IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO LOCAL DIVISION, THOHOYANDOU

(1) REPORTABLE : ~~YES~~ / NO
(2) INTEREST TO THE JUDGES : ~~YES~~ / NO
(3) REVISED
In the matter between:
DATE 25/08/2017 SIGNATURE

CASE NO: 090/2013

NEMAVHULANI NNDITDHENI DORCUS **PLAINTIFF**

And

STATION COMMISSIONER THOHOYANDOU **1ST DEFENDANT**

MEC OF POLICE **2ND DEFENDANT**

MINISTER OF POLICE **3RD DEFENDANT**

JUDGMENT

AML PHATUDI, ADJP

[1] The plaintiff claims that the defendants did wrongfully and maliciously set the law in motion by laying false charges of murder against her. She thus instituted this malicious prosecution. She claims damages against the defendants allegedly occasioned by the said malicious prosecution.

[2] By agreement between the parties, I ordered separation on determination of liability from quantification of the claim in terms of Rule 33 (4) of the Uniform Rules of this Court.

[3] The plaintiff was then called to take a stand. The following factual background emerged from her *viva voce* testimony.

Factual Background:

[4] Nnditsheni Dorcus Nemavhulani (Plaintiff) testified that on 11 April 2011 at or around 18h30 – 19h00, she left her homestead to fetch water by the communal water tap located at the street that feeds the members of the local community. She went there twice. While leaving the homestead to fetch water for the third time, she felt something chop her. She first got chopped on her left side of her head. She then turned to face the assailant with a view to see who was chopping her and with what. She got chopped on the right side of her head. Her hand also got chopped when she raised it with intent to protect her head from being chopped further. She there and then fell down and only awoken at the hospital. She was however, discharged the same day.

[5] In the early morning hours of 12 April 2011, the police came to her homestead. She reported the matter and who the assailant was. On 26 April 2011, she received a phone call from one Captain who informed her that she must come to Thohoyandou police station. They met, as telephonically arranged, at the University of Venda and Ngovhela cross road. The police officer enquired about the events of 11 April 2011. After tendering the explanation, the police officer indicated to her that they (police) were locking her up until the truth is told. She was then arrested and detained until released on bail on 06 May 2011. She confirmed to have been arrested by Rasilingwani Edward Mawela (Edward).

[6] She learned on 28 April 2011 when she appeared in court that she was charged with murder of Alfred Mukwevho. She was then legally represented and confirmed in examination in chief that she never heard of any progress in the matter or called until the matter was provisionally withdrawn on 12 December 2011. The statements made by the police officers Rasilingwani Edward Mawela and Tendani David Mawela (David) were read on record. The plaintiff did not call any other witness. She then closed her case.

[7] The defendants applied for absolution from the instance. It is trite law that when the defendant applies for absolution from the instance at the end of plaintiff's case takes a risk, whether the plaintiff's case is strong or weak. The situation of an application brings an end to the proceedings whereas non-success often lead to the defendant being mulcted with costs of the application for absolution, the appeal and most likely of the trial if he finally loses.

The Law

[8] There are four (4) requirements which the plaintiff must allege and prove in order to succeed with a claim of malicious prosecution. The four (4) requirements were well set out in *Minister of Justice and Constitutional Development v Moleko*[1] and later restated in *Rudolph and Others v Minister of Safety and Security and Another*[2], and as later followed and applied[3]. The said requirements are that the plaintiff must allege and prove:

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[1] [2008] 3 All SA 47 (SCA) Para 8;
[2] 2009 (s) SA 94 (SCA) Para 16
[3] Minister of Safety and Security No v Schubach (437/13 [2014] ZASCA 216 1 Dec 2014 Para [1]; Minister of Safety and Security v Tyokwana (827/13) [2014] ZASCA 130 (23 September 2014) Para [13]; Magwabeni v Liomba 9198/13) [2015] ZASCA 117 (11 September 2015) Para [9]

(a) That the defendants set the law in motion (instigated or instituted the proceedings)

(b) That the defendants acted without reasonable and probable cause.

