

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Appeal No.:A79/2013

In the appeal of:

MORANODI JOSEPH GAOBEPE

Appellant

And

CHRISTO BRITS

Respondent

CORAM:

MOLEMELA, JP *et* JORDAAN, J

JUDGMENT BY:

MOLEMELA, JP

HEARD ON:

17 NOVEMBER 2014

DELIVERED ON:

26 FEBRUARY 2015

INTRODUCTION

- [1] This is an appeal against the whole judgment of the Magistrate Court, Bloemfontein (trial court) in which it found that the appellant had maliciously prosecuted the respondent and defamed him, thus rendering him liable for the payment of damages.

APPLICATION FOR CONDONATION

- [2] The appellant brought a substantive application for condonation of the late prosecution of the appeal, the late filing of the record and the late filing of the heads of argument. The respondent vigorously opposed the granting of condonation in respect of all procedural

non-compliances on the part of the appellant and maintained that the appeal had lapsed and ought not to be re-instated.

- [3] It is necessary to set out a brief background in respect of the procedures to be followed once an appeal has been noted. In terms of rule 50(1) of the Rules of Court, an appeal to the high court against a decision of a Magistrate in a civil matter shall be prosecuted within 60 days after noting the appealing. Rule 50(4)(a) provides that the appellant shall, within 40 days of noting the appeal, apply to the Registrar in writing and with notice to all parties for the allocation of a date for the hearing of the appeal. Rule 50(7) provides that the record shall contain a correct and complete copy of the pleadings, evidence and all documents necessary for the hearing of the appeal, together with an index thereof. Rule 49(6)(6) provides that the court to which the appeal is made may, on application of the appellant, and on good cause shown, reinstate an appeal which has lapsed.
- [4] It is common cause that judgment was handed down by the trial court on 24 December 2012. An appeal was noted on 31 January 2013. The record shows that the appellant filed a notice in terms of Rule 50(4) on 12 April 2013.
- [5] The respondent's basis for opposing the granting of condonation is that there had been a flagrant disregard of rules of court was in many respects with no acceptable explanation. The respondent argued that the appellant's application was defective because it confined itself to the late filing of the record and did not specifically

pray for the reinstatement of the lapsed appeal. It was further argued that the appellant's application failed to deal with prospects of success and failed to canvass the element of prejudice. The respondent pointed out that the record filed was incomplete as the transcript of the proceedings of the trial court was filed without attaching all the documents that formed part of the bundle of documents that were handed in during the proceedings at the trial court. The respondent contended that it would be impossible for the court to adjudicate on the appeal without having had the benefit of perusing the outstanding exhibits, i.e. Nkuna's statement (item 7), a psychologist's report (item 25) and a newspaper report (item 26).

- [6] As stated before the trial court delivered its judgment on 24 December 2012, some four and a half years after the hearing of the matter. The appellant noted an appeal on 31 January 2013. Proper compliance with the rules would have meant that the applicant should have applied for allocation of a hearing date within 40 days after 31 January 2013, which would be on 12 March 2013. The record shows that the relevant notice was filed together with a transcribed record on 13 April 2013. The degree of lateness in respect of the prosecution of the appeal is thus a period of about a month.
- [7] The appellant's counsel contended that most of the delays on its part were directly linked to the late delivery of the judgment. It was pointed out that the appellant's litigation had, up to the conclusion of the trial, been funded by the SAPS due to the fact that the

allegations against him related to actions he had taken in execution of his duties as the provincial commissioner of the SAPS. By the time the judgment was delivered, the appellant was well into his retirement and was no longer based in the Free State and this attorney experienced some difficulty in contacting him. Furthermore, there had been a change in the leadership of the SAPS, with the result that the appellant had to communicate with different personnel when enquiring whether the SAPS would be willing to finance his appeal and this also caused delays. It was contended that as a result of that long delay, the original court file was misplaced and the appellant was thus unable to find the exhibits that were filed. He could only use the documents that were still in his attorney's file. This, according to the appellant, was the reason why an incomplete record, i.e. a transcript without exhibits, was filed.

