

REPORTABLE

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NO: A61/2018

In the matter between:

ANDRÉ EDWARD LINCOLN

Appellant

and

THE MINISTER OF SAFETY AND SECURITY

Respondent

Before: ALLIE et BINNS-WARD et PARKER, JJ

JUDGMENT: 15 OCTOBER 2018

Order

- (i) The appeal is upheld in part and refused in part.
- (ii) The judgment of the court *a quo* is set aside and replaced with an order in the following terms:
 - (a) On the following charges plaintiff has not proved that a malicious prosecution ensued without reasonable and probable cause, namely, the charges relating to drunk driving and fleeing the scene of an accident. Consequently, plaintiff's claim in respect of malicious prosecution on those counts are dismissed.

- (b) In respect of the remaining charges that plaintiff was charged with in the regional court, plaintiff's claim against defendant succeeds with costs, such costs shall include the costs of two counsel.
- (iii) The respondent is ordered to pay the appellant's costs in the appeal, including the costs of two counsel.

ALLIE, J [PARKER, J CONCURRING, BINNS-WARD, J dissenting):

1. This is an appeal against the dismissal of the plaintiff's claim with costs in the court *a quo*.
2. For the sake of convenience, the parties are referred to as they were in the court *a quo*, namely appellant will be referred to as plaintiff and respondent as defendant.

The Pleadings

3. Plaintiff's cause of action is as follows:
 - 3.1. Employees of the SAPS, namely Smith, Senekal, Bouwer, Knipe and Rossouw, acting in the course and scope of their employment with defendant, wrongfully set in motion an investigation of plaintiff without having reasonable and probable cause to do so nor did they have a reasonably held belief that there was any merit in the charges that their investigation laid the basis for. The said employees were fully aware of the fact that the information that they obtained was elicited by coercion through the threat of prosecution of prospective witnesses;

- 3.2. The said employees' conduct was so egregious as to evince patent malice and a preconceived notion that plaintiff was dishonest and acted improperly for which notion, they then set about obtaining support through wrongful and unlawful means;
- 3.3. As a direct consequence of the conduct of defendant's employees, plaintiff suffered damages in the form of *injuria* and patrimonial loss.
4. Defendant's plea contains bald disavowals of knowledge of plaintiff's allegations of impropriety by the said employees, which amounts to a bare denial.
5. The plaintiff's reply to defendant's request for trial particulars, which he confirmed as correct during cross examination, contain the following relevant allegations:

**“ THE LACK OF REASONABLE AND PROBABLE CAUSE FOR PURSUING
THE INVESTIGATION WHERE STATEMENTS WERE NOT MADE
VOLUNTARILY:**

REFERENCE TO INDIVIDUAL CHARGES ”

THE RENTAL OF THE MAZDA 626 & THE AUDI [Counts 1 – 10]

18. *Count 1 relates to the renting of a Mazda 626 and counts 2 – 10 relate to the renting of an Audi vehicle for ten months. The investigators claimed that the Plaintiff rented luxury vehicles [the Mazda 626 from Allisa Car Hire and the Audi vehicle from a private company (Avis)] without the necessary authorization from Commissioner Kramer and*

that he fraudulently applied for extension of the rental for the Audi on numerous occasions, which caused the SAPS to suffer financial loss.

19. *The Plaintiff himself never rented the Mazda 626 or the Audi vehicle despite having the right to do so. On 11 September 1996, Captain van der Westhuizen, who was the person appointed by Fivaz to assist the Plaintiff with all logistical and financial needs, placed a request with the Government Garage for an unmarked vehicle [not a luxury vehicle] to be used by the Plaintiff. Since the Government Garage did not have any reliable vehicles available at the time, Van der Westhuizen rented the Mazda 626 vehicle from Allisa Car Hire.*

20. *Van der Westhuizen made it clear to Knipe and Rossouw that:*

- 20.1 *She had personally engaged with the Government Garage regarding the renting of vehicles, and it was not the Plaintiff who instructed her to rent a car;*

- 20.2 *Although she had been given the 'Order Book' by Commissioner Bosman of the National Office, who also gave her full responsibility and accountability to use it, within her discretion, she in fact never did.*

- 20.3 *She did not even attempt to suggest to the Plaintiff that Commissioners Kramer or Bosman should authorise the rentals;*

- 20.4 *She was solely responsible for the Audi's renewal notices and it was she, alternatively her typist, who had typed the notices, knowing that the initial contract was intended for Officer Kader who was from another Unit. The process entailed extending the existing contracts by simply informing the Government Garage*

thereof after the Mazda had already been written off by Kader.

The contract that was extended was for the Audi.

21. *Marais is the expert on the procedure for the rental of cars. He referred to the policy with the heading:*

“Magtiging: Gebruik van Spesiale verhuringspakette van Budget Rent a Car en Avis Rent a Car”

This document is marked as top-secret. The relevant section reads:

“Dit beteken dat agente/berriggewers onder ander luukse motorvoertuie soos BMW’s en Merceds Benze moet ry om indruk op sindikaatlede te maak. Dit is veral belangrik waar agente/beriggewers die sindikate sodanig geinfiltreer het, dat daar direkte kontak tussen agente/beriggewers en sindikaat leiers is. Dit gebeur soms dat luukse voertuie deel van die maatstaf vorm wat sindikaatleiers gebruik om mense met wie hulle kontak het, te evalueer.”

22. *It is therefore clear that the Investigators knew about this policy as they had consulted with Marais, and yet still they proceeded with ten charges relating to the rental of the Mazda (Count 1) and the Audi (Counts 2 to 10).*

23. *The vehicle rental policy goes as far as to allow for the rental of cars as exotic as Porches, depending on how sophisticated the syndicate or suspect is.*

24. *Viljoen made statements to the effect that the Audi charges were devised by persons who were jealous of members of the elite Presidential Task Unit.*

25. *The lack of reasonable and probable cause, and the malice and unlawfulness of the decision by the Investigators to proceed with the spurious charges, can be summarised as follows:*

25.1 *The Plaintiff (being a Unit Commander with the rank of Director) was fully entitled to rent a car for an extended period, without requesting Commissioner Kramer's permission;*

25.2 *Despite this entitlement, he in fact never rented a car - it was rented by van der Westhuizen;*

25.3 *Even if Kramer's approval had been required, it would in any event have been granted.*

25.4 *PITU had an 'Order Book' to rent cars but the Plaintiff never made use of it;*

25.5 *Despite everyone involved in the PITU operation being well aware of the fact that the Mazda 626 and the Audi had been rented at the time, not a single concern was raised until the Knipe Investigation made an issue about it.*

SUBSISTENCE AND TRAVELLING [S & T] [Counts 11 - 32 and 42]

26. *These are Counts of fraud, alternatively theft. As far as Counts 11 to 31 are concerned, it is common cause that the Plaintiff was stationed in Pretoria but was seconded to Cape Town by President Mandela to serve as Commander of PITU.*

27. *The crux of the S & T allegations is that the Plaintiff claimed R111,00 per day for S & T while he was staying in a safehouse paid for by the*

State. Commissioner Kramer of the National office, however, stated that the Plaintiff would have been entitled to stay in a hotel at a cost of up to R9 000,00 per month. The choice by the Plaintiff to stay in a safehouse and to claim S & T (meals and beverage) therefore both saved the SAPS money and caused the State no prejudice.

28. *Since the Plaintiff had only been a member of SAPS for just over a year, he was clearly ignorant as to the full nature and extent of options available to him, specifically regarding accommodation and S & T claims. This is precisely why Van der Westhuizen was assigned by Fivaz - to handle any of the Plaintiff's logistical or financial issues. The Investigators knew or ought to have known that Counts 11 – 31 lacked reasonable cause and therefore they were clearly malicious in their prosecution thereof.*
29. *Count 32 relates to a S & T claim during a one-night stay in Johannesburg, to which the Plaintiff had travelled on official business. The booking had been made by van der Westhuizen on the Plaintiff's behalf. The Plaintiff stayed in a self-catering unit for which the State paid and he claimed R111,00 for meals, which is a trivial amount in the context of Count 32. In any event, the Plaintiff ought to have been entitled to this amount since his accommodation did not provide any meals.*
30. *Count 42, another fraud charge, was withdrawn as it related to queries from the SAPS which were later paid.*

SAFEHOUSES [Counts 33 & 34]:

31. *The crux of Count 33 is the allegation that the Plaintiff defrauded the SAPS by staying over from time to time in a rented safehouse situated in Rowenzory road, and not limiting his use of the safehouse to its sole intended purpose of briefing and debriefing of witnesses and informants.*
32. *The key point here is that the Plaintiff had been seconded to Cape Town and it was therefore the State's responsibility to see to his accommodation requirements. He was fairly new in the SAPS and oblivious to the safehouse policies. In any event, he did not rent the safehouse, nor was he charged for doing so. His only sin was that he made a statement denying that he had stayed at the house. Again the Plaintiff was entitled to have stayed at a hotel costing approximately R9 000,00 per month, incurring additional S & T claims for daily meals, however he did not. The Rowenzory flat was considered State accommodation and the Plaintiff caused no prejudice to the State by staying over on occasion when the need arose. He was, after all, embroiled in an undercover operation at the time. Accordingly, it is clear that there was absolutely no element of fraud in the Plaintiff's actions in this regard.*
33. *Count 34 relates to the Higgovale safehouse, in which it was always common cause that the Plaintiff had stayed. He moved out of the house of his own accord into a City Council house in Plumstead because he was to infiltrate the ranks of people like Palazzolo, and various other underground figures, who all were unaware that he was a member of SAPS and the Head of a Presidential Task Unit. It was*

therefore necessary for the Plaintiff to build a legend of a normal family man, who lived in an ordinary house, so as not to raise any suspicion - hence the Plaintiff's decision to move from the luxurious Higgovale house to a City Council house where he could live with his wife and children for the duration of the PITU Investigation.

