

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, MAKHANDA**

CASE NO: CA264/2017

In the matter between:

ANDERSON LUMKILE MNDELA

Appellant

and

SEDRICK SIMON AMSTERDAM

Respondent

JUDGMENT

Bloem J

1. This is an appeal against a magistrate's award of damages in favour of the respondent against the appellant for R70 000, interest thereon and costs. The appellant and the respondent are correctional officials employed by the Department of Correctional Services (the Department).
2. In his particulars of claim the respondent alleged that the appellant wrongfully and maliciously initiated internal disciplinary proceedings against him by giving false information about his alleged involvement in misadministration, corruption and other acts of misconduct; that when the appellant initiated those disciplinary proceedings, he had no reasonable cause for doing so and he had no reasonable belief in the truth of the information given and he did so with the sole intention of defaming the respondent and injuring his reputation; that as a result of the appellant's conduct, the Department instituted an investigation against the respondent; and that the charges preferred against him in the disciplinary proceedings were withdrawn on 7 February 2007. The respondent alleged that as a result of the appellant's above conduct, he suffered damages in the sum of R50 000, in respect of the humiliation and discomfort that he allegedly suffered and R25 000 for damage to his reputation.

3. In his plea the appellant denied that he acted maliciously towards the respondent, as alleged or at all. He alleged that on 28 August 2004 the Area Commissioner of the Department, Mr Msenge, instructed him to investigate and compile a report on the respondent's alleged misadministration, corruption and misconduct. He conducted the investigation and compiled a report dated 5 November 2004, which was submitted to Mr Msenge on that same date. In that report he recommended, based on information gathered during the investigation, which information he believed to have been true, that disciplinary proceedings be instituted against the respondent. The appellant pleaded that it was the acting regional commissioner who decided to institute disciplinary proceedings against the respondent.
4. There are two, possibly three, issues to be decided in this appeal. The first is whether the appellant, his employer or both should be held liable. The second issue is who initiated the proceedings against the respondent. If the first two issues are decided in the respondent's favour, the third issue is whether R70 000 represents fair compensation for the damage that the respondent suffered as a result of the malicious proceedings that the appellant instigated against him.
5. It is undisputed that on Friday, 26 August 2004 the respondent submitted his written application for leave of absence to the relevant manager responsible for leave at the Middelburg Correctional Centre. That manager approved the respondent's application to be on leave from Monday, 30 August 2004 to Friday, 3 September 2004. For what it was worth, Mr Msenge approved the application for leave on either 2 or 4 September 2004. The respondent arranged for a Mr van Vuuren to act as head of the Middelburg Correctional Centre while he was on leave.
6. When the appellant was on duty on Saturday, 28 August 2004, he saw, for the first time, a facsimile dated 27 August 2004, which was addressed to the head of the correctional centres at Middelburg, Cradock, Burgersdorp, Somerset East and Graaff Reinet. At the time the appellant was the head of the correctional centre at Cradock while the respondent was the head of the

correctional centre at Middelburg. The facsimile was received by the respondent's office on that Saturday.

7. In the facsimile Mr Msenge forwarded the program of a meeting, to be held at his office and which those heads were required to attend, to them. When Mr Msenge saw that facsimile on that Saturday, he wrote the following on it for the attention of Mr van Vuuren, *"Can you please attend this meeting? If you can't, can you send somebody to represent me."*
8. It is undisputed that the respondent did not telephone Mr van Vuuren on that Saturday or on the Sunday to request him to attend the meeting and that, when Mr van Vuuren reported for duty on Monday, 30 August 2004, it was too late for him or anyone else to travel to East London to attend the meeting on behalf of the respondent.
9. The appellant received a letter dated 2 September 2004 from Mr Msenge wherein he was instructed *"to probe the reasons for the failure of Middelburg correctional centre to attend the Area Management Board Meeting that was held on 30 August 2004"*, to *"investigate any other malpractice related incidents, which may surface during your investigation"* and to finalise the investigation on or before 17 September 2004. The appellant conducted an investigation and submitted a report dated 19 November 2004 to Mr Msenge. Attached to the report were all the written statements and other documents that the appellant obtained from the various departmental officials during the investigation. The appellant did not himself make a statement to form part of the report. In that report, the appellant recommended that disciplinary action be taken against the respondent and *"that he be removed from his position of trust as Head of the Centre as he can no longer have any firm control over his subordinates. He must also pay all monies that the Department lost due to his corrupt practices"*.
10. It is common cause that Mr Msenge approved the appellant's recommendations. He forwarded the report, with annexures thereto and his recommendations, to the regional commissioner, who also approved the appellant's and Mr Msenge's recommendations and instructed that disciplinary

