



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

NOT REPORTABLE

Case no: 3819/2022

In the matter between:

HENRIETTA MARGARET DU PREEZ

Plaintiff

and

MINISTER OF POLICE

Defendant

JUDGMENT

Govindjee J

Background

[1] The Plaintiff was employed as a Captain and acting Visible Police (Vispol) Support Head at the Joza Police Station (Joza). She conducted a parade during December 2020. In response to a concern raised by WO Mbokodi, one of the officers on parade, the plaintiff indicated that she was unprepared to take responsibility for crime prevention vehicles, which were under the command of a colleague, Cpt

Manona. On her version, she used the following expression (to be referred to as ‘the innocent expression’):

‘If you pick up the monkey, you need to feed it...If you take up the problem, you need to sort it out.’

[2] The plaintiff maintains that her utterance made no reference to people as monkeys. On 21 December 2020, WO Mbokodi reported the utterance to the station commander, Col Mtshagi. On her version, the plaintiff had said the following (to be referred to as ‘the racist expression’):

‘I will not worry about that, Captain Manona must worry about his monkeys and I will worry about my monkeys.’

[3] The expression she had heard disturbed WO Mbokodi. She requested that the matter be investigated. Despite receiving a recommending that the grievance be resolved through mediation, Col Mtshagi approached the matter as an enquiry into misconduct. Cpt Prince was appointed to investigate. The plaintiff was subsequently charged with misconduct in the form of, firstly, intimidation or victimisation and, secondly, unfair discrimination. Both charges emanated from her utterances at the parade. The plaintiff was found guilty only of the second charge and dismissed with effect from 14 June 2021. She challenged this outcome and was retrospectively reinstated following an advisory arbitration award issued by the Safety and Security Sector Bargaining Council (SSSBC) dated 6 December 2021. She was only reinstated on 22 June 2022, now stationed at the stock theft unit in Makhanda.

[4] The plaintiff’s first claim is based on alleged malice on the part of the defendant’s employees, and is formulated as follows:

‘W/O Manqola [now Mbokodi] and / or Col Mtshagi acted maliciously by setting the law in motion by laying a false charge of intimidation and / or victimisation and / or discrimination against the Plaintiff at the Joza Police Station, Makhanda under CAS: 112/04/2021 as well as disciplinary proceedings with the Provincial Commissioner, South African Police Services, Eastern Cape ... When laying this charge and giving the false information, the aforesaid policemen and / or other members of the South African Police Services, had no reasonable or probable cause for doing so, nor did they have a reasonable belief that the institution of proceedings was justified.’

[5] The second issue to be determined is whether the plaintiff was defamed by the defendant as alleged in her particulars of claim, whether she sustained any damages as a result and the extent to which the defendant is liable. Finally, the court is required to decide the issue of costs.

Malicious prosecution

Setting the charges in motion

[6] It is common cause that WO Mbokodi raised an issue involving vehicles with the plaintiff during a parade and that, as part of her response, the plaintiff used the word 'monkey'. On the plaintiff's version, it had become normal for Cpt Manona to leave supply chain management issues to her. Having decided that she was no longer willing to perform these functions for Cpt Manona, she had expressed herself accordingly by using the innocent expression. The reference to 'monkey' was intended to relate to the vehicles in issue. This was the 'problem' to be picked up and dealt with by Cpt Manona.

[7] The plaintiff's diary confirms that WO Mbokodi and WO Williams left the parade to meet with Col Mtshagi on 21 December 2020. Col Mtshagi recalled that WO Mbokodi was accompanied by WO Williams, who was a union representative. She listened to the complaint, which highlighted the racist expression that WO Mbokodi had heard and noted that WO Mbokodi had said she was shocked. Col Mtshagi asked WO Williams whether he had taken any action. She then requested WO Mbokodi to submit a written statement before 16h00 that day.

[8] WO Mbokodi complied with Col Mtshagi's request for a written statement, consulted with Cpt Leander, the employer representative, sometime thereafter and, during April 2021, opened a criminal docket based on her sense that her grievance had not been taken seriously. The evidence reveals that she was not informed by her superiors about progress with the disciplinary proceedings against the plaintiff. WO Mbokodi's evidence was that she had little to do with the disciplinary process once she submitted the written complaint to Col Mtshagi, having been consulted only on the date of the disciplinary hearing. Her disappointment with her employer's inaction resulted in her turning towards the criminal justice system by opening a docket against the plaintiff.