- [8] The two issues in respect of the application for condonation are (i) whether condonation should be granted for the late prosecution compliances, and (ii) whether the appeal can be re-instated notwithstanding the appellant's failure to file a complete record of the proceedings.
- [9] The trial court in its judgment included a paragraph explaining its inordinate delay in handing down the judgment. It essentially attributed the delay to its workload, lamenting the fact that it functioned in three different courts and critical of the unacceptable working conditions in the courts e.g. the fact that the air conditioners were not in commission for a period of 4 years. I

have to mention that all the reasons advanced by the trial court, put together fall far short of a reasonable explanation for delivering a judgment four and a half years after the hearing.

- [10] It is trite that the granting of condonation is not a mere formality. It is an indulgence which should only be granted when good cause has been shown. The trite factors that come to the fore when such an application is considered include the extent of the delay, the adequacy of the explanation proffered for the delay, the applicant's prospects of success, the respondent's interest in the finality of the judgment and the prejudice that the parties may suffer as a result of the court's decision to grant or not to grant the application. A court is not expected to follow a check-list approach when considering the aforementioned factors. See **Melane v Santam** 1962 (4) 531 at 532C; **Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd** 2013 [2] All-SA 251 (SCA) paras 11-13. In the case of **Turnbull-Jackson v Hibiscus Coast Municipality & others**¹ the court stated as follows:

“In this Court the test for determining whether condonation should be granted or refused is the interests of justice. Factors that the Court weighs in that enquiry include: the length of the delay; the explanation for, or cause of, the delay; the prospects of success for the party seeking condonation; the importance of the issues that the matter raises; the prejudice to the other party or parties; and the effect of the delay on the administration of justice.² It should be noted that although the existence of prospects of success in favour of the party seeking condonation is not decisive, it is a weighty factor in favour of granting condonation”.

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- [11] In *casu*, the record was filed a mere 12 days after the 60-day deadline. The delay in respect of the application for allocation for a hearing date is a period of less than a month. We are therefore not dealing with a case where there was a severe delay. With regards to the appellant's prospects of success, I am satisfied that even though the appellant was not detailed in its averments pertaining to prospects, this is a case where the prospects of success can readily be said to be reasonable when consideration is paid to the case that was put forward on behalf of the respondent. A reading of the pleadings and the transcribed evidence reveals that the trial court did not confine itself to the case that was pleaded, by so doing neglecting to take into account the purpose of pleadings as set out in a plethora of cases.
- [12] The appellant further asserted that the other reason for the delay in its prosecution of the appeal was the delay in receiving clarity from the appellant's employer regarding the funding of the appellant's opposition of the matter. The one month delay was apparently caused by the fact that the leadership of the respondent's employer changed in the four and a half months period between the hearing of the matter and the delivery of the judgment. The reasons advanced for the late filing of the record and the late prosecution of the appeal are plausible, in my view.
- [13] I am also satisfied that this inordinate delay in the delivery of the trial court's judgment contributed significantly to the appellant's filing of a transcribed record without the exhibits and to the lapsing

of the appeal. The respondent fortunately attempted to reconstruct the record by filing some of the missing exhibits. This meant that, by the time the appeal was argued, the only significant document that had not been filed was the statement made by Nkuna. Suffice it at this stage to mention that it is evident from the transcribed record that Nkuna's statement was read into the record during the trial. I therefore cannot agree with the respondent's submission that this court will not be in a position to properly adjudicate the matter without having perused all exhibits that formed part of the trial court's record. This decision was not made lightly and due consideration was paid to the principles applicable to an application for condonation.

[14] As I stated before, the inordinate delay of the trial court contributed largely to the appellant's delay in filing the record and prosecuting the appeal. This ineptitude on its part should not serve to penalise the appellant. In the case of **Yunman Engineering CC v Charter** 2006 (5) SA 571 at 578 H-J the court held that the High Court has an inherent right to grant condonation where the principle of justice and fair play demand it and where the reasons for non-compliance have been adequately explained to the court.