action be instituted against the respondent. As it turned out, the appellant was appointed as the initiator. Disciplinary proceedings were in due course instituted against the respondent. On 22 March 2006 the presiding officer terminated the disciplinary proceedings against the respondent because “*the hearing of Mr Mandela has dragged for more than a year and as such the charges must fall away.*” It is against the above factual background that the respondent instituted an action for malicious proceedings against the appellant.

11. Regarding the first issue, it is trite law that an employer is liable for the delicts of an employee if such a delict was committed by the employee while acting within the course and scope of his employment with his employer. Whether the appellant was acting within the course and scope of his employment with the Department to attract liability is a factual enquiry.
12. The appellant was at all material times an employee of the Department. It was common cause during the trial before the magistrate and at the hearing of the appeal that the appellant performed the investigation on Mr Msenge’s instruction and conducted the disciplinary proceedings against the respondent on the regional commissioner’s instructions. During cross-examination the respondent conceded that, without instructions from either or both of the area and regional commissioners, he would not have had authority to investigate or institute disciplinary proceedings against the respondent. In other words, absent those instructions, the appellant would not have performed his employer’s duties. Had he refused to either conduct the investigation or institute the disciplinary proceedings against the respondent, the appellant could lawfully have been charged with having refused to obey a lawful instruction.
13. In the circumstances, it is found that, when the appellant conducted the investigation and when he instituted the disciplinary proceedings against the respondent, he did so while acting within the course and scope of his employment as employee of the Department. That much was pleaded by the respondent, who alleged in his particulars of claim that the respondent, “*in his capacity as an employee of the Department of [Correctional Services]*

wrongfully and maliciously initiated internal disciplinary proceedings with the Department of Correctional Services” against him. The Minister of Correctional Services would have been vicariously liable if the respondent established the requirements of malicious prosecution. The respondent could accordingly have institute an action against the Minister of Correctional Services, as political head of the Department.

14. That does not mean that the appellant could not be sued. If a defendant intentionally or negligently causes harm to a plaintiff, he is personally liable for the damages suffered by the plaintiff. Flemming DJP held in *Harnischfeger Corporation and another v Appleton and another*¹ that that would be the case even if the plaintiff’s employer is rendered vicariously liable because of the employee’s conduct. Such an employee:

“... does not cease to be liable because the employer is liable. The employer is also liable; he is not exclusively liable. The relationship between employer and the activity of his employee is a basis for holding an additional party liable and not a ground for absolving the person who actually committed the delict.”

15. In the circumstances of this case, if it is found that the respondent satisfied all the requirements of the claim of malicious prosecution against the appellant, the appeal should be dismissed. The appellant would then be liable as the person who committed the delict. The first issue is therefore decided in the respondent’s favour. I now deal with whether or not the respondent proved the claim of malicious prosecution against the appellant.
16. To succeed with his claim for malicious prosecution against the correct defendant, the respondent was required to prove that: (i) such defendant set the law in motion (instigated the proceedings) against him; (ii) such defendant acted without reasonable or probable cause when he set the law in motion; (iii) such defendant was actuated by malice when he set the law in motion; and (iv) the proceedings that such defendant set in motion against him, terminated in

¹ *Harnischfeger Corporation and another v Appleton and another* 1993 (4) SA 479 (W) at 478C-D.

his (the respondent's) favour.² What needs to be determined in this appeal is whether or not it was the appellant who set the law in motion against the respondent. Ms Nel, attorney for the respondent, submitted that the appellant set the law in motion against the respondent because, had it not been for his report, disciplinary action would not have been instituted against him.