[9] Col Mtshagi submitted the statement she received from WO Mbokodi to human resources for a disciplinary hearing file to be registered. As the matter had been reported to her, Col Mtshagi refused Lt Col Strydom's offer to identify a mediator. Strydom, it may be accepted, had contacted Lt Col van der Merwe at the provincial legal office and both opined that the matter could be mediated. A letter to Brig Lebok on 21 December 2020 reflects Col Mtshagi's view at the time:

'A complaint followed by a statement has been received from a member attached at Vispol Support, complaining about their Acting commander who used an unacceptable word while referring to human beings (members on parade) ... As this is seen as a serious misconduct, this office hereby requests your office to appoint an officer to investigate the alleged misconduct...'

[10] Col Mtshagi did accept Lt Col Strydom's suggestion that Cpt Prince be appointed as investigating officer. Col Mtshagi addressed the following correspondence to Cpt Prince on 21 December 2020:

- '1. Telephonic conversations with between Colonel NE Mtshagi and Capt Prince on 2020-12-21 bear's reference (sic).
2. Attached find a statement made by W/O Manqola [Mbokodi] of Joza SAPS against Capt HM du Preez regarding alleged utterances of a discriminatory nature made by the officer.
3. Would you please investigate the incident as a matter of urgency and report you findings to the Station Commander Joza in order for her to make an informed decision on future action (sic).
4. Your urgent attention to this matter will be greatly appreciated.'

[11] Cpt Prince explained that he commenced the investigation once he had been contacted by Col Mtshagi on 21 December 2020 despite only receiving his formal letter of appointment a month later. The plaintiff accepted that Cpt Prince was assigned to do the investigation and would have done so without malice. His evidence supports this assessment. Having been appointed by Col Mtshagi and furnished with WO Mbokodi's statement, he obtained further statements from those members who had been on parade at the time of the incident during December and January. This included various statements supporting WO Mbokodi's recollection of

the expression that had been used, and Ms Stevens' statement supporting the plaintiff's version.

[12] Cpt Prince considered the two different versions and determined that a prima facie case existed. He linked this to a particular regulation pertaining to 'victimisation / intimidation', despite none of the statements suggesting this. He explained that the precise formulation of the charges was a matter for the employer's representative at the hearing. Having completed his investigation, the file was returned to Col Mtshagi, the station commander, who had to decide whether the file would proceed to the provincial office for the appointment of functionaries, and with final authority to determine whether a prima facie case existed.

[13] Col Mtshagi wrote to the discipline management section of South African Police Service (SAPS) provincial office on 19 January 2021 and provided 'preliminary particulars of the incident'. This included the crux of WO Mbokodi's complaint and confirmation that Col Mtshagi regarded the matter as serious. The document referred to Prince's appointment having occurred on 20 January 2021. By this time, however, he had practically completed his investigation.

[14] On 22 January 2021, Prince produced an investigation outcome in terms of regulation 8(1) of the SAPS Disciplinary Regulations, 2016, (the regulations) and attached statements from seven individuals including WO Mbokodi and WO Williams:

'Charge 1: Regulation 5(3)(w) – Intimidates or victimizes other employees

I investigated the matter and I am of the opinion that the evidence indicated a prima facie case of misconduct...'

[15] On the strength of this recommendation, Col Mtshagi certified that the alleged misconduct was of a serious nature and justified the holding of a disciplinary hearing. The provincial office was informed accordingly. A 'notice of alleged misconduct and pending investigation', issued in terms of the regulations, was prepared on the same day and served on the plaintiff. The file was sent to the provincial office for appointment of an employer representative.

[16] A week later, Cpt Booth, employed in the SAPS Employee Relations and Life Cycle Management department, recommended 'progressive measures (corrective counselling)' in correspondence addressed to Brig De Klerk and Maj-Gen Kunene, the Deputy Provincial Commissioner: Corporate Services. This recommendation was supported by Brig De Klerk on 12 February 2021. In Brig De Klerk's view, both the innocent and racist expressions were known idiomatic expressions in the English language. Brig De Klerk did, however, consider the plaintiff's conduct to warrant corrective counselling and sensitisation:

'... having perused the statements where either no negative inference is drawn from these expressions or where the witnesses state that they understood these expressions in the context of the lack of vehicles that were a challenge, I do not recommend any disciplinary steps to be taken against the officer.

Reference to "monkeys" in general at the workplace may create negative perceptions though, however innocently it may have been made and notwithstanding that it may be used to refer to things and circumstances, not necessarily human beings.

It is therefore further recommended that the officer be subjected to corrective counselling to sensitise her about words / expressions that may offend others regardless of the context in which it was used.'

