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

DATE: 22/11/2007
CASE NO: A1383/2005

UNREPORTABLE

In the matter between

PIETER HENDRIK BAREND ALBERTS Appellant/Plaintiff

and

JAN DIEDERIK MARITZ Respondent/Defendant

JUDGEMENT

RASEFATE, AJ

[1] This is an appeal against the dismissal of the appellant's claim in the magistrates court of the district of Wonderboom.

The claim.

[2] Appellant had instituted two claims against the Respondent in the magistrates court, for malicious prosecution and for defamation, in which he claimed damages as follows:

1) R50,000-00 for contumelia, deprivation of freedom and discomfort which he suffered when he was arrested, detained and prosecuted and which arrest, detention and prosecution were instigated by the Respondent when he laid a false charge of theft

against the Appellant: The charge was subsequently withdrawn by the senior public prosecutor.

2) R2,322-00 as compensation for legal costs incurred by him when he had to defend the charges levelled against him.

3) R50,000-00 for defamation and damage to his reputation when he was accused of theft and arrested in view of the business customers, staff and his wife, and was taken away in a police van.

The parties.

[3] At the time of the event the Appellant as well as the Respondent were employed by Timber City, a trading concern selling hardware and building material to the public. The Appellant was a yard manager at the branch in Zambesi Avenue, also known as Montana Crossing, Pretoria. The Respondent was a general manager stationed in Centurion, under whose supervision the Zambesi branch resorted. The Appellant was not under the direct supervision of the Respondent, but of the branch manager, one Mr Hendrik Coetzer.

The event

[4] On 23 May 2001 at about 8h30 the Respondent arrived at the Zambesi Avenue branch accompanied by a security person from another branch. They went to an office on the first floor of the premises. About half an hour later two police men arrived and went to the office where the Respondent was. The police left after an hour.

The branch manager, Hendrik Coetzer then came down to the yard and told the Appellant that all workers under the Appellant's supervision must go up to the office. The

Appellant gathered everyone and took them to the office, where they stood at the steps while he went in and told the Respondent they were there. He was told to go back to his work station while the workers remained. The workers were interviewed one at a time inside the office, after which they returned to their work stations.

Later the workers were called to the office once again. Some had already gone out with trucks on delivery and had to be called back, to be interviewed again, one at a time. When these interviews were concluded, the respondent came down and called the Appellant to the office. The workers were called for the third time, but by then some were not present. The Appellant could see that the security person was writing while the Respondent interviewed the workers. After they were interviewed a third time the workers returned to their work. Thereafter the police returned at about 16hOO and sat with the Respondent in the office, before the Respondent came down and called Appellant who followed him to the office. The Respondent then said to the police, "Here is the man". A policeman then said he was arresting the Appellant for theft, and that it was the Respondent who had laid the charge. He was not questioned about the alleged theft, but he was taken down through the shop to the police van parked in front of the shop, and was put into the back thereof. On his way past the tills he told his wife who worked there, to get someone to drive her home in their car.

[5] Appellant was taken in the back of the police van to the Sinoville police station where he was detained. He was then transferred to the Kameeldrift police station where he was detained overnight, from where he was taken to court the following morning. At his

appearance in court the case was postponed to the 21st June 2001. He was given bail of R1,000-00, in tenns of which he was then released at about 12h30.

At Sinoville police station he had made a statement in which he denied any theft of the property of Timber City. On the next date of appearance in court the charge was withdrawn against him, but he had already incurred the legal costs which he claimed in the first claim, for which he seeks reimbursement.

The law.

[6] In order to succeed with a claim for damages based upon malicious prosecution, the Appellant has to prove four things. Firstly, that the Respondent instigated the proceedings in which he was prosecuted; secondly, that the Respondent acted without reasonable and probable cause when instigating the proceedings. Thirdly, the Respondent must have acted with intention to injure *(animo iniuriandi)* the Appellant with such proceedings, and fourthly, the prosecution must have failed. See in this regard *Neethling, Potgieter and Visser, Law of Delict, 5th Edition,* p318.

The fourth requirement has been met without much ado in this case, when the charge was withdrawn.

Appellant's grounds for the claims.

[7] In his evidence, and amplified by legal argument, the Appellant advanced the following circumstances as indicative of the Respondent's motive and resultant intention to falsely and maliciously prosecute him:

1) That there was a bad relationship between the Respondent and himself. He based this contention on two incidents; firstly that he had a complaint regarding overtime pay when the Respondent was still the branch manager at the Zambesi store, before he was promoted to be area manager. When he had complained about the issue the Respondent had promised to take it up, but had later advanced the explanation for denying him overtime pay that his (Appellant's) salary was too high. In addition to that, on a certain holiday the Appellant did not report to work and was confronted by the Respondent. The Appellant responded that he did not come to work as he would not be paid for such a day, upon which the Respondent had then said that he should rather fInd another place to work if that was his attitude.

