IN THE HIGH COERT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

In the matter of:- Case no. 61509/12

14/4/2015

CAREL PETRUS LINDE PLAINTIFF

and

THE MINISTER OF POLICE IST DEFENDANT

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS 2^{ND} DEFENDANT

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

13-4-2015 .... DATE .... SIGNATURE

JUDGMENT

1. Plaintiff's causes of action against the defendants are twofold: First, a claim for wrongful and unlawful arrest against First Defendant and, secondly, a claim against the First and Second Defendants for malicious prosecution. The particulars appear from the pleadings and need not be repeated.

2. At the commencement of proceedings the Plaintiff applied for a separation of issues in terms of Rule 33(4). After having heard argument, I granted the application and ordered that the issues pertaining to liability and quantum, respectively, be separated, that the trial would continue regarding the issue of liability only, and that the issue of quantum be postponed sine die. Costs were to be in the cause.

3. Plaintiff practices as an environmental specialist in Pretoria. As such he, inter alia, often, and in the course of his practice, lodges applications for land use approvals, new developments, and the like, with the relevant state departments, on behalf of clients. On 29 April 2009 the Plaintiff filed a rectified application for environmental authorisation in terms of the National Environmental Management Act, 1998, for a proposed township establishment, with the Limpopo Department of Economic Development ("the Department"). In so doing, the Plaintiff acted on the instructions of one Mr. Botha (a Town Planner), who, in turn, acted for the developer of the

proposed township, a certain Mr. Bornman. The purpose of the application was to obtain the necessary "Record of Decision" from the Department.

4. Full particulars regarding the history of the application appear from the statement by Ms. Rodgers, an employee of the Department, as that statement appears at page 60-61 of Bundle "C".

5. The approval of the application for obtaining the required Record of Decision ("ROD"), was taking up too much time for the liking of Mr. Botha and the latter's client. Mr. Botha (acting upon the advice of one Mr. Joubert), thereupon instructed the Plaintiff to contact a certain Mr. Norman Mathebula who, according to the information that Botha had obtained, was a former official of the said department and who, moreover, had the necessary "contacts" within the department and also the "know-how" to speed up the process of obtaining the ROD. Botha provided the Plaintiff with the necessary information regarding the contact details of Mathebula and also said that the client was willing to pay Mathebula's fee for the work to be done by him. Plaintiff thereupon contacted Mathebula with the request that he should see to it that the process for approval be speeded up. The nature of the work to be performed by Mathebula has been described by witnesses as being that of a "foot soldier" who "knocks on doors" to make enquiries and hence exert pressure on departmental officials.

6. Towards the end of May 2008 Mathebula informed the Plaintiff that the ROD had been issued. Mathebula personally brought the ROD to Plaintiff in Pretoria and was paid R5000 by Plaintiff for his services. The alleged ROD furnished by Mathebula to Plaintiff appears at p. 50 and further, of Bundle "C". The covering letter to the alleged ROD appears on page 49 of Bundle "C". As part of the alleged ROD, and at p. 77 of Bundle "C", the particulars of an alleged "site visit' appear. The relevance of the particulars encapsulated in both the covering letter and the alleged "site visit" are dealt with infra.

7. Plaintiff couriered the said documentation to Botha, who resides in Potchefstroom.

8. By October 2008 the Department suspected that fraud had been committed with regard to the issuing of the alleged ROD. Mr. Lucky Moja, a member of the so-called "Green Scorpions", was tasked to investigate the matter. Eventually, the Department gave notice to Botha and his principal as per the letter dated 17 August 2009 (Bundle "C" p. 98-99) that no development of the proposed township may take place.

9. On 20 November 2009 Mr. Lucky Moja took a statement from Mr. Botha – Bundle "C" page 94-97. In the statement Mr. Botha explains how it came about that the services of Norman Mathebula had been obtained, and with what purpose. Mr. Botha also confirmed that Plaintiff had acted upon Botha's instruction when the former contacted Mathebula and obtained his services for the purposes as foresaid.