34. *The monthly rental of the City Council house was significantly lower than the Higgovale property so it could never have been reasonable for the investigators to suspect that its rental was prejudicial to the State. In addition, despite the house belonging to the State, the rent was paid by the Plaintiff out of his own pocket.*

THE ZEO GILLIOT CHARGES [Counts 35 – 37]

35. *The Investigators alleged that the Plaintiff had committed fraud by paying two amounts of R2 000,00 to Gilliot as informer fees to which she was not entitled. The Investigators further alleged that Gilliot had never, in fact, worked for PITU as an informer. Count 35 related to an alleged fraudulent claim for R2 250,00 for operational expenses.*
36. *The second claim [Count 36] was filed by captain Benn and certified by Van der Westhuizen. Accordingly, it was Smith and Benn who had motivated the claims relating to counts 35 and 36, and not the Plaintiff.*
37. *Count 37 deals with an amount of R2 550,00 which was used for the infiltration and for fuel expenses of R50,00. The Plaintiff initially requested an advance of R10 000,00, which he was paid, however he returned R7 450,00 of the advance to van der Westhuizen since there was no reason for them to stay in Johannesburg any longer.*

38. *Van der Westhuizen accepted the Plaintiff's explanation for the expenditure of the R2 550,00.*
39. *Gilliot also made various conflicting statements during the Knipe/Rossouw Investigation.*
40. *Although Knipe and Rossouw falsely asserted that Gilliot had never worked for PITU, Gilliot in fact deposed to various affidavits in which she confirmed the many reports she had compiled; the information she had gathered; and the raid where she went to the house "several times" in Johannesburg.*
41. *Benn is a witness who made nine inconsistent statements to the Investigators.*

THE PRISMAN FILES [Count 38]

42. *Count 38 was based on the false premise that a certain informer did not exist and therefore the R2 000,00 claim was fraudulent. The informer was an employee who worked at the office of Prisman (the attorney of Palazzolo) where he was mandated by PITU to copy certain documentation. During the investigation it was confirmed that the informer did indeed work in the offices of Prisman and that he had indeed copied the requested documents.*
43. *The Plaintiff believed that he was entitled to act as he did because he was involved in a legitimate intelligence-gathering exercise. A motivated claim for the payment of this particular informer was submitted to the National Office and it was ultimately authorised and paid by a Commissioner Bosman.*

44. *Palazzolo paid for the Plaintiff's travelling and accommodation expenses when he accompanied him to Angola. At that stage Palazzolo was still unaware that the Plaintiff was investigating his activities. The Plaintiff submitted a claim to SAPS for these expenses so he could reimburse Palazzolo once they returned from Angola. The Investigators alleged that the claim by the Plaintiff was a misrepresentation.*
45. *It is common cause that the Plaintiff accompanied Palazzolo to Angola; that the trip had been approved by Fivaz; and that the SAPS would have to pay the related expenses. It is also common cause that the Plaintiff wrote to Mufamadi (Minister) to inform him that Palazzolo insisted to pay for this trip.*
46. *The Plaintiff explained that, after returning from Angola, he filed an expenses claim which was paid by SAPS and which he handed in an envelope to Palazzolo's secretary shortly thereafter.*
47. *During the investigation, Viljoen's assessment that the Plaintiff had in fact reimbursed Palazollo was based on three factors: [1] Palazollo filed an affidavit where he confirmed that he was reimbursed; [2] He made a video recording of his consultation with the secretary, who confirmed receipt of the envelope; [3] After Palazollo had chased Knipe away after he approached him to depose to an affidavit, senior officers from SAPS' National Head Office spoke to Palazollo at La Perla restaurant in Sea Point, where Palazollo again confirmed that he had been reimbursed by the Plaintiff. It was only after the Senior*

Officers from Pretoria told Palazollo that the Plaintiff was actually investigating him and that the Plaintiff was not his friend - as he believed at the time - that Palazollo decided to change his version.

48. *Over the course of eight meetings, Knipe placed enormous pressure on Palazollo to deny that he was ever reimbursed by the Plaintiff for the Angola trip, in spite of which Palazollo deposed to an affidavit in which he confirmed that the Plaintiff had offered to reimburse him.*

49. *Despite the fact that Knipe had instructed Palazollo to make a statement against the Plaintiff, he still acknowledged in his statement to Knipe that the Plaintiff reimbursed him by delivering the envelope to his secretary [Toi];*

50. *Consultation took place between the prosecutor [Mr Bouwer] and Palazollo where the latter admitted that he received the money from the Plaintiff.*

FURNITURE THEFT [Count 40]

51. *The furniture concerned had been purchased by the SAPS for the safehouses. When the Plaintiff moved out of the Higgovale safehouse to rent the City Council property, for which he paid himself, it is common cause that he also removed the furniture and took it with him.*

52. *The Plaintiff was obviously accountable for the furniture, and he was responsible for the safe-keeping thereof. It would have been absurd for him to leave the furniture behind in the Higgovale safehouse after he terminated the lease. The Plaintiff was building his legend as an ordinary person in the City Council house, ostensibly far removed from an underground Presidential operation. The fact that he utilised the furniture for the duration of the undercover operation clearly does not rationally lead one to suspect that he intended to permanently deprive SAPS of its ownership thereof.*

53. *In reality, the Plaintiff did not even use all of the furniture concerned. The contents in the docket (photos) taken by the Investigators at the City Council house showed most of the furniture wrapped in plastic. It is for that reason that the Investigators threw in the very skimpy charge of “removing goods from someone’s control with the intention of using it without permission”. It goes without saying that the Plaintiff himself had lawful custody and control over the furniture and that his removal thereof was entirely lawful.*

ALVIRA WILLIAMS-PEARCE [Count 41]

54. *The Investigators alleged that the Plaintiff fraudulently spent R2 099,00 of State funds on a flight ticket from East London to Cape Town, as well as accommodation expenses for Williams. The Plaintiff’s defence was that he intended to recruit Williams as an informer so as to gather information directly from the office of Palazollo.*

55. *Williams is another witness who was threatened and intimidated by Rossouw. As a direct result of Rossouw informing her previous employer that she would be a witness in the case, she lost her job. When she started a new job, Williams confirmed that Rossouw had threatened that he would come to her “present employment on 16 October 1998, to once again interfere at my place of work - I found it as a threat because that is my work, ok, and I found it as a threat”*
56. *Williams made two written statements to Rossouw.*
57. *Rossouw approached her at 08.10 in the morning at her work place and demanded a statement from her regarding her interactions with the Plaintiff, without ever informing her of the allegations which were being levelled against the Plaintiff. It was only later, when Rossouw approached her a further time, that she drafted a more detailed statement. During the Investigation she told the Investigators that, “[she] believe[d] that Mr Lincoln is not guilty of the charges against him.”*
58. *The motivation for the flight ticket and accommodation is contained in an information note addressed to, and later approved by, a Commissioner Blaauw.*

MANGIAGALLI [Counts 43 - 45]

59. *Count 43 is one of fraud and Count 44 is one of obstructing or defeating the ends of justice. It was alleged that the Plaintiff had permitted the removal of a sentenced prisoner from Pollsmoor Prison. Count 45 is for unauthorised removal of a prisoner in contravention of the Prison's Act.*
60. *Mangiagalli was indeed booked out of Pollsmoor Prison to be used as an informer with knowledge of various members of the Italian underworld who were operating in the Western Cape. It is common cause that the recruitment of Mangiagalli was instigated by Captain Benn and not the Plaintiff. Although the Plaintiff recommended the recruitment, it was eventually the Commissioner of Correctional Services, Pretoria who authorised the removal of Mangiagalli together with certain conditions. It is further common cause, as testified by a Gavin Meyer of the Independent Police Investigating Directorate and others, that Mangiagalli was briefed and accommodated in the official safehouse.*

DRUNKEN DRIVING & LEAVING THE SCENE OF ACCIDENT

[Counts 46 & 47]

61. *The Plaintiff was involved in a collision with two stationary vehicles while driving the Audi in Bellevue Road, Oranjezicht on the morning of Sunday, 27 July 1997.*

62. *April, the Plaintiff's friend who removed him from the scene of the accident, made three separate and inconsistent statements to the Police.*
63. *Benn was a section 204 witness. He gave 9 (nine) inconsistent statements to Knipe and Rossouw. Benn was threatened with prosecution if he did not change his statement to incriminate the Plaintiff.*
64. *In a handwritten affidavit Benn also stated that he had not really spoken to the Plaintiff because the latter appeared confused. However, he could not say whether the Plaintiff was under the influence or whether he had a knock against the head, but simply that he was definitely not acting like himself.*
65. *Dr Stoffberg is a medical practitioner with 22 years experience. He saw the Plaintiff on the 27 July 1997 after the Plaintiff's wife had called him twice to tell him that the Plaintiff had been injured in a motor vehicle accident.*
66. *Stoffberg's diagnosis was that the Plaintiff was suffering from shock. He stated that he was staring in front of him and was somewhat incoherent. Stoffberg also concluded that the Plaintiff's confused state was the result of concussion.*

67. *Importantly, Stoffberg noted that he did not smell any alcohol on his breath, despite being in very close proximity to the Plaintiff while examining his pupils.*

68. *Stoffberg sent the Plaintiff to Christian Barnard Hospital for X-rays and contacted a radiologist on the same day.”*

6. The court *a quo* refused defendant’s application for absolution and found that plaintiff had made out a *prima facie* case for defendant to meet at the end of his case.
7. In the judgment on absolution, the court *a quo* made no finding on plaintiff’s argument that but for the investigation by the relevant police officers, there would have been no dockets for the prosecuting authority to consider. The court *a quo* found that at the end of the plaintiff’s case there was some merit, *prima facie*, in that argument.
8. The court *a quo* failed to evaluate the credibility and reliability of the witnesses, Knipe, Fivaz and Rossouw with reference to the well-established test enunciated in **National Employers' General Insurance Co Ltd v Jagers** ¹ and **SFW Group Limited v Martell & Kie & Others** ² and chose instead to cast them as excellent witnesses.

Grounds of Appeal

9. The grounds of appeal are that the court *a quo* erred in the following respects:

¹ 1984 (4) SA 437 (E) at H 440E – H:

² 2003 (1) SA 11 (SCA) at [5]; Dreyer v AXZS Industries (Pty) Ltd 2006 (5) SA 548 (SCA) at 558E-G.

9.1. Defendant *a quo* (who is the respondent) has a positive duty to put its version to the plaintiff during cross examination but failed to do so. Defendant accordingly failed to challenge plaintiff's evidence by putting evidence to plaintiff that could rebut plaintiff's version. Despite this, the court *a quo* failed to draw an adverse inference against defendant's failure to rebut the plaintiff's evidence during the presentation of the plaintiff's case;

9.2. The court *a quo* erred in finding that the plaintiff failed to adduce evidence concerning the contents of the dockets, which contents, would assist the court in determining what objective facts the investigators had when they decided to investigate appellant because the dockets contained the results of the investigation but not what motivated the commencement of an investigation. Smith made numerous concessions that he omitted material facts. Those omissions would have misled any person who read his report and affidavit.

Plaintiff's testimony

10. Plaintiff discovered that a certain Mr Vito Palazzolo ('Palazzolo'), who was allegedly the sixth highest ranking member of the Cosa Nostra, i.e the Italian Mafia, was allegedly engaged in an unsavoury relationship with a certain Commissioner of Police and a cabinet Minister. He reported this information to the Minister of Safety and Security at the time, who in turn informed President Mandela. The President instructed the National Commissioner of Police at the

time, to facilitate the establishment of the Presidential Investigation Task Unit ('PITU') with plaintiff as its head and the unit was to operate outside of the usual chain of command of the SAPS because of the serious and sensitive nature of the investigations that the unit was to undertake. The unit commenced in approximately June 1996 from Cape Town and it had to report to the National Commissioner as well as to the President.

11. Plaintiff explained although the unit was doing covert work, it couldn't use the secret fund meant for covert operations because the Commissioner who had a close association with Palazzolo had access to information involving the secret fund, hence PITU used the open fund of the SAPS to fund its activities. Plaintiff used the example of registration of motor vehicles directly into the names of the members of the unit. According to plaintiff, it is a practice to so register vehicles in covert operations because then if an ownership trace is done on the vehicles, it wouldn't be traced back to the SAPS. Plaintiff alleged that he was charged according to the finance rules of accountability applicable to overt operations because the open fund was used whereas in fact the PITU was a covert structure.
12. During its investigation, the unit exposed the creation of counterfeit money, racketeering and fraud that were being committed by a police officer. US dollars as well as false matric certificates and driver's licences were being printed in the basement of the SAPS head office in Pretoria.

