

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 80233/2014

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: NO
- (2) OF INTEREST TO OTHERS JUDGES: NO
- (3) REVISED

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DATE: April 2017

In the matter between:

WELMA RICKA POTGIETER

Plaintiff

and

MINISTER OF POLICE

First Defendant

JACQUES FERREIRA

Second Defendant

JUDGMENT

C R JANSEN, AJ

- [1] In this matter the plaintiff sues the first and second defendants for damages based on the alleged malicious prosecution of the Plaintiff.
- [2] Merits and quantum were separated for purposes of this trial and therefore only the issue of liability is to be decided.
- [3] The plaintiff is a warrant officer in the South African Police Service and has 25 years' service in the police. At the time of the trial, she was stationed at the Ogies detective branch. At the time the prosecution was instituted in December 2000, she was stationed at the Witbank detective branch.
- [4] The second defendant is a colonel in the counter intelligence section of the South African Police based in Mpumalanga. He was similarly stationed at the Witbank detective branch in December 2000 and was at all relevant times the investigating officer in the prosecution against the plaintiff.
- [5] In terms of the pleadings, it is alleged that the second defendant unlawfully and maliciously set the law in motion against the plaintiff on

15 December 2000. The second defendant (to whom I shall refer to as Ferreira) had the Plaintiff charged with theft, corruption and defeating the ends of justice. The charges related to the presumed theft of a murder docket and the attempted sale of the docket to the murder accused in that case.

[6] After 35 court appearances, spanning over a period of 12 years, the plaintiff was eventually acquitted of all charges. The plaintiff was in fact discharged after the State's case in terms of section 174 of the Criminal Procedure Act 51 of 1977.

[7] For the Plaintiff to succeed in her claim, she must prove the following:

7.1 that Ferreira set the law in motion against her in the sense that he either instigated or formally instituted the proceedings;

7.2 that there existed no reasonable or probable cause to set the law in motion;

7.3 that Ferreira acted with malice; and

7.4 that the prosecution ultimately failed.¹

[8] The facts which gave rise to this most unfortunate saga started in December 1999. At the time, Ferreira was investigating a charge of murder against one Petronella van der Merwe and, as such, the relevant case docket was under his control and kept at his office at the Witbank Police Station.

[9] At the time, Ferreira held the rank of captain in the detective branch. The Plaintiff was also stationed at the Witbank detective branch but in a different section than that which Ferreira was in.

[10] The Plaintiff was in command of a separate section of the branch and did not work on the same dockets as Ferreira.

[11] On 31 December 1999, Ferreira received information that the murder docket against Van der Merwe had been stolen and that someone was attempting to sell it to Van der Merwe. As a result of this information, Ferreira had to interrupt his plans to go on leave for the New Year's weekend and returned to his office to follow up on the lead.

¹ See *Prinsloo and another v Newman* 1975 (1) SA 481 (A) at 491H, *Minister for Justice and Constitutional Development v Moleko* [2008] 3 All SA 47 (SCA) at para [8]; *Rudolph and Others v Minister of Safety and Security and Another* 2009 (5) SA 94 (SCA) at paras [16] to [18].

- [12] An arrangement was set up between the informant and the person attempting to sell the docket to meet at some point to effect the transaction. Before proceeding with his informant to the place arranged, Ferreira contacted a colleague of his who was on duty and requested him to check whether the docket was, in fact, missing. His colleague, a Sergeant Masanga, could not find the docket.
- [13] Later that afternoon, Ferreira arrested a person in respect of the theft of the docket. However, the person was not found in possession of the docket although, when arrested, he acted very suspiciously as he attempted to destroy the sim card in his phone. This person was later identified as one Johan Malan.
- [14] As things turned out, the docket did arrive at the next court appearance early in January 2000. However, the docket appeared to have been mishandled and appeared crumpled.
- [15] Although there is no direct evidence as to how the docket was returned to its rightful place in the system which sees the dockets move from the police station to the court, it is obvious from other evidence that the docket was in fact stolen, and was returned into the system before the next court date.

