IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

CASE NO.: 15746/2003
DATE: 11/4/2005

NOT REPORTABLE

In the matter between:

S **J MOJAPELO** **PLAINTIFF**

And

MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT **FIRST DEFENDANT**

K **H SMIT** **SECOND DEFENDANT**

JUDGMENT

BOTHA. J:

This is an action in which the plaintiff claims an amount of R512 000,00 from the two defendants for malicious prosecution.

The plaintiff was an interpreter attached to the Brits Magistrate Court.

The first defendant is the Minister of Justice and Constitutional Affairs.

The second defendant is mr K H Smit, at the time the chief magistrate of Brits.

The plaintiff alleges that on 3 September 1998, and at Brits the second defendant set the law in motion by bringing a false charge against him, namely that he had entered the office of a prosecutor, mrs van Zyl, without permission and removed a docket therefrom with the intention of stealing it.

It is alleged that the second respondent acted acted in the course and scope of his employment, alternatively that he acted in his personal capacity.

It is further alleged that the plaintiff was arrested, held in custody, released the following day and prosecuted on charges of theft and defeating the ends of justice. On 12 March 2001 he was acquitted.

In the plea the second defendant admits that he made a statement to the police on 2 November 1998, which statement was, to his knowledge, true and correct. He denies that he laid any charges. He also admits that, on 3 September 1998, he, in his capacity of head of the magistrates' court at Brits, handed the plaintiff over to a member of the South African Police Services so that a charge of theft could be investigated.

He also denied that he was in the service of the first defendant, being a judicial officer appointed in terms of Act 90 of 1993.

The rest of the pertinent allegations in the particulars of claim are denied by both defendants.

The plaintiff gave evidence himself and called inspector P J Frauendorf as a witness. On behalf of the defendants the following witnesses gave evidence: the second defendant, mrs L S Van Zyl and Mr S P Lombard.

The plaintiff testified that on 3 September 1998 he was asked to work as maintenance officer because he had the necessary experience. He went to the office of the prosecutor, mrs van Zyl, to get the files of postponed cases so that he could file them. He took the files in her office in her absence and then went to his office. He went to the toilet and from there to the kitchen to get some soap to wash his hands. When he started eating he heard the phone ringing in the office next door. When he went to answer the telephone a number of persons arrived: the second defendant, some policeman and mrs Van Zyl. They wanted to know where a docket was. They searched his office in his presence. When they went outside the second defendant grabbed his hand, looked at his hands and said that there were spots on them.

They then went to mrs Van Zyl's court where they found a docket alleged to have been stolen amongst other dockets. At the insistence of the second defendant he was taken to the district surgeon, dr. Richards, who gave him an injection and cut a piece of flesh from his left middle finger. Then he was

taken to the police station where he was charged and detained. The next day he was released.

He was charged with theft and defeating the ends of justice. When asked who laid the charges he said that it was the second defendant who instructed the police.

He was not on good terms with the second defendant. Second defendant at a time said that he was up to mischief and that he was taking bribes.

He did not put the docket in the court room.

On 12 March 2001 he was acquitted. He had appointed an attorney and an advocate. He appeared in court on 12 to 15 occasions. He paid the advocate R12 000,00. He felt insulted. Members of the public regarded him as a dishonest person.

He referred to a forensic report according which yielded no result. See A4.

He agreed that the Director of Public Prosecutions only decided to prosecute him on 20 January 1999.

It was before the 3rd September 1998 and in the presence of magistrate Monageng that the second defendant said to him: "jy jaag kak aan" and accused him of accepting bribes. He would also point at him before members

of the public and tell them not to pay money to him, but to pay it at the cash office.

In March 2001 he was arrested on a charge of fraud, but it was withdrawn.

At the moment he was under suspension in connection with a case concerning traffic tickets.

When he took the maintenance files, he also had a book that looks like a court book. It is a type of diary. He had to enter cases into that book. He had to take the files and the book to mrs Van Zyl.

On his way to mrs Van Zyl he was approached by mr Lombard, who told him that mrs Van Zyl was not in court. He returned to his office. He left the files and the court book there and went to the toilet. He agreed that he had not mentioned this in his evidence in chief.

Mr Lombard was with the second defendant and the other people who came to his office after the telephone had rung.

He at no stage went into the court.

The docket that was found in the court was mixed up with other dockets.

He also had problems with the second defendant's wife, who was also a magistrate. He laid a complaint with the second defendant himself and ultimately with the Regional Office in Mmabatho. He could not say whether the incident with mrs Smit had occurred before 1998.

