

IN THE KWAZULU-NATAL HIGH COURT: DURBAN
REPUBLIC OF SOUTH AFRICA

CASE NO: 476/2001

In the matter between:

MEERCHAND MAHARAJ

Plaintiff

and

THE GOVERNMENT OF THE REPUBLIC
OF SOUTH AFRICA

Defendant

J U D G M E N T

KOEN J:

INTRODUCTION:

[1] The plaintiff claims damages from the defendant as follows:

- (a) R1 million for pain, suffering and contumelia in respect of wrongful
and malicious prosecution;

(b) R5 500,00 in respect of legal expenses.

No evidence in support of the claim for legal expenses was adduced, and at the conclusion of the trial, plaintiff's counsel indicated that the claim for legal expenses was not persisted with.

[2] The malicious prosecution is averred to arise from 'certain members of the Justice Department', having allegedly unlawfully and maliciously set the law in motion against the plaintiff by instigating charges of fraud alternatively theft, alternatively corruption and defeating and / or obstructing or attempting to defeat the course of justice, resulting in the plaintiff having to appear in the Magistrate's Court on 28 January 2000. The matter was adjourned to subsequent appearances on a number of occasions. On 12 June 2000 the charges against the plaintiff were withdrawn.

[3] It is not disputed by the defendant that certain officials of the National Prosecuting Authority caused the plaintiff to be charged as alleged. The defendant pleads that the 'prosecution was based on good cause and was instituted in good faith', more particularly that the officials were in possession of information and / or evidence which was sufficient for a *prima facie* case against the plaintiff.

THE APPLICABLE LEGAL PRINCIPLES:

[4] The requirements for succeeding with a claim for malicious prosecution have been restated recently in *Minister of Justice and Constitutional Development v Moleko*.¹ A plaintiff has to prove:

- (a) that the defendant set the law in motion (instigated or instituted the proceedings);
- (b) that the defendant acted without reasonable and probable cause;
- (c) that the defendant acted with 'malice' (or *animo injuriandi*);
- (d) that the prosecution has failed.

THE CENTRAL ISSUES FOR DETERMINATION:

[5] The parties are at *ad idem* that the requirements in subparagraphs [4](a) and (d) in the preceding paragraph were met. What remains in dispute is whether the plaintiff has proved:

- (i) that the defendant acted without reasonable and probable cause;
- (ii) that the defendant acted with 'malice'.

THE FACTUAL BACKGROUND:

[6] The following facts are either common cause or not disputed. They are taken largely from the evidence of the plaintiff:

¹ 2009 (2) SACR 585 (SCA) at para [8].

- (a) During 1999 to 2000 the plaintiff was an additional magistrate in Durban² who presided over district court 10.
- (b) With knowledge of the judgment *inter alia* in *S v Reddy and Others*³ he from time to time, in matters that came before him, imposed sentences providing that either the whole or part thereof be suspended, pursuant to the provisions of s 297 (1)(a) (cc) or (hh) of the Criminal Procedure Act 51 of 1977 ('the CPA')⁴, on condition that certain payments be made to specifically identified beneficiaries.
- (c) The amount ordered to be payable to beneficiaries, such as the SPCA, Hospice, Business Against Crime and others, was determined with reference to the amount of a fine which would otherwise have been considered as appropriate, had the plaintiff decided to impose a fine, given the circumstances relating to the particular contravention.
- (d) This was also a practice followed by some other magistrates, who granted similar types of orders.
- (e) How the beneficiaries initially came to be determined and how the money directed to be paid to them reached the beneficiaries, was explained with specific reference to Business Against Crime. A witness had testified as to what its objectives were, so that the plaintiff had some background as to its activities.

² The plaintiff is at present a Regional Court Magistrate in Durban.

³ 1996 (2) SACR 1 (SCA).

⁴ As opposed to compensation orders in terms of s 300 of the CPA.

(f) In other cases there would not be any evidence from the particular beneficiary, but the plaintiff would simply make such an order in his discretion, having identified the particular beneficiary referred to in the order as deserving of such benefit. The beneficiary would be notified and representatives from that beneficiary would then call at the magistrate's court and issue a receipt, a copy of which would be attached to the Charge Sheet. The bench book would be endorsed to the effect that 'beneficiary notified'. If the beneficiary was not present, then the money would be paid to the Clerk of the Court and the beneficiary would then be notified by the Clerk of the Court.

