Ms Breytenbach of suppressing documents that would prove his innocence. In particular, he identified a 'government issued stationery book' in which he had 'detailed all the projects that I approved as well as meetings I held with people in my office.' With regard to the specific charges, the appellant focused on counts 1, 5, 14, 15, 18, 19-22. On the instruction of the NDPP, Ms Breytenbach, as the lead prosecutor, was requested to furnish the NDPP with a response to the appellant's representations, which she did on 14 September 2010. A discussion of the essence of appellant's representations and the NPA's response thereto follows later in this judgment. Suffice to say for now that Ms Breteynbach's response to the appellant's representation was furnished to the then NDPP, Mr Simelane, who, on 11 October 2010, wrote to the appellant and informed him as follows:

'I have taken the liberty to investigate the allegations that you made by requesting a detailed report from the office of the Director of Public Prosecutions, North Gauteng.

After having carefully considered all the documents that were supplied to me as well as your representations, I have decided that the prosecution should continue against you.'

[11] After the rejection of the appellant's representations, the NPA decided to start the trial *de novo* on a new indictment. The prosecution was again led by Ms Breytenbach. However, she was later suspended from her position and, subsequently, resigned from the NPA. Mr Van Zyl then became the lead prosecutor, assisted by Ms Nkula-Nyoni.

[12] On 27 February 2011 the appellant again made written representations to the NDPP; to drop the charges against him. There, he reiterated his stance that Ms Breytenbach had an ulterior motive to charge him. Broadly, the appellant repeated what he had stated in his previous representations. On 18 March 2011 the Deputy National Director of Public Prosecutions, Ms Mokhatla, responded to the appellant's second representations as follows:

'I have been mandated by the National Director of Public Prosecutions (in light of your recent request for an impartial review of the matter) to revisit the issues that you have raised in your representations.

After a careful and diligent perusal of the matter, it became clear that the decision which was communicated to you (in a letter dated 11 October 2010) by the National Director of Public Prosecutions was indeed the correct one.

I therefore concur that [the] prosecution should continue against you.'

[13] As a result of the above letter, the trial *de novo* had to resume. Shortly before its commencement, Mr Van Zyl reconsidered the charge sheet and decided, in agreement with Ms Nkula-Nyoni, not to proceed with charges 4, 5, 9, 10, 12, 13, 15, 17, 18 and 19. They, however, added two additional charges: counts 2 and 4. On 31 October 2012, the trial *de novo* against the appellant commenced before a different Regional Magistrate in the SCC Court on 15 counts of theft and fraud.

[14] On 5 April 2013, whilst the trial was pending, the appellant made further representations to the National Director of Public Prosecutions, alleging that his prosecution was malicious and that, based on how the prosecutors involved had acted, he would not receive a fair trial. He further pointed out what he contended were the weaknesses in the State's case. He therefore requested, once more, for the prosecution to be stopped as, according to him, there was no reasonable prospect of a successful conviction on any of the remaining counts.

[15] On 18 July 2013 Mr Mrwebi wrote an internal memorandum to the Head of the Regional SCCU, Johannesburg and informed him as follows:

'I have perused the subsequent report submitted by Adv. Chabalala. The report makes it amply clear that following investigations, there is a strong prima facie case in the matter on at least the charges of defeating or obstructing the course of justice or attempts thereto, and Fraud. The prosecutor must also be requested to research the possibility of pursuing a corruption charge if possible...'

[16] At the close of the State's case, the appellant was discharged in terms of s 174 of the Criminal Procedure Act 51 of 1977, on counts 1, 2, 5, 6, 7, 8 and 9. On 5 February 2014, the appellant was convicted on counts 3, 4, and 11 to 14, and acquitted on counts 10 and 15.⁶ He was sentenced to 10 years' direct imprisonment. The appellant appealed against his conviction and sentence to the high court, which, on 15 January 2018, upheld his appeal in respect of counts 3, 4, and 11 to 14.

⁶ The presiding Regional Magistrate determined that charge 15 constituted a splitting of charges in respect of the overlapping charges 11 to 14.

In the high court

[17] On 10 December 2018, the appellant instituted an action for malicious prosecution in the high court against the NDPP and the head of the SCCU. He alleged in the particulars of claim that during 2006 the NDPP and the head of the SCCU, acting in the course and scope of their employment, wrongfully and maliciously set the law in motion by laying false criminal charges of fraud and theft against him. The charges were based on the alleged grounds that he had: (a) created and authorised fictitious projects and/or non-existent investigations; (b) misrepresented to the NPA that funds had to be utilised for these projects; and (c) misappropriated, embezzled and/or stole various amounts of money in cash from the DSO C-Fund.

[18] The appellant named the following prosecutors, in the offices of the NDPP and the head of the SCCU, as responsible for wrongfully and maliciously prosecuting him on false charges of theft and fraud: Ms Breytenbach; Mr Van Zyl; Ms Nkula-Nyoni; and Mr Nash Ramparat. He contended, among other things, that: (a) the NDPP and/or the head of the SCCU and/or their prosecutors had no reasonable and probable cause for laying the criminal charges against him; and (b) they proceeded to prosecute him, despite the written representations which he made to the NDPP on 20 July 2010, 27 February 2011 and 5 April 2013 explaining his innocence.

[19] In their plea, the respondents admitted that on 13 October 2006, the appellant was prosecuted for fraud and that the prosecution was instituted at the instance of the NDPP. They furthermore pleaded that: (a) after the IMU investigation and recommendation that criminal charges should be brought against, amongst others, the appellant, the case docket was opened with the SAPS; (b) it was only after careful consideration of the contents of the SAPS docket, together with other available material that a decision to prosecute the appellant was taken; (c) there was reasonable and probable cause for the prosecution of the appellant; and (d) the decision to prosecute him was not actuated by malice on the part of the employees of the NPA.

[20] Thus, the high court had to determine whether the appellant had established the requisites for malicious prosecution, which are the following: (a) the defendant set the law in motion in instigating or instituting the proceedings; (b) the defendant acted

without reasonable and probable cause; (c) the defendant acted with malice or *animus injuriandi*; (d) the prosecution has failed; and (e) the plaintiff has suffered damages.⁷ It was undisputed in the trial, which proceeded only on the issue of liability,⁸ that the first and fourth requirements were met. Accordingly, the high court had to determine whether (a) the NDPP acted without reasonable and probable cause and, (b) with malice or *animus injuriandi*. It concluded that the appellant had failed to prove the latter requirement and dismissed the appellant's claim. In doing so, it reasoned as follows: 'Where the [appellant] failed to prove the requirement of maliciousness or *animus injuriandi*, it would serve no purpose to consider whether [he] has proven the requirements of [lack of] reasonable or probable cause. The [appellant] is obliged to prove all four of the requirements, and should he fail to prove one of those, he cannot succeed in his action for malicious prosecution.'