17. The facts are that it was Mr Msenge who instructed the appellant to investigate the absence of officials from the Middelburg Correctional Centre at the meeting in Cradock on 30 August 2004 and to investigate any other malpractice which may surface during the investigation.
18. After the investigation, the appellant handed the report to Mr Msenge. At that stage, the appellant left it to Mr Msenge to decide whether or not to follow his recommendations. Mr Msenge was required to consider whether or not each of the findings that the appellant had made against the respondent was supported by the contents of the statements and other documents which were attached to the report. Mr Msenge approved the appellant's recommendations that disciplinary proceedings be instituted against the respondent. The report, with Mr Msenge's recommendations, was then forwarded to the regional commissioner. She was also required to consider whether or not the report, the contents of the statements and other documents provided a basis for disciplinary proceedings against the respondent. She approved Mr Msenge's recommendation that disciplinary proceedings be instituted against the respondent. As a result of those recommendations the appellant was instructed to institute charges against the respondent. The respondent was charged with having absented himself without leave on nine days before 30 August 2004 and that he allegedly knocked off duty before he was allowed to leave on five days, *"which resulted into misuse of your position, maladministration/malpractice and corruption"*. (sic)
19. In my view, it was Mr Msenge who initiated the investigation, which the appellant conducted, and it was the regional commissioner who initiated the disciplinary proceedings, which the appellant instituted against the respondent.

² *Minister of Justice and Constitutional Development v Moleko* [2008] 3 All SA 47 (SCA) at par 8.

It was the regional commissioner's conduct in respect of the institution of the disciplinary proceedings that factually caused the respondent to be prosecuted.³ She decided that disciplinary proceedings should be instituted against the respondent. Had she decided that, based on the report, statements and other documents, the appellant's recommendations were without foundation, she could have ordered that no disciplinary proceedings be instituted against the respondent. The appellant might have conducted the investigation and he might have instituted the disciplinary proceedings against the respondent, but he was instructed by his superiors to perform both processes. Despite the appellant's involvement in the investigation and disciplinary proceedings, the respondent failed to prove that any unlawful or wrongful conduct that there may have been on the part of the appellant factually and legally caused harm to him.⁴ Had the magistrate made that finding, she would have dismissed the respondent's claim against the appellant. In the circumstances, the submission that the appellant initiated proceedings against the respondent cannot be sustained.

20. Since the appellant was not the person who set the law in motion against the respondent, the magistrate should have dismissed his claim. The appeal must accordingly be upheld. It is therefore unnecessary to deal with the third issue, namely the assessment of the quantum of the respondent's alleged damages.
21. Mr Dala, counsel for the appellant, submitted that should the appeal succeed, it would be fair and just to order each party to pay his own costs. Ms Nel did not make submissions to the contrary in that regard. In my view, such a costs order would be just and equitable.
22. In the result, it is ordered that:
 1. The appeal be and is hereby upheld.
 2. Each party shall pay his own costs of the appeal.

³ *Lee v Minister for Correctional Services* 2013 (2) SA 144 (CC) at par 38.

⁴ *de Klerk v Minister of Police* 2020 (1) SACR 1 (CC) at para 59-60.

3. The magistrate's judgment is set aside and replaced with the following:

"1. The plaintiff's action is dismissed.

2. Each party shall pay his own costs of the action."

GH BLOEM

Judge of the High Court

I agree.

SJ CUBUNGU

Acting Judge of the High Court

For the appellant:

Mr I Dala, instructed by the State Attorney,
Gqeberha and Netteltons Attorneys,
Makhanda.

For the respondent:

Ms ID Nel of ID Nel, Minnaar and de Kock,
Middelburg and Dold and Stone Attorneys,
Makhanda.

Date of hearing:

27 January 2023.

Date of delivery of judgment:

7 February 2023.