(g) The plaintiff merely issued these orders and handled payment of the monies personally.

(h) In some instances, the plaintiff contended that the prosecutor might have requested such a sentence but he conceded that this was not necessarily so.

(i) During or about 1998 a crèche was started in the Durban magistrate's court building for people in the building, either staff members who contributed fees for the privilege to allow their children to make use of the crèche, or to allow children of accused persons and witnesses to be secured there without any fee being paid whilst their minders were otherwise busy in court.

(j) According to the plaintiff, he had no direct connection with this crèche, but knew of its existence.

(k) At a magistrate's meeting, at some stage, Mr Smit, a co-magistrate and subsequently co-accused with the plaintiff, during a private discussion with the plaintiff, raised the subject of the crèche and it becoming a beneficiary of these orders issued by the plaintiff from time to time. According to the plaintiff's evidence Mr Smit said words to the effect that '...the special projects from the Chamber of Commerce are busy with projects ... They are also assisting in the court with the crèche ... You have made all these previous orders. If the occasion arises and you see fit to do so would you mind considering it?" The plaintiff replied that he had no problem with that request. He explained in his evidence that this was how he came to know that the Chamber of Commerce special projects related to projects within the court building.

(l) The plaintiff thereafter commenced imposing sentences and granting similar suspension orders as before, but now providing for payments to beneficiaries variously referred to as 'DCC (Durban Law Courts) community crèche', or 'Chamber of Commerce special projects'. In all these instances the crèche was intended to benefit.

(m) These types of sentences were subsequently reviewed,

disapproved of and set aside in a judgment by Van der Reyden and Niles-Dunér JJ, probably⁵ on the basis that there was no link or nexus between the nature of the offence of which a particular accused was convicted and the beneficiary identified for payment⁶.

(n) The plaintiff did not know from his own knowledge whether a Chamber of Commerce special projects fund existed.

(o) Once the orders were made by him, administrative clerks employed in the building, notably Karlien Marais and Pegggy Govender were summoned to the plaintiff's court either by him personally, or by others at his instance. The plaintiff would direct the accused to these officials at the back of the court who would collect the monies and issue an unofficial receipt, of the standard variety one can purchase from stationery dealers, one copy of which would be attached to the charge sheet or summons. The receipt would reflect receipt by the Chamber of Commerce special projects or Chamber of Commerce or 'DCC' or 'Durban Community Courts'. In the case of one accused, Flora Dlamini, a typed receipt was issued with the magistrate's court stamp thereon.

(p) These officials who collected the monies were, to the knowledge of the plaintiff, not 'people from the Chamber of Commerce'.

(q) The bench book would be endorsed to reflect 'beneficiary notified'.

⁵ I was not provided with any written judgement.

⁶ The validity of these orders is not a primary or decisive issue in this trial.

According to the plaintiff, his understanding was that,
 ‘the clerks were part of the people involved with the crèche by the
 Chamber of Commerce as part of their project for the
 crèche. So if they collected the money, to me that was sufficient
 compliance that it was the Chamber of Commerce.’

(r) The funds were however never received by the Durban Chamber of
 Commerce and Industry.

(s) At all material times par 162 (c) of the Code for Clerks of the Court
 provided in respect of compensation payable directly to a
 complainant that:

‘Where another institution or individual is charged with the recovery
 of the compensation, the clerk of the court must inform the said
 institution or individual in writing of the particulars of the sentence
 and the conditions of suspension and request institutions or
 individuals to apply for the implementation of the sentence if the
 accused fails to comply with the conditions of suspension and
 requests the institution or individual to apply for the implementation
 of the sentence if the accused fails to comply with the conditions of
 suspension. A copy of the notice must be attached to the record.
 The application for implementation must be accompanied by an
 affidavit in which particulars of the breach of conditions are to be
 set out.’

(t) On 10 January 2000 the plaintiff deposed to an affidavit which was

handed to the police explaining the nature and extent of his involvement .