In this Court

Reasonable and probable Cause

[21] The appellant submitted that the assessment of a claim for malicious prosecution must unfold sequentially in relation to the requirements of reasonable and probable cause on the one hand, and malice or *animus injuriandi*, on the other.⁹ He relied for this submission on *Minister of Justice v Moleko (Moleko)*.¹⁰ The appellant contended that the high court erred in first dealing with the question of whether the prosecution acted with malice or *animus injuriandi* and then concluding that this requirement was not proven. The correct approach, he argued, was to first enquire into whether the prosecution had reasonable and probable cause to prosecute him, which the court did not consider.

⁷ *Beckenstrater v Rottcher and Theunnissen* 1955 (1) SA 129 (A) at 135-136; *Groenewald v Minister of Justice* 1973 (2) SA 480 (O).

⁸ The high court made an order, in terms of rule 33(4) of the Uniform Rules of Court, separating the issue of liability from the quantum of damages.

⁹ The appellant was represented in the appeal by two counsel. After the appellant's counsel had argued the matter and shortly before counsel for the NPA was to commence argument, the court was informed by the appellant's counsel that their mandate, as well as that of their instructing attorney, was terminated by the appellant. Once his legal representatives were excused from the hearing, the appellant requested leave of the Court to argue his own case, which was granted.

¹⁰ *Minister of Justice and Constitutional Development v Moleko* [2008] ZASCA 43; [2008] 3 All SA 47 (SCA); 2009 (2) SACR 585 (SCA) para 8.

[22] Although our law requires that the defendant must have acted with malice or *animus injuriandi*, that question will only become relevant when it is established that the defendant instigated the prosecution without reasonable and probable cause. The latter issue is anterior to the question of whether the defendant acted with *animus injuriandi*. To succeed on this leg of the enquiry, a plaintiff must not only prove intent to injure but also consciousness of wrongfulness. As held by this Court in *Moleko*, *animus injuriandi* 'means that the defendant directed his or her will to prosecuting the plaintiff in the awareness that reasonable grounds for the prosecution were absent'.¹¹ It follows from this that the determination of whether a defendant had reasonable and probable cause to prosecute the plaintiff, must precede the determination into whether it acted with *animus injuriandi*. The high court was, therefore, obliged to determine whether the NPA had reasonable and probable cause for the appellant's prosecution. A further reason for this, is a litigant's entitlement 'to a decision on all issues raised, especially where they have the option of appealing further',¹² as in this case.

[23] It is to the issue of reasonable and probable cause that I now turn. In *Beckenstrater*¹³ this Court held that:

'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.'

There would, thus, be reasonable and probable cause for the prosecution where a defendant is of the honest belief that the facts, available at the time of taking the decision to prosecute the plaintiff, constituted an offence which would lead a reasonable person to conclude that the person against whom charges are brought, was probably guilty of such offence. This question must not be confused with whether there is sufficient evidence upon which the accused may be convicted. That question

¹¹ *Moleko* para 63 citing Neethling, JM Potgieter & PJ Visser *Neethling's Law of Personality* 2 ed (2005) p181.

¹² *Spilhaus Property Holdings (Pty) Limited and Others v MTN and Another* [2019] ZACC 16; 2019 (6) BCLR 772 (CC); 2019 (4) SA 406 (CC) para 44.

¹³ *Beckenstrater* at 136.

would ultimately be for the court, in the criminal trial, to decide at the conclusion of the evidence.¹⁴

[24] The appellant sought in his testimony, in the malicious prosecution trial (the trial), to justify his actions and prove his innocence. That is not the test for absence of reasonable and probable cause in a malicious prosecution. Whether there was reasonable and probable cause for the prosecution depends on the facts or material which was at the disposal of the prosecutor, at the time that the prosecution was instigated, and the careful assessment of that information. The pertinent date would be that on which the prosecution applied for a warrant of arrest for the plaintiff. In this case, that date is 11 October 2006. If there are representations along the way, the prosecutor is obliged to carefully assess those representations to decide whether to proceed with the prosecution or to withdraw the charges.

[25] Mr Van Zyl was a member of the prosecution team from the date that the NPA applied for the warrant of arrest for the appellant. He testified that they decided to prosecute the appellant based on a careful assessment of the information in the docket, and after consultation with the state witnesses. He confirmed that the docket contained evidence relating to each of the counts on which the appellant was charged. This included the IMU full investigation file, the IMU investigation report and disciplinary file which included sworn statements made by various witnesses against the appellant, and other supporting documents. He testified that from his assessment of the evidence in the docket, he was of the honest belief that the charges against the appellant could be sustained as there was a prima facie case against him.¹⁵

[26] Where there are numerous discrete charges, such as we have here, each of them must be considered separately in determining whether the prosecution had reasonable and probable cause.¹⁶ In line with this approach, I will consider the evidence in the docket that the prosecution had at its disposal, when it decided to prosecute the appellant on each of the charges in the indictment.

¹⁴ C Okpaluba, 'Reasonable and Probable Cause in the Law of Malicious Prosecution: A Review of South African and Commonwealth Decisions' [2013] PER 8 at para 1.

¹⁵ The docket ran into more than 400 pages.

¹⁶ *Minister of Safety and Security N.O. and Another v Schubach* [2014] ZASCA 216 para 13.

Counts 1 to 17

[27] In relation to the first 17 counts in the charge sheet, it is alleged that the appellant defrauded the NPA when he misrepresented to it, and its employees, that certain amounts/advances/transactions against the DSO C-Fund were real and valid transactions that could be undertaken in terms of the policies governing the DSO C-Fund. The charge sheet alleges, in the alternative, that the appellant stole the said amounts of money.

Count 1

[28] This concerned an alleged fictitious claim that the appellant apparently authorized for a sting operation in the amount of R15 000 on 9 December 2003. This charge was supported by the affidavits of Mr Jan Marthinus Henning (Deputy National Director of Public Prosecutions); Mr Gordon Laersk (Chief Investigating Officer in the DSO), Ms Malebo Ramagoshi (DSO C-Fund Custodian) and a Request for Advance of DSO C-Funds form together with a memorandum compiled and signed on 9 December 2003 by the appellant. The appellant wrote in this memorandum that Mr Henning contacted him and Mr Leonard McCarthy, then head of the DSO, and requested assistance in staging a sting operation. This operation involved a public prosecutor stationed at the Benoni District Court, who purportedly sought a bribe from an accused to withdraw the charges against him. The DSO was tasked with managing the sting operation and arresting the prosecutor. R15 000 was requested for use as entrapment money in the operation.

[29] R15 000 was advanced from the DSO C-Fund to the appellant for the operation. The appellant advanced R4 000 to Mr Laersk's team. Mr Laersk deposed to an affidavit, in which he stated that he requested, and received, R4 000 from the appellant for the operation. He returned R4 000 to the DSO C-Fund because of the termination of the operation, as the accused in question denied that the prosecutor had tried to bribe him. After the commencement of the investigation into the allegations against him, the appellant returned R10 000 to the DSO C-Fund. Although R14 000 (including the R 4000 returned by Mr Laersk) was ultimately returned, an amount of R1 000 remained outstanding. On 6 June 2006, Ms Ramagoshi, the Custodian of the DSO C-Fund, confirmed on affidavit that the appellant received R15 000 from the DSO C-Fund for the sting operation; that Mr Laersk returned R4000; that the appellant

returned R10 000 four months' later; and that although he undertook to repay the shortfall of R1 000 from funds in his bank account, he never did.