13. The unit also continued with an investigation into an attempted assassination plot of President Mandela, which had stalled and the unit retrieved a handcrafted rifle.
14. The unit was instrumental in investigating two German nationals who were ultimately extradited to Germany.
15. Plaintiff alleged that the activities of the unit was not welcomed by certain members of the SAPS who attempted to obstruct its work and who resented the unit for allegedly having transgressed into areas of investigation previously undertaken by other units in the SAPS.
16. During October 1996, Plaintiff addressed a letter directly to the deputy President, the Minister, the National Commissioner and the Divisional Commissioner complaining about obstruction and interference by other SAPS members.
17. In response to that letter plaintiff met the deputy President and the Minister and thereafter the National Commissioner was tasked with intervening in the conflict.
18. During July 1997, the plaintiff again wrote to the deputy President and the Minister alleging that the investigation into Palazzolo was being obstructed by a member of the unit, Smith, the Attorney-General and the anti-Mafia Division of

the Italian State Police. He allegedly believed that Smith may have been recruited by the Italian Police.

19. On 15 August 1997, the National Commissioner arranged for plaintiff to meet him at his office but plaintiff approached the deputy President who arranged a meeting which was attended by the National Commissioner, the deputy President, one Viljoen and the plaintiff. The National Commissioner alleged that he had received reports of serious irregularities at the PITU and plaintiff complained about interference. It was agreed that an investigation would be held into the alleged irregularities in the PITU and that Director Leonard Knipe would lead that investigation. The deputy President agreed provided that the investigation was conducted for the correct reasons.
20. On 19 August 1997 Bouwer and Senekal produced an Information Note for the National Commissioner after having conducted an investigation into complaints against the PITU. That investigation didn't include consultations with the plaintiff as head of the PITU nor was the plaintiff advised that he must remedy certain deficiencies found in the operation of the PITU. In that note, the authors recommend that: "*The continued existence of the Presidential Task unit should be considered by top management.*"
21. Despite that recommendation, on 29 August 1997, the National Commissioner addressed a letter to the plaintiff in which the unit's mandate and parameters were clearly described. The said letter does not terminate the PITU's mandate.

22. On 3 October 1997, the Mail and Guardian published an article alleging that the PITU was a political unit working outside the SAPS and that serious charges were being investigated against it on the instructions of the National Commissioner. The article also referred to various covert operations being conducted by the PITU.
23. On 5 October 1997, plaintiff wrote to the National Commissioner alleging that certain members of the SAPS revealed the information to the media and that the leak not only compromised the PITU's investigations but also placed its members and informers in jeopardy.
24. The National Commissioner responded by instructing that departmental steps be taken against plaintiff because he perceived plaintiff's letter to be disrespectful and arrogant.
25. On 11 November 1997, plaintiff wrote to the National Commissioner complaining about the failure to pay necessary expenses of the PITU.
26. On 25 November 1997, the assistant Commissioner in charge of Finance replied in a letter in which he authorised payment of the increased rent for PITU's offices.
27. On 18 February 1998, plaintiff was arrested and stood trial in the Wynberg Regional Court on 47 charges. He was convicted on 17 charges and on appeal to the High Court he was acquitted on all charges.

28. During the cross examination of plaintiff, counsel for respondent clearly attributed the commencement of the investigation into plaintiff's conduct at PITU to the following: Smith's affidavit dated 16 July 1997 and Superintendents Bouwer and Senekal's information note dated 19 August 1997. Plaintiff agreed with respondent's counsel's attribution.
29. According to the judgment of the court *a quo*, Plaintiff conceded that the charges involving Mangiagalli; drunk driving and leaving the scene of an accident; would have been appropriate to investigate on the face of it but plaintiff alleged that there was a hidden agenda to investigate him. In my view, plaintiff's evidence which the court *a quo* correctly quotes at paragraph 80 of its judgment, is not a concession but a consistent allegation that the investigation on those counts, as with all the counts, were motivated by malice.
30. Zenzile Khoisan testified for plaintiff. He is the journalist who received a tape recording that Smith had allegedly made of Knipe in which the latter is alleged to have stated, *inter alia* that he's tired of covert operations and he wishes to bring down the ANC government. Khoisan said he received the recording from a very liable source who held a very senior position. Khoisan said that he called Smith and played the recording to him. He asked Smith to confirm the veracity of the recording, which he did. He asked Smith why he made the recording and Smith said that he did so to protect himself. Khoisan went on to publish articles in the media concerning the content of the recording and no legal action was taken against him for doing so nor was he requested to withdraw the articles nor to apologise.

Defendant's testimony

31. Knipe testified that the Evaluation Section at SAPS' head office usually investigated alleged irregularities in SAPS' units. The people at that unit gave him a verbal explanation of what they saw as the problems and they gave him a handwritten statement of Smith which then formed the base document from which he commenced his investigations.
32. Knipe said that the Information Note compiled by the people at Evaluation Services, namely Superintendents Bouwer and Senekal is dated 19 August 1997 and Knipe had already received instructions from the National Commissioner to investigate in late July or early August 1997.
33. Knipe said that the docket relating to the charge that emanated from the motor vehicle accident in which plaintiff collided with two parked vehicles was opened at Sea Point police station. Then he went on to say that he believed that the docket was kept by Benn who was a subordinate of plaintiff and he thought that was inappropriate. When asked why Benn had the docket, he said he couldn't recall. He has a selective memory in that he recalls that Benn had the docket but not why. That is clearly an indication that he had the intention of implying that Benn had the docket because plaintiff had asked Benn to act corruptly. Even worse he doesn't state for a fact the docket was with Benn but states that he "thinks" it was. He was content to venture a guess that is prejudicial to the plaintiff.

34. Knipe's evidence in essence is aimed at placing a larger than normal investigative role on the prosecutors during the course of his investigation.
35. Knipe clearly made a distinction between operational irregularities of PITU and alleged criminal conduct and said that his brief was to investigate the latter. For example, allegations of the Morroccans and Project Quickfall being conducted in an untoward manner, was meant to be investigated by the Evaluation Unit because it involved the operation of PITU. Despite that delineation, Knipe didn't consider the following to be operational matters that ought to be investigated by the Evaluation Unit: question of whether Williams was in the process of being recruited; whether the vehicles used by PITU members were registered in the names of the members for sound operational reasons and whether it was necessary to rent a safe house and use it for residential purposes as part of the building up of a legend.
36. Senekal testified that his instruction was to evaluate the PITU's administration and financial claims. He was approached by Smith shortly after arriving in Cape Town to conduct the evaluation. He consulted with Smith on the same day that Smith had left the PITU. Smith raised many complaints which he believed to be allegations of criminal misconduct by plaintiff. He spent two days making notes on Smith's allegations and then used his notes to formulate a 70 page affidavit which he wrote out for Smith to sign.
37. From time to time Senekal used the word investigation instead of evaluation and it became evident that Senekal in fact conducted an investigation albeit, on

his own evidence, not thorough in as much as he didn't investigate Smith's motive for raising the complaints. At the behest of Smith, he clearly strayed beyond the instruction of evaluating administrative and financial irregularities. He eventually handed the results of his investigation and his recommendations to the National Commissioner for his decision.

38. He harboured some suspicion that Smith was not acting entirely honestly when he later met Smith driving a big BMW vehicle which he said was from Government Garage while Smith was on leave. Nonetheless, he used Smith's affidavit as support for his investigation.
39. The preconceived notions of the employees of defendant were overtly demonstrated by the utterances of Knipe in the recording made by Smith; by Knipe's testimony in the regional court; by Smith's testimony in the regional court concerning Knipe's zealous need for Smith to make a further statement setting out more detail concerning why he implicated plaintiff and by Boucher and Senekal's method of convincing witnesses to make further statements which implicated plaintiff in the prosecution before the regional court.
40. Although plaintiff withdrew the claim involving the prosecuting authority, as the court *a quo* found that the investigators at some stage conducted the investigation on the instructions of the prosecutor, Adv Boucher, his evidence is accordingly relevant.

41. Advocate Bouwer, the prosecutor in the criminal trial held in the regional court testified as follows. He said that he was involved in the investigation by the police only once they produced statements and he drove the investigation as he believed in a hands-on approach of a prosecutor in the investigation by the police. He was also present when statements were taken from senior management of the police in Johannesburg/Pretoria. By contrast, Knipe said that Bouwer was involved in the investigation at a very early stage.
42. Bouwer's testimony concerning why he proceeded with the charge of fraud based on money that plaintiff was meant to give to Palazzolo as repayment of the expenses for their trip to Angola is curious. He said that Palazzolo gave so many contradictory versions and because Palazzolo was a suspect that the state was investigating, he decided not to use him as a witness to support that charge. (The magistrate however called Palazzolo as a witness.) Bouwer goes on to testify as follows: *"We did not want Palazzolo as a witness. The problem is, on the **Angola case there is a charge. There is a criminal case to answer to.** It relates to money that he claimed that **in our view on the evidence was not repaid.**"* (my emphasis). If Palazzolo was a key witness to the alleged failure to repay him, then its inexplicable that the investigators, including Bouwer could have formed the view that there was a case to answer to and a charge to bring, when they didn't intend calling Palazzolo as a witness. What that *modus operandi* does demonstrate is an attitude of throwing as much dirt at plaintiff and seeing what holds up in court. That is indeed not the actions of investigators who genuinely believed there is reasonable and probable cause.

43. Adv Bouwer said that plaintiff's counsel was in fact saying that he and the other prosecutors involved were incompetent and that he cherry-picked which evidence to use of state witnesses who initially gave exculpatory statements and later gave implicative statements. Plaintiff's allegations in the pleadings and in his testimony are not that the investigators were incompetent, but that they held a pre-conceived notion that he was guilty.
44. Bouwer expressed extreme dissatisfaction with the reasons of the appeal court when it acquitted appellant on all charges. He challenged the validity of those reasons and persisted with the view that plaintiff ought not to have been acquitted.
45. When dealing with the charge of driving while exceeding the alcohol limit and fleeing the scene of the accident, Bouwer relied on the credibility of the witnesses that implicated the plaintiff by referring to the professional status of the witnesses. He said the following: *"And an advocate comes out and says: this man is drunk and he gives strong evidence. I know concussion and drunken driving is close. There's a professor in speech therapy- or in speech at some university who saw him, who smelled him. There were three, four witnesses led who said he was intoxicated- either heavily intoxicated or intoxicated."*
46. In fact, Adv Bouwer's evidence in which he places strong reliance on witnesses based on their occupation, profession, status is also duplicated by counsel for defendant when he refers to the findings of the regional court magistrate with

reference to the fact that he was a very senior magistrate, thereby implying his competence is beyond reproach. Plaintiff's counsel also makes the status of the judges in the appeal an important consideration when he refers to their findings as being those of very senior judges.

47. The approach outlined above of elevating people based on their seniority or status and of placing less store on others based on their alleged unlawful/unsavoury activities is a most unsalutary one. It does not advance an objective analysis of a person's credibility with due regard to the probabilities.
48. Adv Bouwer said during re-examination that counts 1 to 10 i.e. the renting of motor vehicles charges; counts 32 and 34 i.e. the use of safe houses charges; counts 11 to 31 and 32 and 42 i.e. S & T claims made by plaintiff were looked at because of the safe houses charges; count 39 i.e. the Angola trip claim; count 40 i.e. the removal and use of the furniture charge all arose from complaints made by Smith.
49. Adv Bouwer said that Count 41 i.e. the charge of claiming travel and accommodation expenses for Williams arose because plaintiff gave an incorrect motivation for the claim even though Adv Bouwer acknowledged that plaintiff's testimony was that he had to protect Williams by not disclosing her true role, namely that Williams was a witness instead of saying that she was a potential source. Bouwer said that plaintiff could have given a broad, generic motivation without giving a false one.

