

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES NO.	
(2) OF INTEREST TO OTHER JUDGES: YES / NO.	
(3) REVISED.	
DATE 19/5/2015	SIGNATURE 

CASE NO: 38012/2013

DATE: 19/5/2015

IN THE MATTER BETWEEN:

JAMES GREGORY LEY

PLAINTIFF

AND

**XSTRATA COAL SOUTH AFRICA
(PTY) LIMITED**

FIRST DEFENDANT

BAREND CHRISTOPHER DE WET

SECOND DEFENDANT

JUDGMENT

KOLLAPEN J:

1. The plaintiff issued summons against the defendant seeking damages in the amount of R7 million in respect of what the plaintiff alleges is the instigation of a malicious prosecution against him by the second defendant, who the plaintiff alleges was at all relevant times, acting in the course and scope of his employment with the first defendant.

2. Both defendants oppose the claim.

3. The plaintiff and Mr Samuel Mthimunye testified in the plaintiff's case, while Mr Barend de Wet, the second defendant, and Mr Frank Richards testified for the defendant.

FACTS

4. The plaintiff was employed by the first defendant as a Plant Superintendent at the South Witbank Coal Mine, where he was responsible for safety and production. He had been continuously employed by the first defendant from 1989 until 2011, except for a period of about two years when he was employed elsewhere.
5. During December 2010 arrangements were underway for the receipt and installation of fabricated offices on the property, and the installation was scheduled for the 26th or 27th of December 2010. Ground maintenance would have to precede the installation and this in broad terms required the removal of existing concrete and bricks, and the preparation of the ground.
6. It is common cause that an order for this work was signed by the first defendant on or about the 26th of November 2010, appointing Coal Lite Engineering CC ('Coal Lite) to undertake the work.
7. It is not in dispute that the plaintiff was requested on or about the 18th of December 2010 by one Mr Voges, his senior supervisor, to assist and to ensure that the work was completed. The plaintiff then became involved and requested an entity known as Fraser Alexander to assist with the work. At the time, Fraser Alexander was already doing work for the mine and was on site. It appears that most of the work in respect of the ground preparation was completed by Fraser Alexander, not Coal Lite.

8. After completion of the work Coal Lite prepared an invoice for R85 900 (plus VAT). Ms Melissa Bosch of Coal Lite took the invoice to Frank Richards in the engineering section of the first defendant on Friday the 7th of January 2011 for his signature, which was a requirement before payment could be effected. Richards refused to sign as he was of the view that Fraser Alexander had done some of the work and no provision had been made for them to be paid.
9. On Monday the 10th of January 2011, the plaintiff accompanied by Ms Bosch, and Mr Jan van Rooyen of Fraser Alexander, went to Richards' office and the plaintiff informed Richards that there was a sub-contracting arrangement between Coal Lite and Fraser Alexander and that Coal Lite would arrange to pay Fraser Alexander. Richards then approved the request for payment, which was then effected.
10. The issue of the existence or otherwise of the sub-contracting arrangement is at the core of determining this matter.
11. The plaintiff's stance is that he was informed of the supposed sub-contracting arrangement by Bosch and he simply communicated this to Richards in the presence of Bosch and van Rooyen. His stance was therefore that the second defendant who instigated the charge / prosecution had no reasonable or probable cause to believe that the plaintiff was guilty of fraud.
12. The stance of the defendant is that there was no sub-contracting arrangement and the plaintiff misled Richards into believing that such an arrangement was in place. In doing so, this led to the prejudice of the first defendant, who paid Coal Lite for work it did not do. The first defendant was also required to pay Fraser Alexander for some of the work it did and this amounted to some R8 288-00. It appears the money paid to Coal Lite was later recovered, but not much turns on this. The second defendant's stance is that he was justified in taking the matter to the police.

