

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: **A93/2023**
(Court A *quo* case number: **82114/2017**)

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
18/02/2025	
DATE	SIGNATURE

In the matter between:

DAVID GORDON CLIVE SANDOW

Appellant (Plaintiff *a quo*)

and

**NATIONAL DIRECTOR OF PUBLIC
PROSECUTIONS**

Respondent (Defendant *a quo*)

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 18 February 2025

JUDGMENT

LENYAI, J (BASSON, J AND MPSHE, AJ CONCURRING)

Introduction

[1] This is an appeal flowing from an action for malicious prosecution. The appeal is against the order of absolution from the instance, delivered by Malungana, AJ on 07 November 2022. The appellant's claim emanates from a trial in the Pretoria North Regional Court on a charge of murder.

Background

[2] David Gordon Olive Sandow (the appellant) was a male security officer at the time of the incident herein. The National Prosecuting Authority (the NPA) of South Africa (the respondent), is the body responsible for criminal prosecutions in the Republic of South Africa.

[3] On the 29 May 2008, the appellant was on duty at the South African Breweries (SAB) in Rosslyn. He visited the canteen and whilst waiting for his food, he was confronted by an employee of SAB about entering the canteen whilst in possession of a firearm. Allegedly, an exchange of words ensued whereby the appellant, believing that the employee wanted to rob him of the firearm, pulled out the firearm and fatally shot the employee (the deceased).

[4] The appellant was arrested and charged for murder. He was subsequently convicted for murder in the Regional Court of Pretoria North. He was sentenced to 10 years imprisonment. On appeal, on 29 January 2015, both the conviction and sentence were set aside.

[5] On 04 December 2017, the appellant issued combined summons against the respondent for malicious, unlawful prosecution. The claim is for damages in the amount of R 4 500 000. The action proceeded before Malungana, AJ. After the close of the appellant's case, the respondent applied for absolution from the instance. This was granted with costs.

[6] Application for leave to appeal to this court was granted by the court *a quo* on 24 February 2023.

The Law

[7] In our law, absolution from the instance is regulated by rule 39(6) of the Uniform Rules of Court. The rule provides as follows:

“At the close of the case for the plaintiff, the defendant may apply for absolution from the instance, . . .”

It is trite that for the defendant to succeed on an application for absolution from the instance, the plaintiff must have failed to establish a *prima facie* case.

In order to succeed with a claim for malicious prosecution, the plaintiff must prove the following requirements:

- (a) That the defendant set the law in motion.
- (b) That the defendant acted without reasonable and probable cause.
- (c) That the defendant acted with “malice” (or *animo injuriandi*) and
- (d) That the prosecution has failed.

[8]

8.1 The following are issues not in dispute:

- a. That the respondent set the law in motion and
- b. That the prosecution failed, albeit only on appeal.

8.2 Issues in dispute:

- (a) Whether the respondent acted unconstitutionally and had reasonable and probable cause to conduct and maintain the prosecution as it did.
- (b) Whether the respondent acted with malice in failing to act like a reasonable, objective and skilful persecutor in accordance with the constitution and legal duties of a prosecutor.

[9] Generally, the onus rests on a plaintiff to prove its case. The plaintiff has to establish a *prima facie* case calling upon the defendant to answer. *Prima facie* in the sense that the evidence of the plaintiff relates to all elements of the claim.¹

[10] In *Claude Neon Lights (SA) Ltd v Daniel*, the test for absolution to be applied at the end of a plaintiff's case was set out as follows:²

"It is to that question that I now turn, bearing in mind that, when absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established. But whether there is evidence upon which a court applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff" (my emphasis)

[11] I now hereunder attend to the requirements above at the hand of evidence tendered.

Probable cause

[12] This pertains to requirement (b) above. Reasonable and probable cause is explained as follows in *Beckenstrater v Rottcher And Theunissen*,³ where the court stated:

"When it is alleged that 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."

[13] Reasonable and probable cause may be determined by an examination of the evidence adduced. In the court *a quo*, the appellant led evidence of two witnesses, being Adv Jacobs and the appellant himself. The evidence of the expert witnesses is of no relevance for purposes of this appeal. Adv Jacobs is the prosecutor who

¹ *Ex parte The Minister of Justice: In re R V Jacobson And Levy* 1931 AD 466 at 478.

² 1976 (4) SA 403 (A) at 409G-H. See also *Fedgas (Pty) Ltd v Rack-Rite Bop (Pty) Ltd* [1997] 3 All SA 68 (B) at 72.

³ 1955 (1) SA 129 (A) at 136A-B.

represented the state in the appeal against the conviction and sentence of the Regional Magistrate.

[14] In brief, he testified that he conceded that the appeal ought to succeed as a result of contradictions in the state's case in the Regional Court. He testified and put on record the statements (from the case docket) of the three witnesses; Annah Malantswana, Dinah Mamabolo, Daniel Phetha and the affidavit of Officer Zimu.