50. Counts 43 to 45 i.e. the release of Mangiagalli from custody charge arose because people who Mangiagalli had defrauded, had seen him driving around as though he was free from custody. Those people complained and it was leaked to the media.
51. Counts 46 and 47 i.e. the driving under the influence of alcohol and fleeing the scene of the accident charges arose from a docket being opened at Cape Town police station.
52. Former National Commissioner G Fivaz testified that his employment with the SAPS ended at the end of 1999. He explained that in terms of the law, the plaintiff could never have been reporting to the president or the deputy president only because they could not be plaintiff's commanders. According to him plaintiff had to account to him, as National Commissioner but plaintiff clearly didn't want to do that so he constantly complained to the deputy president that he was being sabotaged by sectors of the SAPS and even investigated by them. He said that the initial mandate given to plaintiff was vague so on 29 August 1997, he gave plaintiff a written mandate which not only spelt out the lines of reporting but also the accountability procedures that PITU was subjected to as well as who could authorise inspections of the work and function of PITU.
53. Fivaz differed from Knipe in that he believed that Knipe was only asked to investigate PITU after the meeting between, plaintiff, Mbeki, Viljoen and Fivaz whereas Knipe said it was in July 1997, i.e. before that meeting took place.

54. Smith admitted that he was suspicious of the close relationship that plaintiff had with Palazzolo and the fact that so many of Palazzolo's associates at the nightclubs knew plaintiff although he also admitted that plaintiff would have been doing intelligence work on those people before PITU.
55. The crux of Smith's dissatisfaction with plaintiff appears to stem from the fact that plaintiff didn't discuss his activities and plan with Smith and the latter felt that plaintiff wasn't doing the work that he was employed to do and therefore he assumed that plaintiff was colluding with the suspects in their investigation.
56. Smith also exhibited a tendency to draw negative conclusions from unsubstantiated suspicions. He contradicted himself when he said that while he and plaintiff was in Italy and Palazzolo called plaintiff, Palazzolo was informed by plaintiff that he was in Italy yet he later said that Palazzolo already knew before he called that they were in Italy.
57. Smith blamed Benn for deliberately writing down the wrong address on the warrant for the search and seizure of a house in Johannesburg even though Benn had written a letter expressing regret and apologising for his error.
58. Smith said that Van der Westhuizen deliberately dated her statement incorrectly on a date before he left PITU and she couldn't have constructed her statement herself because she was Afrikaans speaking, hence he believed that she said that Smith intended leaving the unit before he actually did so that Smith could be held responsible for irregularities in the unit.

59. Smith believed that he had given the original recording that he made of Knipe allegedly threatening him to Adv Jacobs. He said that he made no copy of the recording so he believes plaintiff or his advocate made a copy. He claimed to have no recollection of what Knipe allegedly said in the recorded conversation which became the subject of a Mail and Guardian news article.
60. Smith was presented with Adv Jacobs' letter to the Bar Council in which he stated that the tape was copied with Smith's agreement. Smith didn't remember that the original was ever returned to him.
61. Mr Roussouw testified that at the end of August 1997, he was Commander of Cape Town Central detectives at the time of the investigation into PITU. He was asked by Fivaz to join Knipe in the investigation. He admitted that he is part of club 35 but alleged that it was a social, 'braaivleis' club.
62. He said that the prosecutor became involved in the case when the dockets were almost trial ready only.
63. He investigated the drunk driving case by taking statements from witnesses who alleged why they believe plaintiff was drunk. He relied on those statements because no blood alcohol sample was taken from plaintiff at the time of the accident.
64. He had no knowledge concerning why an open account was used to fund PITU and not the secret fund of the SAPS. He didn't investigate whether the rules of

the secret fund or that of the open account ought to apply to PITU. He expressed the view that PITU nonetheless remains accountable for its claims and conduct.

65. A final statement was taken from Dr Stoffberg very late and only after the case had been running for a while in the regional court.

Evaluation

66. Smith was neither objective as he had demonstrated in his dispute with plaintiff; in his penchant for sharing information with the Italian authorities; in his inability to understand, believe or trust plaintiff's *modus operandi* in building up his legend when plaintiff befriended known suspects and by his inability to accept that the requests of the Italian authorities couldn't simply be acceded to if they were in conflict with South African law and procedure.
67. It is common cause that plaintiff agreed with the National Commissioner's decision to hold the investigation into PITU. Plaintiff however didn't have sight of Smith's affidavit and the information note then. He and the National Commissioner agreed on the need for an investigation based on different grounds. The National Commissioner clearly relied on an oral account of the content of the affidavit while plaintiff couldn't have relied on the affidavit because he hadn't seen it at that stage.
68. Plaintiff was questioned during cross examination on the fact that several complaints were made that PITU had interfered with the investigations of other

units of the SAPS, such as, the Narcotics Bureau, Cape Town Central Police Station's dockets, the Aliens Investigation Unit, the Organised Crime Unit and the Syndicate Fraud Unit. Plaintiff agreed that he became aware of some complaints.

69. It is interesting that the Commissioner who was alleged to have an untoward relationship with Palazzolo was the head of the Organised Crime Unit and Smith who had worked in a branch of that unit previously, alleged in his affidavit that the Organised Crime Unit was also dissatisfied with the *modus operandi* of the PITU.
70. It was then put to plaintiff during cross examination that the National Commissioner as the officer who had to account for the expenses of the PITU to the auditor-general, was justifiably concerned about the administration of the PITU. Plaintiff responded by saying that the Commissioner in charge of finances, Bosman dealt with the expenditure of PITU in his affidavit. He also explained that there was no cause for the National Commissioner to be concerned and that if he indeed was concerned, he wouldn't have issued a further written mandate enabling PITU to proceed with its work.
71. Plaintiff's response to the question that Smith didn't admit that he lied in his statements to the investigators but merely said that Knipe put him under immense pressure, is that that evidence of Smith has to be evaluated objectively and not taken on face value. That response of plaintiff in fact is a call for an evaluation based on the probabilities.

72. To dismiss the bias that plaintiff attributes to defendant's employees as conspiracy theories is to approach the common cause facts and unchallenged evidence of plaintiff without an appreciation of the nuances they raise.
73. Throughout plaintiff's testimony there is a consistent refrain that there was a hidden agenda driving the decision to investigate him. In substance, that allegation is one of attributing malice to the investigators.
74. Plaintiff testified during cross examination that the witnesses at his criminal trial who lied in their statements to the investigators would not have admitted in their testimony that they lied. Plaintiff pointed out that Zoe Gilliot, Van der Westhuizen, April, Dr Stoffberg, Benn and Palazzolo all made more than one statement and they changed their initial statements from exculpatory to implicative. According to plaintiff, that fact ought to lead to the conclusion that they were coerced.
75. In the case of Williams, she said that as a result of the investigator informing her employer that she would be a witness in a criminal trial, she lost her employment and thereafter when the investigator requested another statement from her, she complied for fear that she would lose her new job. According to plaintiff, she however made an initial untruthful statement and subsequently made truthful statements when she realised the impact of her first statement on plaintiff after having read in the media that she was a paid informer in PITU. In her later statements she clearly revealed more than in her first statement in as much as she explained in her later statements that plaintiff arranged a job

interview for her with one, Robert and then plaintiff explained to her that if she worked for Robert, she had to keep plaintiff informed of what was happening in Robert's office.

76. A person who found herself in the position of Williams, namely that she was being offered a job opportunity on condition that she spies on her employer would most likely not be very willing to disclose those details in her first statement. As Williams said in her testimony in the regional court, after reading about the criminal case against plaintiff in the media, she made her later statement. Clearly at that stage, she understood the need to disclose that she was requested to spy on Robert. Plaintiff was asked in the court *a quo* why he wanted to recruit Williams and his answer was that he needed someone in Palazzolo's office that he could trust not to divulge her spying mission to Palazzolo. While the plan and process of planting a spy is indeed a sinister one, it clearly falls within the ambit of the work of the PITU. However it doesn't lend itself to the most probable reasonable inference that Williams was not being recruited and that her travel and accommodation was being paid for by PITU for the dishonest purpose of financially assisting her as a friend of plaintiff's.
77. Plaintiff testified that he was in the process of recruiting Williams as an informant when PITU paid for her trip to Cape Town from the Eastern Cape, where she lived at the time, for which payment he was prosecuted.

78. The investigation into the payment of Williams' flight and one night stay in a Formula1 Hotel is a patent attempt by the investigators to muddy the water so that it seems deep.
79. During cross examination, it was put to plaintiff that his counsel had not, during the regional court trial, put it to all the witnesses that he claims were coerced by the investigators, that they were in fact coerced.
80. Plaintiff testified at page 559 lines 15 to 24 of the record as follows in response in the court *a quo*:
- " M'Lady, again I say, if that- if that was the line of questioning at the time, it would have been appropriate. It was not the line of questioning what the- the line of questioning was to see where the inaccuracies were. And I must say, M'Lady, in the regional court-in the magistrate's court in Wynberg, it was not as in depth as what it is now, we didn't have as much knowledge as what we have now of this case, and where we can see, and where we can see in terms of even with regards to the appeal, where things went wrong in this matter, M'Lady."*
81. The action in the court *a quo* was instituted after plaintiff was acquitted of all charges on appeal to the High Court. Clearly at the stage of his criminal trial in the regional court, plaintiff appears to have chosen different methods of challenging the state witnesses during their cross examination. At that stage he faced 47 charges, although he was convicted of only 17 eventually. At that time, it would not have been in the contemplation of plaintiff nor that of his legal representative, that he would bring a malicious prosecution and/or malicious investigation claim against the Minister. Plaintiff's legal representative's failure to challenge state witnesses in the regional court on whether the duress of the

investigators led them to lie, can't be held against plaintiff in this civil suit. To have challenged the witnesses on the duress and lies aspect would have provided consistency for plaintiff's current allegations of duress of witnesses but the civil trial in this matter is not an extension of the regional court trial and any omission in those proceedings are not definitive of allegations and counter-allegations in these proceedings.

82. At the time of his trial, plaintiff's attempts to place Williams as an informant close to Palazzolo had failed because Palazzolo had been told of plaintiff's operation against him by the people investigating plaintiff.
83. It is common cause that Benn, April, Van der Westhuizen and Smith were implicated in allegations of wrongdoing by the investigators and offered potential immunity in terms of section 204 of the Criminal Procedure Act. According to Knipe, it was fair to warn them of the consequences of their actions.
84. The plaintiff's evidence concerning the resentment expressed by Knipe, Rossouw, Smith, Senekal and Bouwer towards the PITU, its work, *modus operandi* and how it was established is not only uncontested but also confirmed by the views expressed by Smith, Senekal, Knipe & Rossouw towards covert units and their views on the motivation given by PITU for some of the S and T claims.