[15] It is evident that the appellant's attorney also contributed to some delays by failing to paginate and index the record and failing to file his heads of argument timeously. Compliance with the court rules is essential, as was correctly pointed out by the court in the case of **Grootboom v National Prosecuting Authority And Another** [2013] ZACC 37; 2014 (2) SA 68 (CC); 2014 (1) BCLR 65 (CC)

The following remarks made by the court in that case at para 32 ring true:

“I need to remind practitioners and litigants that the rules and courts’ directions serve a necessary purpose. Their primary aim is to ensure that the business of our courts is run effectively and efficiently. Invariably this will lead to the orderly management of our courts’ rolls, which in turn will bring about the expeditious disposal of cases in the most cost-effective manner. This is particularly important given the ever-increasing costs of litigation, which if left unchecked will make access to justice too expensive.”

[16] I am satisfied that despite the difficulties experienced by the respondents in its preparation of its heads as a result of the non-indexing and non-pagination of the record, the respondent was nevertheless in a position to file comprehensive heads of argument. I am therefore of the view that this court should not adopt an overly technical approach that results in the dismissal of an otherwise meritorious appeal purely because of relatively insignificant procedural non-compliances. The prejudice suffered by the respondent with regards to these non-compliances was ameliorated by the cost-order made against the appellant when the appeal was postponed on a previous occasion.

[17] Another factor that also counts in the appellant’s favour is that despite the procedural non-compliances on the part of the appellant, it had always been evident that he was pursuing his appeal. Significantly, the notice of appeal was filed timeously and the respondent thus became aware of the appellant’s intentions early in the game. In **Palmer v Goldberg** 1961 (3) SA 692 at 701

the court held that “relief will more readily be granted when there is some deficiency or irregularity in the noting or prosecution of the appeal than if no steps at all were taken in connection with the appeal.” I am also satisfied that the degree of lateness in the bringing of the condonation application of this application for condonation is not severe and ought to be condoned in light of the strong prospects of success.

- [18] I am satisfied that all the circumstances of this case warrant that this court should exercise its discretion in favour of the granting of condonation. The authorities alluded to earlier in this judgment also support such a conclusion. Condonation is therefore granted and the appeal is re-instated.

THE APPEAL

- [19] I now turn to the merits of the appeal. It is apposite to refer to the claim pursued by the respondent by quoting *verbatim* from the particulars of claim. The relevant parts of the claim are canvased I paragraphs 4 – 9 of the particulars of claim, which provide as follows:-

- “4. Die verweerder het gedurende 2003 tot Julie 2004 kwaadwillige en onbehoorlike ondersoeke gelas teen die eiser welke ondersoeke geen redelike substansie gehad het nie maar slegs ingestel was uit hoofde van ‘n direkte of indirekte motief deur die verweerder, om die eiser te benadeel.
5. Die verweerder het hierdie ondersoeke opsetlik gelas met die bedoeling om die eiser se eer, waardigheid en professionele status leed aan te doen.

6. Hierdie opsetlike en kwaadwillige handeling deur die verweerder was onregmatig.
7. Die verweerder het hierdie benadeling van die eiser vererger deur die inhoud van sy ongesubstansieerde ondersoeke wyd te publiseer sonder inagneming van nadelige effek op die eer, waardigheid en professionele status van die eiser.
8. Die kwaadwillige en onregmatige handeling deur die verweerder is die kosale gevolg van die skade en nadeel wat die eiser gely het.
9. Die eiser het skade gely in die bedrag van R99 990,00 (nege en negentig duisende nege honderd en negentig rand) synde die skending van sy goeie naam, eer en profesionele reputasie.

[18] It is common cause that the appellant had filed a special plea in terms of which he averred that the trial court had no jurisdiction to hear the matter due to the fact that the respondent had wrongly cited him in his personal capacity for conduct evidently committed within the scope of the appellant's employment. The appellant had asserted that the respondent ought to have joined the Minister of Safety and Security as a party in the matter. He argued that this was more so the case because the respondent had made the following concession: "Ons het meer as een keer gesê daar is geen dispuut by die eiser dat mnr Gaobepe [appellant] in sy amptelike hoedanigheid opgetree het nie, daar is nie 'n dispuut daaroor nie." In the course of dismissing the special plea on the basis that the respondent had a choice as to which defendant to pursue, the trial court remarked as follows in its *ex tempore* judgment. "As indicated by the plaintiff, to a certain extent they have decided to continue with a much weaker matter against the defendant. It is perhaps better for them to have joined both parties as defendants in this matter but it is their choice. They only want to proceed on specific grounds" (*sic*). This special plea does not warrant any further mention in this judgment as the appellant's

counsel advised the court that the appellant was no longer persisting with the appeal against the dismissal of the special plea.