- [16] Johan Malan became the first accused in the subsequent prosecution in the matter of theft of a docket, corruption and defeating the ends of justice.
- [17] Ferreira investigated the phone calls that Johan Malan had made. The investigation led him to the then spouse of the plaintiff, a Mr Hennie van Loggerenberg. Malan had made a number of phone calls to Van Loggerenberg during the relevant period leading up to the events of 31 December 1999. Ferreira later learnt that the plaintiff and Malan's spouse were acquaintances.
- [18] On the evidence led during this trial, the above information can be considered to be common cause or not seriously in dispute. From a later statement that Van Loggerenberg made, when he became a section 204 witness for the State, it is clear that the docket was in fact stolen and that he and Malan had been involved in the theft and the later attempts to sell the docket.
- [19] It is, however, at this point, where the involvement of Van Loggerenberg was established, that the further facts in this matter become seriously in dispute.

[20] The disputed facts become further complicated by the animosity between the plaintiff and Ferreira.

[21] The first events relevant in this matter relate to the arrest and initial release of Malan. Malan was arrested on a Friday. Ferreira was already on leave and at the point of leaving on vacation. He had to return to duty as a result of the information received in respect of the stolen docket. After the arrest of Malan on 31 December 1999, he then left and opened only a “skeleton docket”. This simply means that he did not fill in the usual A1 arresting statement as complainant and arresting officer in the case.

[22] The time arranged for Malan’s appearance in court exceeded the constitutionally and statutorily determined time period of 48 hours. As Malan and Van Loggerenberg had been acquaintances, and as we later know, also accomplices, it was natural for Malan’s wife to make enquiries about his detention with the plaintiff. The latter two were also acquaintances.

[23] When the 48 hours expired after the weekend, the plaintiff arranged with one of her seniors that Malan be released. Malan was, of course,

entitled to be released at that point as his continued detention was unlawful.

[24] However, it should be noted that the plaintiff made no effort to contact Ferreira about the release of Malan. It is this small, but important fact which started the animosity between the plaintiff and Ferreira which neither of them made any attempt to defuse at any stage.

[25] It is at this stage that I wish to point to certain unfortunate aspects of the plaintiff's evidence. She was extremely dogmatic and subjective in the presentation of her evidence.

[26] This was not only true in respect of the release of Malan, but in respect of a whole range of other issues which were in dispute. She refused to acknowledge that Ferreira had real reason to be upset with the release of Malan and, more particularly, that he had not been contacted. The plaintiff's only reply to this was a very rule bound retort that the 48 hours had expired and that she was entitled to release Malan. The fact that her personal relationship with Malan would create suspicions she simply rejected as unreasonable. The contrary is true. Ferreira's unhappiness about the fact that a colleague did not even inform him, let

alone discuss with him, the release of Malan, accords with one's general experience of police practices.

[27] The same stubbornness and unreasonableness continued in respect of a number of other issues. The Plaintiff refused to accept, even 15 years after the initial events and with the benefit of all the evidence gathered since then, that the docket had, in fact, been stolen. She continued during this trial to assert that the docket had possibly just simply been misplaced within the police station. This evidence of hers is simply not acceptable and it shows her extremely unreasonable interpretation of the facts.

[28] She also continued to defend her refusal to have her fingerprints taken when requested to do so by Ferreira. She refused to acknowledge that her stance was unreasonable even though it could technically be defended. She also refused to accept that this simply further fuelled the suspicions that Ferreira had against her.

[29] Her evidence that the docket could have been handled and uplifted by any of the detectives in the branch is simply also not acceptable. It is clear that Ferreira and his three colleagues, who worked in the one

office, considered themselves to be the only persons with lawful access to the dockets in their office.

[30] The fact that Van Loggerenberg's fingerprints were later positively linked to fingerprints on the docket should have led the plaintiff to change her stance dramatically. She should have realised at a very early stage that there were very real reasons to suspect her husband of involvement, and that these suspicions would eventually lead to her being suspected as well.

[31] It also did not help the cause of either plaintiff or Ferreira that their seniors appeared to deal with the matter in a most inept manner. The station commander should have given clear direction in this matter and plaintiff's direct in command should have been more assertive in ensuring that plaintiff co-operated with the investigation of Ferreira. Instead, both of these senior officials seem to have avoided the conflict between plaintiff and Ferreira.

