IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: 5293/22

In the matter between:

JANE DAVIES	**PLAINTIFF**
and	
THE MINISTER OF POLICE	**FIRST DEFENDANT**
THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	**SECOND DEFENDANT**

ORDER

The following order is made:

The plaintiff's claims against the defendants are dismissed with costs on scale B.

JUDGMENT

Sibiya AJ

Introduction

[1] On 05August2019, the plaintiff was served with the summons to appear before the Magistrate's Court, Durban, on 30 August 2019, on a charge of contravention of s 120(9)(f) of the Firearms Control Act 60 of 2000 ('The Act').

[2] The charge, as reflected in the charge sheet, was that on or about 15 and 16 August 2018, and at or near Maydon Wharf in the district of Durban, the plaintiff unlawfully contravened the Act by furnishing false information to Selvarani Naicker, a Flash Officer and/or Registrar and/or a Designated Officer. Specifically, it was alleged that the plaintiff falsely stated that the firearms referred to under reference number MARI 3153, 3154, 3155 and 3156 were located in Fujairah and Serbia, whereas, they were, in actual fact, already in South Africa. It was further alleged that the plaintiff, at the time of furnishing the information, either knew that it was false or, alternatively, did not hold the belief that the information supplied was true.

[3] The criminal proceedings endured for a period exceeding two years until the plaintiff's acquittal on 12 October 2021. Pursuant to the verdict, the plaintiff instituted an action for damages in the amount of R950 000.

[4] At the commencement of the trial, the parties agreed to a separation of issues, as envisaged in rule 33(4) of the Uniform Rules of Court ('the rules'). Accordingly, I am enjoined to determine the question of liability, with the issue of quantum standing over for later determination. The parties were also in agreement that the defendants bore an onus to justify the alleged arrest and prosecution of the plaintiff.[1]

Pleadings

[5] The particulars of claim, although lacking the requisite clarity and conciseness, indicate that the cause of action is founded upon allegations of unlawful arrest and malicious prosecution. It is alleged that the conduct of the defendants' members was wrongful and/or unlawful, alternatively, malicious and/or negligent, and in breach of the plaintiff's constitutional and civil rights. It is further pleaded that members of the

[1] *Minister of Law and Order and Others v Hurley and Another* [1986] ZASCA 53; See also *Mahlangu and Another v Minister of Police Mahlangu and Another v Minister of Police* [2021] ZACC 10; 2021 (7) BCLR 698 (CC); 2021 (2) SACR 595 (CC).

defendants acted without reasonable or probable cause in effecting the plaintiffs arrest and prosecution, and without a reasonable belief in the veracity of the information or evidence on which they relied, or that such evidence would suffice to sustain a conviction.

[6] The defendants initially raised a special plea of non-compliance with ss 3 and 4 of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002, alleging that the plaintiff failed to serve the requisite notice of intention to institute legal proceedings on the heads of the relevant departments, and further, that such notice was served late. The special plea was, however, subsequently abandoned during the pre-trial conference held by the parties on 23 August 2023.

[7] On the merits, the defendants, in their plea, admit the issuing of the summons and the prosecution of the plaintiff, however, resist liability contending that the prosecutor had thoroughly assessed all the facts, evidence and circumstances of the matter and was, at all material times, of the view that there was a reasonable prospect of a successful prosecution. The prosecutor was of the view that the plaintiff knew the whereabouts of the relevant firearms before she lodged the applications for permits.

[8] At paragraph 12 of their plea, the defendants aver that when interviewed by members of the first defendant in December 2018, the plaintiff had elected to remain silent, reserving her explanation for court and declined to cooperate with the police investigation. They contend that her cooperation might have curtailed the investigation and obviated her subsequent prosecution.

[9] In replication, the plaintiff contends that in terms of s 35 of the Constitution, she has a right to remain silent and not to be compelled to assist the police in their investigation.