(c) That the defendant acted with malice (or *animo injuriandi*) and

(d) That the prosecution has failed.

[9] I find it prudent to state the test for absolution from the instance at the close of plaintiff's case which has been highlighted and restated by Harm JA in *Gordon Lloyd Page and Associates v Rivera and Another*[4] quoting from *Claude Neon Lights (SA) Ltd v Daniel 1976 (4) SA 403 (A)* that '...when absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should nor ought to) find for the plaintiff". Harms JA further penned that "this implies that a plaintiff has to make out a prima facie case – in the sense that there is evidence relating to all elements of the claim to survive absolution because without such evidence no court could find for the plaintiff"[5](emphasis added)

Assessment

[10] It is clear that the plaintiff must make out a prima facie case in relation to all the elements of his /her claim upon which the court could or might find to have been proven at the end of his/her case. Having said that, I find it inevitable to first determine if the plaintiff did make out a prima facie case in relation to all element of her claim upon which this court could or might find to have been proven. I indicated earlier in this judgment that there are 4 requirements which must be alleged and proven for the plaintiff to succeed with a claim of malicious prosecution.

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[4] (384/98) [2000] ZASCA (31 August 2000) Para [2]. Footnotes omitted

[5] Ibid

Equally for absolution from the instance to succeed, a prima facie case must be made out in all four (4) requirements.

[11] Perhaps I must digress to determine what a prima facie case means notwithstanding the common knowledge and common usage of the words. The words prima facie are derived from the Latin words *prima facies*, meaning first appearance or on the face of things. A prima facie case is defined as '[a] case that has been supported by sufficient evidence for it to be taken as proved should there be no adequate evidence to the contrary'.[6]

[12] Returning to the four (4) requirements for the claim of malicious prosecution. The questions to determine are whether the plaintiff did adduce the prima facie evidence that:

(a)The defendants did set the law in motion.

[13] The plaintiff testified that she was called by one police officer who she confirmed to have been Edward, effected an arrest after her little explanation to him. Her version was corroborated by Edward's statement as recorded and placed on record as follows:

'... [her] evidence was that [she] was chopped by [her] ex-husband without any provocation. I then went to Maungani village where I [found] one Dorcus...who I interviewed [her]. Her explanation was no defensive and I was unsatisfied about her explanation. I then arrested her and also explained to her about her rights..."[7]

[14] It is common cause that effecting an arrest of a person is one of the elements of setting the law in motion. Considering the plaintiff's evidence as corroborated by Edward's statement, I am of the view that the defendants did, prima facie, set the law in motion.

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[6] Oxford Dictionary of law – 7TH Edition 2009 – Oxford University Pages 422
[7] The scriber in Edward's statement made use of masculine gender of which I replaced as in square brackets.

(b)The defendants did act without reasonable and probable cause.

[15] Schreiner JA penned in *Beckernstrater v Rottcher and Theunissen*[8] 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[9].'

[16] Edward interviewed the plaintiff pertaining to the incident of the 11 April 2011. It is clear from his statement that he did not believe what the plaintiff told him on what happened. It has been recorded that "he was unsatisfied about her explanation."

[17] The plaintiff testified on how she was attacked around 18h30 – 19h00 on the day in question. She further testified on how she managed to identify the assailant. She further testified how and what she said to Edward as her explanation. Edward did not have any information at his disposal that would lead a reasonable police officer or man to conclude that the plaintiff was probably guilty of the offence of murder. In my view, the plaintiff has shown, prima facie, that the defendants acted without reasonable and probable cause.

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[8] 1955 (1) SA 129 (A)
[9] Ibid (a) 136 A- B

(c)The defendants did act with malice.