- (u) On 24 January 2000 the Director of Public Prosecutions represented by a Mr Sankar had determined that the plaintiff and Mr Smit be prosecuted summarily in the Regional Court.
- (v) On 28 January the plaintiff and Mr Smit were required to appear in court.
- (w) On 23 February 2000 the plaintiff deposed to a second affidavit referring to the involvement of Mr Smit and detailing the communications made to him by Mr Smit on which he based his belief, thought process and understanding.

WHAT WAS AVAILABLE TO THE STATE WHEN THE DECISION TO PROSECUTE WAS TAKEN:

[7] As significant as the plaintiff's oral evidence of his version of events and his motivation for acting in the manner he did as testified during the trial may be, the crucial issue is what information and evidence was available to the State when the decision to prosecute was taken and whether that, and any inferences to be drawn there from, were sufficient to at least *prima facie* point to the commission of an offence by the plaintiff.

[8] The defendant, represented by the Directorate of Public Prosecution had

the content of the police docket as at 24 January 2000 available to it when the decision was taken to prosecute the plaintiff. This docket contained inter alia the various charge sheets in respect of which the orders were made, as well as various affidavits by would be State witnesses, and also the affidavit by the plaintiff dated the 10th January 2000. It was agreed between the parties that these affidavits in the docket are what they purport to be. The defendant thus had evidence on oath of the allegations recorded in these affidavits, although the correctness thereof was not admitted by the plaintiff. Mr Sankar testified that he had held consultations with many of the witnesses and had satisfied himself as to their credibility. However his impressions as to their credibility and whether the allegations the various state witnesses deposed to may ultimately be proved, is not relevant to this trial.

[9] I do not intend repeating the contents of these affidavits which were in the docket in detail. They are contained in exhibit D2. I shall only briefly refer to the portions thereof relevant to this judgment.

[10] The further affidavit by the plaintiff dated the 23 February 2000 was also referred to in the evidence. It is not clear whether this affidavit found its way into the docket and if so when. It seems that it might only have been presented to the prosecuting authorities when representations were made to the Director of Public Prosecutions towards the middle of 2000 to withdraw the charges. It might be the 'written representations' referred to in the letter from the Director of Public

Prosecutions dated 6 June 2000 advising that the charges against the plaintiff were to be withdrawn and recording the intention on the part of the prosecution to call the plaintiff as a state witness in the trial against Mr Smit. The investigation diary in the docket did not refer to this affidavit being filed in the docket and *ex facie* the document it does not appear to have been allocated an 'A' reference number, as is usual with affidavits filed under the 'A' clip in a docket. However, it does seem strange and improbable that the plaintiff would go to the trouble of preparing this affidavit and deposing thereto on 23 February 2000, simply to then withhold it until some months later. Whatever the correct factual position may be, it is clear that this affidavit was certainly not available to the State at the time when the decision to prosecute was taken, as it was not yet in existence by that date.

[11] The events having occurred some eleven years ago Mr Sankar was unable to recall what exactly had motivated him to prosecute, save to state that having perused the contents of the docket he was satisfied that there was a case made out which had to be answered. He however conceded that it was a difficult decision and that when he discussed it generally and superficially with some prosecuting colleagues, their partially informed views whether to prosecute or not were not unanimous.

[12] In my view, the decision to prosecute the plaintiff was justified and the subsequent decision to withdraw the charge against the plaintiff understandable.

I conclude thus for the following reasons:

(a) The nature of the orders granted. It became a condition of suspension of various sentences that payment of certain amounts had to be made to the Chamber where there was no link or nexus between the subject matter of the charges and the Chamber. This on its own, although certainly not decisive, would have appeared very suspicious to any reader of the docket, as potentially pointing to a possible nefarious purpose being sought to be achieved. The orders granted by the plaintiff were subsequently found by two Judges of this Division to be irregular and were set aside. I share that view. The fact that the orders were not competent and subsequently declared to be such, obviously does not establish *per se* that the State was entitled to prosecute. Not every mistake by a Judge or Magistrate means that a prosecutable offence has been committed. But the unusual nature of the order in my view certainly created a suspicion, which together with the other factors below, gave rise to a *prima facie* case. This is also particularly so where according to the affidavits of a number of prosecutors, all filed in the docket, they had not asked for these particular orders or required payment to the Chamber, but the orders were issued by the plaintiff of his own volition.