[17] While the pleadings identify WO Mbokodi and / or Col Mtshagi as having acted maliciously by setting the law in motion, the plaintiff accepted that the decision to be taken in respect of formal disciplinary proceedings rested with Maj-Gen Kunene, following consideration of the views of Cpt Booth and Brig De Klerk. On 17 February 2021, Maj-Gen Kunene recommended that the plaintiff be subjected to a disciplinary hearing '...to check the context under which the statement was used.' The process culminated in this decision and the plaintiff took no issue with the way Maj-Gen Kunene had proceeded.

[18] Col Nkwenkwe was appointed as chairperson of the disciplinary hearing during May 2021. This was after Cpt Gusha had requested to be released from his duties as the selected employer representative due to a lack of experience. Cpt Leander was appointed as the employer representative. The hearing proceeded in June and the plaintiff's application for legal representation was granted because of the seriousness of the charges. Mr Greyling, the chosen representative, was

formerly a brigadier attached to legal services at the SAPS provincial head office. The disciplinary hearing record reflects that Col Nkwenkwe engaged at length with the plaintiff regarding her use of the word 'monkey', the alleged offence it had caused and whether the plaintiff continued to use the innocent expression. The plaintiff was found not guilty of intimidation but guilty of discrimination. Having heard evidence in mitigation, Col Nkwenkwe decided that dismissal was the appropriate sanction. This was notwithstanding the plaintiff's exemplary disciplinary record. Maj-Gen Kunene, having received this finding from Col Nkwenkwe, recommended a sanction of two months suspension without salary, on the basis that the plaintiff ought to be given the benefit of the doubt in respect of the use of the word 'monkey' as a metaphor. Despite this, the sanction of dismissal was confirmed a few days later by the provincial commissioner.

Disputes of fact and procedural irregularities

The date of the incident

[19] The plaintiff disputed WO Mbokodi's evidence regarding the day on which the incident occurred. A meticulous chronicler of her activities, the plaintiff's diary entry suggested that the incident occurred at the parade on 14 December 2020. This is based on a diary entry for that day that refers to 'issue raised about CPU vehicles' and because WO Williams was absent from parade that day. On the plaintiff's version, WO Williams' outspoken nature would have resulted in a confrontation with her about what she had said, had he been present. This is speculative and there are various reasons why he might not have chosen to press the matter himself even if he was present. The plaintiff's diary entry also does not take the matter further. Leaving aside the questions posed as to its authenticity, being the only entry that day not written on its own separate line, Ms Stevens testified that the issue of vehicles was a matter of daily discussion, so that the entry likely referred to a separate discussion about vehicles.

[20] By contrast, WO Mbokodi had two good reasons to recall that the incident occurred on 17 December 2020. Firstly, the previous day had been a public holiday and she and other police officers had performed special duties. As it was busy in the town area, a visible police presence had been required, including the performance of night work. Importantly, WO Mbokodi explained that this was the first occasion on

which night duties had been performed, so that the occasion would more easily have remained in memory. This had been necessitated by Covid and the police's attempt to enforce compliance with the associated regulations during the December period. Those who worked would receive extra remuneration and had to return the following morning at 07h30 to perform their normal duties. It was during the performance of those duties that WO Mbokodi, who was stationed in a vehicle, recalled observing members from crime prevention carrying out their duties on foot, without access to motor vehicles. This prompted her enquiry at the parade the following morning.

[21] Secondly, WO Mbokodi explained that the events in question had been painful to her, as she believed that she and her colleagues had been addressed as monkeys by a fellow SAPS member, so that she recalled the date clearly. Indeed, her testimony in this respect was unequivocal and based on her independent recollection. These dates are also supported by her typed complaint on 21 December 2020, a few days after the incident, which refers to all those who had been in attendance, including WO Williams, and provides insight as to her state of mind at the time:

'This is not sitting well to me at all, as I never thought in this day in age, in my career, at my work environment a commander can refer to me and other members as Monkeys whereas we are human beings. I find it very hard to come to work and face the same commander. I am traumatised physically and emotionally by this incident, but I try and put a brave face and be professional for service delivery to continue until this matter is resolved in a proper manner.' (sic.)'