Evidence

[10] In discharging the onus placed on them, the defendants called two witnesses: Selvanary Naicker ('Naicker'), followed by the prosecutor, Zakheleni David Nsuza

('Nsuza'). The plaintiff thereafter testified in support of her claim. Several exhibits, including *inter alia*, the summons initiating the criminal proceedings, a copy of the police docket, the transcripts of the criminal proceedings and the SAP 520 form, were admitted into the record by consent. The SAP 520 form is a regulated standard application form utilised by individuals and companies to apply for multiple import or export permits for weapons as defined in the Act.

[11] Naicker's evidence is that at the time the plaintiff was charged, she was a Warrant Officer in the service of the South African Police Service ('SAPS') and was stationed at the Habour Firearms, Liquor and Second Hand Goods Office (Flash Office). Her duties entailed overseeing receipt and consideration of applications brought on SAP 520 forms for entry and safekeeping of firearms brought into the country by foreign vessels. Due to the country's ports being gun-free zones, the applications for imports and exports permits are scrutinised to determine strict compliance with the Act and regulatory requirements.

[12] The requisite documentation and annexures to the SAP 520 form are ordinarily required to be lodged with the Flash Office two to three months prior to the foreign vessel's entry into South African waters, save in exceptional circumstances when urgent approval is sought. The annexures include, *inter alia*, the particulars of the nominated local shipping agent responsible for the lodging of applications on behalf of foreign clients; the curriculum vitae and accreditation certificate of such agent; valid identification documents, passports; and a statement from the agent's overseas client seeking the issuance of the necessary permits. The documents serve to declare firearms being brought into the country and also advise of where they will be stored before they leave the country.

[13] On 15 and 16 August 2018 Naicker had received a total of four SAP 520 application forms for permits, as per reference numbers: MARI 3153, 3154, 3155 and 3156, in respect of 16 high calibre firearms and ammunitions on board four vessels en route to South Africa for the protection of the vessels against piracy at sea. The applications were lodged by the plaintiff, a shipping agent at Maritime Operations CC ('Maritime'), on behalf of the offshore client, Black Pearl. Upon scrutinising the information contained in the application forms, she established that

the relevant firearms being applied for, had previously been the subject of applications for permits submitted by one Clinton Ogle ('Ogle') of a company called Secure Shipping, on behalf of his offshore client, Patroit. The relevant firearms had already been permitted to Ogle under permit number M[…], M[…]2, M[…]3, M[…]4

[14] Having verified with two colleagues that the records at the Flash Office and the statistics submitted by Ogle reflect that the relevant firearms were at an armoury in Pinetown, Naicker had contacted Ogle telephonically to arrange for the inspection of his armoury. On 29 August 2018 before the inspection could take place, she learnt that the relevant firearms had been moved by Ogle and the plaintiff's husband to Titans Armoury ('Titans'), in Jacobs. Titans is a storage facility for firearms under Maritime's custodianship.

[15] Subsequent to finding out that the firearms were at Titans, it was arranged that an inspection be conducted by herself and her colleagues at Titans. At Titans, the relevant firearms were recovered and seized. In light of the alleged false information furnished in the applications lodged, and the movement of the firearms from Ogle's Pinetown armoury to Titans, without prior authorisation, Naicker testified that she had resolved to initiate criminal charges against both the plaintiff and Ogle.

[16] Naicker testified further that the need for the local shipping agents to collate and submit statistics to the Flash Office, pertaining to the firearms in their custodianship, had arisen during the year 2018, when concerns were raised pertaining to the spate of political killings in the country whereby high calibre firearms, originating from foreign countries, were found to have been utilised. Subsequent investigations had revealed instances of stockpiling of weapons, as local shipping agents were failing to lodge applications for extensions once the initially issued permits had expired. In response to these concerns, a meeting was convened with various stakeholders, including the representatives of the Provincial Central Firearms Registry, Flash officers, their superiors, as well as all nominated local shipping agents where it was resolved that all local shipping agents are required to submit comprehensive statistics in respect of every firearm under their custodianship and their locations within the country. Such statistics also had to include particulars of weapons that had also exited the country.

[17] Under cross-examination, while acknowledging that the declarant on the four SAP 520 forms is Black Pearl, and that the plaintiff had only signed the forms as a nominee of Black Pearl, Naicker insisted that the plaintiff was liable for the false information furnished on the forms stating that the plaintiff ought to have advised her overseas client about the applicable laws of our country. She contended that the plaintiff, as the nominated shipping agent for Black Pearl and the person who was going to obtain the permits upon their issuance, knew that the firearms were not in Fujairah but were in South Africa.