85. At the end of plaintiff's case, his credibility remained intact. At the end of the trial, the evidence of defendant did not impugn plaintiff's credibility.
86. It is patently obvious that since the claim for Williams had been paid without first being queried, the only way that the investigators could have established that she wasn't a witness but a potential source, was by consulting with her and taking her statement.
87. The investigators would not have done so had Smith not alleged that she was a friend of plaintiff's former wife and that the claim for her travel and accommodation was a favour for a friend.
88. The court *a quo* evaluated Smith's evidence as follows:
- " Observing his testimony in chief, it became apparent that there was merit in the plaintiff's complaint that Smith had an over-inflated sense of his own importance... As his cross examination progressed, Smith's testimony became riddled with inconsistencies...It became clear that Smith had embellished various matters concerning the plaintiff, PITU and its members in his affidavit. ...that he developed a deep rooted resentment towards plaintiff; and that he also resented Benn... I have certain reservations that Smith was motivated by his professed desire to do the right thing. To my mind it was more a case of him realising that the chickens would come home to roost and that he should take proactive steps to cover himself as far as he possibly could... It is far more probable that Smith, who obviously had an axe to grind with the plaintiff, seized the opportunity presented by Senekal to spill the beans and at the same time make life as difficult as possible for the plaintiff."*
89. I agree with the court *a quo*'s finding that Smith's complaints against the plaintiff were motivated by considerations other than a desire to speak the truth.

90. Smith's patent omission of exculpatory facts in his affidavit which formed the basis of the investigation into plaintiff in circumstances where Smith knew of the existence of those facts and neither investigated their veracity nor referred to them, are indicative of the motives of Smith.
91. While an investigator may employ improper motives without necessarily vitiating the investigation or subsequent prosecution, in this case, there existed at the time of the investigation no objectively rational basis for holding the suspicion that the plaintiff had committed all the offences for which he was being investigated, hence it can't be said that they also held a proper motive of wanting to ensure that plaintiff was convicted of the offences so that he could cease his alleged offending misconduct. None of the alleged offending conduct, other than his relationship with Palazzolo were continuing conduct. If their intention was to procure the ceasing of his relationship with Palazzolo, the prosecution of plaintiff exposed the covert nature of PITU's *modus operandi* and intention concerning Palazzolo, thereby effectively blowing PITU's cover. A charge of corruption between plaintiff and Palazzolo would have evinced an intention to stop that relationship from ensuing but no charge of that nature was brought against plaintiff.

Judgment a quo

92. In its judgment, the court a quo found as follows:
- 92.1. Plaintiff had failed to prove that the defendant acted with malice or *animus injuriandi* and without reasonable or probable cause;

92.2. In relying on **Rudolph v Minister of Safety and Security**,³ the court found that plaintiff had not established that defendant's employees foresaw the possibility that they were acting wrongfully in as much as the court didn't have an opportunity to scrutinise the contents of the dockets and establish for itself whether there was sufficient incriminating material available to justify the handing over of the dockets to the prosecutor.

92.3. In relying on the following extract from the case of **Woji v Minister of Police**,⁴ the court *a quo* found that the defendant's employees who conducted the investigation, did no more than what could be expected of police officers conducting an investigation because they gave a fair and honest account of relevant facts to the prosecutor:

"With regard to the liability of the SAPS, the question is whether Inspector Kuhn did anything more than one would expect from a police officer in the circumstances, namely to give a fair and honest statement of the relevant facts to the prosecutor, leaving it to the latter to decide whether to prosecute or not. See Moleko at paragraph 11..."

92.4. In relying on the following extract from **Minister of Justice and Constitutional Development v Moleko**,⁵ the court *a quo* clearly saw the plaintiff's claim against the defendant as misconceived, in as much as the court held the view that the claim ought to lie against the prosecutor's decision to prosecute and not the police officers who conducted the investigation; (The plaintiff having withdrawn his claim

³ 2009(5) SA 94 (SCA) at [18]

⁴ [2015] 1 All SA 68 (SCA) at [34]

⁵ 2009(2) SACR 585 (SCA) at [16] and [17]

against the Minister of Justice and consequently not relying on any wrongdoing on the part of the prosecutor.)

“ [16] Captain Gwayi testified that he had nothing to do with the decision to prosecute Mr Moleko – he merely conducted the investigation and collected evidence. As far as he was concerned, the decision to prosecute was ‘the prerogative of the National prosecuting Authority’.

[17] Based on these facts, it is clear to me that Captain Gwayi at all times acted on the instructions and under the direction of the office of the DPP. Neither he nor any other policeman employed by the third appellant was responsible for the decision to prosecute the plaintiff. For this reason alone, I am of the view that the appeal must therefore succeed insofar as the third appellant is concerned.”

92.5. The court *a quo* found that the plaintiff’s failure to deal with the full content of the dockets in the criminal case against him was fatal to plaintiff’s case. This finding was made despite plaintiff’s case being understood by the court *a quo* as being based on the decision to investigate with malice in mind because the investigators held a preconceived notion that plaintiff had committed crimes and then set about trying to support that notion in a biased manner. The finding is based on the court *a quo* not having an opportunity to scrutinise the dockets to establish for itself if there was reasonable and probable cause to investigate and refer the fruits of the investigation to the prosecuting authority;

92.6. The court *a quo* found that at the end of plaintiff’s case, his version was largely uncontested;

92.7. Plaintiff was not interviewed by Knipe and Rossouw until the criminal case was almost ready for trial and they must have relied on evidence

other than that which plaintiff presented to the court *a quo*, to arrive at a decision that there was sufficient incriminating material to produce to the prosecutor;

92.8. Plaintiff failed to mention Fivaz in his pleadings as one of the employees of defendant who allegedly acted out of malice against him. It was considered as strange given that plaintiff complained in correspondence that Fivaz had conspired against him;

92.9. Plaintiff adduced no evidence in support of his allegations that Knipe was involved in the Gugulethu Seven massacre and the bombing of Community House;

92.10. It wasn't suggested by plaintiff that Knipe was motivated by malice when he investigated plaintiff's claim for an informer's fee for a person employed in the office of Palazollo's attorney. Instead plaintiff alleged that many people wanted to know the identity of the informer and that is why he was charged with a count relating to that informer's fee;

92.11. On plaintiff's version Knipe wasn't responsible for the Mangiagalli dockets, nor the dockets relating to drunk driving, fleeing the scene of an accident, the *crimen injuria*, disturbing of the peace charges and the attempted murder charges;

92.12. Plaintiff didn't mention the article in the Mail and Guardian written by Khoisan;

92.13. Plaintiff didn't disclose that his legal representatives in the criminal trial had been given the tape recording allegedly made of Knipe that was later allegedly tampered with and given to Khoisan;

92.14. Bouwer, Knipe, Fivaz and Rossouw were found to be excellent witnesses while Senekal was found to be a credible witness.

Probabilities on allegations of Malice and Animus Injuriandi

93. I turn now to a consideration of the probabilities concerning whether the decision to investigate and to hand the fruits of the investigation to the prosecuting authority could have been actuated by malice.

94. To determine whether Knipe was actuated by malice, the court *a quo* didn't have to determine that his alleged agenda was fuelled by the "old guard" wanting to discredit and remove the "new guard." The reason for the alleged malice or intention to injure does not have to be proved to find that malice and intention to injure was an integral part of the process that set the law in motion.

95. Knipe's own evidence reveals scepticism towards the PITU. It is demonstrated by Knipe's testimony that the complaints about alleged irregularities in PITU was why he investigated plaintiff, yet he failed to investigate plaintiff's allegation that PITU was being interfered with by members of the SAPS who weren't happy with its work. If Knipe was indeed as fair-minded, impartial and professional as he held himself out to be, he would have investigated plaintiff's

known complaints as well and established the motive behind the complaints of irregularities in the PITU.

96. A further example of Knipe's partiality is his evidence that he proceeded to investigate the S & T claims of plaintiff; the safe house used by plaintiff despite seeing a letter from Assistant Commissioner Bosman in charge of finance that those items were legitimately claimed and used by plaintiff. Knipe's testimony that those investigations may not have formed part of the charges preferred against plaintiff is untrue because the counts relating to those allegations of alleged misconduct were proceeded with in the regional court.
97. Knipe attempted to contextualise the threat of prosecution made to witnesses by saying that he had a duty to inform them when they broke the law and that it was fair of him to do so. Knipe appears to have adopted a selective approach to fairness in as much as he deemed it fair to "caution" witnesses but not fair to interview plaintiff early on as part of his alleged investigation into irregularities at PITU and to "caution" him.
98. Senekal testified that when investigating a unit, it was protocol to first inform the commander of that unit. Plaintiff as the head of PITU knew only that the unit was being investigated for irregularities and not for criminal conduct allegedly perpetrated by plaintiff.
99. Senekal saw his function as that of gathering information and not testing the veracity thereof.

100. It became clear that Senekal had commenced from an incorrect premise when considering certain expenditure of PITU when he drafted his contribution to the Information Note.
101. More pertinently, Smith said that he believed that Operation Intrigue, being the investigation into Palazzolo conducted by PITU was a farce and that plaintiff was in effect protecting Palazzolo.
102. When Knipe testified at a hearing held by Italian judges concerning the extradition of Palazzolo he said that he believed that Operation Intrigue which was headed by plaintiff initially, was a false pretence in that plaintiff had actually carried out a false investigation that covered (protected) Palazzolo. Knipe's view of the operation was not supported by the charges that plaintiff faced in the regional court because he wasn't charged with pretending to conduct a covert operation which was not an actual operation.
103. Knipe had the background of a detective, having been stationed in the old Murder and Robbery Squad. Knipe's perspective of covert operations was determined by his experience and exposure. Knipe didn't demonstrate an appreciation of the need to keep a prime suspect in a covert investigation from becoming embroiled in prosecution for petty offences when the suspect was being surveilled and intelligence was being gathered to prove that the suspect is engaged in far more serious offences for which he could ultimately be prosecuted, anymore than Smith did.

104. Knipe's views on Operation Intrigue shows that he couldn't have approached the investigation of the PITU with an open mind. Knipe's testimony that he was appointed to the investigation because he was "neutral" rings hollow in the light of his views and conduct.

105. The fact that plaintiff initially had no difficulty with Knipe conducting the investigation when he met with the deputy President, the National Commissioner and Viljoen can't be held against the plaintiff because clearly at that time Knipe had not yet commenced the investigation and plaintiff conducted himself in a reasonable manner by agreeing to Knipe conducting the investigation. At that meeting, the decision was taken to investigate alleged irregularities in the PITU and not plaintiff in particular. When Knipe took the decision to offer certain other members of PITU immunity subject to section 204 of the Criminal Procedure Act, he did so with the intention of implicating plaintiff. Knipe clearly had the intention to implicate plaintiff alone for what he allegedly perceived to be PITU irregularities. He didn't believe that those perceived irregularities could be dealt with as a departmental disciplinary process because he had every intention to do his level best to ensure that plaintiff was prosecuted.

106. The court *a quo* made the following assumption:

"The plaintiff had faced 47 charges and it is fair to accept that there must still have been sufficient material in those dockets to assist the court in determining this essential element of his claim."

107. The court *a quo* provides no reason for the assumption other than an unexplained notion of fairness.

108. The court has to evaluate the credibility of Adv Bouwer, Knipe, Fivaz and Rossouw with reference to their reliability, consistency and the probabilities and not merely determine that they were excellent witnesses. In **National Employers General Insurance v Jagers** ⁶ the approach of determining credibility in isolation from probabilities was dealt with as follows:

“It does not seem to me to be desirable for a Court first to consider the question of the credibility of the witnesses as the trial Judge did in the present case, and then, having concluded that enquiry, to consider the probabilities of the case, as though the two aspects constitute separate fields of enquiry. In fact, as I have pointed out it is only where a consideration of the probabilities fails to indicate where the truth probably lies, that recourse is had to an estimate of relative credibility apart from the probabilities.”