THE ISSUE

[19] The crisp issue is whether the respondent succeeded in proving on a balance of probabilities that the appellant's decision to initiate an investigation into the appellant's conduct amounted to a malicious prosecution that entitled the respondent to payment of damages.

THE LAW

[20] It is clear from paragraph 4 of the particulars of claim that the claim instituted against the appellant was one for malicious prosecution. In the case of **Relyant Trading (Pty) Ltd v Shongwe and the Minister of Safety and Security**³ Malan, AJA (as he then was) said the following with regards to a claim of malicious prosecution:

“5. Malicious prosecution consists in the wrongful and intentional assault on the dignity of a person comprehending also his or her good name and privacy. The requirements are that arrest or prosecution be instigated without reasonable and probable cause and with malice or *animo inuriandi* ...” It follows that a defendant will not be liable if he or she held a genuine belief founded on reasonable grounds in the plaintiff's guilt. Where reasonable and probable cause for an arrest or prosecution exists the conduct of the defendant instigating it is not wrongful. The requirement of reasonable and probable cause is a sensible one: “For it is of importance to the community that persons who have reasonable and probable cause for a prosecution should not be deterred from setting the criminal law in motion against those

³ [2006] SCA 111 at paragraph 5

whom they believe to have committed offences, even if in so doing they are actuated by indirect and improper motives”.

- [21] In the case of **Minister of Justice and Constitution v Moleko**⁴ (i) the court order stated that in order to succeed with a claim for malicious prosecution, a claimant had to prove the following: that the defendant set the law in motion (instigated proceedings); (ii) that the defendants acted without reasonable and probable cause; (iii) that appellant was motivated by malice – *animo inuriandi* (iv) that the prosecution has failed.

ANALYSIS

- [22] It is common cause that the appellant and respondent both held legal qualifications and both held senior positions in the South African Police Services (SAPS). The respondent was, during the period 2001 – 2005 the acting senior provincial head legal officer. He was, *inter alia*, responsible for all civil litigation, labour matters in the department. He was also responsible for issuing instructions to junior legal officers attached to the office of the Area Commissioner. The respondent was, during the same period, appointed as the Commissioner of Police in terms of a fixed term employment contract.

- [23] It is not disputed that the respondent’s tasks included giving written legal opinions within the department and giving instructions to the

⁴ [2008] 3 All SA 47 (SCA) at pa 50d-f

state attorney, attending consultation with SAPS members, rendering expert legal support, and attending court.

[24] The provincial office of SAPS was involved in a number of lawsuits. One of these lawsuits related to an incident that occurred in Frankfort, in which police officials were implicated in the killing of someone. The officers in question were subsequently arrested and detained. They were then suspended by the SAPS. They in turn instituted proceedings for unlawful arrest and detention against the Minister of Safety and Security. This case ("Steenbergen case") was subsequently heard in the Free State High Court. On the date of the hearing of that matter, the respondent had certain discussions with the respondent's counsel. Some officials of the SAPS who formed part of the team which gave instructions to the SAPS's counsel were also present at the High Court. Mr Nkuna and Mr Mofokeng were part of this team.

[25] It is clear from the respondent's evidence and that of one of his witnesses, Mrs Brits, that at least one of these officials, viz superintendent Mofokeng was very unhappy with the respondent's involvement in the legal team's discussions regarding the Steenberger matter. The appellant testified that superintendent Mofokeng and Superintendent Nkuna subsequently submitted written statements in terms of which they complained that the respondent had unduly tried to influence the outcome of the Steenberger case by proposing a settlement that was in favour of the police officers implicated in the assault. He then asked one of his colleagues to conduct an investigation into the matter.