He did not know how the docket got into Court A.

The matter for which he is under suspension is subject to an appeal. He lodged the appeal.

He did not retain any receipts relating to his legal expenses.

According to him the analyst should have received the sample cut from his finger in September 1998, not on 5 February 2001, as stated in his report.

He did not tell the advocate who defended him of his problem with the second defendant. He was not sure of his rights.

He believed in 1998 that there were ulterior motives behind the prosecution.

The complaint with the Regional Office was lodged after the prosecution.

The 1998 incident hurt him emotionally. He was a priest in the ZCC Church and was respected as such in his community.

He conceded that the incident concerning mrs Smit happened after the 3rd September 1998. The incident in which mr Monageng was involved also occurred after that date but he could not remember if it occurred in 2001.

When it was put to him that the second respondent's conduct was reasonable in the circumstances, he eventually answered that he would not deny it.

The record book and the maintenance files were left in his office. The diary and the record book were separate books.

His version, as put by his counsel in the criminal case, was put to him. According to that version he walked into the court with the maintenance book and the maintenance files and put them next to the prosecutor's lectern. See A95. He explained that that happened when he was confronted in his office.

He went with them to the court with the files to show them that those were the only files in his possession.

His version as put at A126 was also put to him, namely that he put the maintenance book and files on the desk next to the lectern. His answer was that when he was confronted in his office, he had the files with him.

He denied that he was confronted by Lombard.

He was not aware of the fact that the docket of the case S *v Micheal Pooe* had become lost. He did not know the complainant in that case, but he could routinely have asked him whether he wanted to withdraw his complaint, as he does in many cases.

He was referred to the letter of demand, A59 (a), in which it was alleged that the Director of Public Prosecutions had maliciously instituted the prosecution. He could not remember whether he had told his attorney of second respondent's malicious attitude.

He denied that there was any discolouring of his hands.

According to him it was not reasonable for the second respondent to hand him over to the police.

Inspector P J Frauendorf testified that he sent the sample of plaintiff's skin to the laboratory. It would have been the day of the incident or the day thereafter. Later on he was telephoned by superintendent Stewart, who wanted a specimen of the powder used to trap the suspect. The last sample was sent to him on 5 February 2001. On 25 January 1999 the result of the analysis of the skin specimen was received. See exhibit B.

That concluded the evidence on behalf of the plaintiff.

The second defendant testified that he was approached by magistrate Lombard on 3 September 1998. Mr Lombard told him that there was a suspicion that a docket had been stolen and asked him to accompany him to make certain observations. Down the corridor he could see the plaintiff moving to and fro between the toilet and the tearoom.

Eventually the plaintiff, who at that stage was carrying a diary and a file or docket disappeared behind the corner of Court A. When they went into Court A the plaintiff was inside. Mr Lombard drew his attention to a file on the desk. Mr Lombard said that it was the docket. It was a duplicate file according to a prominent inscription. Mr Lombard asked the plaintiff whether he had had anything to do with the docket. He denied it. He also asked him whether he had handled it, and he denied it. He said to him that if there was any discolouring of his hand, it would then not have been caused by the docket. The plaintiff showed him his hands. There was no discolouring. He then instructed the police to investigate the matter. He had been told that a substance had been smeared onto the docket.

They first went to the plaintiff's office, which he searched for police dockets and also for a treasury order book. Nothing was found.

After he had asked the police to take the plaintiff away he did not pay any further attention to the matter. After some time a detective called him outside. The plaintiff was there and he showed him his hands, which now showed a discolouring. It was as if he had worked with blue carbon paper. He told the

detective that it might be necessary to take the plaintiff to a district surgeon to have a sample of his skin taken.

He supplied a statement to the police on 2 November 1998. See A 9 -12.

He denied that he ever accused the plaintiff of misconduct. He did convene his personnel as a result of an allegation made by an accused person and warned them not to be involved in dishonesty.

His discussion with mr Monageng and the plaintiff was much later. He had documents that revealed irregularities. He decided not to investigate the matter and condoned what had been done.

He was inside court A when he said that the plaintiff should be taken to the police and the matter investigated. He confirmed that nothing untoward was found in the office of the plaintiff.

When asked why, if he found no discolouring on the hands of the accused, he handed him over to the police, he said that it was in order to make sure that he did not touch anything that could cause a discolouring.

When it was put to him that there was nothing to investigate, he said that the plaintiff had put the docket in the court room. He thought it must have been so. He informed the police that the plaintiff must have put it there because shortly before he was carrying a diary and something looking like a docket.