[32] Plaintiff, during her evidence, was quick to describe herself as a victim of Ferreira's malice, and stressed how this seriously affected her for a period of 12 years. At the same time, she did not hesitate to make completely unsubstantiated allegations against Ferreira, such as that he

had intimidated and threatened witnesses. After all these years, it should have been clear to her that these allegations or suspicions had no basis. Again, this is all evidence of her unreasonable subjectivity.

[33] Ultimately, however, this matter does not deal with the overly subjective and unprofessional behaviour of the Plaintiff. It concerns the issue whether there was a reasonable basis for prosecuting the Plaintiff and whether Ferreira was actuated by malice. It is the behaviour and the state of mind of Ferreira that must be at the centre of the considerations here.

[34] For the reasons I give below, I am of the view that Ferreira at some point during the investigation lost his professional objectivity and was, in fact, ultimately actuated by malice. It all resulted from the personal animosity between himself and plaintiff.

[35] Why the matter against the plaintiff was not investigated by an external independent division of the SAPS, which deal with alleged corruption of members, is not quite clear from the evidence. Such a unit does exist as was confirmed by Ferreira. The present matter is a good example of why allegations of corruption against police officials should not be investigated by members attached to their own divisions or police

stations. The necessity for external investigation mostly relates to the fact that the police will be suspected of covering up for each other and would not apply the necessary professional integrity to their investigations.

[36] However, the contrary is also true as this case illustrates. A police officer could also be the victim of personal animosity between him/herself and another officer stationed at the same branch. As this case illustrates, office politics can reach dangerous levels. The facts of this case clearly show that animosity between members of the same unit or division can also lead to injustice and the loss of integrity in investigations.

[37] Very early on in the investigation it became clear that Ferreira held suspicions against plaintiff. These suspicions were justified and certainly deserved further investigation and attention. However, Ferreira became entangled in the personal animosity between him and plaintiff and it is clear that he eventually shut his mind to all the exculpatory facts.

[38] Ferreira eventually presented a statement to the prosecuting authorities for purposes of a decision which contained seriously misleading factual

assertions. There is no doubt that was done intentionally and with a view of securing a prosecution against the plaintiff.

[39] Ferreira made a number of statements during the course of the investigation. It is not necessary to analyse all of them. What needs analysis is statement A47 in the docket. This is the statement which was eventually presented to the prosecuting authorities as a summary of the evidence in the docket.

[40] There are a number of factual allegations in this statement that need particular attention.

[41] Ferreira is very meticulous in the statement in analysing the phone calls made between Malan and Van Loggerenberg and a number of other persons involved. There is no doubt that an analysis of paragraphs 3 to 10 of this statement clearly shows that Malan, Van Loggerenberg and one De Fourtier were in contact with each other on various occasions between the period 24 and 31 December 1999 and the suspicions drawn from the exchange of these calls were well founded.

[42] In the statement, Ferreira does not miss the opportunity to rehash the issues relating to the initial release of Malan. He does not hesitate to

make the factual assertion that Johan Malan and the Plaintiff were good friends. This, in itself, is a serious overstatement of the facts. Plaintiff knew Malan as an acquaintance of her husband and she had had personal contact with Malan and his wife. However, to describe them as “goeie vriende” is not accurate.

[43] In paragraph 23 of this statement, Ferreira asserts that only a detective of the Witbank branch could have known when the docket had to be returned into the system. It is obvious that Ferreira wanted to create the impression that only a detective of the Witbank branch could have had access to the docket and would have known how to remove it and return it into the system.

[44] To the outside observer, this fact would appear to be conclusive in respect of creating the link between the theft of the docket and the plaintiff as the only detective in the branch who had a close link, albeit a personal one, with the persons who did in fact steal the docket.

[45] These statements by Ferreira are unfortunately not a fair and honest presentation of the facts. He completely omits to state that he was aware of the fact that Van Loggerenberg had, on a number of occasions, been at the detective branch at Witbank. He accompanied the Plaintiff to

work, especially when she worked after hours or during weekends. Whatever the propriety may be of family members accompanying a detective to his or her offices, the fact of the matter is that this fact was known to Ferreira. He acknowledged this during evidence.