[26] The respondent subsequently learnt about the investigation and directed enquiries to the SAPS head office demanding to be advised of the reasons for the investigation. The SAPS head office in turn wrote a letter to the appellant asking about the progress of the investigation, to which the appellant responded as follows:

“We are convinced that a *prima facie* [case] of a grievous misconduct can be made against Senior Superintendent C Brits. When he was giving a legal opinion on the possible suspension of Supt H W Steenberger and Others, instead of dealing with the case in such a way that a fair and just decision be made on the matter, he advocated for the alleged members and not representing the management case whatsoever, suggesting that we should not suspend members ... but senior Superintendent Brits was there and not being on the side of management but on the side of the accused persons ... Instead of standing the Area Commissioner by on the matter he was threatening them of the consequences which was never the case at the end... I have lost trust in him and I am afraid to use him any further for any issue whatsoever even on litigation matters. I cannot keep on watching my back always and for that matter it means that his presence in this office is of no use because of the broken trust and relationship between both of us. I doubt and I don't think that this will improve in the near future because he since registered a grievance and this grievance is appearing for the second time for arbitration and is still pending, Snr Sup C Brits will continue fighting.”

[27] It is common cause that subsequent to the afore-mentioned letter, superintendent Nkuna was asked whether he was prepared to submit a written statement. He stated that he was not prepared to make a statement because he was not a complainant in the matter. On the 2nd July 2004 the respondent a letter was directed

to the respondent, informing him that SAPS had decided not to institute any disciplinary proceedings against him. The respondent then decided to institute action against the appellant.

[28] The respondent testified during the hearing and called witnesses. These witnesses testified at length about the tension and animosity between the appellant and the respondent. They also testified about the grievances lodged by the respondent against the Minister of Safety and Security over his non-appointment to a director's post in the legal department. The respondent believed that the letter sent by the appellant to the SAPS head office was behind the decision to overlook him when the appointment of a director was made. The grievance that the respondent had lodged was subsequently arbitrated and the outcome was in his favour. The dispute was referred to the Labour Court and it ordered that he be retrospectively appointed in that post.

[29] The appellant testified that he initiated into the respondent's conduct after received complaints about his interference in the consultations regarding the Steenberger case. He had received these complaints from a certain Mr Nkuna who was the Area Commissioner of the Eastern Free State. He had also received a complaint about the same conduct from a certain senior superintendent Mofokeng, who was a legal officer in the Eastern Free State region. At that stage the appellant was the provincial commissioner and the respondent was working at the provincial office legal service at that stage. The respondent was occupying a junior post to that of the appellant.

- [30] The appellant in his testimony stated that Mr Nkuna's complaint was in the form of an affidavit dated 10 March 2003. It is evident from p 308 Volume 4 of the record that the document in question was one of the documents that was in a bundle of documents that served before the trial court. Parts of this statement were read into the trial court's record. In this affidavit Mr Nkuna is said to have asserted that the respondent had approached counsel that represented Steenberger and his colleagues and had negotiated for an out of court settlement as well as the immediate reinstatement of the said police officers.
- [31] The appellant in his testimony also read a statement purportedly made by Mr Mofokeng into the record. This document, too, was part of the bundle of documents that served before the court *a quo*. It is evident from p 313, Volume 4 of the record that the document in question was read into the record without any objection from the respondent's counsel. In this document Mr Mofokeng was alleged to have stated that the respondent interfered in the high court despite the fact that he did not form part of the team that had consulted on behalf of the Minister of Safety and Security. The following part of Mr Mofokeng's statement was read into the record; "It was surprising why senior superintendent Brits was attending the hearing and trying to give advice which were going to be detrimental to the respondent [SAPS]."
- [32] The appellant testified that it was at the strength of the two statements made by Mr Nkuna and Mr Mofokeng, respectively, that he decided to assign the matter to senior superintendent

Mofokeng for an investigation to be initiated against the respondent “so as to ensure that the matter is addressed and dealt with properly.” He held the view that if he did not do so, he would have failed to do his duty and would have been charged with dereliction of duty. He testified that the investigation started around March 2003, within 2 weeks of receipt of the affidavits in question. The appellant maintained that having perused that affidavit, he was of the view that an investigation had to be conducted.