[30] There was no credible explanation from the appellant as to why he requested R15 000 from the DSO C-Fund when only R4 000 had been requested from him for the operation. This, coupled with the supporting evidence in the docket would have led a reasonable person to conclude that the appellant was probably guilty of the offence of fraud. There was accordingly reasonable and probable cause for the appellant's prosecution on this charge.

Count 2 (in the new indictment)

[31] This charge concerned an advance of R22 000 from the DSO C-Fund to the appellant, on 23 January 2004, for use in an entrapment operation. This charge was supported by a Request for Advance of DSO C-Funds form from, Mr Nonpho Frans Doubada (Mr Doubada), a Senior Advocate in the DSO, to the appellant requesting R22 000 entrapment money. It was accompanied by a requesting memorandum that was approved by the appellant.

[32] On 8 July 2004, Mr Doubada deposed to an affidavit in which he said that, on 23 January 2004, the appellant instructed him to draft a memorandum requesting the amount of R22 000 from the DSO C-Fund for purposes of an entrapment operation, which he did. The memorandum contained facts that the appellant instructed him to include. Mr Doubada stated, in the affidavit, that he knew nothing of the facts contained in the requesting memorandum and that he drafted it because the appellant instructed him to do so. In addition, Adv Doubada said:

'Later during the day, Ledwaba contacted me and requested me to fetch R22,000.00 in cash from Ms. Malebo Ramagoshi, the DSO Confidential Funds Custodian. He further instructed me to hand over the R22, 000.00 to him once I had received it. I then went to Ramagoshi's office and signed for the R22,000.00. Once I had received the R22, 000.00 as instructed, I handed it to Ledwaba personally at the office of Anthea Annandale (Office Manager, DSO).'

[33] The evidence in the docket would have led a reasonable person to conclude that the appellant was probably guilty of the offence of fraud. There was accordingly reasonable and probable cause for the appellant's prosecution on this charge.

Count 2 (in the old indictment)

[34] This charge concerned an advance of R45 000 received on 27 February 2004 by the appellant from the DSO C-Fund. The advance was made based on a Request for Advance of DSO C-Funds form purportedly compiled by Mr Andrew Becker, at the request of the appellant. The request read in relevant part:

'2. The matter involves a possible investigation of Nigerian Nationals for Drug Dealing. The suspects will be sending a Courier to travel to the UK to collect and bring some drugs back to South Africa...a source is being tasked to follow the Courier and establish all contacts he makes as well as the product and *modus operandi* of passing through the customs at the airport.

3. The source must urgently be provided with an amount of R45 000.00 for the operation. The project is not yet registered'.

However, as is apparent from an affidavit deposed to by Mr Becker, he had no personal knowledge of the contents of the memorandum. Mr Becker confirmed in the affidavit that he signed the memorandum because the appellant instructed him to do so. He believed that the appellant had full knowledge of the operation and the contents of the memorandum. He signed the memorandum because he had no reason to doubt the truth of its contents. He was, therefore, surprised when the appellant informed him in September 2004 'that things were not well' because of the two memoranda he had signed at his [the appellant's] request.

[35] Mr Tongwane deposed to an affidavit on 13 June 2005 in which he denied receiving or handling these amounts of money from the DSO C-Fund. He also said that he had no knowledge of the memorandum dated 27 February 2004, in which Mr Becker requested R45 000 for payment to a source in a drug-dealing operation. According to Mr Tongwane, on 14 April 2005, the appellant intimated that he was in trouble, and requested Mr Tongwane to inform the IMU investigators that he had received R45 000 and R66 000 from the appellant. If Mr Tongwane was amenable to doing so, then the appellant would provide him with the necessary paperwork. Mr Tongwane advised the appellant that he was not prepared to assist him to commit fraud. A day or two later, Mr Tongwane was informed by Mr Prince Mokotedi of the IMU that the appellant had informed the IMU that the amounts of R45 000 and R66 000 were requested by, and handed to, Mr Tongwane for operational purposes on 27

February 2004 and 23 April 2004, respectively. Mr Tongwane was shocked and angry, and explained to Mr Mokotodi what had transpired at the meeting with the appellant on 14 April 2005.

[36] Mr Becker was also interviewed by Mr Mokotodi. After the interview, he asked the appellant for feedback on the investigation. He assured Mr Becker that there was nothing to be concerned about, as he had already repaid both amounts. Mr Becker considered the appellant's response to be strange because both the memoranda he had signed, indicated that the requested money was for operational expenses. The appellant personally returned the R45 000 nine months after it was advanced.

[37] In my view, it was reasonable to conclude that if the informer that was supposedly paid was not fictitious, there would have been no reason whatsoever for the appellant to reimburse the DSO C-Fund. This, coupled with the sworn statements, in the docket, of Mr Becker and Mr Tongwane, would have led a reasonable person to conclude that the appellant was probably guilty of the offence of fraud. There was accordingly reasonable and probable cause for the appellant's prosecution on this charge.

Count 3

[38] Count 3 concerned an advance of R20 000 from the DSO C-Fund to the appellant, on 7 March 2004, for an unknown project and without this claim being approved by the operational and fiscal authoriser as required by DSO C-Funds Policy and Procedure document. According to the sworn statement of Mr Pieterse, no supporting documentation could be found for this transaction. There was also no evidence indicating that the R20 000 advance was returned by the appellant. The supporting affidavit of Mr Pieterse would have led a reasonable person to conclude that the appellant was probably guilty of the offence of fraud. There was accordingly reasonable and probable cause for the appellant's prosecution on this charge.

Count 4 (in the new indictment)

[39] This count concerned the payment of R40 000 on 5 April 2004 to the appellant from the DSO C-Fund. The advance was supported by a Request for Advance of DSO C-Funds form, dated 5 April 2004, for an amount of R40 000 signed by Mr Doubada as the claimant and Ms Ramagoshi as the fiscal authoriser. It was accompanied by a

memorandum also signed by Mr Doubada. The memorandum did not describe the purpose for which the funds were to be used. It merely stated that: '[T]he source should be motivated by an award of source fee for the information already provided'. An amount of R40 000 was suggested taking into account the value of money principle'. This memorandum was approved by the appellant.

[40] However, on 8 July 2005, Mr Doubada deposed to an affidavit in which he stated that he had no knowledge of the facts contained in the memorandum relating to the DSO Head Office C-Fund 'Operation Catchment' because:

'On 5 April 2004, the appellant called me to his office and handed me a requesting memorandum that had already been typed and requested me to sign it. On page 2 of the Annexure X, my name and rank had already been typed in, and all I was required to do was sign my name. Ledwaba informed me that he needed the R40,000 referred to in Annexure X for an operation. As instructed, I duly signed Annexure X and handed it to Ledwaba. Later on, during the day, Ledwaba instructed me to fetch the R40 000 cash from the C-Fund Custodian (Ramagoshi). I then went to Ramagoshi and signed for receipt of the R40 000 cash (see Annexure Y). Once again, Ramagoshi did not query my receipt of this money. I then went to Ledwaba's office and personally handed him the R40 000. I had no knowledge of the facts contained in Annexure X.'