[46] This issue goes further than just the presence of Van Loggerenberg at the detective branch. Ferreira attempted to create the impression that the office where he and his three colleagues worked was generally locked. However, he conceded that the office was often left open. This was confirmed by Warrant Officer Dumeleni who also testified in the matter. In fact, from his evidence, it would appear that the office was generally left open and that there wasn't always someone in the office.

[47] It is clear from the facts that Van Loggerenberg would, in fact, have had access to the office and could have removed the docket. These are extremely important facts which the prosecutor should have been made aware of.

[48] Despite the criticism that can be levelled against the plaintiff's evidence, this criticism relates to her reaction to her prosecution and this litigation. She otherwise appears as a person who takes her police work very seriously. Her character and years of service in the SAPS make it

extremely unlikely that she would have been involved in the theft and sale of a case docket. Ferreira should have factored this into his thinking. It would have opened up his mind to all the exculpatory facts of the case.

[49] Also, the manner in which Ferreira deals with the fingerprint reports in the statement to the prosecuting authorities is most unfortunate. The fingerprint reports which were returned by Warrant Officer Luus, who also testified in court, was to the effect that Van Loggerenberg's fingerprints were positively identified on the docket and that, in respect of the plaintiff, her fingerprints can be excluded from those found on the docket.

[50] During her evidence, Luus was also very clear in stating that absolutely no inference can be drawn from any of the fingerprints lifted from the docket as far as plaintiff is concerned.

[51] Luus did, however, confirm a conversation which she had with Ferreira after she had done her analysis. She confirmed that she informed Ferreira that three points of similarity had been found with one of the small fingers of the Plaintiff.

- [52] Apart from the fact that Luus had trouble distinguishing between very basic concepts, such as “probabilities”, “certainties” and terminology such as “beyond reasonable doubt”, she did confirm that no inferences can be made against plaintiff from her evidence.
- [53] Ferreira was quite assertive in respect of the fingerprint evidence in his statement to the prosecuting authorities. He stated the fact that there were three points of similarity found on the docket which accords with the one small finger of the plaintiff. But Luus said nothing of this in her report, she only mentioned this in an informal discussion. She made it clear in her evidence that no inference can be drawn from these observations.
- [54] It is well-known that seven points of similarity are needed in our criminal law to make any finding beyond reasonable doubt. The problem in this matter is what fingerprint analysis showing less than seven similarities can be used to form a reasonable suspicion.
- [55] To some extent one must rely on one’s own experience of expert evidence in this regard. It is not only the similarity between fingerprints that is relevant. Unexplained differences are also relevant. In addition, it is not a simple exponential numerical calculation to be made to assess

how much more probable four points of similarity is as opposed to three points of similarity.

[56] Fingerprint analysis is often described as an art and is most certainly a science where experience is essential. It is the spatial relationship between the friction ridges, the shape of the curves and their intersections that must be given a qualitative evaluation. Even in this day and age of automated biometric recognition, forensic fingerprint analysis is done by experts, not computers.

[57] I am mindful of the fact that no expert evidence in regard to the theory of fingerprint analysis was presented in this matter. Luus was very unclear on these aspects. However, what is clear in this matter is that the report of Luus was to the effect that the fingerprints were described as “nie identies gevind”. Luus was unfortunately very unclear about what these words mean. She confirmed that she was not satisfied with the wording used in the pro forma documents of the SAPS. From her evidence as a whole, I gather that she testified that plaintiff’s fingerprints must be considered as excluded rather than regarding the analysis as only inconclusive.