[18] Malan AJA (as he then was) penned in Relyant Trading (Pty) Ltd v Shongwe and Another[10] that "...although the expression "malice" is used, it means *animus iniuriandi*[11]." Malan AJA further quoted Wessels JA who penned in *Moaki & Colman (Africa) Ltd and Another* that:

"Where relief is claimed by this action the plaintiff must allege and prove that the defendant intended to injure (either *dolus directus* or *indirectus*). Save to the extent that is might afford evidence of the defendant's true intention or might possibly be taken into account in fixing the quantum of damages, the motive of the defendant is not of any legal relevance[12]"

[19] Van Heerden JA indicated in *Minister for Justice and Constitutional Development v Moleko*[13] that "*animus injuriandi* includes not only the intention to injure, but also consciousness of wrongfulness. It has been penned:

'In this regard *animus injuriandi* (intention) means that the defendant directed his will to prosecuting the plaintiff (and thus infringing his personality), in the awareness that reasonable grounds for the prosecution were (possibly) absent, in other words, that his conduct was (possibly) wrongful (consciousness of wrongfulness). It follows from this that the defendant will go free where reasonable grounds for the prosecution were lacking, but the defendant honestly believed that the plaintiff was guilty. [14]

[20] Even though the plaintiff did not plead *animus injuriandi* in a form of *dolus directus*, such *animus* may be inferred prima facie from her

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[10] (472/05) [2006] ZASCA162; [2007] All SA 375 (SCA) (26 September 2006)
[11] Ibid – Para [5]
[12] Ibid
[13] Minister of Justice and Constitutional Development and Others v Moleko (131/07) [2008] ZASCA 43; [2008] 3 All SA 47 (SCA) ; 2009 (2) SACR 585 (SCA) (31 March 2008)
[14] Para [63]

testimony considering the principle set out by Wessels JA as quoted by Malan AJA[15]. That brings me to the last element, being

(d)The prosecution failed:

[21] For the plaintiff to succeed with her claim, she must allege and prove that the prosecution failed. In Moleko's case, Moleko was acquitted at the end of his criminal trial, thus succeeding with the requirement. In this case, the plaintiff testified that the charge of murder proffered against her was provisionally withdrawn.

[22] I enquired from both counsel for the plaintiff and the defendant as to whether "provisional withdrawal" of a criminal charge against the accused brings an end to such proceedings. Put differently does a "provisionally withdrawn" charge exonerate the accused from being prosecuted in the future on the same charge? Mr Sikhwari for the plaintiff conceded outright that the provisional withdrawal of a charge does not exonerate the accused. Considering the said concession, of which I agree, I am of the view that the plaintiff failed to, prima facie set out that the prosecution failed. The plaintiff thus failed to prima facie prove that the prosecution of the case proffered against her failed. An application for absolution from the instance at the close of the plaintiff's case stands to be granted on that leg alone.

[23] It is trite law that costs follow the event. The defendants succeeded with their application for absolution from the instance at the close of the plaintiff's case and thus entitled to their costs.

[24] In the result, I make the following order.

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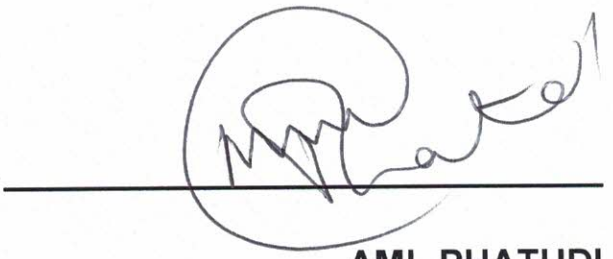
[15] Relyant Trading (Pty) Ltd v Shongwe and Another

ORDER

Absolution from the instance is granted with costs



AML PHATUDI

ACTING DEPUTY JUDGE PRESIDENT

LIMPOPO DIVISION OF THE HIGH COURT

APPEARANCES

PLAINTIFF COUNSEL	**:**	**ADV M.S SIKWARI**
INSTRUCTED BY	**:**	**MALULEKE Z.D ATTORNEYS**
DEFEDANT COUNSEL	**:**	**ADV D.E SEGWAVHULIMU**
INSTRUCTED BY	**:**	**THE STATE ATTORNEYS, THOHOYANDOU**