He did not know whether that was the docket. He conceded that he could not say whether the docket had been in the court room before he saw the plaintiff.

It was put to him that before he could hand over the plaintiff he should have known the whereabouts of the docket. He answered that mr Lombard and mrs Van Zyl were aware of the facts and that the matter had to be investigated.

When it was put to him that there had to be a basis for an investigation, he said that mr Lombard and mrs Van Zyl had explained what they suspected. The little he saw confirmed the suspicion. The best was for the police to investigate the matter.

When he was referred to his statement he confirmed a conversation with mr Lebese, who helped to search the office of the plaintiff. When he told mr Lebese of the trap, mr Lebese said that that explained why the plaintiff had asked soap to wash his hands.

Someone said that the powder caused discolouration after some time, only when the subject started sweating.

He repeated that it was in the court room that he handed the plaintiff over to the police. His recollection is that there was a lapse of time between the handing over of the plaintiff and the time when he noticed the discolouring.

He had never read the record of the criminal case before he gave his evidence.

In re-examination he gave the impression that he referred the plaintiff to the police after he had been brought back to him.

Mrs van Zyl testified that she was the prosecutor in court A. Some time before the 3rd September 1998 the docket in S *v Pooe* had disappeared from her office. She made a duplicate docket. On 3 September 1998, an attorney wanted a copy of the contents of the docket. Her suspicion was aroused when the plaintiff hovered around her office and seemed to follow her when she went to make copies of the contents of the docket. She went to the office of mr Lombard and told him of her suspicions . There was an attorney in his office, a mrs Cronje. She fetched a substance at the police office which was smeared onto the docket to trap a would-be thief. She put the substance on the docket, using a surgical glove. Then she put the docket in her office on top of a pile of dockets. She closed the door of her office and went to court. Mr Lombard could see the door of her office from the bench and the arrangement was that he would alert her if he saw the plaintiff enter her office. Within five minutes mr Lombard told her that it had happened and that she should ask for an adjournment. She went to her office and found that the docket was missing.

When she looked for mr Lombard, he was in the court room with the second defendant and the plaintiff. The missing docket was on the desk. Nobody brought it back. She did not know how it got there.

She was not involved in the matter any further.

She could not say whether someone should have seen the docket in the possession of the plaintiff. She never saw him with the docket.

She did not lay a charge. In a sense they were all complainants, she, the second defendant and mr Lombard.

She was not at the time aware of the fact that the plaintiff had been taken to the district surgeon.

She thought that the maintenance court book and the files of postponed maintenance cases were in her office.

She did not know whether there were maintenance files in court after the event.

She never saw the hands of the plaintiff.

If mr Lombard left the court, the second respondent's office would be on his left hand side. The tearoom would be in his right hand side. She left the court

room on the other side. She would not have been able to see what mr Lombard was doing.

She had not yet dealt with the postponed maintenance cases. She had gone out and on her return she was detained by the attorney who wanted a copy of the contents of the docket.

She was the person who phoned the police. When she returned to the court sergeant Frauendorf was there.

Mr S P Lombard, now an attorney, testified that in 1998 he was the magistrate in court A at Brits.

On the 3rd September 1998 mrs Van Zyl, who prosecuted before him, told him that she suspected that the plaintiff was going to steal a particular docket.

Mrs Van Zyl took the docket and smeared it with a powder that she had obtained from a mrs Cronje. She put the docket in her office on top of other dockets. When the court resumed he watched the door of mrs Van Zyl's office. He saw the plaintiff enter the office and leave it shortly thereafter. He had a court book with a docket or something similar inside it.

The court then adjourned. He asked mrs Van Zyl to check whether the docket was still in her office. He could see that the plaintiff went into his office. Mrs Van Zyl returned, reporting that the docket was gone. He instructed her to

telephone the police. He could see the plaintiff come out of his office and go into the bathroom. After a while he emerged, shaking his hands as if he had washed them.

He went to the second defendant and called him outside whilst keeping observation. He briefly explained the situation to the second defendant. The plaintiff came out of his office again, went into the kitchen and back to his office. When the plaintiff came out of his office for a third time, he had a docket with him. He walked in the direction of court A. He entered the court room through a side door. He and second defendant entered the court room through the magistrate's door.

Inside the court room he saw the plaintiff put a docket on the long desk. He could see that it was the same docket that had been treated with powder. He asked the plaintiff why he had put the docket there. He denied having done so.