13. The plaintiff went through a disciplinary hearing and was found guilty and dismissed on the basis of a dishonest practice in relation to the supposed Coal Lite / Fraser Alexander sub-contracting arrangement.
14. The plaintiff was also put on trial for fraud in the Kriel Magistrate's Court and in the end he was acquitted.
15. The defendant's stance is that following investigations and interviews it conducted regarding payments to Coal Lite, it obtained statements from Bosch, van Rooyen and Richards which indicated the following:
 - The plaintiff had appointed Fraser Alexander to do certain work in connection with the ground preparation;
 - There was no sub-contracting arrangement agreed upon between Coal Lite and Fraser Alexander and it was the plaintiff who suggested that Bosch and van Rooyen go along with the sub-contracting 'arrangement';
 - Although Richards refused to sign Coal Lite's invoice on the 7th of January 2011, this changed by the 10th of January 2011 after the plaintiff told him that a sub-contracting arrangement existed.
16. In this regard even though Richards conceded that he would have been justified in continuing to refuse to sign the invoice as sub-contracting was not provided for in the order to Coal Lite, his evidence was that he signed as a result of the plaintiff's intervention.

THE LAW

The requirements in a claim for malicious prosecution

17. In order to succeed on the merits with a claim for malicious prosecution, a claimant must allege and prove:

- i. That the defendants set the law in motion (instigated or instituted the proceedings);
- ii. That the defendants acted without reasonable and probable cause;
- iii. That the defendants acted with ‘malice’ (or *animo injuriandi*); and
- iv. That the prosecution has failed.

(See *Minister for Justice and Constitutional Development and Others v Sekele Michael Moleko* (131/07) [2008] ZASCA 43 (31 March 2008)).

➤ Instigating the prosecution

18. What is required is more than simply reporting the facts to the police but is instead what our Courts have described as ‘being actively instrumental in the prosecution of the charge’. In *LEDERMAN v MOHARAL INVESTMENTS (PTY.) LTD 1969 (1) SA 190 (A. D.)*, the Court approved of the following *dicta* in *Waterhouse v Shields 1924 CPD 155* as reflecting the true position of the law:

‘The first matter the plaintiff has to prove is that the defendant was actively instrumental in the prosecution of the charge. This is a matter more difficult to prove in South Africa, where prosecutions are nearly always conducted by the Crown, than it is in England, where many cases are left to the private prosecutor. Where a person merely gives a fair statement of the facts to the police, and leaves it to the latter to take such steps thereon as they may deem fit, and does nothing more to identify himself with the prosecution, he is not responsible, in an action for malicious prosecution, to a person whom the police may charge. But if he goes further, and actively assists and identifies himself with the prosecution, he may be held liable. ‘The test...is whether the defendant did more than tell the detective the facts and leave him to act on his own judgment’. (at page 197)

19. From the evidence of the second defendant it is clear that beyond reporting the matter to the police and sharing with the latter the information he had gathered in the form of witness statements, he had taken the view that the plaintiff had committed a crime and sought his prosecution. I am satisfied that under these circumstances the second defendant had identified himself with the prosecution and went beyond simply sharing the facts at his disposal with the police. This is clear from his statement where he takes the view that *'Greg Ley had no right or permission to act in the way he did. We request SA Police investigation and prosecution in this case.'*
20. I am satisfied that the plaintiff has on a preponderance of probabilities proved this requirement.

➤ Acted without reasonable and probable cause

21. In ***Minister for Justice and Constitutional Development and Others v Sekele Michael Moleko*** (supra), the Court characterised this requirement as follows:

'Reasonable and probable cause, in the context of a claim for malicious prosecution, means an honest belief founded on reasonable grounds that the institution of proceedings is justified. The concept therefore involves both a subjective and an objective element (see Prinsloo & Another v Newman 1975 (1) SA 481 (A) –

'Not only must the defendant have subjectively had an honest belief in the guilt of the plaintiff, but his belief and conduct must have been objectively reasonable, as would have been exercised by a person using ordinary care and prudence.'