- [33] The respondent averred that the appellant’s failure to call Nkuna and Mofokeng as witnesses resulted in him failing to show that Nkuna and Mofokeng had indeed made the statements in question and had consequently failed to show any justification for initiating or persisting with the investigation. The appellant’s counsel argued that the respondent was being disingenuous, as Mr Nkuna’s affidavit, in particular, had never been placed in dispute. Having perused the record, I agree that various parts of the record suggest that the existence of a statement allegedly made by Nkuna was not disputed. It was clear from both the respondent’s evidence and that of Mrs Brits that both Mr Nkuna and Mr Mofokeng were dissatisfied with the respondent’s participation in the consultations that took place at the High Court pertaining to the Steenberger case. Significantly, it is evident from the record that both Mr Nkuna and Mr Mofokeng’s statements were part of the respondent’s own bundle of documents and that the parties had agreed on the authenticity and the truthfulness of the documents that were in the bundle. See paras [4] and [143] of the trial court’s judgment.

[34] The following exchange between the appellant's counsel and the respondent, transcribed on p 235 – 238 line 19 of the record is very significant:

“Q: Looking at the existing circumstances, more specifically your application or the applicants' founding papers having found with an opinion prepared by yourself and also looking at the statements made by Nkuna and Mofokeng, do you not think it was reasonable of the provincial commissioner to then investigate the matter thoroughly?

A: Soos ek gesê het 'n ondersoek is nie 'n probleem nie. Die manier hoe jy dit doen dit is waar die probleem sê en ek het verduidelik wat ek van 'n senior persoon of as a persoon sou gedoen het.

Q: Your worship if we can go to document no. 3 of the bundle of documentation, without wasting the court's time you would confirm with me that this letter was coming from the deputy national commissioner L Oeloff?

A: Dit is so.

Q: If you can go to the front page of the letter, you would agree with me that the letter was addressed to all provincial commissioners.

A: Dit is reg.

Q: So then would you agree with me that this letter was therefore addressed to the defendant as we, as he was the provincial commissioner at that stage?

A: Daardie tyd, ja.

Q: If you look in paragraph 2 of the letter, if you can read paragraph 2 for me?

A: **“An integral part of the right to manage is the power to prescribe standard of conduct for employees and to initiate disciplinary steps against offenders, South African Police Service Discipline Regulations 1996, adhere to these principles and that they hold the national and the provincial commissioners responsible for**

maintaining discipline nationally and in their respective provinces.

Commanders are also required to take disciplinary steps against members against whom there is reasonable suspicion that they have committed misconduct. It is therefore clear in the context of the South African Police Service that apart from an inherent responsibility to maintain discipline, commanders also have a duty to do so. I intend holding commanders to this duty.”

Q: Would you then agree with me that in terms of the national commissioner of police in South Africa the defendant was, as part of his integral management and powers prescribed, he was also expected to maintain discipline with the respective provinces [indistinct]?

A: Natuurlik.

Q: Would you then agree with me that also, I think it is line no. 4 from the end of that paragraph where it reads there, I will read that one. It says there is a reasonable suspicion that they have committed misconduct. It is in the same paragraph or it starts with “commanders.”?

A: Oh ja, now I am with you.

Q: Let me read that for the record: “Commanders are also required to take disciplinary steps against members against whom there is reasonable suspicion that they have committed misconduct.” Having read the letter and having had a better understanding of the facts that existed on the ground as far as the defendant was concerned, I am sure you know what facts were those, the opinion being found in wrong papers and the defendant disputing that he had given you the right to give an opinion, that anyone had been authorised to give you the right to give an opinion and **having received the complaint as per 7 and 8, being the affidavits from Assistant Area Commissioner Nkuna and legal head in that area, Mofokeng.** Now looking on all those factors that existed, do you not think there was a reasonable suspicion that you might have conducted misconduct to the point where the commissioner would have to investigate that?

A: Daar is twee dinge wat mn. Qwelane nou aangeraak het. Die eerste is die gedeelte van “commanders” wat hy ingeles het, die interpretasie van

die paragraaf is dat 'commanders' is die direkte "commander" van 'n "employee" – in my geval sou dit Mokwaledi wees. Die tweede aspek is ek het verduidelik dat met hierdie bewerings op rekord, moes die proses gewees het – en dit is in terme van die regulasies – die betrek van die "commander" van die werknemer en dat die hantering van hierdie bewerings teen hierdie senior offisier.

Q: I will come to that point later but the defendant again, his evidence is in terms of the Act and the disciplinary regulations of the SAPS he had an authority, if there is a suspicion of that nature, to initiate an investigation. Do you have comments on that?