[18] Under cross-examination Naicker conceded that the professional relationship between herself and the plaintiff had at a certain stage, been strained, however she maintained that by the time the plaintiff was charged, such difficulties had already been resolved. She did not disclose the cause of the difficulties. She testified further that there was no obligation on her part to afford the plaintiff an opportunity to explain the discrepancies.

[19] Nsuza testified that he is a commercial prosecutor currently based at the Durban Magistrate's Court. Prior to relocating to Durban, he had been a prosecutor at the Empangeni Magistrate's Court. He did not have prior knowledge of the plaintiff until he became seized with the matter in August 2020, when the matter was already ripe for trial. Having examined the police docket and consulted with State witnesses, he formed the view that there was sufficient evidence to prosecute the plaintiff on a charge of furnishing false information in the application forms. He was of the opinion that the evidence was sufficient to secure a conviction. He had further noted that the plaintiff, on being questioned by the police, had elected to remain silent and to provide an explanation at court.

[20] Under cross-examination Nsuza testified that, his decision to prosecute the plaintiff was informed, inter alia, by the written statements of two of Naicker's colleagues, Warrant Officer Pillay and Sergeant Conjwa ('Conjwa'), who corroborated Naicker's version that the official records reflected the firearms as already being present in the country, and further, that the plaintiff’s husband had moved the firearms from the Pinetown armoury to Titans. He testified further that if

the plaintiff had offered an explanation he would have considered the same for the purposes of deciding whether to prosecute her or not. He testified that during the pre-trial conference the plaintiff did not offer an explanation. He averred that he only became aware of the plaintiff’s version when it was put to the state witnesses during cross-examination. On being informed that the plaintiff had offered her explanation when she made representations to the Senior Public Prosecutor, his response was that he was not aware of such representations.

[21] He insisted that the plaintiff should be held liable for the alleged false information furnished in the application forms, submitting that it is the plaintiff who would have received the requisite permits upon their issuance and would have been in charge of the firearms. When pressed about the identity of the declarant in the application forms, he, just like Naicker, conceded that Black Pearl is the declarant. Asked further why he had not directed the investigating officer to obtain an explanation from Black Pearl pertaining to the alleged false information, his response was that he did not consider it necessary to do so. That was the evidence for the defendants.

Evidence of the plaintiff

[22] The plaintiff testified that she is a former police officer and a co-director of Maritime which she co-founded with her husband, Robert Morgan Davies, in 2011. Maritime is in the business of assisting offshore shipping clients to comply with the Act and regulations pertaining to, *inter alia*, firearm permits, customs clearance, weapon inspections both on and off international vessels, and storage of firearms in accordance with the Act. She shoulders the administrative duties of the business while her husband bears the responsibility to store and move the permitted firearms under Maritime's custodianship. Titans Armoury is registered with the police as the storage facility for Maritime.

[23] In 2018, the plaintiff was nominated by Black Pearl to act as its local shipping agent or nominee for the purpose of administering the permits upon their issuance. She considered her role to be that of a conduit, the permits themselves being issued

to Black Pearl, and thereafter being used by Maritime for custom clearance and declaration of movement of the firearms within the country.

[24] On 15 and 16 August 2018, she had submitted four application forms at the Flash Office, on behalf of Black Pearl, for the issuing of the requisite firearm permits.

[25] On 28 August 2018, she received the rejection notice, in respect of the four applications, which she then emailed to Black Pearl. The notice further advised Black Pearl that, in terms of s 133 of the Act, it had 90 days, from the date of receipt of the notice, within which to appeal the rejection, if it so wished.

[26] On 29 August 2018, the plaintiff was contacted telephonically by Colonel Masuku ('Masuku') of Maydon Wharf Police Station, advising that he wished to conduct an inspection at Titans in order to search and seize weapons. Masuku did not, at that stage, provide reasons for the inspection. When she enquired from him whether there was a warrant of search and seizure, Masuku had indicated that he would revert with information and further that the investigating officer would engage her. She was not aware at the time that she was the subject of a criminal investigation.