109. In my view, the court *a quo* failed to evaluate the credibility of Knipe, Rossouw, Bouwer & Fivaz with due regard to the probabilities. The court *a quo* erred in seeking irrefutable proof of what informed the investigation and prosecution and in believing that that proof was to be found in the dockets in circumstances where plaintiff's case is that the method of investigation: i.e. not consulting plaintiff; not testing the veracity of Smith's allegations with due regard to him being disgruntled about PITU and plaintiff; taking further statements from witnesses who initially made statements that absolve plaintiff and the wide ranging nature of the investigation which culminated in the 47 charges, when there already existed not only approval of the S and T claims but also an official pronouncement of acceptance of the categories of expenditure by Commissioner Bosman and an acceptance of the use of the immovable property by plaintiff.

⁶ *supra*

110. In **Woji v Minister of Police** at [33] the Supreme Court of Appeal set out the requirements for malicious prosecution as follows:

“Malicious prosecution

[33] Mr Woji had to allege and prove that Inspector Kuhn:

(a) Set the law in motion (instituted or instigated the proceedings)

(b) Acted without reasonable and probable cause

(c) Acted with malice (animo injuriandi) and

(d) The prosecution failed.

See Minister of Justice and Constitutional Development v Moleko [2008] 3 All SA 47 (SCA) para 8.”

111. The court a quo found that plaintiff had met the first and last requirements but not the second and third requirements.

112. The requirements of malice and *animus injuriandi* has to be inferred from the conduct of Smith, bearing in mind that Smith ought reasonably to have known that the allegations of fraud that he levelled against plaintiff as well as the allegation that plaintiff had colluded with Palazzolo, were false. Despite that knowledge, Smith proceeded to depose to an affidavit in which he made those allegations. The misconduct of Smith was perpetuated by the investigators, primarily because of their suspicions which they failed to test against objective facts and with reference to the *modus operandi* of a covert unit that was investigating sensitive matters, namely, allegations of possible criminal activity between Palazzolo, a cabinet minister and a high ranking police commissioner.

113. In **Minister of Justice and Constitutional Development v Moleko** at [20] the Supreme Court of Appeal held that there had to have been an honest belief in the guilt of the plaintiff held on reasonable grounds to prove reasonable and probable cause.

114. I am not persuaded that Smith could have had a reasonable and honest belief in the guilt of the plaintiff.
115. If the dockets did indeed contain evidence capable of proving beyond reasonable doubt that plaintiff had committed fraud, the state would have been remiss in not adducing that evidence in the regional court and in conceding the merits of plaintiff's appeal in the criminal case.
116. The alleged malice of Smith and the investigators would clearly not have been found in the dockets themselves. Malice would have to be inferred based on what the court *a quo* had been presented with in the evidence of plaintiff supported by documents that he relied on and on the candid evidence of Knipe, Senekal, Rossouw and Smith which confirm that they held a bias against plaintiff and the PITU and a lack of appreciation for the need to be discreet in the submission of claims for the payment of informants and witnesses. The nuance that appears to have been overlooked by the court *a quo*, is the fact that even if, on the information contained in the dockets, reasonable and probable cause to prosecute may have been apparent, it does not necessarily follow that reasonable and probable cause had not been contrived.
117. For the reasons advanced earlier concerning *inter alia*, the method of investigation; the preconceived notions of the investigators towards the covert unit initiated by politicians; their lack of appreciation for the sensitive nature of the work undertaken by PITU which had access to the open fund of the SAPS as opposed to the secret fund and the need to evaluate by measuring the defendant's witnesses' *ipse dixit* that they conducted the investigation in an

impartial and professional manner, against the probabilities, I find myself unable to agree with the court *a quo*'s finding that Bouwer, Knipe, Fivaz and Rossouw were excellent witnesses.

118. I am of the view that the probabilities do not favour defendant's version that there was reasonable or probable cause to set the law in motion for the prosecution of the plaintiff on all counts.

119. In respect of the count of driving under the influence of liquor and the count of fleeing the scene of an accident, plaintiff has not established a lack of reasonable and probable cause on the part of defendant.

120. I am of the view that the appeal should be upheld, in part and it should be refused in part.

121. To the extent that plaintiff has been substantially successful, costs ought to be awarded in his favour.

122. The judgment of the court *a quo* should be set aside and replaced with an order in the following terms:

122.1. On the following charges plaintiff has not proved that a malicious prosecution ensued without reasonable and probable cause, namely, the charges relating to drunk driving and fleeing the scene of an accident. Consequently, plaintiff's claim in respect of malicious prosecution on those counts are dismissed.

122.2. In respect of the remaining charges that plaintiff was charged with in the regional court, plaintiff's claim against defendant succeeds with costs, such costs shall include the costs of two counsel and the costs of the appeal.

R. ALLIE
Judge of the High Court

PARKER, J:
 I agree.

M.K. PARKER
Judge of the High Court

BINNS-WARD J (dissenting):

Introduction

123. I write separately because in the main I take a different view of the matter from that expressed in the judgment written by my colleague Allie J, with which Parker J has agreed.

124. The appellant instituted an action against the Ministers of Justice and Police (the latter cited by the appellation 'Minister of Safety and Security') claiming damages for malicious prosecution. The Minister of Justice was sued on the grounds of his alleged vicarious responsibility for the actions of the prosecuting authority and the Minister of Police was joined on the basis of his alleged responsibility for the acts of the police officers who prepared and submitted to the prosecuting authority the cases in respect of which the appellant was

arraigned in the regional court. The claim against the Minister of Justice was withdrawn after the close of pleadings, and the trial in the court a quo therefore proceeded only in respect of the claim against the Minister of Police, who is the sole respondent before us.

125. At the commencement of the hearing the trial court acceded to a request by the parties that the issue of liability should be tried and determined first, with the matter of how the damages (if any) should be quantified stood over for later determination. A ruling to that effect was made in terms of rule 33(4).

126. The court a quo adjudged that the appellant had failed to prove his case on a balance of probabilities and dismissed the action. The judgment of the court a quo is reported on SAFLII, sub nom. *Lincoln v Minister of Justice and Constitutional Development and Another* [2017] ZAWCHC 108 (22 September 2017). With the leave of the learned judge at first instance, the appellant has come on appeal from that decision to the full court.

Factual background

127. I find it convenient to begin by contextualising the matter with my own summary of the factual background to the proceedings at first instance, as provided in the evidence at the trial.⁷

128. The appellant was an operative in the underground intelligence network of uMkhonto weSizwe in the period before the transition to constitutional democracy in the 1994 general elections. He was thereafter integrated into the

⁷ A more detailed account is given in the judgment at first instance.

newly established South African Police Service ('the SAPS') - presumably in terms of s 5 of the South African Police Service Act 68 of 1995, pursuant to the 'Rationalisation Proclamation' defined in s 1 of the said Act. His appointment to the SAPS was made in the relatively senior rank of 'director'.

129. In June 1996, the appellant made a presentation to the then President, the late Mr Nelson Mandela, and the then minister in the Cabinet responsible for the SAPS, Mr Sydney Mufamadi, concerning the desirability of an investigation into the allegedly nefarious activities of one Vito Palazzolo, a naturalised South African citizen said to be a highly placed member of the Italian mafia, and in respect of whom the Italian judicial authorities had issued arrest warrants.⁸ The appellant also drew to the attention of the President certain allegations suggesting the involvement of a Cabinet Minister and a senior member of the SAPS in the allegedly corrupt activities of Palazzolo. It would appear from the evidence that he had come by this information in the course of investigative work that he had been engaged in earlier that year together with one, Inspector Abraham Smith.

130. The presentation resulted in directions being given under the President's hand to the then National Commissioner of the SAPS, Mr George Fivaz, to establish what was called the Presidential Investigative Task Unit ('the PITU') under the command of the appellant, and to be manned by a complement of police officers chosen by him.⁹ The PITU was charged with investigating the aforementioned allegations reported on by the appellant to the President.

⁸ By the time of the trial in the court a quo, Palazzolo was incarcerated in Italy; it being common knowledge that he was extradited there from Thailand.

⁹ See para. 11 of the judgment at first instance.

These included Palazzolo's alleged links with 'the criminal underworld' in Cape Town.

131. The unit's operations were designated by the codename 'Operation Intrigue'.

Its activities were subsequently expanded to include various other apparently sensitive investigations.

132. The evidence adduced at the trial in the court a quo suggested that the appellant was initially given an unconventionally free hand in the management of the PITU's operations. This was illustrated by the fact that in the first year or so of the unit's operations he reported on its activities directly to then Deputy President Thabo Mbeki and/or Minister Mufamadi, instead of to superior officers in the SAPS.¹⁰ It also appeared that the PITU was empowered to take over investigations from other units in the SAPS at will, and commandeer their dockets for that purpose. This appears to have caused a degree of tension with senior officers in certain other branches in the police force, which led to complaints being made from various quarters to the National Commissioner. The internal tension of which I have made mention may well have been exacerbated by the lack of trust that the appellant alleges prevailed at the time between some officers from the old order South African Police ('the SAP') and

¹⁰ Section 207 of the Constitution, which was adopted on 8 May 1996, provides that the National Commissioner must exercise control over and manage the South African Police Services in accordance with the national policing policy and under the directions of the Cabinet member responsible for policing. Those provisions are reiterated in s 11 of the South African Police Services Act 68 of 1995, which also provides that the National Commissioner is the functionary responsible for 'organis[ing] or reorganis[ing] the Service at national level into various components, units or groups'. Section 218 of the Interim Constitution (Act 200 of 1993) contained equivalent provisions. Commissioner Fivaz testified that the appellant had been directed at the outset to report jointly to himself and the President, but that the appellant had taken to bypassing him and reporting directly to Deputy President Mbeki and/or Minister Mufamadi.

those, who like the appellant, had been integrated into the newly established SAPS from the freedom fighter organisations.

133. Concerned about the effects of the unconventional line of reporting of the PITU and by the complaints about the unit that he was receiving from various sources in the police force, and even from the then attorney-general, Commissioner Fivaz summoned the appellant from Cape Town to attend a meeting with him in Pretoria in August 1997 to discuss these issues. In circumstances that are not entirely clear from the record, but probably as a result of complaints or concerns conveyed to him by the appellant, Deputy President Mbeki intervened to cancel the meeting called by Fivaz and, in its stead, convene a different meeting later on the same date at his official residence, also in Pretoria. This meeting was to be attended by the Cabinet minister responsible for policing, the National Commissioner and the appellant. A certain Inspector Piet Viljoen of the PITU also accompanied the appellant to the meeting with the Deputy President.

134. Mr Fivaz drew it to the Deputy President's attention that there were certain matters of serious concern concerning the PITU that he was duty bound to investigate arising out of the reports that had been made to him. Some of the reports made to the National Commissioner had emanated from internal 'audit' investigations already set in train by the police's Evaluation Unit represented by Superintendents Bouwer and Senekal. It became evident that an important basis for the further investigation contemplated by the National Commissioner was the content of an affidavit that the abovementioned Inspector Smith - who

had at that stage recently resigned from the PITU in disenchantment - had provided to Superintendent Senekal.

