

IN THE HIGH COURT OF SOUTH AFRICA  
(NORTH GAUTENG HIGH COURT, PRETORIA)

27/05/2011

Case No:40439/06

In the matter between:

|                              |                           |
|------------------------------|---------------------------|
| NOBEL SEAN CHARTON           | 1 <sup>ST</sup> PLAINTIFF |
| CHONYANE JOHANNES MMONENG    | 2 <sup>ND</sup> PLAINTIFF |
| PYOOS, CHRISTOPHER PATRICK   | 3 <sup>RD</sup> PLAINTIFF |
| ROBERTS, SELWYN              | 4 <sup>TH</sup> PLAINTIFF |
| CONDICE, ALLISSIN TERRY-ANNE | 5 <sup>TH</sup> PLAINTIFF |
| LEE, LUNA VIRGINIA           | 6 <sup>TH</sup> PLAINTIFF |
| ABRAHAMS, THERESA PHOEBE     | 7 <sup>TH</sup> PLAINTIFF |
| ROBERTS, ZOHRA               | 8 <sup>TH</sup> PLAINTIFF |
| SEBOLA, JOSIA MOBIKOE        | 9 <sup>TH</sup> PLAINTIFF |

WHICHEVER IS NOT APPLICABLE  
(2) OF INTEREST TO OTHER JUDGES: YES/NO.  
(3) REVISED.

And

2011/05/27  
DATE  
SIGNATURE

|                                     |                            |
|-------------------------------------|----------------------------|
| DRIVE CONTROL SERVICES (PTY) LTD    | 1 <sup>ST</sup> RESPONDENT |
| FOURIE, JOHANNES HERMANUS           | 2 <sup>ND</sup> RESPONDENT |
| THE MINISTER OF SAFETY AND SECURITY | 3 <sup>RD</sup> RESPONDENT |
| CAPTAIN J.D. ENGELBRECHT            | 4 <sup>TH</sup> RESPONDENT |

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## JUDGMENT

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**MAVUNDLA J.**

- [1] The claims of the plaintiffs against the defendants are for alleged unlawful arrest and unlawful prosecution. By agreement an order in terms of Rule 33(4) of the High Court the issues regarding merits ad quantum were separated and quantum related issues were postponed *sine die*. The matter proceeded on merits related issues.
- [2] It is common cause that all the plaintiffs were in the employ of the first defendant. The second defendant has at all relevant times acted in the course and scope of his employ with the first defendant. The fourth defendant at all relevant times acted in the course and scope of his employ with the third defendant.
- [3] It is common cause that the plaintiffs were arrested consequent to the second defendant having preferred theft charges against them. The plaintiffs allege that the information furnished by the second defendant to the police against them was false and that

the defendants had no reasonable cause to do so, neither did they have a reasonable belief that the information was true. They further allege that the arrest was unlawful. They further allege that their subsequent prosecution was malicious.

[4] The second defendant acted with the course and scope of his employ with the first defendant. The fourth defendant acted within the scope and course of his employ with the third defendant.

[5] The first and second defendants denied any wrongdoing and pleaded that the criminal charges were brought against the plaintiffs subsequent to internal investigation and found that the plaintiffs were involved in the theft of some computer stock.

[6] The arrest of the plaintiffs is not in dispute. It is not for the plaintiff to prove that the arrest was wrongful. It is for the defendants to prove that the arrest was justified and lawful, *vide*

*Cele v Minister of Safety and Security*<sup>1</sup>; *Mhaga v Minister of Safety and Security*<sup>2</sup>; *Lombo v African National Congress*<sup>3</sup>.

[7] In *Mhaga v Minister of Safety and Security (supra)* at 538b-g it was held that an arrest without a warrant is lawful if the arresting officer at the time of the arrest had a reasonable belief that the plaintiff had committed a schedule 1 offence. The arrest remains lawful if circumstances exist demanding the arrest to bring arrested person to court, even if his appearance at court could have been secured by means of a subpoena.<sup>4</sup>

[8] In respect of malicious arrest and prosecution, the plaintiff bears the *onus* of proving all the elements of action *iniuriarum*, vide *Van Der Merwe v Strydom*<sup>5</sup>; *Rudolph v Minister of Safety & Security*<sup>6</sup>.

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<sup>1</sup>2007 3 ALL SA 365 (D).

<sup>2</sup>2001 (2) ALL SA 534.

<sup>3</sup>2002 (5) SA 668 (SCA) para32.

<sup>4</sup> Vide *Tsose v Minister of Justice and others* 1951 (3) SA 10 (A) at17G-H.

<sup>5</sup>1967 (3) SA 460 (A) 467.

<sup>6</sup>[2007] 3 ALL SA 271 (T).

[9] The arrest of the plaintiffs, their subsequent prosecution and withdrawal of the charges against them was common cause. For the plaintiff to succeed with the malicious prosecution claim, they must prove, *inter alia*, that the defendants, could not have reasonably believed that the plaintiffs have possibly committed the offence accused of, secondly that the defendants in instituting the prosecution were moved by improper motive and had no reasonable cause. If the plaintiffs fails in proving that the defendants acted unreasonably then they cannot succeed; *vide Van Der Merwe v Strydom at 467C-F*.

[10] In *Rudolph v Minister of Safety & Security*,<sup>7</sup> Mokgoathleng J cited the following:

"...In *Beckenstrater v Rottcher and Theunissen* 1985 (1) SA 129(A) at 136A- elements for malicious arrest and prosecution, that the arrest and prosecution was instituted in the absence of reasonable and probable cause was categorises as follows:

'When it is alleged that a defendant had no reasonable cause for prosecuting, I understand to mean that he did not have such information as would lead to a reasonable man to conclude that the plaintiff had probably been guilty of the offence charged; If despite having such information, the defendant is shown not

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<sup>7</sup> (*supra*) at 285 para [123].

to have believed in the plaintiff's guilt, a subjective element comes into play and disprove the existence, for the defendant, of reasonable and probable cause.'