[41] I am of the view that the evidence in the docket, especially the affidavit of Mr Doubada, would have led a reasonable person to conclude that the appellant was guilty of fraud. There was accordingly reasonable and probable cause to prosecute the appellant on this charge.

Count 4 (old count 4)

[42] This charge concerned an advance of R15 000 to the appellant on 12 March 2004. It was supported by two handwritten documents. The one note reads: 'R15 000 – Geoph Ledwaba [the appellant]. Taken by Phillip Lebopa. Total money to Geoph that was not signed for: R35 000 on 12/03/2004. These comments were handwritten and signed by Ms Ramagoshi, the Custodian of the DSO C-Fund. In an affidavit deposed to by Ms Ramagoshi, she confirmed that she made these entries after the appellant, without the necessary documentation, requested her to give him an advance of R15 000 from the DSO C-Fund. The appellant requested the money

telephonically, and informed her that Mr Phillip Lebopa, Assistant Director of Investigations in the DSO, would fetch it. This concerned Ms Ramagoshi as the appellant's request was not supported by the requisite documentation in terms of the Policy and Procedure document. She raised this with Mr Jonker, the Administrator of the DSO C-Fund, who said that 'we cannot deny Ledwaba the money because he is the 'big boss'. She also approached Ms Ayanda Dlodlo, then Deputy Head of the DSO, to intervene, on a different occasion, when the appellant requested funds without completing the requisite documentation.

[43] Mr Lebopa also deposed to an affidavit on 6 July 2005 in which he confirmed that the appellant had instructed him to collect a sum of money from Ms. Ramagoshi, which he did. Ms Ramagoshi handed him an envelope which she said contained R15 000 in cash. Since the appellant did not inform Mr Lebopa of the purpose for which the money was to be used, Mr Lebopa refused to sign the receipt that Ms Ramagoshi requested him to sign. As instructed by the appellant, Mr Lebopa handed the money to the appellant at the Rosebank Mall. The claim was not supported by an operationally approved request form as required by the Policy and Procedures document.

[44] The sworn statements in the docket in respect of this charge would have led a reasonable person to conclude that the appellant was probably guilty of fraud. There was accordingly reasonable and probable cause to prosecute the appellant on this charge.

Count 5

[45] This charge concerned the payment of R150 000, on 5 April 2004, from the C-Fund to a certain Mr Yusuf Patel, an alleged informer in the investigation into the South African National Association of Clients (SANAC). The Official DSO C-Fund receipt reflects that Mr Patel acknowledged receipt of R150 000 and the funds were paid to him for the purpose of 'source information in the SANAC matter' on 19 March 2005. The receipt contains the signatures of the appellant and Mr Kasper Jonker, the Administrator of the DSO C-Fund. They were apparently present when the funds were handed over to Mr Patel. Mr Koobendran Naidoo, the Investigating Officer in the SANAC investigation stated in an affidavit deposed to on 21 June 2005, that he used two sources, namely Mr Jannie Van der Sandt and Mr Ebrahim Dawood in the

investigation. However, on 14 March 2005, Mr Naidoo received a telephone call from the Chief Investigating Officer, Mr Marion, who informed him that the appellant had requested Mr Naidoo to draft a memorandum motivating the payment of money to a source in the SANAC investigation. In the belief that the requested memorandum related to Mr Dawood, Mr Naidoo advised Mr Marion that he had difficulty with his request, as Mr Dawood was an accomplice and accomplices were never rewarded.

[46] The next morning, Mr Marion again requested Mr Naidoo to draft the memorandum. Mr Naidoo refused, asserting that he was unaware of any source (informant) who qualified for a reward for information supplied in the SANAC investigation. Mr Marion then spoke to the appellant, who called Mr Naidoo and insisted that he draft the memorandum. When Mr Naidoo refused, the appellant told him that he had interviewed the informant who qualified for a reward as he had supplied information relevant to the investigation. Mr Naidoo considered this to be very strange as, in his experience, the 'Head of Operations does not become involved with informants... all information, supplied by informants or potential informants, was channeled through to the investigating officers of the matters concerned'.

[47] Mr Naidoo subsequently received a call from Mr Lawrence Mrwebi, the DSO Durban Regional Head, who instructed him, at the behest of the appellant, to submit a motivation for payment to a source in the SANAC investigation. Mr Naidoo refused but offered to send Mr Mrwebi a report on the status of the SANAC investigation, which he did. On 19 March 2004, Mr Naidoo became aware of a memorandum, dated 16 March 2004, signed by Mr Mrwebi and Officer Ngema (on behalf of Mr Marion). The memorandum detailed a list of successes in the SANAC investigation which were contained in Mr Naidoo's report. It, however, went further and recommended payment of R150 000 to a source (informant) in the SANAC investigation, even though Mr Naidoo's report made no reference to any such source. This concerned Mr Naidoo, as it appeared that his successes in the investigation were now used to motivate payment to an unknown source (informant), whom he had no knowledge of. He immediately expressed this concern to Mr Mrwebi and Mr Marion in a memorandum dated 19 November 2004.

[48] Mr Naidoo subsequently requested Mr Mrwebi to provide him with access to the source, but to no avail. During the appellant's visit to the DSO Durban Office, Mr Naidoo requested the appellant to make the source available to him. The appellant undertook to do so, but never made good on his undertaking. The affidavits of Mr Dawood, Mr Mrwebi, Mr Pieterse and Ms Dlodlo were also in the docket. Mr Dawood, a source inside SANAC explained how it defrauded members of NEHAWU. He, however, categorically stated that: 'I do not know and never heard of a person called Yusuf Patel. During the course of involvement with SANAC I never met a person called Yusuf Patel'.

[49] Mr Mrwebi explained, in his affidavit, that based on the information and reports he had received, 'I have always been aware that a source (informant) Mr Ibrahim Dawood approached the President of NEHAWU with information and the latter contacted the DSO in Gauteng where Mr Dawood was debriefed and the investigation in the matter commenced'. Notably, Mr Mrwebi did not mention Mr Patel as an informer. Ms Dlodlo explained in her affidavit why she co-signed for the payment of R150 000 to the appellant. She apparently did so because she was advised by the appellant that the money had been used for operational expenses, relating to information he had received concerning the possible disruption of the 2004 national elections by a political party. Mr Pieterse deposed to an affidavit, dated 5 June 2005, in which he confirmed the version of Mr Naidoo. He also confirmed that the source – Mr Patel – was not registered with the DSO. Mr Pieterse was also unable, despite a diligent search, to locate a file in respect of Mr Patel in the DSO informant files.

[50] The appellant testified in the trial that when the prosecution decided to charge him on this count, they failed to consider CCTV footage in which Mr Patel could be seen entering his office. Mr Van Zyl testified that this footage was not part of the material in the docket and was not considered in their evaluation. In the light of the sworn statements, in the docket, relating to the non-existence of the informant, a reasonable person would have concluded that there was sufficient evidence to sustain a conviction on the charge. The prosecution clearly had reasonable and probable cause to prosecute the appellant on this charge.