(see 15 Lawsa 1999 para 449 and the authorities there cited and also Wille's *Principles of South African Law* pp 1193-1194)

22. In this regard the evidence of the second defendant was that he placed reliance on the statement of three people namely Bosch, van Rooyen and Richards, all of which pointed in the direction that the plaintiff had not only come up with the idea of a sub-contracting arrangement but was instrumental in convincing Richards about its existence. This was certainly key in overcoming Richards's initial reluctance and refusal to sign and approve the request for payment.
23. In cross-examination it was never suggested to de Wet that he should have doubted the reports made to him by Bosch, van Rooyen and Richards nor was it suggested that what he did was motivated by a desire to cause harm or injury to the plaintiff or that he dealt in an unfair manner with the investigation that he was tasked with.
24. On the other hand it is difficult to understand the plaintiff intervening by advising Richards that a sub-contracting arrangement existed. He had not appointed Coal Lite but in fact had requested Fraser Alexander directly to undertake the work. If this was so then how could there conceivably have been a sub-contracting arrangement between Coal Lite and Fraser Alexander when the plaintiff according to his own evidence, had approached Fraser Alexander directly. In addition his involvement in the matter has not been adequately explained. If all he did was to convey to Richards what Bosch had told him, then it begs the question as to why his intervention was necessary. If Richards had a problem with signing off the invoice, then it was up to Bosch and van Rooyen to convince him otherwise, and not the plaintiff.
25. There are other objective indications of an absence of malice on the second defendant's part. These include that investigations of this kind fell within his normal duties, and that he had no relationship with the plaintiff other than sharing a common employer.

26. In ***MOLEKO*** (supra) the Court dealt with the requirement of *animus injuriandi* as follows (at paragraph 63):

'Animus injuriandi includes not only the intention to injure, but also consciousness of wrongfulness:

'In this regard animus injuriandi (intention) means that the defendant directed his will to prosecuting the plaintiff (and thus infringing his personality), in the awareness that reasonable grounds for the prosecution were (possibly) absent, in other words, that his conduct was (possibly) wrongful (consciousness of wrongfulness). It follows from this that the defendant will go free where reasonable grounds for the prosecution were lacking but the defendant honestly believed that the plaintiff was guilty. In such a case the second element of dolus, namely of consciousness of wrongfulness, and therefore animus injuriandi, will be lacking. His mistake therefore excludes the existence of animus injuriandi.' (see Neethling, Potgieter and Visser (2005) (*Neethling's Law of Personality*. 2nd Ed.) p. 181))

27. In ***RUDOLPH AND OTHERS v MINISTER OF SAFETY AND SECURITY AND ANOTHER*** 2009 (5) SA 94 (SCA), the Court in dealing with this requirement said (at 100E-G):

'The requirement of 'malice' has been the subject of discussion in a number of cases in this court. The approach now adopted by this court is that, although the expression 'malice' is used, the claimant's remedy in a claim for malicious prosecution lies under the actio injuriarum and that what has to be proved in this regard is animus injuriandi...By way of further elaboration in Moleko it was said:

*'The defendant must thus not only have been aware of what he or she was doing in instituting or initiating the prosecution, but must at least have foreseen the possibility that he or she was acting wrongfully, but nevertheless continued to act, reckless as to the consequences of his or her conduct (dolus eventualis). Negligence on the part of the defendant (or would I say, even gross negligence) will not suffice). (see **MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT v MOLEKO** [2008] 3 All SA 47 (SCA) at paragraph 64)*

28. In my view it could hardly be said that following his investigations and in particular the consultations he had with Bosch, van Rooyen and Richards, de Wet did not have reasonable and probable cause in approaching the police. In addition it could not be said that he acted with the required *animus* – it was never suggested or indeed argued that he did.
29. In the circumstances it must follow that the plaintiff has not proved the requirements of the absence of reasonable and probable cause nor the necessary *animus injuriandi*. The claim must accordingly fail.

ORDER

30. The claim is dismissed with costs.


 N KOLLAPEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA

HEARD ON: 13, 14 & 15 APRIL 2015

FOR THE PLAINTIFF: ADV. S B JACOBS

INSTRUCTED BY: B. J. MTSHALI ATTORNEYS (ref: BJM/NAM/L10521)

FOR THE DEFENDANT: ADV. H VAN DER MERWE

INSTRUCTED BY: FLUXMANS INC. (ref: J Antunes/X23/121141) (correspondents
– GROSS PAPADOPULO & ASSOCIATES)