[27] On 30 August 2018, the plaintiff was contacted by Conjwa, seeking to meet her at Titans. She had then contacted her husband and two of Titans' employees, Mr Myeza and Mr Hooper, as they possessed the keys to open the armoury. Together they attended at Titans whereby the police, who were travelling in marked police vehicles, proceeded to conduct the search and seizure of firearms, without any warrant.

[28] Titans' register reflected that Ogle had requested the storage of the relevant firearms at Titans, and that Myeza had signed the entry register on 20 August 2018.

[29] The plaintiff testified that Maritime had received the completed electronic copies of the application forms from Black Pearl, in a PDF format. Before she lodged the applications from Black Pearl, she merely signed the forms as a nominee. It was the representative of Black Pearl who had signed the forms as declarant. She had no

knowledge that Ogle and her husband had possessed the firearms and that they had moved them from Pinetown to Titans.

[30] She confirmed that, prior to being charged, she was interviewed by Conjwa. During that interview, she had stated that she would make a statement at court, her reason being that she did not, at that stage know what the allegations were against her, as it was never explained.

[31] The plaintiff further confirmed that the professional relationship between herself and Naicker was strained stating that Naicker would unreasonably obstruct applications lodged by Maritime, on behalf of its offshore clients, and when she had escalated her complaints to Naicker's superiors at the Provincial Office, Naicker's decisions would be reviewed and the applications approved.

[32] Subsequent to her first appearance at court, she made representations to the Senior Public Prosecutor however, her prosecution proceeded until she was acquitted. That concludes the evidence of the plaintiff.

Was the plaintiff arrested?

[33] S 38 of the of the Criminal Procedure Act 51 of 1977 ('CPA') prescribes four distinct mechanisms for securing the attendance of an accused person over the age of 18, at court for the purposes of trial, namely: arrest, summons, written notice and indictment. It accordingly follows that an arrest and the service of the summons constitute distinct processes.

[34] For the plaintiff to succeed on a claim of unlawful arrest, it must be established that an arrest as contemplated ins 39 of the CPA was effected. The section provides that an arrest may be carried out with or without a warrant, either by the person to be arrested submitting to custody, by actual physical contact or by the forcible confinement of the body. The consequence of an arrest is that the individual is detained in custody until lawfully discharged or released.

[35] An arrest without a warrant is governed by s 40 of the CPA The plaintiff, in her pleadings did not rely on any of the subsections and the jurisdictional facts pertaining thereto to prove her case. The plaintiff stands and falls by her pleadings.

[36] In *Minister of Safety and Security v Slabberl*,[2] the Supreme Court of Appeal, in dealing with the purpose of pleadings, held as follows:

> '[11] The purpose of the pleadings is to define the issues for the other party and the court. A party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at the trial. It is equally not permissible for the trial court to have recourse to issues falling outside the pleadings when deciding a case.
>
> [12] There are, however, circumstances in which a party may be allowed to rely on an issue which was not covered by the pleadings. This occurs where the issue in question has been canvassed fully by both sides at the trial. In *South British Insurance Co Ltd v Unicorn Shipping Lines (Pty) Ltd*, this court said:
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> "However, the absence of such an averment in the pleadings would not necessarily be fatal if the point was fully canvassed in evidence. This means fully canvassed by both sides in the sense that the Court was expected to pronounce upon it as an issue."' (Footnotes omitted)

[37] In his opening address, Mr *Shaikjee* conceded that the detention of the plaintiff for the processing of the charge is not placed in issue. He submitted, in his written heads of argument, that the plaintiff has suffered various heads of injuries due to the defendants' conduct in arresting, issuing the summons and prosecuting the plaintiff without a reasonable and probable cause.

[38] Having considered the above, I am unable to find that the plaintiff succeeded in proving, on a balance of probabilities, that she was arrested by members of the first and or second defendant. She was summoned to appear before the lower court.

[2] *Minister of Safety and Security v Slabbert* [2009] ZASCA 163; [2010] 2 All SA 474 (SCA) paras 11-12.