[51] Count 6 concerned an advance of R66 000 from the DSO C-Fund, to the appellant, on 23 April 2004. The advance was supported by a Request for Advance of DSO C-Funds form and a memorandum from Mr Doubada to the appellant, motivating the claim as entrapment money. However, Mr Doubada stated in an affidavit deposed to on 8 July 2005 that he compiled the memorandum requesting the amount of R66 000 on the instructions of the appellant. The appellant called him to his office and instructed him to sign a requesting memorandum that had already been typed. His name and rank were also already typed in, and all he had to do was sign, which he did. He said that he had no personal knowledge of the facts contained in the memorandum, and that he did not collect the cash on behalf of the appellant. The appellant only returned these funds approximately 8 months after they were advanced.

[52] Mr Tongwane's affidavit, dated 13 June 2005, which supported charge 3 also supports this charge. In my view, it was reasonable to conclude that the money was refunded to the DSO C-Fund because the entrapment project was fictitious. This, coupled with the sworn statements in the docket, of Mr Doubada and Mr Tongwane, would have led a reasonable person to conclude that the appellant was probably guilty of fraud. There was accordingly reasonable and probable cause to prosecute the appellant on this charge.

Count 7

[53] Count 7 concerned an advance of R22 000, on 6 May 2004, to the appellant from the DSO C-Fund. On 14 June 2005, Ms Mercier Fryer, who was at the time employed at the DSO as the Project Management Officer, deposed to an affidavit in which she stated that prior to this appointment she was employed in Operational Support where she worked on undercover operations. From time to time, she received money for these operations. She had an amount of R114 258 in her custody and under her control, which was assigned to rent undercover accommodation. On 6 May 2004, the appellant instructed her to provide him with R22 000 of the funds in her custody, for use in an undercover entrapment operation. She obliged and handed over the funds to the appellant. She asked him to sign an official DSO C-Fund receipt, dated 6 May 2004, which he did. She indicated on the receipt that the appellant had received the funds for purposes of 'evidence/purchase/trap'. The appellant informed her that he would hand her the authorising documentation the following day, but never did so.

[54] The appellant returned the money on 27 August 2004. No supporting documentation could be located for this transaction. Again, it was reasonable to infer that if this transaction was not fictitious, there would have been no reason for the appellant to reimburse the DSO C-Fund. This, coupled with the supporting sworn statements in the docket would have led a reasonable person to conclude that the appellant was probably guilty of fraud. There was, accordingly, reasonable, and probable cause to prosecute the appellant on this charge.

Count 8

[55] Count 8 concerned an advance of R5 000 from the DSO C-Fund, to the appellant, on 28 May 2004. This advance was not supported by an approved Request for Advance of DSO C-Funds form as required by the Policy and Procedures document. The appellant returned the funds approximately 9 nine months after they were advanced. As in the case of the other charges, I am of the view that it was reasonable to deduce that if this transaction was not fictitious, there would have been no reason to reimburse the DSO C-Fund nine months later. The sworn statements in the docket in relation to this charge would have led a reasonable person to conclude that the appellant was probably guilty of fraud. There was accordingly reasonable and probable cause to prosecute the appellant on this charge.

Counts 9 and 12

[56] These counts concerned advances of R35 000 to the appellant on 18 June 2004, and R25 000 on 13 July 2004 (total of R60 000). The advances were not supported by approved Request for Advance of DSO C-Funds forms. In a memorandum dated 28 June 2004, supposedly from Mr Becker to the appellant, Mr Becker motivated a claim for R60 000 to be used by a source for payment of an airflight to the United Kingdom (UK) and accommodation and subsistence costs whilst there. The appellant approved the memorandum. However, Mr Becker deposed to an affidavit in which he said that he did not compile the memorandum requesting R60 000. The appellant only returned these monies eight months after they were advanced to him. According to the affidavit of Mr Pieterse, the facts mentioned in the memorandum were not consistent with the facts of an existing investigation, relating to the Department of Home Affairs, namely Project Zealot.

[57] On this basis, a reasonable prosecutor would have concluded that there was no reason for the appellant to reimburse the DSO C-Fund other than that the transaction was fictitious. The sworn statements in the docket in relation to this charge would have led a reasonable person to conclude that the appellant was probably guilty of fraud. There was accordingly reasonable and probable cause to prosecute the appellant on this charge.

Counts 10 and 11

[58] Counts 10 and 11 concerned two advances of R24 000 and R15 455 to the appellant on 6 July 2004 and 12 July 2004, respectively. In relation to both these advances, the appellant issued memoranda indicating that he had authorized the use of these amounts for operational purposes and that the money was handed over to the 'team'. However, the advances made were not supported by approved Request for Advance of DSO C-Funds forms. The appellant only returned both these amounts five months later. It was reasonable to conclude that the appellant reimbursed the DSO C-Fund because the purported transaction was fictitious. The sworn statements in the docket in respect of these charges would have led a reasonable person to conclude that the appellant was probably guilty of fraud. There was accordingly reasonable and probable cause to prosecute the appellant on this charge.

Count 13

[59] Count 13 concerned an advance of R13 000, from the DSO C-Fund to the appellant, on 20 July 2004. The advance was not supported by an approved Request for Advance of DSO C-Funds form. According to the affidavit of Mr Doubada dated 8 July 2005, he received R13 000 from Ms Ramagoshi with an instruction from the appellant that it be handed to him at the Menlyn Park Shopping Centre, in Pretoria. Mr Doubada tried to contact the appellant but failed to do so. Later that evening, the appellant went to Mr Doukada's home and collected the money from him. The appellant only returned the advance of R13 000 nine months after it was advanced to him.

[60] In my view, it was reasonable to conclude that the appellant reimbursed the DSO C-Fund because there never was a legitimate transaction underlying the advance of

the R13 000. The sworn statements in the docket in relation to this charge would have led a reasonable person to conclude that the appellant was probably guilty of fraud. There was accordingly reasonable and probable cause to prosecute the appellant on this charge.

Count 14

[61] Count 14 concerned a payment of R50 000, on 23 July 2004, to a source that was never registered as an informer. Payment was authorized based on a memorandum, dated 23 July 2004, prepared by Mr Doubada. However, Mr Doubada stated, in the affidavit deposed to on 8 July 2005, that the appellant instructed him to sign a requesting memorandum, for an advance of money for an operation at the OR Tambo International Airport. The memorandum had already been typed and included Mr Doubada's name. Mr Doubada signed the memorandum as duly instructed. He, however, said that he had no personal knowledge of the facts in the memorandum, and did not collect the money on behalf of the appellant. The appellant approved the memorandum and payment of R50 000 to the informer, whom he claimed to have spoken to on several issues. No official receipt was found in which the source acknowledged receipt of the money.

[62] The evidence in the docket in respect of this charge would have led a reasonable person to conclude that the appellant was probably guilty of fraud. There was accordingly reasonable and probable cause to prosecute the appellant on this charge.

Count 15

[63] Count 15 concerned an advance of R30 000 to the appellant. This advance to the appellant was made without any Request for Advance of DSO C-Funds form. The request was made by Mr Tongwane for R20 000. However, the appellant, in his own handwriting, increased the amount to R30 000. No other documents relating to this transaction could be traced. The money was refunded on 6 October 2004, but could not be linked to a specific advance.