135. Smith's affidavit described a number of alleged irregularities concerning the appellant's use of the PITU. He alleged that the appellant was in point of fact working in league with Palazzolo. He also alleged that the appellant was misusing state resources; for example, by using a safe house hired by the state for the accommodation of himself and his family, as well as using for his private purposes an upscale model motor vehicle hired by the unit at state expense. Smith had concluded his affidavit with a statement requesting that 'a comprehensive criminal investigation be launched against [the appellant] and those associated with him'. Fivaz informed the Deputy President that the contemplated investigation could give rise to criminal charges.

136. Mr Fivaz also conveyed to the Deputy President his difficulty with the unconventional system of reporting concerning the unit's operations. It bears mention in this regard that very shortly after the meeting at the Deputy President's residence, the National Commissioner issued a revised mandate for the PITU, which more clearly delineated the unit's scope of operation and line of reporting.¹¹

137. The upshot of the meeting at the Deputy President's residence was that it was agreed that an investigation of the PITU could ensue. There was some discussion about the appointment of an officer who could be regarded as impartial to lead the process. (Then) Director Leonard Knipe was agreed upon

¹¹ See para 24 of the judgment at first instance.

by all concerned, including the appellant, as the suitable appointee. (It was not clear at whose suggestion Knipe was chosen. The appellant suggested that it was at the suggestion of Inspector Viljoen,¹² whilst Mr Fivaz testified to recalling that it was in fact the appellant himself who had made the proposal.)

138. The investigations led by Mr Knipe ultimately culminated in the appellant's arrest in February 1998, and his subsequent arraignment on 47 charges in the regional court in Wynberg.¹³ The investigations were conducted under the close supervision of a member of the attorney-general's staff, who later acted as the prosecutor in the criminal case. The decision to prosecute was taken after a detailed review by a deputy attorney-general, the attorney-general himself, and finally by the National Director of Public Prosecutions of the evidence that had been assembled against the appellant. The NDPP endorsed the decision to proceed with the prosecution after entertaining written and oral submissions from the prosecuting staff and from the appellant's side. In the process it was decided not to proceed on all of the matters that had been submitted by the investigators. Some of them were dropped, and others referred to be dealt with in internal proceedings within the SAPS.¹⁴ This quite extraordinary treatment of the decision to prosecute was apparently on account of the perceived sensitivity of instituting proceedings against the commander of

¹² Inspector Viljoen was a member of the PITU's complement with whom the appellant appears to have been on good terms. Viljoen accompanied him to the meeting with Deputy President Mbeki and, together with the appellant, was admitted to the Deputy President's presence, before Commissioner Fivaz who had been waiting outside, was called in to join the meeting.

¹³ One of the charges (that in respect of count 42) was withdrawn by the prosecutor.

¹⁴ The evidence was to the effect that the internal processes were not pursued in the end because the appellant had been automatically dismissed from the SAPS consequent upon his conviction and custodial sentences.

a police unit that had been especially established at the direction of the President.

139. The charges brought against the appellant included several counts of fraud, one of theft, a charge of obstructing or defeating the ends of justice, the unauthorised removal of a prisoner from a prison in contravention of the Correctional Services Act and charges of drunken driving and leaving the scene of an accident. As the judge a quo noted, 'the counts of fraud and theft all pertained to alleged financial and related irregularities by the plaintiff within the unit, in particular his rental of two vehicles without authority, claims that he made for subsistence and travel allowances; rental of two safe houses without the necessary authority, payment of fees to three informers, and theft of furniture from a unit safe house. The ... charges of drunken driving and leaving the scene of an accident arose from a collision in Higgovale in which the plaintiff was involved early on the morning of Sunday, 27 July 1997'.¹⁵

140. After a lengthy trial the appellant was convicted in the regional court at Wynberg in 2002 on 15 counts of fraud and of drunken driving and leaving the scene of an accident. He was sentenced to nine years' imprisonment and ordered to pay a certain amount in money to the state in compensation.

141. The appellant appealed against the judgment of the regional court. After several years delay, the appeal was eventually heard by Traverso AJP and Le Grange J in 2009. The appeal was successful, and the convictions and

¹⁵ In para 29 of the judgment at first instance.

sentence were set aside. In the result the appellant was ultimately acquitted and discharged on all of the charges upon which he had been tried. The institution of the civil claim for damages for malicious prosecution that came before the court a quo followed three years later, in 2012.

The essentialia of the case that the appellant had to make in order to succeed in the court a quo

142. It was not disputed, correctly so, that in order to succeed in his action in the court a quo the appellant had to prove on a balance of probabilities –

142.1 that the police officers identified in his claim ¹⁶ (acting within the course and scope of their employment) set the law in motion (by instigating or instituting the criminal proceedings);

142.2 that they acted without reasonable and probable cause;

142.3 that they acted with ‘malice’ (or *animo injuriandi*); and

142.4 that the prosecution has failed.

(See e.g. *Minister of Justice and Constitutional Development and Others v Moleko* [2008] ZASCA 43, [2008] 3 All SA 47 (SCA), 2009 (2) SACR 585, at para 8 and *Rudolph and Others v Minister of Safety and Security and Others* [2009] ZASCA 39, 2009 (5) SA 94 (SCA), 2009 (2) SACR 271; [2009] 3 All SA 323, at para 16.)

143. I consider that the appeal can be disposed of on a determination of the narrow question of whether the appellant satisfied the requirement of showing that the

¹⁶ Director Knipe, Superintendents Rossouw, Bouwer and Senekal, and Inspector Smith.

prosecution had been instituted without reasonable and probable cause. The discussion that follows therefore focuses primarily on that aspect of the case.

The appellant's case in the court a quo

144. Only two witnesses were called in support of the appellant's claim at the trial; the appellant himself and a certain Mr Zenzile Khoisan. I shall discuss their evidence only to the extent strictly necessary for the purpose of this judgment. Any reader seeking a more comprehensive review of the evidence is referred to the judgment of the trial court.

145. The appellant's evidence, which is reviewed at length in the judgment of the court a quo, traversed the charges that had been brought against him and his explanations as to why he considered that there had been no substance in them. I must confess that I found some of the explanations difficult to understand. For example, it was not clear to me why the appellant should have used accommodation hired at his instance as safe houses for the PITU for the accommodation of his family. I also found it difficult to understand why the appellant should have been entitled to draw a subsistence allowance for living in Cape Town, when it appears that he had effectively been posted there indefinitely for the purposes of the PITU's operation and had set up house there with his wife and children. His explanations concerning certain payments made to informers and in reimbursement of money expended by Palazzolo in taking him on a trip to Angola were also rather opaque. The appellant testified that some of the allegations concerning the apparent financial irregularities of which he had been accused had arisen out of a lack of appreciation by his accusers

that the PITU's covert activities were being financed out of the SAPS open account instead of - as would ordinarily be the case in such matters - out of the secret account. According to him, this was done to keep the expenditure from coming to the attention of a senior police officer alleged to be complicit with Palazzolo, who had access to the information on the operation of the secret account.

146. Nothing turns on any of these matters, however, because the question that the court a quo had to determine at the end of the trial on the separated issues was not whether the appellant was innocent of the charges preferred against him, but rather whether he had satisfied all the requirements for his claim of malicious prosecution on a balance of probabilities.

147. In addition to giving reasons why he considered himself innocent on the charges preferred against him, the appellant testified that in his opinion Messrs Knipe and Smith had been motivated by malice in initiating and conducting the investigation against him. He made similar allegations against Senior Superintendent Rossouw, who was Knipe's principal assistant in the investigation.

148. Smith's malice was attributed by the appellant to Smith's resentment at the manner in which he was given a subsidiary role in the operations of the PITU, in particular, by being superseded as second in command of the unit by a certain Captain Benn who had been recruited to the unit by the appellant. The appellant also suggested that some of the content of the affidavit made by Smith reflected outside influence by other policemen. That allegation has to be

seen in the context of the appellant's evidence that he had been the target of a number of old order police officers.

149. There was a very recognisable concurrence between many of the allegations made in Smith's July 1997 affidavit and the nature of the charges subsequently preferred against the appellant. The only ones that were not connected were those arising from a motor vehicle collision in which the appellant had collided with two vehicles parked on the side of Bellevue Road in Higgovale, Cape Town on 27 July 1997, some two weeks or so after Smith had made the affidavit.

150. Knipe's malicious intent was attributed to his alleged hostility to the appellant predicated on the latter's knowledge of Knipe's alleged involvement on behalf of the apartheid era government in certain unlawful operations conducted by the Security Branch of the SAP. In this regard, the appellant alleged that the Murder and Robbery Unit of the SAP, to which Knipe had belonged before the establishment of the SAPS, had played 'a crucial role in sweeping those crime scenes' to clear them of any evidence that would link back to the Security Branch. He said that Knipe had been 'a notorious name' in the Murder and Robbery unit.

151. The appellant acceded in cross-examination to a proposition by the respondent's counsel that his case essentially was that '[i]t was the former Apartheid-era policemen who did not want you in the province, who were malicious, and they contrived and orchestrated this process'. In answer to the question 'Is that what you are saying?', the appellant replied 'That is exactly

what I am saying, M'Lady'. Later in his evidence, and consistently with the allegation he had made in his particulars of claim, the appellant averred that the police had procured 'false statements against the [appellant] ... in terms of section 204 of the Criminal Procedure Act from junior officers, informers and other witnesses who did not want to give statements on a voluntary basis'.¹⁷

152. In this regard he named the witnesses as Inspector Smith, Captain Dorothea ('Thea') van der Westhuizen, Mr Anwar April, Palazzolo, Captain Benn, Ms Zoe Gillot and Ms Alvira Williams. He named the same persons as having been threatened with prosecution by Knipe and Senior Superintendent Rossouw should they not make incriminating statements against him. The appellant also identified the prosecutor in the case, Adv Bouwer of the office of the then attorney-general, as having had a malicious intent to harm him. But his counsel confirmed, in answer to questions from the trial judge, that the claim was predicated only on a so-called 'malicious investigation' by the police, and not on the actions of the prosecuting authority. The appellant also confirmed in answer to a reiterative question by the respondent's counsel that the foregoing 'complaints' were 'effectively the basis of [his] cause of action', maintaining that 'the malice [was] demonstrated by the fact that these persons were threatened, they were forced to make statements against their will and they were made to lie in their statements'. At another stage of his evidence, the appellant conceded that 'central to his claim' was his allegation that Messrs Knipe and

¹⁷ There is actually no such thing as a 'statement in terms of s 204 of the Criminal Procedure Act'. It is apparent from the context of his evidence that the appellant's use of the expression was intended to refer to the obtaining of statements from witnesses who might be expected or required to give self-incriminating evidence in the course of their testimony against the appellant at his criminal trial.

Rossouw had behaved 'improperly [by] going to witnesses, [and] placing them under pressure to get them to incriminate [him] falsely'.

153. Yet, under cross-examination by the respondent's counsel in the court a quo the appellant was constrained to acknowledge that it was evident from the transcript of the evidence at his criminal trial of each of the witnesses whom he alleged had been pressured to make false statements against him that they had denied being pressured into making false statements against him. Indeed, it was shown that Ms Williams had in fact made a second police statement that differed from her first statement in a manner favourable to the appellant's case, and that she had done so at the instance of a friend of the appellant's. Those witnesses who had made one or more contradictory affidavits during the police investigation explained to the regional court that they had initially given false statements of their own accord in order to protect the appellant. They confirmed that the oral evidence that they gave in court was the truth. The appellant did not call any of them to refute the evidence that they had given in the criminal court. Smith and van der Westhuizen, who testified in the court a quo at the instance of the respondent, in point of fact reiterated their earlier denials that they had been pressured into making false statements. Smith confirmed that Knipe had placed him under pressure during the investigation, but made it plain that the pressure had not been directed at leaning on him to make false statements.