The second defendant also said something. Shortly afterwards the police were there. After their arrival they went outside. There, in the daylight, he looked at the hands of the plaintiff. He could see spots, but he could not say whether they had been caused by the powder.

He was not involved in the matter any further. On 21 September 1998 he made a statement to the police, A 13.

In cross examination he was referred to contradictory statements in his evidence in the criminal case, namely

(a) that he smeared the powder on the docket

(b) The he told mrs Van Zyl to go to police station

(c) that mrs Van Zyl arrived with a policeman, mr Strauss.

He said that he had not read the evidence before testifying. He pointed out that he only testified in the criminal case that he thought that he had smeared the powder on. When it was put to him that mrs Van Zyl had testified that he had asked her to telephone the police, he said that it was probable. He also explained that mrs Van Zyl's office was a very short distance from the police station and that if she walked to her office, she also walked in the direction of the police station.

According to him nobody asked the plaintiff to show his hands inside the court room. When he saw the hands of the plaintiff outside the court room it was some minutes after the incident inside the court.

He was not aware of a search of the office of the the plaintiff.

He cannot remember that anything in particular happened when the spots were noticed on the plaintiff's hands.

When asked who the complainant was he said that he thought that he, the second respondent and mrs Van Zyl should be considered as such because they were all involved in the administration of justice.

Mr Bokaba, who appeared for the plaintiff, referred the court to *Lederman v Moharal Investments (Pty) Ltd* 1969 (1) SA 190 AD and submitted that the plaintiff had proved that the second defendant had instigated the prosecution. He submitted that that was indeed confirmed by the second defendant. To the extent that it is required that a defendant should have done more than merely provide information to the police, he pointed out that the second defendant had profferred advice to the police, namely to have the plaintiff examined by the district surgeon. As far as the liability of the first defendant was concerned, he submitted that it was clear that the charge was laid by persons acting within the course and scope of their employment by the first respondent.

Then he contended that the evidence showed that the charge was laid without reasonable and probable cause. He pointed out that the criminal case to which the docket related was due to be heard in court A. He referred to the confusion in the evidence of the second defendant's evidence concerning the discolouring of the plaintiff's hands. On one version the matter had been handed over to the police before any discolouring was observed. On that basis there was no reason to hand the matter over to the police.

He submitted that malice was the probable explanation for a baseless charge.

He also referred the court to *Heyns v Venter* [2003] 3 All SA 176 T at 183 b - c where it was held that lack of knowledge of unlawfulness should not be a defence in an action for malicious prosecution if the lack of knowledge is the result of gross negligence.

In respect of the quantum he referred the court to *Ramakulukusha v Venda National Force* 1989 (2) SA 813.

Mr Minnaar, who appeared for the defendants submitted that the second defendant did nothing more than convey information to the police.

He submitted that the decision of the Director of Public Prosecutions was a *novus actus interveniens.*

He referred to *Beckenstrater v Rottcher and Theunissen* 1955 (1) SA 129 AD at 135 D - E and argued that persons who believe that offences have been committed should not be deterred from laying charges.

He pointed out that the plaintiff had to concede that the incidents which according to him displayed malice towards him had occurred after the 3rd September 1995.

I want to make a few remarks about the witnesses.

The plaintiff did try to make out that the second defendant was vindictive against him. He had to concede that these instances occurred after the incident that formed the subject matter of the prosecution. As far as these incidents are concerned, it is strange that the plaintiff never briefed his counsel in the criminal case about them.

If these incidents evinced malice, it is strange that in the letter of demand malice was only attributed to the Director of Public Prosecutions.

The version that was put on behalf of the plaintiff at A95 in the criminal case differs completely from his evidence in this trial. It is important because the version put in the criminal case puts him inside the court room where the docket was found. It makes it possible that he could have placed the docket in the court room, because he admits having been in mrs Van Zyl's office. His explanation of the discrepancy makes no sense. His denial in this trial that he was in the court room warrants the inference that he realized that he would not be able to explain his presence there.

The plaintiff denied that he was confronted by mr Lombard. That is in contrast to what was put in the criminal trial. See A 126.

The second defendant did not show much interest in the case. It is amazing that he never read his evidence in the criminal trial. He did not create the

impression that he had a vivid memory of the events. In his narrative he did not give details of what mr Lombard had told him. Later, parts of what mr Lombard had told him emerged in his evidence.

In the criminal case he said that the discolouring of plaintiff's hands was the factor that convinced him to hand the plaintiff over to the police. In this case he said that he had handed the plaintiff over to the police before he noticed the discolouring of his hands.