14.1 The statement of Annah Malantswana may briefly be summed up as follows:

"That she was at the canteen. She then saw deceased enter the canteen for food. Deceased then asked the plaintiff (accused) as to why he entered the canteen with the firearm. Plaintiff put the food down cocked his gun and shot the deceased once. Deceased pleaded with plaintiff not to shoot him, again. She ran outside to report and call an ambulance"⁴

14.2 The statement of Dinah Mamabolo may be summed up as follows:

"That when plaintiff (accused) was about to go away, the deceased, and his friend entered the canteen to buy food. Deceased then asked plaintiff as to why he entered the canteen with a firearm. Deceased did not wait for an answer but continued checking for his food."⁵

14.3 The statement of Daniel Pheta may be summed up as follows:

"That on that day (on 29 May 2008) he entered the canteen whilst Daniel (deceased) was already in front. He saw the deceased talking to a security officer who was leaving the canteen. The security officer faced the deceased, drew a firearm, cocked it and fired the deceased and left. Deceased asked him, witness, to hold him and he was bleeding from the back."⁶

14.4 The affidavit of investigating officer Zimu was also read:

"He states that he is the investigating officer in this matter, that he opposes bail. He mentioned the plaintiff's residential address, that the plaintiff has no

⁴ Record pp.209 lines 1-25.

⁵ Record pp. 210 lines 20-25.

⁶ Record pp. 211 lines 17-25 and pp 212 lines 1-3.

previous convictions. Further that plaintiff's address in Witbank is to be confirmed for granting of bail." ⁷

[15] In addition to the above, a post-mortem report was put on record, as well as the finding of the appeal court to the effect that witnesses contradicted themselves. I am of the opinion that the post-mortem and the appeal decision are of no importance in determining the existence or otherwise of a just and probable cause.⁸ The appeal decision was not in consideration when the prosecutor initiated the prosecution against the appellant and the post-mortem report was *prima facie* evidence that the bullet that caused the fatal injury was from a firearm that was fired by the appellant.

[16] Considering the statements of witnesses as per the docket placed on record by Adv Jacobs, I fail to find any indication of absence of probable cause on the part of the respondent. The witnesses, Annah, Pheta and Dinah do not mention anything regarding the attempted robbery of appellant's firearm. Their statements are, to my mind, clearly demonstrating the commission of an offence, providing the respondent with a probable cause to prosecute.

[17] I am in agreement with the finding of court *a quo* that the evidence of Adv Jacobs does not help the appellant. I base my view on the fact that Adv Jacobs did not peruse or study the case- docket for prosecution purposes. He dealt with the matter at appeal level. His evidence could not be examined for the existence of probable cause or otherwise. It should be remembered that he, Adv Jacobs, had filed Heads of Argument opposing the appeal but changed his mind when the appeal court enquired of him as to the success of the appeal. He then changed and referred to contradictions in the state evidence. Of importance in this determination of probable cause is the subjective element of the initial prosecutor who set the matter in motion in the Regional Court, and not on appeal.

[18] The evidence of the appellant, in my mind, does not contribute to establishing a *prima facie* case. In his evidence in chief, he did not testify to the existence or otherwise of probable cause nor malice.

⁷ Record pp 213 lines 3-25 and pp 214 lines 1-8.

⁸ See also *Fedgas (Pty) Ltd v Rack-Rite Bop (Pty) Ltd* [1997] 3 All SA 68 (B) at 72.

Animus Injuriandi

[19] It is trite in our law that malice, as a requirement, refers to *animus injuriandi*. The case of *Rudolph and Others v Minister Of Safety And Security And Another*⁹ states the following regarding the requirements for malice:

“The requirements for ‘malice’ have 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* and *Prinsloo and Another v Newman*. By way of further elaboration in *Moleko* it was said:

‘The defendant must thus not only have been aware of what he/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.’”

[20] Having perused the statements and or affidavits of the state witnesses in the docket, and the pleadings herein, I find no indication of malice on the part of the prosecution. Neither was this requirement dealt with by the appellant in the court *a quo*.

[21] In conclusion, I find it appropriate to refer to an article in the appellant’s Heads of Argument. This is an article by Professor Chucks Okpaluba titled “Reasonable and Probable Cause in the Law of Malicious Prosecution”¹⁰ and explains the following:⁸

“The requirement that the plaintiff in an action for malicious prosecution must prove a lack of reasonable and probable cause to initiate, instigate or continue the prosecution on the part of the instigator or prosecutor is one of the four elements of that cause of action. It is a vital link between the lawfulness of the prosecution and the state of mind of the defendant. Again, whether a prosecution is wrongful or lawful depends on whether there was a reasonable or probable cause coupled with the *animus injuriandi*

⁹ 2009 (5) SA 94 (SCA) at para 18.

¹⁰ Okpaluba “Reasonable and Probable Cause in the Law of Malicious Prosecution: A Review of South African and Commonwealth Decisions” (2013) 16 *Potchefstroom Electronic Law Journal* (PER) 240.

of the defendant in instigating, initiating or continuing it. It is not whether the prosecutor possessed evidence to secure a conviction since that is for the trial court to decide after the conclusion of the evidence; but the honest belief by the prosecutor that, having carefully collected and objectively assessed the available information, the plaintiff was probably guilty of the crime. In coming to that decision, the prosecutor must have grappled with both the subjective and objective elements in the exercise of that discretion."

[22] I am satisfied that this appeal stands to be dismissed.

[23] I order as follows:

1. The appeal is dismissed with costs.



M LENYAI
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I Agree,



AC BASSON
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I Agree,



M J MPSHE
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances:

For the Appellant: Adv S Güldenpfenning SC instructed by
Dyason INC

For the Respondent: Adv M Makhubela instructed by State
Attorney, Pretoria

Date of hearing: 25 July 2024

Date of Judgment: 18 February 2025