[22] WO Mbokodi was mistaken in certain respects, including when she had first communicated with Col Mtshagi after the incident, whether WO Williams had accompanied her at Col Mtshagi's request and whether Capt Prince had spoken to her about her statement. But she demonstrated a very good ability to recall details of the day in question and she was clear and consistent in this respect. On a conspectus of the evidence, she had good reason to recall these specifics, and she was emphatic that the incident occurred on 17 December 2020. Given the seriousness with which she viewed the matter, her evidence that she would not have waited for a week before acting was compelling. On her version, she had endeavoured to contact Col Mtshagi for two days before making contact on Sunday

20 December 2020. According to Col Mtshagi, she received a Whats App message from WO Mbokodi as early as Friday 18 December 2020. Col Mtshagi also recalled WO Mbokodi advising her that the incident had occurred on 17 December 2020. I have also considered that Ms Stevens did not recall WO Williams' presence on the date of the incident and the plaintiff's version. Considering the evidence, however, including the interaction between WO Mbokodi, WO Williams and Col Mtshagi on 21 December 2020, the probabilities favour the finding that WO Williams was present, as he subsequently indicated in his statement. This all supports the conclusion that the incident occurred on 17 December 2020. There was no reason for WO Mbokodi to fabricate this date, which, on the probabilities, is when the incident occurred.

Communication of the plaintiff's version

[23] There is a dispute as to whether the plaintiff was afforded the opportunity, either by Col Mtshagi or Cpt Prince, to provide her version of events. She certainly did not do so in writing during December or January. The plaintiff did, however, have the opportunity to discuss the matter with Col Mtshagi on 21 December 2020. From her own evidence, it is apparent that she was confronted with the racist expression. She immediately explained to Col Mtshagi that she had uttered the innocent expression, with the 'monkey' reference pertaining to the vehicles. Col Mtshagi informed her that a written statement had been requested from WO Mbokodi.

[24] The plaintiff's argument that she had not been given the opportunity to put her version before Col Mtshagi is therefore gainsaid by her own recollection of their interaction at that time. It is common cause that the professional relationship between the plaintiff and Col Mtshagi was good, that Col Mtshagi advised the plaintiff about the complaint and that this interaction was not confrontational. Col Mtshagi, it must be noted, testified twice in the plaintiff's favour, including testimony in mitigation that no member had advised her that they would refuse to continue working with the plaintiff, despite her utterance, and recommending corrective measures short of dismissal.

[25] I accept that the plaintiff conveyed her version of events to Col Mtshagi, indicated that WO Mbokodi's version was denied, admitted using the word 'monkey' and explained that this was with reference to the vehicles, not people. According to

the plaintiff, Col Mtshagi said as much at the disciplinary hearing in the plaintiff's defence. Col Mtshagi's conduct thereafter must be assessed on the basis that she was aware that the plaintiff disputed WO Mbokodi's understanding and interpretation of what had been uttered.

[26] As for the dispute of fact between the plaintiff and Cpt Prince, and to the extent that this may be relevant, I am of the view that the plaintiff was mistaken in failing to recall that Cpt Prince afforded her an opportunity to place her version in writing. Cpt Prince was a good witness who testified clearly and openly about his role in the proceedings and without having any reason to embellish the truth. While the plaintiff was also generally a good witness, on the probabilities I accept that Cpt Prince afforded the plaintiff an opportunity to make a statement and to place her version before him.

Procedural irregularities

[27] Col Nkwenkwe testified that he had knowledge of the principles underpinning the SAPS revised discipline regulations. In his view, the hearing had proceeded smoothly and neither party had expressed any concerns with his conduct or suggested that he had been biased. Instead, the evidence, including the record of the disciplinary proceedings, reveals various irregularities and shortcomings in respect of the plaintiff's hearing. Firstly, Cpt Toto testified that Col Nkwenkwe had mentioned that he had been appointed to chair a racism-related matter, when the two met while attending a training course in the Western Cape. He also mentioned that he had dealt with a similar matter in Graaff Reinet. On my assessment of the evidence, Col Nkwenkwe's denials in this respect must be rejected on the probabilities as being implausible and based on an adverse credibility finding. Secondly, it is accepted that Col Nkwenkwe commented, in the presence of the plaintiff and Mr Greyling at the start of the proceedings, that he had never trialled a white woman before. This was an inappropriate remark. Thirdly, the disciplinary hearing record captured his discussion with Col Mtshagi, including reference to the possible transfer of the plaintiff, while she was under oath, while the plaintiff and Mr Greyling were consulting outside the room. This was highly irregular. Finally, his clarification questions, it may be accepted, morphed into cross-examination and his repeated interventions, manner and tone revealed that he entered the arena. He also

investigated Ms Stevens' attendance at the parade by personally travelling to Joza at his own instance.