The prosecution of the plaintiff

[39] To succeed on a claim for malicious prosecution, a plaintiff is required to establish the following:

> (a) The defendant set the law in motion (that they instigated or instituted the proceedings);
> (b) The defendant acted without reasonable and probable cause;
> (c) The defendant acted with malice or *animo inuirandi*; and
> (d) The prosecution failed.[3]

Set the law in motion

[40] Ms *Bisseru*, submitted in her written heads of argument, that it is common cause that members of the defendants set the law in motion by initiating and instigating the prosecution of the plaintiff and that the plaintiff was acquitted.

[41] S 54(1) of the CPA provides for the issuance and service of the summons at the instance of the prosecution. It provides:

> 'Where the prosecution intends prosecuting an accused in respect of any offence and the accused is not in custody in respect of that offence and no warrant has been or is to be issued for the arrest of the accused for that offence, the prosecutor may secure the attendance of the accused for a summary trial in a lower court having jurisdiction by drawing up the relevant charge and handing such charge, together with information relating to the name and, where known and where applicable, the residential address and occupation or status of the accused, to the clerk of the court who shall -
> (a) issue a summons containing the charge and the information handed to him by the prosecutor...

[3] *Minister of Justice and Constitutional Development and Others v Moleko* [2008] ZASCA 43; [2008] 3 All SA 47 (SCA); 2009 (2) SACR 585 (SCA).

(b) deliver such summons, together with so many copies thereof as there are accused to be summoned, to a person empowered to serve a summons in criminal proceedings.'

[42] The issuance of the summons and the charge to be preferred against the plaintiff were decided by the prosecution after consultation with the State witnesses and the investigating officer.[4] This discretion is also discernible from the fact that, even though Naicker had determined at the end of August 2018 that the plaintiff needed to be charged for contravention of the Act, the police docket had been submitted to the Senior Public Prosecutor for decision. It was only almost a year later, on 05 August 2019, after a prosecutorial led investigation, that the plaintiff was formally charged and served with the summons. I therefore find that it was the members of the second defendant who initiated and instituted the prosecution of the plaintiff.

[43] S 179(2) of the Constitution provides that 'the prosecuting authority has the power to institute criminal proceedings on behalf of the state and to carry out any necessary functions incidental to instituting criminal proceedings.' The Senior Public Prosecutor had the authority to decline to prosecute in the event she or he believed there was no reasonable and probable cause to proceed with the investigation.

Reasonable or probable cause

[44] S 120(9)(f) of the Act provides that 'it is an offence to supply particulars, information or answers in an application for a competency certificate, licence, permit or authorisation in terms of this Act, knowing them to be false, incorrect or misleading or not believing to be correct'.

[45] Ms *Bisseru*, for the defendants, submitted that it should be found that there was a reasonable and probable cause to proceed with the prosecution in that both Nsuza and Naicker had testified that, the plaintiff, being the person who lodged the applications and that the firearms were found at her armoury, is liable for the false

[4] C -Clip of the Docket.

information provided in the application knowing that it was false. Naicker stated that the permits, on their issuance, were going to be given to the plaintiff and as such she was supposed to advise her clients accordingly regarding compliance with our laws.

[46] Mr *Shaikjee* did not state in the heads of argument the damages the plaintiff relies on; in the absence of evidence proving malicious prosecution. He referred the court to the case of Schubach[5] where the Supreme Court of Appeal dealt with a claim for malicious prosecution and what needed to be considered in determining whether there was a reasonable or probable cause to prosecute. Mr *Shaikjee* omitted to consider that 'absence of reasonable and probable cause', is but one out of four requirements in proving a claim for malicious prosecution. There is no claim for unlawful or negligent prosecution. It appears to me that Mr *Shaikjee* himself, is unable to provide clarity on the plaintiffs cause of action and the issues for determination. In trying to understand the submissions made on behalf of the plaintiff, I am left to wonder whether the plaintiff seeks to plead unlawful prosecution as head of damages. Does the said claim even exist in our law? In the absence of authority, it remains doubtful.