The second incident which caused bad blood between them, according to the Appellant, happened in the following manner, when the Respondent was already area manager:

The Respondent had phoned the Zambesi branch and Appellant, being nearest to the phone at the time, had answered it. The person calling wanted to speak to one Gerhard whom the Appellant tried to fInd without success. The person calling had then become impatient and used the "f---" word, upon which the Appellant then said to Gerhard he must fInd out who the ill-mannered person on the phone was, the Appellant also making use of a swear word in the process. It turned out that the person calling was the Respondent, who, having heard what the Appellant had said to Gerhard, had then insisted that Appellant be given a written warning or else he would do it himself. The Appellant was then indeed given the written

warning by the branch manager. On a day subsequent to this incident, when Respondent had visited the branch, he raised the matter again when Appellant greeted him, and Respondent said that he would fire the Appellant on the spot if he did that again.

The Respondent did not deny these incidents, but said that they were resolved, and he harboured no grudge against the Appellant.

2) That on the day of his arrest, the Respondent deliberately did not mention to the police the fact that the branch manager, Hendrik Coetzer, did not know or complain of any theft at the branch; and that the branch manager had in fact made a statement in which he had exonerated the Appellant from the alleged theft of specific items alleged to have been stolen. The Respondent denied that any such statement was made by Mr Coetzer, but said that he did say that he did not know of any theft or irregularities in the store, upon which he carried on with the investigation without him.

3) That the Respondent did not heed the branch manager's contention that there was no theft on the branch, and the Respondent had continued to lay a charge and instigated the arrest and prosecution, despite the fact that it was clear that he would not be able to prove the charge of theft against the Appellant. To this the Respondent contended that he only gave information and made a statement to the police so that they could continue with an investigation of the theft.

4) That the Respondent gave an unsubstantiated figure of R70,000-00 as the value of the goods allegedly stolen, despite the fact that there was no substantiation of the

alleged theft of goods; no proper correlation of the alleged stolen goods with the amount, and there was no proof of any shortage of stock to that value.

5) That the Respondent was selective in laying the charge against the Appellant only, since he did not do the same against one "Mr Dup" who was also fingered by the workers of stealing diesel, and thus that the Respondent had shown bias or malicious intent against the Appellant.

6) That the Respondent completely ignored the fact that the so-called witnesses who made the allegations against him, were persons who had been identified by the Appellant for retrenchment, and thus could have had a motive to falsely incriminate the Appellant in the alleged theft.

The arrest

[8] The Appellant called the police officer who arrested him to testify, in the person of Inspector Titus Monoge. His evidence was that on the morning of 23 May 2001 he was with Inspector Oberholzer when they received a complaint through their radio control. They went to Timber City as a result of the complaint, where they met the Respondent who confirmed the complaint of theft. Inspector Oberholzer then took a statement from the Respondent. According to Inspector Monoge no statements of other witnesses were taken or handed to him or to Inspector Oberholzer at the scene. He arrested the Appellant solely on the basis of the Respondent's statement, and to satisfy the Respondent's wish. He confirmed that after the arrest they had proceeded with the Appellant through the store and the main entrance to the marked police van outside in which they put him, while he and Inspector Oberholzer were fully dressed in police uniform.

Cross-examination of the Inspector, which was aimed at establishing that statements of other witnesses besides the Respondent were taken or handed to him and/or to Inspector Oberholzer, did not succeed; and neither did it succeed in establishing that the arrest was carried out by Inspector Monoge exercising his own discretion as opposed to being ordered or instigated by the Respondent to do so.

[8] Inspector Monoge later became ambivalent under persistent cross-examination on the question whether statements were taken at the scene by Inspector Oberholzer or were handed to them. However, his concession in this regard is not borne out by an examination of the said statements which, where it is indicated, were taken at a different place and time than could have been at the scene and at the time of the arrest, eg Wilson Chuma signed his affidavit or attested to it at 17h45 at Sinoville Police station; Lazarus Makaleng Mawela did not indicate the time and date, but it was taken at Sinoville by a Detective Inspector GD Kotze who was not at Timber City when Appellant was arrested; similarly that ofFreddie Masango. Those of Hector Matome Kapa as well as of Jan Tholo Ngako do not indicate any details of their taking, but only that they were signed at Sinoville, and they appear to be in the same hand writing which could not be identified through the evidence of Inspector Monoge. Only the statement of the Respondent stated clearly and coherently that it was taken at 16h20 on the 23rd May 2001 by Inspector IT Oberholzer. The time that the police spent at Timber City on that day, either in the morning or in the afternoon, excludes any contention that statements of witnesses could have been taken at the scene: The police did not interview any workers. Inspector Titus Monoge's statement was sworn to at Sinoville on 23 May 2001 at 17h50, after he had

already arrested the Appellant, whose warning statement was taken at Sinoville on the same date at 18h20. It is clear, therefore, that no statements of any witnesses other than the Respondent could have been considered for the purpose of the arrest of the Appellant at the time when it was carried out.