10. In his evidence in Court Botha also said that upon receipt of the documentation from Mathebula, and prior to sending the documentation to him, Plaintiff had mentioned to Botha that the former had some concerns regarding the contents of parts of the documentation provided by Mathebula, that he had taken it up with Mathebula and that the latter had promised to attend to Plaintiff's queries.

11. Also during July 2009 Mr Moja contacted the Plaintiff and inter alia informed the latter that he, Moja, suspected that fraud had been committed regarding the issuing of the alleged ROD. At Moja's insistence Plaintiff provided the former with an "overview" of his involvement in the process, inclusive of how Mathebula had become involved.

12. In January 2010 Plaintiff was approached by the investigating officer, Lieut-Col (then Captain) Shiburi. The latter requested a statement from Plaintiff. Plaintiff, however, responded that he was only willing to provide a statement in the presence of his lawyer. Such a statement was later provided by Plaintiff, after having consulted his lawyer. However, on 4 May 2010 Plaintiff received a call from Shiburi during which the latter informed him that the State Prosecutor had decided to prosecute him and that Plaintiff should present himself at the Sunnyside Police Station to be arrested. Due to certain personal circumstances Plaintiff was only in a position to attend at the Police station the following day, 5 May 2010, where he presented himself to Shiburi at approximately 2pm and was formally arrested by Shiburi. The "Constitutional Warning" signed by Plaintiff appears at p 54 of Bundle "C".

13. Having been arrested Plaintiff was taken to the holding cells where his fingerprints were taken. Subsequent thereto, Shiburi granted Plaintiff bail of R1000 which was duly paid by Plaintiff. According to Plaintiff he spend some three hours (i e from approximately 2-5pm) at the Police Station before being granted bail and allowed to leave.

14. Plaintiff thereupon appeared in Court on 6 May 2010 and 24 May 2010 (when the case was postponed on each occasion) and again on 29 July 2010. During these appearances, Mathebula appeared as accused number one and Plaintiff as accused

number two. At none of these appearances was any charge brought against or put to Plaintiff. In fact, at no stage did he ever receive a formal charge sheet regarding any alleged charges against him. At the Court appearance on 29 July 2010 Mathebula pleaded guilty. The charge against Mathebula inter alia reads that he was guilty of fraud in that he pretended to Linde (the Plaintiff) and/or Hannes Botha "that the Environmental Authorisation of a township development document was issued/authorised by the department of Environmental Affairs, to the prejudice or potential prejudice of Environmental affairs and/or Hannes Botha." In his Plea Explanation to his plea of guilty (p 37-38 of Bundle "C") Mathebula stated as follows: "I did unlawfully and intentionally defraud, gave out and pretend to carel petrus Linde and Hannes Botha that the Environmental Authorisation of a township development is issued and authorised by the Dept.of Environmental Affairs." Consequently, Mathebula was found guilty and the trials were separated.

15. Subsequently, Plaintiff appeared again in Court on 9 September 2010, 9 November 2010 and 24 November 2010, when the case against Plaintiff was withdrawn.

16. When testifying on behalf of First defendant Shiburi persisted that the fraud he suspected Plaintiff of having committed, was fraud against Botha. In essence, Shiburi based his suspicion in this regard on the following facts which were at his disposal, pursuant to the investigation of Moja: First, false letterheads of the Department were used: secondly, the signatures of the "authorised" signees on the ROD were probably falsified. In addition Shiburi added that his suspicion was aroused because of the referral in the ROD (the first paragraph thereof at p 79 of Bundle "C") to the Environmental Conservation Act of 1989, whereas the actual application was launched in terms of the National Environmental Management Act of 1998, as well as the fact that all three of the "attendants" to the "site visit" referred to at p 79 could probably not have been present at a site meeting at that particular time and date. According to Shiburi he suspected that Plaintiff must have been aware of these facts and that the latter, nevertheless, presented the alleged ROD as an authentic document to Botha and hence committed fraud against Botha. Shiburi did not rely on Plaintiff having committed fraud against the Department, only against Botha.