(b) Although the orders were made in favour of the Chamber of Commerce special project, or the chamber described by other designations, the references in all instances was clearly intended to be the Durban Chamber of Commerce and Industry. There is no other and there has been no suggestion that any other chamber than the Durban Chamber of Commerce and Industry

was intended. Indeed the receipts reflected the recipient also not as any 'project' but in most instances as 'Chamber of Commerce', or payment being received 'for Chamber of Commerce'. According to the affidavit of Mr Parsons, the Vice-President of Finance and Treasure for the Durban Chamber of Commerce and Industry, the Chamber had not been notified of any such orders from which it was to benefit, nor had any arrangements been entered into with the Chamber allowing for such orders, nor had any funds ever been received by the Chamber. This evidence was in direct conflict with the entry reflected in the bench book on every occasion that the beneficiary had been 'notified'. It also conflicts directly with what is to be gleaned from the charge sheets and bench book namely that payment had been made to the chamber, when the chamber in fact had no knowledge thereof and did not receive same. Certainly, to any reader, these circumstances would point to some potential misrepresentation or possible theft of monies.

(c) The plaintiff knew that these funds, resulting from suspended sentences imposed by him, were being receipted in his court, often at his direction, by Department of Justice officials who had nothing to do with the cash hall or the chamber, but were Justice administrative officials. They purported to receive these funds 'for' or on behalf of the chamber. The procedure in par 162 (c) of the Code for Clerks of Court had not been complied with, whether that was known to the plaintiff or not. The plaintiff knew that these funds were used for the crèche. According to the affidavit of Marie Nel, the plaintiff was shown receipts relating to the purchase of a freezer, camping cot, sheets, cot mattresses and

toys for the crèche.

(d) According to the affidavit of Wilhelmina Karlien Marais, Mr Smit had asked for an amount of R1 000,00 from these funds during September to October 1999. No reason was given for him wanting these funds, no receipt was issued and it was not repaid, resulting in her being unable to account therefore. According to the affidavit of Captain Van Vuuren there were also instances of certain other loans having been made. The funds although destined for the chamber, or then the crèche, do not appear, on the affidavits, to have been confined in their use for the benefit of the crèche, and the person who assisted in creating this fund was the plaintiff.

(e) Clearly it was represented to the various accused and to the State that these payments were to be made to the chamber. In fact that was not so and money represented to be destined for the chamber were diverted and found there way to some officials who used it for the crèche and / or certain loans and the R1 000,00 given to Mr Smit, to the prejudice, actual or potential of the chamber and/or the State. That established *prima facie* the *actus reus* for at least fraud and / possibly theft.

(f) The only remaining issue for the reader of the docket to determine was whether it could be inferred at a *prima facie* level that the plaintiff had the required *mens rea* that the plaintiff intended a fraud, or theft of the money. Based on what was the plaintiff's knowledge, set out above, that is that payments were received by Department of Justice employees of funds intended to be for the benefit of the chamber, and that funds destined for the chamber and of which

the chamber as beneficiary had not been notified being diverted, the irresistible inference, or at least the only reasonable inference in the absence of a credible explanation to the contrary was that the plaintiff knew the funds were not reaching the intended named beneficiary. His counter to that is that the officials receipted these funds 'for Chamber of Commerce'. He had in many instances called or caused these officials to be summoned to his court to receipt the funds. In referring accused persons to these officials to pay the suspended portion, he represented to the accused persons that these officials represented or were authorized to receive those payments on behalf of the chamber. It was thus crucial that the plaintiff explain the basis of any belief he might have held that these administrative officials of the Department of Justice, who should be devoting their time and attention to the business of the Department of Justice, could on an ad hoc basis, during official working time, represent the chamber (at least for the purpose of receipting funds). The plaintiff was given the opportunity to set out in detail the basis of his defence and hence the basis for his beliefs in this regard in the affidavit deposed to on the 10th January 2000. He contented himself by simply recording:

"12

The entry in the court book which indicates beneficiary notified relates to the fact that the monies were paid by the accused and that this would prevent duplication of work by the clerk of court 10 in having to send letters of notification to Chamber of Commerce informing them of such order.