[64] Once again it was reasonable to conclude that there was no legitimate basis for this transaction. And the way it was conducted did not accord with the applicable Policy and Procedures document. This, coupled with the evidence in the docket in relation to

this charge, would have led a reasonable person to conclude that the appellant was probably guilty of fraud. There was accordingly reasonable and probable cause to prosecute the appellant on this charge.

Count 16

[65] This count concerned an advance of R7 000 from the DSO C-Fund, to the appellant, on 23 October 2004. Payment was made to the appellant based on an unsigned and unauthorized Request for Advance of DSO C-Funds form from the appellant as claimant. No additional documents could be located. The appellant returned this amount in February 2005. For reasons similar to the previous charge, the evidence in the docket in relation to this charge would have led a reasonable person to conclude that the appellant was probably guilty of fraud. There was accordingly reasonable and probable cause to prosecute the appellant on this charge.

Count 17

[66] Count 17 concerned an advance of R22 000, from the DSO C-fund to the appellant, on 25 January 2005. The appellant received an advance of R22 000, on 6 May 2004, for the purposes of an 'evidence purchase/ trap' without providing Ms Fry with the necessary supporting documentation. In the affidavit deposed to by Ms Fry, the appellant returned this advance on 27 August 2004 (See count 7 above). However, according to a handwritten note (annexure 31 to the PWC Report), dated 25 January 2005, the R22 000 was returned by the appellant on 18 January 2005 and withdrawn again on 25 January 2005. The handwritten note was signed by Mr Jonker, the administrator of the DSO C-Fund. The advance of R22 000 made on 25 January 2005 was not supported by a Request for Advance of DSO C-Funds form and the annexures as required by the Policy and Procedures document.

[67] According to the affidavit of Ms Joline Lamprecht, she handed the R22 000 to the appellant on his mere instruction, and without receiving any proper authorised documents. The evidence in the docket in respect of this charge would have led a reasonable person to conclude that the appellant was probably guilty of fraud. There was accordingly reasonable and probable cause to prosecute the appellant on this charge.

Counts 18 and 19 to 23

[68] In respect of count 18 of the charge sheet (Count 10 in the new indictment), it was alleged that the appellant committed fraud in failing to inform the NPA/DSO that he was doing remunerated work (not authorised by the NPA) whilst he was still employed by the NPA. In counts 19 to 23 of the charge sheet (counts 11 to 15 in the new indictment), it was alleged that the appellant, on four separate occasions, stole money that belonged to Ndumiso Trust CC trading as Kagiso Consulting (Kagiso). It was also alleged that the appellant defrauded members of Kagiso when he represented that a certain project had been terminated, and that no money was received as payment, whereas this was not true. Count 18 was supported by a letter of resignation from the appellant, as well as the affidavit of Mr Lloyd Charles Lephoko deposed to on 9 October 2006. Counts 19-23 are also supported by the affidavit of Mr Lephoko and the annexures thereto.

[69] The events that led up to the appellant becoming involved in the business of Kagiso are explained by Mr Lephoko in his affidavit. He states that he and Ms Rose Nonyane decided to conduct an insolvency practice and registered Ndumiso Trust as a close corporation for that purpose. Ndumiso Trust CC was registered on 27 January 2004. In August/September 2004, they met with the appellant, who was his brother-in-law, to explore the possibility of getting work for their insolvency practice from the Asset Forfeiture Unit (AFU). During this time, the appellant expressed an interest in becoming involved in their insolvency practice, and they, in principle, agreed that the appellant would become a member of Ndumiso Trust CC.

[70] According to Mr Lephoko, the appellant approached him again towards the end of November 2004 and requested him to register a close corporation for him. The appellant informed Mr Lephoko that a close corporation was needed as there was a possibility of obtaining work from the Gauteng Department of Safety and Liaison (the Department). The appellant proposed that the close corporation be named Kagiso Consulting. Since it would have taken some time to register a close corporation, Mr Lephoko suggested that they do the work through Ndumiso Trust CC, which was already registered, and that Kagiso Consulting be its trading name. The appellant agreed and suggested that Ms Nonyane and Mr Lephoko should be involved. Ms

Nonyane agreed to the arrangement, and they registered the appellant as a member of Ndumiso Trust CC. They secured office space to conduct the business.

[71] The appellant provided Mr Lephoko with some background information about the possible work and requested him to prepare a quotation and a company profile for the Department. They agreed to quote an hourly fee of R900 per hour for the appellant, R800 per hour for Mr Lephoko, and R800 per hour for Ms Nonyane. They also agreed that the appellant would be available all the time to do the work of the business, and that Mr Lephoko and Ms Nonyane would assist on an alternate basis. Mr Lephoko specifically asked the appellant if the work for the Department, which they envisaged would take about 30 working days, would not interfere with his work at the DSO. The appellant assured him that it would not be a problem as he had obtained permission to do the work.

[72] As requested, Mr Lephoko drafted a quotation and a company profile which he gave to the appellant. A few days later the appellant informed Mr Lephoko that Kagiso was given work by the Department. They then started their research for the project, which consisted of three different phases. During December 2004, Mr Lephoko visited the offices of the Department and met Ms Dlodlo, then Head of the Department.

[73] In early January 2005, Mr Lephoko and the appellant met with Ms Dlodlo and a certain Mr Mpanza and they reported on the progress of the project. Towards the end of the first phase of the project, Mr Lephoko got the impression that the appellant was not keen on having him and Ms Nonyane involved and wanted to do all the work himself. Despite the problems they continued to work together. On the due date for the report on the first phase, Mr Lephoko met with the appellant who informed him that the report was almost complete, and that he would submit it the next morning, which he did. They then began working on phase two but shortly thereafter, the appellant informed Mr Lephoko that the Department had taken the project away from Kagiso and given it to another entity. Mr Lephoko stopped and did no further work. He, however, asked the appellant, on numerous occasions, to be paid for the work done in the first phase. The appellant informed Mr Lephoko that he could not be paid, because the Department had not paid Kagiso for the work done.

[74] Mr Lephoko only discovered, after receiving copies of invoices and other relevant documents from the SAPS, that Kagiso had received payment for the work done, and that it was paid into the private bank account of the appellant. The documentation revealed that the appellant had submitted invoices made out in the name of Kagiso to the Department on the dates and for the amounts as follows: 10 January 2005 for R193 422.20; 1 February 2005 for R165 375.98; 11 February 2005 for R110 250.65; and 16 February 2005 for R27 079.11. These invoices were attached to the affidavit of Mr Lephoko and were, therefore, part of the docket.

[75] The appellant testified that he resigned from the NPA in January 2005 and was, as such, not employed by the NPA when he was involved in the business of Kagiso during the period in question. Therefore, he said that he did not need permission from the NDPP to carry out work outside the NPA. This was put to Mr Van Zyl in cross-examination. He responded by making it clear that this information was not before them when they took the decision to prosecute the appellant on charge 18. He said that what they had before them were documents which indicated that the appellant had resigned with effect from August 2005. He also said that the appellant's letter of resignation, dated 15 June 2005, which was shown to him in court was not in the docket. Nor was the appellant's earlier application to the NDPP (attachments to that letter) to be released from service to pursue a career, as an advocate, at either the Johannesburg Bar or the Pretoria Bar. The appellant's resignation, in terms of the letter of 15 June 2005, was with effect from 31 July 2005.