- [58] In any event, it may be that Ferreira's statement in this regard had no real influence on the prosecutor making the decision. To some extent, it must be accepted that the prosecutor would be acquainted with the general principles to be applied in respect of fingerprint analysis.
- [59] What is important is that the manner in which the evidence is presented is evidence of Ferreira's approach to the matter. He certainly tried to give every bit of evidence a slant prejudicial to the plaintiff.
- [60] The manner in which the prosecution and Ferreira dealt with Van Loggerenberg as a state witness is also telling. Ferreira was instrumental in getting Van Loggerenberg to break ranks with his co-accused and to become a state witness.
- [61] I believe the probabilities strongly favour a finding that Ferreira was actuated by malice against the plaintiff in this regard. The State had a solid case against Van Loggerenberg. There was simply no way in which he could explain away his fingerprints on the docket.²
- [62] Van Loggerenberg obviously had more than sufficient incentive to lie and to become a section 204 witness. As it would appear to have turned

² At the time of the trial, Hennie van Loggerenberg had undergone gender re-assignment and is then referred to in the record as Jeanin-Lee Xena van Loggerenberg.

out, Van Loggerenberg was a disastrous witness. This led to the ultimate demise of the State's case as acknowledged by Ferreira. At the time of the trial, plaintiff and Van Loggerenberg were no longer married.

[63] The fact that Van Loggerenberg's statement implicates the plaintiff also does not assist the defendants. Apart from the fact that the content of his evidence should have been viewed with suspicion, his section 204 statement was only obtained many years after the prosecution had been initiated. It could, therefore, not have formed the basis of any reasonable suspicion at the time when the prosecution was initiated.

[64] What I find most unacceptable in Ferreira's A47 statement is the impression that he tries to create that De Fortier was phoned by some unknown person from Witbank police station on 31 December. When paragraphs 9 and 10 of the statement are read together, it would appear that Ferreira is trying to convey to the reader that he only made the calls from the police station between 15:04 and 15:34, but not the one at 14:45. This impression which he attempts to create in his statement is not just misleading, it is downright false. From the chronology of events it is highly unlikely that the person who stole the docket did so in the afternoon of the 31st of December. The first call was made 19 minutes

before the second. It is highly probable that Ferreira also made the first one.

[65] As a result, I have come to the conclusion that Ferreira, at some point during the investigation, lost his objectivity and failed to act with the professionalism required of a police official. Such objectivity and professionalism are central to the actions of members of the police force.

[66] I further find that Ferreira's work was more than just sloppy. In fact, it was quite meticulous. Unfortunately, much of the meticulousness was maliciously aimed at creating a case against the plaintiff.

[67] His presentation of the case to the prosecutors was not fair and honest in all respects. He clearly wanted to sway the prosecutors in favour of a prosecution and he did so by including misleading statements in the A47 statement. His actions therefore fall within the requirements of having set the law in motion as described in the *Prinsloo v Newman*-case (*supra*)³, and also as having been motivated by malice.

[68] Had the facts also been fairly assessed, it would have been apparent that the plaintiff's lack of co-operation had nothing to do with a fear of being

³ ftn 1 above, at p492 A-H and p495 A.

exposed, but rather with the animosity between her and Ferreira. Her actions in releasing Malan qualify even less as suspicious behaviour. There is nothing that links her with the probable theft by Van Loggerenberg of the docket. It is simply a vague suspicion based on her personal relationship with Van Loggerenberg and Malan, coupled with the access that she had as a detective. Considering the facts of this case, which were known to Ferreira at the time, this does not constitute probable cause.

[69] It is common cause that the prosecution ultimately failed.

[70] Vicarious liability of the first defendant follows naturally from these facts.

[71] As a result, the Plaintiff's claim should be upheld and I therefore make the following order:

1. It is declared that the defendants are liable to compensate the plaintiff for the malicious prosecution of plaintiff under case docket number CAS 1028/12/1999 (Witbank), Magistrate's Court Case No SHG 114/09.

2. Defendants are to pay Plaintiff's legal costs, jointly and severally, in respect of the separated hearing regarding the merits.
3. The remaining issues concerning quantum of damages are postponed *sine die* for later determination.

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C R JANSEN AJ

JUDGE OF THE GAUTENG DIVISION, PRETORIA

Heard on: 23 and 24 August 2016; 28 November to 1 December 2016

Date of judgment: _____ April 2017

Counsel for the Plaintiff: CP Wesley

Counsel for the Defendants: A Thompson