[11] I attentively listened and observed all the persons who testified in this matter. I have a deem view of the plaintiffs as witnesses, they did not cut a good impression at all. The plaintiffs wanted to make believe that they did not know why and when they were arrested. They professed their innocence of any wrong doing. They also professed to have been coerced or tricked or not knowing what they were signing, when they signed their resignation from the employ of the first defendant, or statements admitting their involvement in the theft. My general impression of all the plaintiffs is that they were pathetic witnesses. They were subjected to polygraph testing by their employer in connection with the rampant stock theft the plaintiffs were all involved in.

[12] On the contrary, the witnesses of the defendants, without singling any one of them, were impressive witnesses. I did not gain the impression that they were hell bent in perverting the truth to their advantage. They made concession where

necessary but steadfastly insisted in the essence of their defence. The essence of the defence of the first and second defendants is that there was a reasonable suspicion to believe that all the plaintiffs were involved in the commission of theft of grand magnitude, running into several thousand rand, which required further investigation by the police.

[13] The evidence presented by the defendants shows that the plaintiffs were colluding with one another in committing thefts of the stock in the first plaintiff's business. The plaintiffs were presented by an independent company Secura Data of evidence that implicated the plaintiffs in the thefts. Statements made by the plaintiffs as well as an undercover operative seemingly implicated the plaintiffs in the scheme of theft. The investigation by the first and second defendant revealed that the thefts involved enormous amounts. Presented with all the material emanating from their investigation, it is understandable that the first and second defendant believed that the plaintiffs were involved in the crime of theft which warranted that charges be preferred against with the police. Indeed, I would

not have accepted the first defendant and the second defendant, presented with all the material presented to them, not to report this to the police, as they did. In my view, there was enough material that raised suspicion on the part of the first and second defendants implicating the plaintiffs, justifying that they prefer charges against them.

[14] I further accept the evidence of the second defendant that, once he reported to the police what their investigation has revealed, he arranged with the fourth to show him the plaintiffs at the first defendant's premises. Once all the plaintiffs who were present at work on the day of arrest, reported at dispatch area, he mentioned their names to the fourth defendant, he left it to the defendant to effect the arrest. I further accept his evidence that he was not driven by any malice when he reported the matter to the police as he believed that the plaintiffs were guilty of theft from the first defendant's business. He further had nothing to do with the subsequent prosecution of the matter. He denied that he was driven by any malice. This fact, in my view is borne out by the fact he was prepared to



have the plaintiffs back at work, although not all of them came back.

[15] The fourth defendant concedes that, there was no warrant of arrest, when the plaintiffs were arrested. He, however, stated that the because of the nature of the complainant and the magnitude of the amounts running into several thousand of rand involved, he believed that the matter did not require procurement of a warrant of arrest, but immediate arrest and further investigation later. He accepted that the offence complained of fell within schedule 1 and a reasonable suspicion that the plaintiffs were guilty of the charges accused of.

[16] It is trite that once an arrest has been effected, it is for the prosecutors to decide whether the arrestee be charged or not. It is not necessary that investigations be first completed before an arrest is effected. Investigations would invariably proceed well even after an arrest. In my view, it was not necessary that the fourth defendant should have first completed his investigation before effecting an arrest. The defendant also testified that he

believed that the plaintiffs had committed a schedule offence which they were guilty of. He further stated that once the arrest was effected, further prosecution was a matter within the discretion of the prosecutor.

[17] Having regard to the totality of the evidence that has been led in this case, the impressions the witnesses have made on me, I am satisfied that the plaintiffs have not discharged the *onus* resting on them to prove that the defendants did not have reasonable cause to believe that the plaintiffs committed the offence of theft; and that they did not believe the truthfulness of the allegations against them; that in instituting the complainant, the arrest and subsequent prosecution the defendants were motivated by malice; and that the defendants acted unreasonably. I am also satisfied that the defendants have discharged on a balance of probability the onus resting on them to show that there was a reasonable suspicion, premised on the material placed before them, that the plaintiffs were guilty of the offence of theft at a grand scale from the first defendant's premises, and that they reasonably believed the information

that was at hand at the time that the plaintiffs were involved in the thefts. I am equally satisfied that the defendants acted reasonably in preferring charges against the plaintiffs, in causing the arrest of the plaintiffs, and their subsequent prosecution.

[16] In the premises, I make the following order:

1. That the claims of all the plaintiffs are dismissed;
2. That the plaintiffs are jointly and severally, the one paying the others to be absolved, to pay the defendants' costs on party and party scale, which shall include the fees of senior counsel and two counsel where applicable.

  
N.M. MAVUNDLA  
JUDGE OF THE HIGH COURT

DATE OF JUDGMENT : 27/05/2011  
PLAINTIFFS' ATT : MINNAAR INC  
PLAINTIFFS' S ADV : MR. P.M. VAN RYNEVELD with  
MR. G. JACOBS  
1<sup>ST</sup> & 2<sup>ND</sup> DEFENDANTS' ATT : BEZUIDENHOUT VAN ZYL INC  
1<sup>ST</sup> & 2<sup>ND</sup> DEFENDANTS' ATT : MS. ADELÉ DE WET SC  
3<sup>RD</sup> & 4<sup>TH</sup> DEFENDANTS' ATT : STATE ATTORNEY  
3<sup>RD</sup> & 4<sup>TH</sup> DEFENDANTS' ATT : MR. A. PIETERSE