[76] Although this letter of resignation refers to an earlier application to be released from office during January 2005, it is clear from the letter itself that the appellant was persuaded by the NDPP, at the time, Mr Vusi Pikoli to reconsider his request which he did. As stated by him, in the letter, the appellant subsequently withdrew his request to be released from office and 'continued [his] responsibilities as Investigating Director in the DSO'.¹⁷

[77] Mr Lephoko's affidavit and the annexures thereto which he received from the SAPS, coupled with the appellant's resignation from the NPA with effect from 31 July

¹⁷ Resignation letter from the appellant to the NDPP dated 15 June 2005.

2005, would have led a reasonable person to conclude that the appellant: (a) probably committed fraud in failing to inform the NDPP that he was doing remunerated work (not authorised by the NPA) whilst he was still employed by the NPA, and (b) probably stole money that belonged to Kagiso on four separate occasions; and (c) probably committed fraud against the members of Kagiso when he represented that the project was terminated and that no payment was received for the work done.

Withdrawal of Charges

[78] The prosecution took the decision to start the trial *de novo* and to proceed on a new indictment. The PWC report was only completed on 27 February 2007. It was, therefore, not part of the docket when the decision to prosecute the appellant, on the original charges, was taken on 11 October 2006. The PWC Report was, however, in the docket when the prosecution decided to start the trial *de novo* on the new indictment.

[79] Mr Moepi compiled the PWC report. It detailed the findings of PWC in respect of the DSO C-Fund transactions and other related transactions in respect of, amongst others, the appellant. The main findings were that:

- (a) A review of the appellant's personal bank account revealed that some of the refunds which the appellant had made to the DSO C-Fund, coincided with his receipt of funds from the Department;
- (b) On 24 February 2005, a total of R82 500 in cash withdrawals was made from the appellant's bank account. On the same day, the appellant refunded an amount of R79 000 to the DSO C-Fund;
- (c) A net amount of R234 000 advanced to the appellant from the DSO C-Fund was still outstanding;
- (d) Payments amounting to R496,127.94, from the Department to Kagiso, were deposited into the appellant's personal bank account on 28 January 2005, 23 February 2005, 16 March 2005 and 25 March 2005, respectively.

[80] Mr Moepi testified on some of these findings in the first trial. However, before he could complete his evidence, the trial was terminated because of the recusal of the Regional Magistrate.

[81] The appellant contended in the appeal that the withdrawal of 10 of the 23 charges by the prosecution, at the commencement of the trial *de novo*, demonstrated that it had no reasonable and probable cause to prosecute him on those charges. I disagree. In this regard, Mr Van Zyl testified that on the day before the trial *de novo* was to commence, he decided in agreement with Ms Nkuna-Nyoni to withdraw counts 4, 5, 9, 10, 12, 13, 15, 17, 18 and 19 against the appellant. He testified that although Mr Moepi had testified in support of some of these charges in the first trial, it was going to be too expensive, due to his high fee rate, to recall him to testify in the trial *de novo*. Mr Van Zyl said that he was initially of the view that these charges could be proved, in the trial *de novo*, by leading the evidence of other witnesses on the documents referenced in the PWC report. However, on reconsideration, he realised that Mr Moepi's testimony was essential because in respect of certain transgressions he relied on a single document for his findings, but in respect of others he relied on several documents. Mr Van Zyl furthermore testified that after listening to Mr Moepi's testimony in the first trial and understanding his methodology, he believed that if he omitted to call Mr Moepi to testify in the trial *de novo*, he would struggle to prove some charges. However, to avoid the costs of recalling Mr Moepi to testify in the trial *de novo*, he considered it prudent to withdraw those charges.

[82] Mr Van Zyl's explanation for withdrawing the charges was not implausible, because there was no evidence to gainsay it. In the circumstances, no adverse inference can be drawn from the prosecution's decision to withdraw these charges. Neither does it matter that the appellant was discharged in terms of s 174 of the CPA, in respect of counts 1, 2, 5, 6, 7, 8 and 9. What matters is that when the prosecution authority originally decided to prosecute the appellant on these charges, it was of the honest belief, based on the contents of the docket, that there was reasonable and probable cause for his prosecution.

[83] Prior to the commencement of the trial *de novo*, the appellant made two sets of representations to the NDPP to have the charges against him withdrawn based on his innocence. These representations were rejected by the respective NDPPs. The appellant, however, did not give a version in his warning statement in the first trial. Nor did he give a version or state his defense in his plea explanation, as he exercised his right to remain silent. This meant that the only material available to the NPA to decide

whether to continue with the prosecution was the docket itself. Mr Van Zyl testified, under cross-examination, that he did consider the representations of the appellant when he decided, in consultation with Ms Nkuna-Nyoni, to withdraw the ten charges. He, however, testified that ultimately, his decision to withdraw these charges and add two additional ones, was based on his own assessment of the information in the docket, which included the PWC report. According to Mr Van Zyl, charges 2 and 4 were added to the new indictment because they were erroneously omitted from the original charge sheet. These charges were supported by the sworn statements and the PWC report which were in the docket.

Malice or animus injuriandi

[84] The overall premise of the appellant's case in so far as this requirement is concerned, was that there was a conspiracy instigated by his direct superior, Mr McCarthy, to destroy his career. The appellant testified in this regard that he had an acrimonious relationship with Mr McCarthy and Ms Breytenbach from the inception of his employment at the NPA. He said that once Mr McCarthy discovered that certain DSO C-Fund transactions that the appellant had authorised were not fully compliant with the Policy and Procedures document, he used that as an opportunity to make his stay at the NPA very unpleasant. The appellant furthermore stated that their relationship deteriorated even further when he told Mr McCarthy that, in terms of the Policy and Procedures document, accountability for the DSO C-Fund lay with him. According to the appellant, McCarthy became angry and threatened that he would destroy the appellant's career and would use the services of Ms Breytenbach in the SCCU to do so.

[85] Neither Mr McCarthy nor Ms Breytenbach testified at the trial. The appellant contended that given the failure of the NPA to call them to testify, his evidence against them remains unchallenged and conclusively demonstrates that the NPA acted with malice and *animus injuriandi* in deciding to prosecute him. I disagree. Although the appellant may have had an acrimonious relationship with Mr McCarthy and Ms Breytenbach, I fail to see how this could have led to a conspiracy by at least four officers of the Court to destroy his career. The appellant named four individuals in his particulars of claim but did not name Mr McCarthy. Yet in his testimony, in the trial, Mr McCarthy was the main perpetrator. Mr McCarthy had, however, relocated to

Washington DC in 2007/8 and could not have driven the prosecution. The prosecution proceeded even after he had left the country.