[9] Thus, when the Appellant was arrested at about 16hOO - 16h30 the statements of witnesses were either not yet taken or sworn to: There were no valid statements supporting the Respondent's complaint, upon which the arresting officer could have formed his own assessment of the allegations of the Respondent or exercised his discretion whether to arrest or not. As he testified - and that is borne out by the circumstances as outlined - he arrested the Appellant to appease the Respondent.

Evaluation

[10] The arrest of a person for the purpose of prosecution cannot be separated from the prosecution itself, as counsel for the Respondent sought to achieve right at the beginning of the hearing as well as when cross examining the Appellant. Where the arrest leads directly to a prosecution, it becomes part of a continuing process culminating in the appearance in court, and it will serve no useful purpose to attempt to compartmentalize the different stages. If the arrest leads to a failed prosecution, as it is the position in this case, it becomes one that should never have been carried out, albeit in hindsight. The question should be whether the arrest was carried out on the basis of allegations which point prima facie to a scheduled offence having been committed, which then justifies it.

[11] In this case it is an established fact that there were no valid statements or affidavits of witnesses, except that of the Respondent, when the Appellant was arrested. It is therefore clear that it was the Respondent himself who set the law in motion against the Appellant. Further, the fact that the Respondent earlier that day sent the police away for the reason that he was going to investigate the theft himself, and later recalled them in the afternoon, is an indication that he was not an uninterested person who only gave information to the police and left them to their own devices to elect whether or not to take action. His calling them later had the tendency to create the impression that he had established the validity of the initial complaint with his investigation, evidently with considerable effect because it influenced and induced the arrest of the Respondent. In the circumstances, the Respondent had clearly done more than identify himself with the prosecution of the Appellant. He instigated it. See in this regard *Waterhouse v Shields* 1924 *CPD* 155, at 160; *Heyns* v *Venter 2004(3) SA 200(1')* at 206-207.
Thus, the first requirement has been established.

[12] The charge of theft had a lot of odds loaded against it, and the Respondent should have realized that he was not going to succeed in prosecuting it successfully. In the first place the Respondent had to ignore and by-pass the branch manager, whose cooperation was clearly indispensable, in his quest to put together the charge. The fact that the branch manager denied to the Respondent that there was any theft, and that he in fact gave an exculpatory explanation of the Appellant to the Respondent, should have been enough to bring him to a realization that he was not going to succeed with a prosecution under those circumstances. It does not matter, for this purpose, though it was hotly debated at

considerable length, whether the branch manager gave a written statement or not. What is clear is that he contended that there had been no theft committed. Secondly, the fact that the goods alleged to have been stolen were consummable in the sense that they were going to be used in building and construction was to inevitably render their tracing, identification, or recovery, very difficult if not impossible; and the Respondent should have realized that fact if he had applied his mind to his actions in an unbiased manner. Furthermore, there were security measures in place at the particular premises, including cameras, which the Respondent could have and should have had regard to, to establish whether any theft had actually been committed. He failed to do so.

Therefore, the Respondent's action in instigating the prosecution in the face of all these obstacles is indicative of unreasonableness on his part, and a determination to press the charge even without probable cause. His persistence with the action is in the circumstances unlawful and indicative of an improper motive or *animus nocendi.*

[13] Intention is a state of mind which, unless it is admitted, is often inferred from surrounding circumstances of an act. In this case the Respondent went to great length to have the Appellant arrested and prosecuted. In the first instance he forged ahead with the complaint of theft despite the branch manager actually denying that there was any theft at the branch. Secondly, he was selective in pressing for only the Appellant's arrest when there was another culprit also fingered for theft, albeit of diesel, namely Mr 11 du Plessis (also known as "Dup") against whom he did not take similar action. Thirdly, and objectively speaking, the immediate arrest of the Respondent without a warrant was not even imperative as there would have been enough time to investigate the alleged theft and

have a case made if at all before embarking on such a drastic measure as a summary arrest. Fourthly, the conduct of the Respondent during the hearing of the matter in giving biased evidence as displayed by his evasiveness on many aspects as well as his avoidance of many questions is proof of a guilty knowledge. While he knew or was aware of the branch manager's exculpation of the Appellant, the Respondent did not draw the police's attention to the fact – whether there was a written statement by him or not. Therefore, the Respondent, while being aware that there were no reasonable grounds for arresting and prosecuting the Appellant or even for assuming that a theft had actually been committed, he directed his will to do just that, and thus manifested an intention to

[14] In the premises, the Appellant has succeeded in proving all the elements of the claim for malicious prosecution, and is entitled to judgment on the whole of the first claim.