13

The monies which were received by the said clerks was done on the basis that it was convenient for the clerks to receive the monies here as this was that I understood the arrangement was with Mr Parsons of the Chamber of Commerce."

(g) No basis was advanced for such belief other than that it was for "convenience". No factual basis was advanced which could have caused him to understand that that was the arrangement with Mr Parsons or anyone else of the chamber. No person was identified who allegedly communicated to him any information on the basis of which he could have formed that understanding or pointing to his *bona fides* for forming such belief;

(h) The plaintiff's allegation that he understood that the clerks from the Department of Justice could receive the money for the chamber, without detailing the basis for such belief, had an appearance at best devoid of good faith and at worst indicating possible dishonesty. The explanation of the entry in the bench book that the beneficiary had been notified so as to prevent 'duplication of work by the clerk of court 10 in having to send letters of notification ...' is similarly incredulous. If the prescribed procedure required the clerk to send a written notification, then that should be followed. If other beneficiaries could have been phoned for them to have representatives present in court to receipt the money, then there was no explanation why this could also not be done in respect of the chamber. In my view the terse explanations proffered by the plaintiff in his first affidavit was such as to leave considerable doubt as to whether his mere say so that he understood that there was such an arrangement in place with the Chamber of Commerce, could be said to be reasonably possibly true, or to be remotely such as to disturb the only inference from the facts making up the *actus reus*, that the plaintiff had intended this result. Particularly, the reader of the docket would have had to weigh up the mere say so by the plaintiff that he

understood that this was the arrangement with Mr Parsons, against the direct evidence of Mr Parsons contained in his affidavit that no funds had been received, no such an arrangement had been entered into, and no notification had ever been received by the chamber.

(i) If the plaintiff had disclosed the source of his belief or any information and the nature of such information as had been communicated to him by any such source in his initial affidavit, provided the source was credible and the nature of what was communicated to him had the appearance of being reasonably possibly true, the decision as to whether to prosecute would probably have been different. But this the plaintiff did not do. The first time he identified Mr Smit, a senior magistrate, as the source of such information in the affidavit deposed to after he had been charged, namely on the 23rd of February 2000. Certainly by the time representations were made to the Director of Public Prosecutions during June 2000, the contents of this affidavit was brought to the attention of the State. If indeed Mr Smit had given these assurances to the plaintiff and had made the statements attributed to him by the plaintiff, being from a senior colleague, the plaintiff's reliance on such statements might have negated the inference of intention on his part. However, even then the evidence of what Mr Smit had told him, would be in direct conflict with what Mr Parsons says in his affidavit and if the latter's evidence was accepted, a strong case would be made out against Mr Smit. But such a case would also require the evidence of the plaintiff against Mr Smit. Hence it is no surprise to find in the letter from the

Director of Public Prosecutions dated 6 June 2000 advising that the charges were being withdrawn, that the plaintiff was to be used as a state witness against Mr Smit.

(j) Even to that extent, the plaintiff might have been fortunate to have the charges against him withdrawn because if during any trial against Mr Smit, the plaintiff's evidence as to what Mr Smit on his version allegedly told him was disbelieved, his complicity would continue to exist and hence also his status as potential accomplice. The State might in those circumstances have been remiss, on that information, not to continue against both Mr Smit and the plaintiff, leaving any conflict between them to be resolved and decided in one forum.

(k) Based on the aforesaid, I am not persuaded that the plaintiff has shown that the defendant acted without reasonable and probable cause and with malice in taking the decision to prosecute.

CONCLUSION:

[13] It follows from the aforesaid that the plaintiff's claim must fail.

[14] The defendant having been successful, the costs must follow the result of the trial.

ORDER:

The plaintiff's claims are dismissed with costs.

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COUNSEL FOR PLAINTIFF: ADV. L PILLAY SC with M BAHADUR

PLAINTIFFS ATTORNEYS: KESI MOODLEY

Ref.: KM/HC/M168

COUNSEL FOR DEFENDANT: ADV P MOKHATLA with ADV S J

MTHIMUNYE

DEFENDANTS ATTORNEYS: STATE ATTORNEY