[47] With the evidence that the application forms had stated that the firearms were out of the country but were subsequently located at Titans, the plaintiffs resolve to speak at court and her reliance on s 35 of the Constitution is misplaced. The section pertains to arrested, detained and accused persons. On 04 December 2018, when she was questioned by Conjwa, she was a suspect, not an arrested, detained or accused person.

[48] Even though the plaintiff was not a declarant on the forms, it is common cause that she had signed as a nominee to take charge of the permits, upon their issuance and, also the firearms referenced therein. The form, on page 8 thereof, provides that a nominee or authorized person must notify the Registrar of all changes of address or circumstances within 30 days of such change occurring. On page 6, it provides for a declaration by a person who is lawfully in possession of the

[5] *Minister of Safety and Security N.O. and Another v Schubach* [2014] ZASCA 216.

firearms. It follows that the expectation by Naicker and Nsuza for the plaintiff to satisfy herself of the truthfulness of the information furnished in the form, the particulars of the firearms and their location is reasonable in the circumstances. The aggravating factor is that the relevant firearms were found at Titans, an armoury belonging to Maritime. In the absence of an explanation by the plaintiff and her husband, members of the second defendant had a reasonable and probable cause to prosecute her. There was a prima facie case to answer and she had elected to offer her explanation at court during the criminal proceedings.

[49] It was not disclosed before this court regarding the nature of the representations made to the Senior Public Prosecutor. I am therefore unable to find that there was no reasonable or probable cause to prosecute after the representations were made.

[50] In *Prinsloo and Another v Newman*,[6] in dealing with the element of reasonable and probable cause for malicious prosecution, the court held that the test for reasonable and probable cause is an objective one. It is not based on the subjective beliefs or motives of the prosecutor. It exists if a reasonable person would have concluded that the accused was probably guilty on the facts available to the prosecutor at the time.

Did the second defendant act with malice or animo inuirandi?

[51] Mr *Shaikjee*, on behalf of the plaintiff, in his written heads of argument, in disavowing the plaintiff from a claim for malicious prosecution submitted as follows:

> '1. Plaintiff claimed in her Particulars of Claim (POC) that:
> (a) her arrest, service of the criminal summons as well as the criminal proceedings she had to endure, were wrongful, unlawful alternatively malicious.
> At the outset the plaintiff submits that her claim is NOT based on MALICIOUS PROSECUTION. The Plaintiff's POC manifestly does not plead those

[6] *Prinsloo and Another v Newman* 1975 (1) SA 481 (A).

elements. But malice is claimed to have been involved in the conduct of the police in their wrongful and unlawful conduct, which is more clearly outlined and dealt with further on in these Heads together with case law. Malice is pleaded purely for aggravation of the Defendants' conduct to warrant greater compensation.'

[52] I have already determined that the prosecution was initiated by members of the second defendant and not the first defendant. Nsuza testified that he did not know the plaintiff prior to dealing with the trial in 2020 and had no qualms with her. The plaintiff did not proof that Nsuza or any of the members of the second defendant intended to injure her by proceeding with her prosecution. I accept Mr *Shaikjee's* concession that the plaintiff did not lead evidence that sustains a claim of malicious prosecution.

[53] In *Matshego v Minister of Police and Another*,[7] the issue of negligent prosecution, as a cause of action, was dealt with the court stating that the common law has not developed to include such a claim.

The prosecution failed

[54] It is common cause that, in delivering her judgment in the court a quo, the Magistrate accepted the explanation tendered by the plaintiff as being possibly true, and further observed that the information reflected on the application forms was capable of verification only by the Flash Office. Members of the second defendant, in initiating the prosecution, did not have an explanation by the plaintiff as she had reserved the same for court.

[55] In the circumstances, I find that the plaintiff did not prove malicious prosecution against the defendants.

Costs

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[7] *Matshego v Minister of Police and Another* [2015] ZAGPPHC 1052 paras 25-26.

[56] It is trite that costs follow the event.

Order

[57] The following order is made

The plaintiff's claims against the defendants are dismissed with costs on scale B.

SIBIYA AJ

<u>Case Information</u>

Appearances

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Dates of Hearing	:	12 & 13 May 2025
Submission of written Heads	:	12 June 2025
Date of Judgment	:	12 September 2025