154. It was actually of no moment for the purposes of the appellant's claim that a witness statement may have been procured by the police by putting the subject

under pressure or threatening him or her with prosecution. The only things that are material in this regard are that the police officer does not prevail on the witness to give false evidence and that the policeman does not use the statement for the purposes of initiating a prosecution when he has no reasonable belief in the truth of the statement.

155. In the result, the appellant's evidence did not establish that the witness statements procured by the SAPS were falsely procured or that their content was contrived. That highlighted the importance to the appellant's case, if he were to be able to succeed, of putting the content of the police dockets before the court a quo to show that on their face the evidence procured by the police did not make out reasonable and probable cause and that the police officers concerned must have appreciated that there was no valid basis to submit the cases for prosecution.

156. As it was, the court was given insight into the content of only two of the dockets - and that in the course of the cross-examination of the appellant by the *respondent's* counsel. As the discussion of that insight that will follow presently after my treatment of Mr Khoisan's evidence will show, the evidence concerning the content of those dockets was not helpful to the appellant's case.

157. Mr Khoisan, the third party witness called in support of his claim by the appellant, was a newspaper journalist. He had written an article in the Mail & Guardian newspaper in November 2000, during the criminal trial against the appellant, in which allegations were made that Director Knipe had 'used his senior position in the police to intimidate witnesses and threatened to topple the

African National Congress government'. It included the statement that '*Knipe threatened to "bring down" the ANC government if it continued with a covert operation aimed at exposing senior civil servants and senior policemen connected to Mafia boss Vito Palazzolo ...*'

158. Mr Khoisan testified that the basis for his article had been a tape recording made by Inspector Smith of an interview that the latter had had with Knipe in the course of the police investigations into the PITU's activities. He said that he had obtained the tape from a well-placed 'very senior' source (whom he did not feel at liberty to identify), and had confirmed its authenticity with Smith prior to the publication of the story. He was unable to produce the tape or say what had become of it.

159. The court a quo dealt in some detail with Mr Khoisan's evidence and found it to be contradictory and unreliable in certain respects. Mr Smith confirmed that he had indeed made a tape of an interaction with Knipe and stated that he had given it to the appellant's legal representatives during the criminal trial. Subsequent communications between the appellant's counsel in the criminal trial¹⁸ and the Cape Bar Council bore out Smith's evidence in that respect. Smith testified in the court a quo that he had no recollection that Knipe had uttered any threats to bring the down the government. He also denied that he had ever spoken to Khoisan about the content of the tape.

160. In my judgment, Khoisan's contribution did nothing to cure what had been lacking in the appellant's evidence. It might, if its veracity were accepted, have

¹⁸ Different counsel appeared for the appellant in this court and in the court a quo.

served to provide material for the appellant to argue that Knipe had been moved by ulterior motives in the investigation, but it did not in any way advance the appellant's case that there had not been reasonable and probable cause for the prosecution.

161. Turning now, as promised, to a consideration of the content of the two dockets into which the evidence in the court a quo gave some insight.

162. It will be recalled that the appellant was acquitted on appeal on the charges of drunken driving and leaving the scene of the accident. Those charges related to an event that it was uncontested had occurred. The appellant had driven the Audi motor vehicle hired by the PITU that he was using at the time into two parked cars in Bellevue Road sometime between 7 o'clock and 8:30 on a Sunday morning. The impact had been sufficient to dislodge one of the wheels of the Audi. In the court a quo the appellant was taken by the respondent's counsel in cross-examination to several of the eyewitness statements in the relevant police docket. These showed that a number of persons at the scene of the collision, including a practising advocate who lived in a house nearby, had observed on the scene that the appellant had been unsteady on his feet and was unable to speak normally immediately after the collision. Some of the witnesses stated in their witness statements that the appellant had smelled of alcohol. Some of them also described how the appellant had been removed from the scene of the collision by someone in a white BMW before the arrival of the police, who had been called to the scene.

163. These witnesses had no connection whatsoever - or at least none that was identified in the evidence - to Messrs Knipe or Rossouw or the police force. Their statements, considered together, certainly made out a prima facie case for prosecution. It could not be suggested on the face of it that a prosecution instituted on the basis of such evidence would lack reasonable and probable cause. Yet the appellant contended that it was only after Superintendent Rossouw took over the investigation that the case took some direction. He stated that the terminology used in the witness statements to the effect that he had appeared to be strongly under the influence of liquor indicated the malicious input of Rossouw. He did not adduce any evidence from the makers of the witness statements that their content was fabricated or false.

164. In my judgment the attempt by the appellant to categorise the charges brought against him arising out of the incident on Bellevue Road as malicious prosecution was risible in the circumstances.¹⁹

165. The only other docket related to the charges preferred against the appellant that the evidence in the court a quo gave some insight into was that concerning the charge of fraud related to the procurement of an airline ticket for the above-mentioned Ms Alvira Williams. Both the statements of Alvira Williams referred to earlier evidenced prima facie wrongdoing by the appellant that would have justified the institution of the charge related to the expenditure of state moneys on her airfare from East London to Cape Town. Neither of the statements

¹⁹ It bears mention in this regard that the witness statement of the medical doctor who was called to the appellant's house to examine him approximately three to four hours after the incident was amended from the form in which it had originally been given. It was apparent from the evidence in the criminal trial to which reference was made in the court a quo that the amendment had been procured at the instance of the member of the Attorney-General's office in charge of the prosecution, not that of any of the investigating policemen.

given by Ms Williams bore out the reason given by the appellant in the written requisition for the flight ticket.

166. The written requisition for the payment of Ms Williams' airfare, 'SAP Miscellaneous Claim Form SAP 174' was supported by an 'information note' that stated that Ms Williams was 'a potential source' who could give valuable information with regards to Operation Intrigue and had direct knowledge of 'the key role players'. Ms Williams, who was a friend of the appellant's wife, stated in her first witness statement that she had no knowledge of Operation Intrigue or of 'role players'. In her second statement she said that the appellant had raised the possibility of employing her as an informer, but it was evident that no steps had been taken to engage her in that capacity in the intervening 5 months between her visit to Cape Town in September 1997 and the appellant's arrest in February 1998.

167. It was irrelevant that the appellant sought to explain himself on the merits of the charge to the court a quo, and unnecessary for the trial judge or this court to express an opinion on the persuasiveness of his explanation. The only matter of relevance was whether the evidence in the state's possession, assuming that it had not been falsely procured, sustained a decision that there had been just and reasonable cause to prosecute. In my judgment (and evidently also that of the then Attorney-General of the Western Cape, Mr Frank Kahn SC, and the then National Director of Public Prosecutions, Mr Bulelani Ngcuka), it did.

168. More importantly, however, the exercise that the respondent's counsel went through with the appellant in respect of the drunken driving charge showed - as

it was expressly indicated to the appellant by the respondent's counsel that it was intended to - that any assessment of whether there had been reasonable and probable cause for the prosecution required a consideration of the witness statements in the relevant police dockets. If those statements made out on their face a basis for the prosecution (as the content of the dockets in the driving offences and the Williams matters did), then it ordinarily would follow that there would have been reasonable and probable cause for the institution of proceedings. This much is illustrated by the following observation by Cameron JA in *Murray v Minister of Defence* 2009 (3) SA 130 (SCA),²⁰ at para. 46: '*Prosecution may be justified if there is a prima facie case, consisting in allegations, supported by statements and real and documentary evidence available to the prosecution, of such a nature that if proved in a court of law through admissible evidence, should result in a conviction*'.

169. The position would be different, of course, if the evidence had been falsely or dishonestly procured, or the investigators had no belief in the truth of the witness statements.

170. The test for absence of reasonable and probable cause was formulated by Schreiner JA as follows in *Beckenstrater v Rottcher and Theunissen* 1955 (1) SA 129 (A) at 136A-B:

When it is alleged that a defendant had no reasonable cause for prosecuting, ... this [means] that he did not have such information as would lead a reasonable man to conclude that the plaintiff had probably been guilty of the

²⁰ Also reported at [2008] ZASCA 44; [2008] 3 All SA 66 (SCA); [2008] 6 BLLR 513 (SCA); 2008 (11) BCLR 1175 (SCA) and (2008) 29 ILJ 1369 (SCA).

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.

That formulation has been endorsed in a number of subsequent judgments of the appeal court; see, for example, *Relyant Trading (Pty) Ltd. v Shongwe and Another* [2006] ZASCA 162; [2007] 1 All SA 375 (SCA) at para 14, *Maleko supra*, at para 57; *Minister of Safety and Security v Tyokwana* [2014] ZASCA 130; 2015 (1) SACR 597 (SCA), at para 14 and *Magwabeni v Liomba* [2015] ZASCA 117 (11 September 2015) at para 10-11.

171. The test shows that in the context of the current case in order to prove the lack of reasonable and probable cause the appellant had to show –

- (i) that the content of the police dockets submitted by the investigators to the prosecuting authority did not contain witness statements and/or reveal the existence of real and documentary evidence that would show a reasonable basis for the institution of a prosecution; and/or
- (ii) assuming that they did, that the investigators nevertheless subjectively had no belief in the truth of such evidence.²¹

He failed to do this. For that reason, the trial should, in my view, actually have ended with an order - as sought by the respondent - for absolution from the

²¹ It would be a good defence for a defendant in a malicious prosecution case to show that even when the evidence did not objectively justify the institution of a prosecution, he reasonably and honestly believed it did; see *Tyokwana supra*, at para 15.

instance at the end of the appellant's case. No prima facie case had been made out.

172. Despite being expressly alerted in the cross-examination as to what would be required if he were to succeed with his claim, and notwithstanding that all the dockets had been discovered by the respondent and made available to him, the appellant neglected to show that their content could not sustain the foundation for the bona fide institution of the criminal proceedings, nor did he show that the witness statements and/or documentary evidence in the dockets had been falsely procured. There was also no evidence to prove that the investigators did not believe in the truth of the content of the witness statements that they had procured. On the contrary, the evidence adduced by the respondent through the testimony of Knipe, Rossouw, Van der Westhuizen and Smith was to the opposite effect.

173. In the circumstances, even assuming in the appellant's favour that the persons named in his pleading had acted maliciously in the relevant sense of the word (as to which I find it unnecessary to make any finding), he failed to make out a case. As Harms JA noted in *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1, 2009 (2) SA 277 (SCA), 2009 (1) SACR 361, 2009 (4) BCLR 393, [2009] 2 All SA 243, at para 37, '*A prosecution is not wrongful merely because it is brought for an improper purpose. It will only be wrongful if, in addition, reasonable and probable grounds for prosecuting are absent.*'²²

²² See also *Maleko* supra, at para 57, citing *Beckenstrater* supra, at 135D-E.

Conclusion

174. In the result, his claim was correctly dismissed by the trial court and his appeal had no merit.

175. I would have made the following order:

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

A.G. BINNS-WARD

Judge of the High Court