17. The State Prosecutor in the Court where Plaintiff and Mathebula appeared as co-accused, Mr Makhuvha, testified on behalf of the Defendants. In essence, he persisted that the reason for Plaintiff being prosecuted was that the latter committed fraud against the Department; in other words, that Plaintiff was in cahoots with Mathebula in committing fraud against the Department. This (so he reiterated) was the case despite the contents of Mathebula's Plea Explanation in

which the latter stated that he had acted fraudulently against , inter alia, the Plaintiff, as has been quoted supra.

WRONGFUL ARREST

18. In **Duncan v Minister of Law and Order** 1986 (2) SA 805 (AD) at 814 D-E the following was said: "It was also common cause that the question whether a peace officer 'reasonably suspects' a person having committed an offence within the ambit of s 40(1)(b) of the Act is objectively justiciable. And it seems clear that the test is not whether a policeman believes that he has reason to suspect, but whether, on an objective approach, he in fact has reasonable grounds for his suspicion." Given the circumstances of the arrest in this instance, it is trite that the onus rests on the defence to justify an arrest: **Minister of Law and Order v Hurley** 1986 (3) SA 568 (AD) at 589E-F.

19. The first three of what are usually referred to as the four jurisdictional facts necessary for a lawful arrest, were present in this instance: see **Minister of safety and Security v Sekheto and Another (unreported)** 131/2010 ZASCA 141 (19 November 2010) par [6]. The only question to be decided is whether reasonable grounds (in the sense as referred to in **Duncan** supra), can be said to have been present. When deciding the issue, and in addition to what has already been referred to regarding the facts which preceded the arrest, the following are also relevant. It was Botha who requested Plaintiff that the services of Mathebula (who was unknown to Plaintiff) should be obtained for purposes of "speeding up" the process at the Department, and at a fee to be provided by Botha or his client. Plaintiff was merely the "go-between" in that regard. Those facts appear from Botha's statement made to Moja. Having been placed in possession of the alleged ROD by Mathebula and prior to forwarding same to Botha, Plaintiff did inform Botha that he had some concerns regarding certain issues pertaining to the ROD, that he had taken those up with Mathebula, and that the latter had undertaken to attend to Plaintiff's concerns. These constitute objective facts which, had they been taken into consideration by Shiburi, clearly would have gainsaid any suspicion of Plaintiff having had the intention to defraud Botha. In addition, the likelihood of Plaintiff having been in cahoots with Mathebula in the latter's defrauding of the Department is negligible and highly improbable. It would have been utterly stupid for someone in Plaintiff's position to have intended to present Botha (from whom he regularly received instructions to launch similar applications) with a falsified ROD or an ROD concerning which he had doubts, and believe that his unprofessional conduct would go undetected.

20. In coming to that conclusion I need not revert to questions such as the following: what influence (if any) did Plaintiff's initial decision not to adhere to Shiburi's request to provide him with a statement had on Shiburi's decision to arrest? Or, was an arrest really justified or could Plaintiff's presence at Court have been obtained in a different way? The objective facts, as alluded to in the previous paragraph, clearly show that no reasonable grounds for the arresting officer's suspicion, in fact, existed: there were no grounds that would or could constitute a reasonable suspicion that Plaintiff had intended to defraud Botha. Hence, from the very outset the premise on which Shiburi based his actions against Plaintiff was flawed: at the very least a simple enquiry with Botha regarding Plaintiff's attitude regarding possible flaws (which may have amounted to fraudulent action) forming part of the ROD, could have cleared up the incorrect suppositions upon which Siburi based his intended charge against Plaintiff.