A: Enige persoon kan 'n ondersoek inisieer of 'n klagte lê, maar dan skryf die regulasies voor hoe dit vandaar af gehanteer moet word.

Q: So then would you agree with me that the provincial commissioner being the defendant, he had also a right to initiate an investigation in the matter?

Solank dit binne die riglyne van die wet plaasvind, ja. (My underlining for emphasis).

[35] It is clear from paragraph 4 of the particulars of claim that the cause of action was that of malicious prosecution. It is also clear from various parts of the record that that is indeed the case that was presented to the court. The following remarks made by the trial court are relevant. "As indicated by the plaintiff, to a certain extent they have decided to continue with a much weaker matter against the defendant. It is perhaps better for them to have joined both parties as defendants in this matter but it is their choice. They only want to proceed on specific grounds".

[36] It is clear from the authorities mentioned above, that in order to succeed in his claim for malicious prosecution, the respondent would have to show that 'proceedings' were instituted. It is

common cause that no disciplinary proceedings were instituted against the respondent and consequently there was no 'outcome' in favour of respondent. Only an investigation was initiated at the instance of the appellant. With regards to the investigation, it is interesting to note that the respondent in the exchange quoted earlier in the judgment, acknowledged the need for an investigation to be initiated. Interesting enough, the trial court also acknowledged the need for an investigation to be conducted. I am of the view that an investigation does not equate to institution of proceedings. In paragraph 12 of its judgment, the trial court seems to have based his conclusion that the investigation amounted to the institution of legal proceedings purely from the fact that the Disciplinary Regulations of the SAPS, in terms of which the investigation was initiated, were gazetted. This conclusion has no legal basis. I am thus satisfied that the respondent failed to satisfy the first requirement. As no proceedings were instituted, it goes without saying that there could not have been any 'outcome' that is in favour of the respondent. This means that he also failed to satisfy the second requirement.

- [37] It is evident from the extract of the evidence quoted earlier that the appellant was the respondent's senior and that he was entitled to investigate conduct allegedly committed by his juniors. The respondent conceded that an investigation was necessary. On the appellant's own version, Mr Mofokeng had expressed dissatisfaction with his involvement in the Steenberger matter.

[38] As stated before, it was the respondent who provided the trial court with the affidavit of Area Commissioner Nkuna and the statement of superintendent Mofokeng in its bundle of documents. His counsel then confirmed the status of the bundle of documents by stating that both authenticity and veracity of the contents were admitted. The fact that Mr Mofokeng indicated in 2004 that he did not want to make a statement as he was not a complainant in the matter did not equate to a disavowal of having made a statement before. I agree with the appellant's counsel that what is important here is whether Mr Nkuna and Mr Mofokeng made statements complaining about the respondent's conduct. This does not seem to have been in dispute during the proceedings at the trial court. My conclusion that this aspect was not in dispute is fortified by the fact that the respondent, in his own letter directed to the information officer, (which letter formed part of the record), stated as follows: "During June 2002 I was at court when this matter was heard. After the proceedings, Snr Supt Mofokeng and Commissioner Nkuna submitted statements to the provincial commissioner alleging that I personally assisted the legal team of Steenberger." (My underlining for emphasis).

[39] In the case of Minister of Justice v Moleko⁵ the following was stated with regards to the requirement of malice:

"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. 'Not only must the defendant

⁵ (*supra*)

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.”

[40] “Malice” was explained as follows in the case of **Rudolph and Others v Minister of Safety and Security**⁶:

“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*. See **Moaki v Reckitt and Colman (Africa) Ltd and Another** 1968 (3) SA 98 (A) 1034 at 104E; and **Prinsloo and Another v Newman** 1975 (1) SA 481 (A) at 492A-B. 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, I would say, even gross negligence) will not suffice.’ [Paragraph 64.]”