[15] The second cla1 is one of defamation in that, on the same facts of the first claim, the Appellant's good name and dignity had been impaired when he was accused of theft, arrested, and was taken in full view of the store's customers and staff (including his wife), to the police van parked outside in front of the store. The legal elements of the delict are all there, being the a~ or conduct which consists in the pointing out of the Respondent as having stolen, and his arrest, and **publication** thereof in escorting the Appellant through the store; the wrongfulness thereof because of the invalidity of the charge; the **injury** to the Respondent's good name and dignity which has already been demonstrated when

demonstrated. The presence of all these elements completes the delict. See *Neethling et al., op. cit.* p307.

The Appellant is entitled to judgment also on this claim.

[16] In awarding the amount of damages, the Court is always mindful of its duty to moderate the tendency of damages getting out of hand, which is basically occasioned by the fact that litigants are often motivated by their emotions in staking them. The principle is often stated that the mere fact that the plaintiff wins on a legal principle should be enough compensation, rather than in the amount; and that the claim in damages should not be a gold mine from which a litigant seeks to emerge rich, the opposite of which would be the financial ruin of a losing party, especially where the litigants are ordinary working people as in this case. Compare the remarks of Van Dijkhorst J in *Marais* v *Groenewald 2001* (1) *SA* 634 (1') at 648E. On the other hand, however, the indignity and anxiety which the Appellant had to endure as a result of the arrest and detention and while facing the charge before it was withdrawn should not be made light of. It must also be taken into account that the Appellant had to approach this Court twice before obtaining this relief, the fIrst time being after the Respondent was granted absolution from the instance, after which the matter was referred back for further hearing, and the second time with this appeal after his claims were dismissed in the magistrates' court.

I am of the view that an amount ofR20,000-00 would be appropriate compensation in general damages on the first claim, plus the out of pocket amount of R2,322-00 incurred in legal costs.

[17] The second claim is very closely related to the first. Not only are the two the same species of *iniuria,* but they are founded on one and the same chain of events. Only the second seeks to compensate the Appellant for violation of an aspect of personal integrity not specifically highlighted in the first, namely his good name and reputation. Counsel for the Appellant actually indicated that a nominal award would suffice for the second claim if the Court found for the Appellant on the first, as it has done. Compare van Rooyen AJ's remarks, as he was then, in *Ramakulukuta* v *Commander, Venda National Defence Force* 1989(2) *SA* 813 *(V)* at 851H, in which judgment the Court declined to make an award for defamation in the same action with one for malicious prosecution. Contrast *Mthimkhulu and Ana.* v *Minister of Law and Order* 1993(3) *SA* 432 *(E)* in which damages for unlawful arrest and detention were awarded separately and in addition to that for malicious prosecution. The Court therefore, has a discretion to award damages for both, depending on the circumstances of a particular case. I think that an amount of R10,000-00 should be appropriate for the purpose.

[18] In her judgment the magistrate did not pay sufficient attention to the elements of the delict, as well as the context of the evidence in finding that the Respondent did no more than give information to the police, and that he did not display the necessary intention to injure the Respondent. The fact that the police had already been called that morning before the Respondent and Mr Tolley even started to interview anybody should clearly have indicated a predetermination to set the law in motion against the Appellant, and should have prompted a more vigilant analysis of the situation. Clearly the magistrate

misdirected herself with a less incisive approach to the matter. A more critical analysis of the facts, however, points to the delict having been committed.

[19] Consequently, the appeal is upheld, and the following order is made:

1) The Respondent is ordered to pay the following amounts to the Appellant:

a) R22,322-00 in respect of claim 1;

b) RI 0,000-00 in respect of claim 2;

c) Interest on the aforesaid amounts at 15.5% *per annum* from date of judgment in the court *a quo* to date of payment.

2) The Respondent is ordered to pay the Appellant's costs of suit including the costs of the appeal.

THE HONOURABLE RE RASEFATE

ACTING JUDGE OF THE HIGH COURT.

I agree:

THE HONOURABLE CP RABIE

JUDGE OF THE HIGH COURT.