21. In my view wrongful and unlawful arrest, as pleaded, has been proven by Plaintiff.

<u>MALICIOUS PROCEEDINGS</u>

22. The requirements for malicious prosecution are conveniently set out in **Minister for Justice and Constitutional Development & others v Moleko** [2008] 3 All SA 47 (SCA)par 8 as follows: "In order to succeed on the merits with a claim for malicious prosecution, a claimant must allege and prove; (a) that the defendants set the law in motion (instigated or instituted the proceedings); (b) that the defendants acted without reasonable and probable cause; (c) that the defendants acted with malice (or animus iniuriandi, and; (d) that the prosecution has failed."

23. In the present case it is evident that the defendants set the law in motion to prosecute Plaintiff. Regarding the issue of reasonable and probable cause, I have already held that a simple enquiry by Shiburi would have resulted in the conclusion that Plaintiff, in no way, intended to defraud Botha (as was Shiburi's reason for instituting legal proceedings against Plaintiff). Hence, Shiburi could not have had an honest belief founded on reasonable grounds, that the institution of proceedings was justified: the objective facts (as alluded to) point to the absence of reasonable grounds: no ordinary care and prudence had been exercised by him. In addition, the State Prosecutor intended to charge Plaintiff for fraud committed against the Department whilst, clearly, no reasonable grounds for such a charge ever existed. Hence, reasonable and probable cause was absent.

24. The third requisite requires more intensive scrutiny. In **Moleko** supra it was said that either dolus directus or dolus indirectus must be proven [61] and that "...the defendant directed his will to prosecuting the plaintiff...in the awareness that reasonable grounds for the prosecution were (possibly) absent, in other words, that his conduct was (possibly) wrongful (consciousness of wrongfulness). It follows from this that the defendant will go free where reasonable grounds for the prosecution were lacking, but the defendant honestly believed that the plaintiff was guilty. In such a case the second element of of dolus, namely consciousness of wrongfulness, and therefore animus injuriandi, will be lacking. His mistake therefore excludes animus injuriandi." [63] It was further held that where a defendant has foreseen the possibility that he was acting wrongfully but nevertheless continued to act, reckless as to the consequences of his act, then dolus eventualis was established. In that case the fact that the defendant would "...in all probability be 'injured' in his dignity..." but still taking the decision to prosecute him "...without making any of the enquiries which cried out to be made..." showed recklessness which constituted dolus eventualis. [65]

25. I am of the view that Shiburi's conduct, as has been alluded to herein before, amounts to recklessness, as he also failed to make enquiries which "cried out to be made". The same reasoning as in **Moleko** finds application. Also, I hold that Shiburi did not honestly believe that Plaintiff was guilty (i e of defrauding Botha). The facts at Shiburi's disposal simply did not allow for such a belief. But even if I am mistaken in holding such, there is another reason why Shiburi's motivation for allegedly having believed that Plaintiff had defrauded Botha is unacceptable. That reason is that I do not believe Shiburi when he says that Plaintiff was in cahoots with Mathebula to an extent where the former intended to defraud Botha. In this regard his evidence while testifying was unconvincing and reluctant. I gained the distinct impression that he was grasping at straws in order to justify his own conduct. I hold that I cannot rely on his evidence in this regard.

26. Regarding the conduct of Makhuvha acting on behalf of Second Defendant, the situation was even worse: he commenced and proceeded with a prosecution for which the known facts did not render any support viz for fraud committed by Plaintiff as against the Department. Despite the terms in which Mathebula's Plea Explanation were couched and despite him having pleaded guilty and, moreover, despite Mathebula having admitted to also having defrauded Plaintiff, those facts did not serve as any deterrent for Second Defendant: on the contrary, the prosecution of Plaintiff was proceeded with for another two court appearances before eventually being withdrawn.

27. In my view, therefore, all the requisites for malicious prosecution have been satisfied and proven.

28. I make the following order:

- It is held that First Defendant is liable to Plaintiff for wrongful and unlawful arrest;
- It is held that First and Second defendants, jointly and severally, are liable to Plaintiff for malicious prosecution.
- Costs of suit thus far to be costs in the cause.

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T J KRUGER (AJ)

7/4/2015