[41] The requirement for malicious arrest and prosecution that the arrest and prosecution be instituted “in the absence of reasonable and probable cause” was explained as follows in **Beckenstrater v Rottcher and Theunissen**⁷:

⁶ 2009 (5) SA 94 (SCA) at p100E-G:-

⁷ [1955 (1) SA 129 (A) at 136A-B]

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

- [42] I am satisfied that the evidence adduced by the respondent does not pass muster in respect of the requirements mentioned in the cases alluded to in this judgment. On the contrary, the extracts of evidence quoted above show that the appellant had reasonable and probable cause for initiating the investigation against the respondent. The trial court seems to have somehow conflated malice with motives. The fact that the appellant subsequently stated there was a *prima facie* case against the respondent was obviously based on the statements made by Mr Nkuna and Mr Mofokeng, who were very senior members in the SAPS. It would, under the circumstances, have been folly for him to summarily disregard their complaints without investigating the matter. In particular, paragraph 7 - 9 of Mr Mofokeng’s statement made serious allegations that of impropriety against the respondent which, in my view, would have warranted to be investigated notwithstanding that the respondent’s duties entailed the giving of legal advice. This paragraph is canvassed in paragraph 144 of the trial court’s judgment and reads as follows:

- “7. It was surprising why senior superintendent Brits was attending the hearing and trying to give advice which were going to be detrimental to the respondent.
8. It is further questioned whether senior superintendent Brits had informed his seniors that he would be attending the said hearing and whether his seniors knew that he had to give some legal assistance to the applicants.
9. According to my observation, senior superintendent Brits had interest in the matter as such, it can be said that he was not bona fide in his approach, as his advice would have had far-reaching negative results to the administration of the law and the perception of the community regarding justice, particularly that of Frankfort if the applicants were re-instated.”

[43] In my view, the respondent failed to adduce evidence that showed on a balance of probabilities that the appellant had no reasonable and probable cause for initiating the investigation. This is especially so because the respondent conceded that an investigation was necessary and his counsel conceded that the appellant acted in his official capacity. The appellant that there was a *prima facie* case against the respondent must be taken in its proper context, namely that statements had been made to the appellant accusing the respondent of some impropriety in his involvement in the Steenberger case, that the respondent in his own letter (attached to the summons) referred to the statements made by Nkuna and Mofokeng, and that the appellant made that statement in response to a specific enquiry made by the national office of the SAPS. It is clear that Mr Nkuna’s statement that he would not make a statement as he was not a complainant in the case was only made after the appellant had communicated his

belief that there was a *prima facie* case. Soon after Mr Nkuna's email, the respondent was advised that no disciplinary steps would be taken against him. Under such circumstances, I am satisfied that the respondent failed to prove malice.

[44] My perusal of the trial court's judgment leaves me with the impression that it conflated the successful outcomes of the grievances lodged by the respondent against the SAPS with the dispute it had to resolve and concluded that the appellant had acted maliciously towards the respondent. Little regard was paid to the fact that such arbitration proceedings were directed at the department and various officials involved in staff recruitment and were not directed at the appellant's exclusive conduct. The successful arbitrations against the department can, in my view, have no bearing on a claim made against the appellant in his own personal capacity, as is the case in this matter.

[45] For the reasons alluded to before, I am satisfied that the trial court erred in finding that the respondent had succeeded in proving its case of malicious prosecution. The trial court proceeded to make findings that are related to a defamation claim even though that was not the case the appellant was called upon to meet. The trial court clearly failed to confine itself to the case that was pleaded and clarified by the parties during the hearing. That the appellant always understood the claim to be that of malicious prosecution only is evident from the record, which shows that after the closure of the respondent's case the appellant's counsel applied for absolution from the instance on the basis that the respondent had

not proven a claim of malicious prosecution and that he had canvassed matters that related to a claim of defamation even though same had not been proven. This clearly constitutes a material misdirection. Even if it were to be accepted that the respondent had, in addition to the claim of malicious prosecution, also pursued a claim of defamation, then the same facts that served to show that the respondent had not proven malice would be the same facts that would serve to show that the appellant had refuted the requirement of unlawfulness. In so far as the trial court found that the appellant had not discharged that onus, it erred. The trial court's findings thus fall to be set aside.

[46] With regards to costs, I am of the view that there is no justification for deviating from the ordinary rule that costs are to follow the result. In the result the following order is made:

1. The appeal is upheld with costs.
2. The order of the trial court is set aside and replaced with the following: "The plaintiff's action is dismissed with costs."

M. B. MOLEMELA, J

I concur.

A. F. JORDAAN, J

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