[86] It is clear from the factual background that the initial decision to prosecute the appellant was a joint one. The meeting of 25 July 2005, where the decision was taken, was attended by several senior officials of the NDPP, including Mr McCarthy and Jordaan. Moreover, on the unchallenged evidence, the decision to institute criminal proceedings against the appellant was made by Mr Chris Jordaan (Mr Jordaan), the head of the SCCU. He appointed Ms Breytenbach, Mr Van Zyl and Ms Nkula-Nyoni as the prosecutors in the matter. They took their instructions directly from Mr Jordaan. Ms Breytenbach was only involved in the first trial and the original charges. By the time the trial *de novo* commenced, she had been suspended from the NPA and had subsequently resigned.

[87] Although Ms Breytenbach did not testify in the trial, it is clear from her written response to the 20 July 2010 representations of the appellant, that the prosecution had a *prima facie* case against the appellant in respect of all 23 original charges, based on her evaluation of the evidence in the docket. The essence of the appellant's representations were denials that he had committed the offences that he was accused of. In respect of count 1 (retaining R11 000 of the R15 000) the appellant merely denied that the underlying case was fictitious, to which Ms Breytenbach responded that the nub of the charge was his representation that the amount of R15 000 was required as trap for the project, when all that had been required was R4 000, and his retention of the R11 000 on termination of the project. In respect of count 5 (payment of R150 000 to Mr Patel, a fictitious informer) he argued that the payment of the reward to the informer was witnessed by himself and Mr Jonker. He also relied on two affidavits deposed to by Mr Mrwebi. In the first one he had prepared a report in support of payment of the R150 000. In the second affidavit Mr Mrwebi had stated that the amount of R150 000 had not been dictated to him by the appellant. To this Ms Breytenbach responded that the decision to prosecute was based on the responses by Senior Special Investigator in the case, Mr Pieterse, and the lead investigator, Mr Naidoo, to the effect that there was no informer in the matter. Furthermore, according to a report prepared by a handwriting expert, Mr Jonker's

signature had been forged. In addition, the alleged informer was not registered with the DSO, and Mr Jonker seemed ambivalent on the payment to the alleged informer.

[88] With regard to count 14 (alleged payment of R50 000 to an informer that was never registered as such with DSO) the appellant's representation was that the payment was made on the basis of a handwritten note dated 25 January 2005 with the inscription: "R50 000 23/7/2004 Geoph Ledwaba" and Mr Jonker's comment thereon that "To get original from Malebo with receipts". In response Ms Breytenbach reiterated that the alleged informer was never registered with the DSO, that the appellant that the appellant had instructed his junior, Mr Doubada, to authorize the payment without the latter having any knowledge about the matter, and that no official receipt of payment by the

[89] In respect of count 15 (R30 000 paid out to the appellant without completion of a Request for Advance or the DSO C-Fund claim form) the appellant had referred to two documents in the forensic report on which was the inscription: 'The advance is supported by a hand-written document (Annexure 57) with comments as follows 'Ref 21 Mr Ledwaba R30 000''. The advance is marked Ref 21 (Annexure 58 for bookkeeping purposes'. He asserted that the documents supported advance payment. He also maintained that the money was requested by Mr Tongwane, not him. Ms Breytenbach responded that State case was that the advance payment was made without the required documents. She stated that Mr Pieterse had confirmed that no other documents could be traced in relation to the transaction, and, Mr Tongwane had initially made a request for payment of R20 000 which the appellant changed to R30 000.

[90] In respect of count 18 (engagement in unauthorised remunerated project while employed by the NPA) the appellant argued that he had resigned from the NPA with effect from October 2005. Ms Breytenbach pointed out that the State case was that the tender was awarded in December 2004 and the appellant resigned in August 2005. In conclusion, Ms Breytenbach submitted that 'the National Prosecuting Authority cannot afford not to prosecute one of its own senior officials if such a strong case exists'.

[91] As to counts 19 to 22 (theft of moneys paid in respect of the project awarded to Ndumiso Trust or Kagiso Consulting) the appellant explained that the reason that the money was paid into his personal account was that the bank account for Kagiso Consulting had not yet been opened. He argued that he did pay the one interest holder, Mr Tshepo Nkadimeng, his share of the money, but did not pay the second one, Mr Lephoko because he had not contributed anything to the project. In response Ms Breytenbach highlighted that the appellant refunded some of the moneys to the NPA.

[92] After Ms Breytenbach's suspension, the prosecution then continued under the leadership of Mr Van Zyl assisted by Ms Nkula-Nyoni. His involvement in the trial *de novo* was also short-lived, as he withdrew from the case due to a suspicion that he had been compromised by the appellant. Although this fact alone does not show absence of *animus iniuriandi* on the Mr Van Zyl's part, his withdrawal from the case and the withdrawal of the 10 charges against the appellant, demonstrated his willingness to acknowledge and take the necessary steps in relation to defects in the case against the appellant. As was Ms Nkula-Nyoni's support of the appellant's s 174 application for a discharge on counts 1, 2, 5, 6, 7, 8, and 9. The appellant's accusations of malice and intent to injure against them are therefore baseless and unsupported on the evidence.

[93] The appellant's conspiracy is not supported by the objective facts, especially when one has regard to how his three sets of representations were handled. First, having assessed Ms Breytenbach's response to the first set of representations, the National Director of Public Prosecutions, Mr Simelane, was satisfied that there was a prima facie case in respect of the charges, and that the prosecution should continue. Second, the Deputy National Director of Public Prosecutions, Ms Mokhatla, was requested to review the charges against the appellant in the light of his second set of representations. She too, having assessed the charges, was of the view that there was a prima facie case against the appellant. She directed that the prosecution should continue. Third, Mr Mrwebi, in response to the third set of representations, was similarly of the view that there was a prima facie case against the appellant, and implored the prosecution to consider adding a charge of corruption.

[94] Were the appellant's conspiracy theory to be accepted, it would have had to imply that all the above were too, biased against him. There is no such suggestion by the appellant that any of these senior prosecutors was biased against him or that they were part of the conspiracy to convict him on false charges. There is no suggestion that they did not objectively and independently apply their minds to his representations.

[95] On an assessment of the totality of the evidence that served before the high court in the trial as well as the probabilities, I am of the view that the appellant's conspiracy theory is improbable. The appellant presented no credible evidence to demonstrate that when the prosecution team took the decision to prosecute him, and when it decided to proceed with the prosecution after considering his representations, they directed their will to doing so in the awareness that reasonable grounds for the prosecution were absent.

Conclusion

[96] For these reasons, I conclude that appellant had failed to prove, on a balance of probabilities, that the employees of the NPA had no probable cause to instigate the prosecution against the appellant or that they acted with malice or *animus injuriandi*.

[97] In the result, the appeal must fail. I make the following order:

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

F KATHREE-SETILOANE
ACTING JUDGE OF APPEAL

Appearances:

Counsel for the appellant: ME Manala (with him MT Matlapeng)

Instructed by: KS Dinaka Attorneys, Pretoria
Webbers Attorney, Bloemfontein
The appellant (In person)

Counsel for the respondent: MC Erasmus SC (with him NAR Ngoepe and
HA Mpshe)

Instructed by: State Attorney, Pretoria
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