His explanation that he handed the plaintiff over to the police to prevent him from touching anything that could cause a discolouring, is strange and not in consonance with his previous evidence.

The evidence of mrs Van Zyl was not really challenged.

Mr Lombard's evidence evidence differs from the evidence of the second defendant in certain respects. He did not see the plaintiff's hands being inspected in the court room. According to him the inspection of the plaintiff's hands outside the court room took place shortly after the scene in the court room.

Mr Lombard was not aware of the search of the plaintiff's office. It was common cause that such a search did take place. He also had no memory of the fact that the second defendant advised the police to take the plaintiff to a

district surgeon. All this may be explained on the basis that mr Lombard withdrew himself from the scene at an early stage as he himself suggested.

On the vital dispute of fact as to whether the plaintiff was found inside court A, I must accept the evidence of second defendant and Mr Lombard. It is corroborated by what was put by plaintiff's counsel during the criminal case.

As far as the evidence of mrs Van Zyl, mr Lombard and second defendant is concerned, I want to say this: there are contradictions which may cast doubt on their reliability, but I have no doubt about their honesty. I do believe that there was a suspicion on the part of mrs Van Zyl and that after consultation with mr Lombard she placed the duplicate docket in her office.

A feature of the evidence of these witnesses is that they did not conspire to manufacture a water tight case against the plaintiff. The gaps are obvious.

I was said that they laid a trap. In the broadest sense they did, but it was not a trap where they performed any part of a transaction that required two or more participants. At most they created the opportunity for the commission of an offence. See section 252A of Act 51 of 1977.

On the probabilities the following must be accepted:

(a) that the original docket in the case of S *v Pooe* was stolen and replaced with a duplicate.

(b) that the duplicate docket was placed in mrs Van Zyl's office

(c) that the plaintiff entered the office of mrs Van Zyl after the duplicate docket had been placed in her office.

(d) that shortly after the plaintiff had left mrs van Zyl's office, the plaintiff was found in court A and that the docket was also found there.

These facts alone would justify the inference that the plaintiff was the person who removed the docket from mrs Van Zyl's office and put it in court A. It is clear that the plaintiff had no buiness to do with that docket and that any handling of that docket, given its history, must have been highly suspect. If, in the short space of time available, someone else had removed the docket from mrs Van Zyl's office and placed it in Court A, he would probably have been noticed by the plaintiff or second defendant and mr Lombard. In my view these facts alone would have justified the laying of a charge with a view to a police investigation.

The evidence of the second defendant and mr Lombard goes further, of course. They testified about a discolouring of the hands of the plaintiff and mr Lombard in particular says that he saw the plaintiff put the docket on the desk. I shall not take this evidence into account because of the contradictions about when the discolouring was noticed and because mr Lombard's evidence about the plaintiff putting the docket on the desk is not supported by the second defendant.

I shall assume that the second defendant instigated the prosecution. It was not simply a case that information was placed before the police so that they

could at their leisure decide whether to charge the plaintiff. They had been summoned to the court building and the plaintiff was handed over to them. By saying that the plaintiff should be taken to a district surgeon, the second defendant .referred to something that could only have been done with a person who was charged and in custody. It does not appear from the evidence when the plaintiff was formally arrested and charged, but it is reasonable to infer that he was in police custody from the moment he was handed over by the second defendant.

In view of what I have said above, I am, however, of the view that the second defendant had acted with reasonable and probable cause. There was a *prima facie* case that he had at least attempted to steal a docket. That would also have entailed an attempt to defeat the ends of justice. The second defendant was not only entitled to lay the charge. It was his duty. What was said in *Beckenstrater's* case *supra* at 135 D - E is still apposite:

> " ... **For it is of importance to the community that persons who have reasonable and probable cause for prosecution should not be deterred from setting the criminal law in motion against those whom they believe to have committed offences even if in so doing they are actuated by indirect or improper motives."**

It was argued that the second defendant went beyond what was necessary and gratuitously gave advice to the police about the desirability of taking the plaintiff to a district surgeon for an examination. I do not find it improper in the circumstances. The second defendant was aware of the fact that the docket

had been treated chemically in order to provide proof of who had handled it. It was entirely appropriate to have alerted the police to that so that objective evidence could be obtained. Such evidence could even have enured to the benefit of the plaintiff.

For all these reasons I am of the view that the plaintiff has failed to prove all the elements of an action for malicious prosecution.

The action is dismissed with costs.

C BOTHA

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

TRANSVAAL PROVINCIAL DIVISION

ZOOC: Karen/uitspraaklMojapelo

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