[28] The procedures adopted by the defendant's employees also contravened the regulations in various respects. I accept that the plaintiff was, for example, only served notice after the investigation had been completed. There were discrepancies in completing the relevant forms accurately and in the timeline for appointment of the investigating officer. But the plaintiff was alive to most of these inadequacies as they occurred. It may be noted that the plaintiff had extensive knowledge of discipline management and had trained others to conduct disciplinary enquiries over a lengthy period. She was also assisted initially by a co-employee. As she testified, she was initially eager for the hearing to proceed given the mistakes that had been made by SAPS along the way. Things changed when the initially appointed initiator and chairperson were replaced. The plaintiff's evidence was that she knew, at that point, that the writing was on the wall and that she would be dismissed. In response, she engaged Mr Greyling, a legal practitioner with vast experience in matters pertaining to the police. The plaintiff's sense of foreboding was confirmed when Col Nkwenkwe referred to her race and gender at the outset of proceedings and conducted himself in the unfortunate manner described above. It cannot be gainsaid that the designated chairperson fell short of the mark in his treatment of the hearing. The defendant eventually adopted the stance that the plaintiff's dismissal was unfair.

[29] Throughout the process, however, there was no application for Col Nkwenkwe's recusal. When this issue was raised with her, the plaintiff accepted that it was evident from his demeanour that he was 'biased from the word go' and 'overpowered' the disciplinary proceedings. In the circumstances, it is remarkable that the plaintiff elected not to seek his recusal. The plaintiff's only answer was to contend that he would not have recused himself, which was an inadequate response. The plaintiff, aided as she was by a competent and experienced legal representative, must have appreciated that she would be able to vindicate her right to fair labour practices through statutory labour dispute resolution processes, as she subsequently did. She had herself lodged two grievances against previous supervisors and was *au fait* with the relevant processes. She testified that she and Mr Greyling agreed, during a lunch interval during the proceedings, that Col

Nkwenkwe had prejudged the issue and intended to dismiss her. Col Mtshagi's evidence in support of the plaintiff was dealt with in a similar manner by the chairperson. The plaintiff was undoubtedly aware that the record would capture the demonstrated bias and that she would be able to utilise this to her advantage in the subsequent proceedings. Unsurprisingly, bias was listed as one of the grounds of complaint when the matter was referred to the SSSBC. The result is that the plaintiff's testimony of the extent to which she had been upset by the chairperson's conduct is difficult to understand. That said, the procedural irregularities identified add little to the determination of plaintiff's claim of malicious proceedings at the instance of WO Mbokodi or Col Mtshagi.

The law

[30] WO Mbokodi, Col Mtshagi and the other employees involved in the disciplinary process against the plaintiff were acting in the course and scope of their employment with the defendant. It is also accepted that disciplinary proceedings instituted in terms of the regulations fall within the ambit of 'malicious proceedings' as a valid cause of action.¹ The cause of action for a claim for damages caused by malicious legal proceedings is the *actio iniuriarum*. To succeed, the plaintiff must allege and prove:²

- (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*); and
- (d) that the prosecution has failed.

¹ *Mahlangu v Minister of Police* 2017 JDR 0129 (GP); [2017] ZAGPPHC 13; [2017] 5 BLLR 528 (GP); (2017) 38 ILJ 1749 (GP); *Holden v Assmang* [2020] ZASCA 145; 2021 (6) SA 345 (SCA) para 10; Cf *Kutu v Minister, Department of Justice and Correctional Services* (2021) 42 ILJ 2489 (MM). Also see C Okpaluba 'Does "prosecution" in the law of malicious prosecution extend to malicious civil proceedings? A commonwealth update (Part I) (2017) 28 *Stell LR* 402.

² *Minister of Justice and Constitutional Development and Others v Moleko* [2008] ZASCA 43; [2009] 3 All SA 47 (SCA); 2009 (2) SACR 585 (SCA) (*Moleko*) para 8, cited with approval in *Kruger v National Director of Public Prosecutions* [2019] ZACC 13; 2019 (6) BCLR 703 (CC) para 48. Also see *Relyant Trading (Pty) Ltd v Shongwe & Another* [2007] 1 All SA 375 (SCA) para 5: malicious prosecution consists in the wrongful and intentional assault on the dignity of a person comprehending also their good name and privacy. The plaintiff must allege and prove that the defendant intended to injure (either *dolus directus* or *indirectus*). Save to the extent that it might afford evidence of the defendant's true intention or might possibly be taken into account in fixing the quantum of damages, the motive of the defendant is not of any legal relevance.

Whilst there may be a measure of overlap between the first three requirements, they remain separate elements of the cause of action and the plaintiff bore the onus to establish each distinctly.³ I accept that the plaintiff has proved the requirements in (a) and (d), although it is necessary to comment on the identity of which of the defendant's employees 'instigated or instituted the proceedings'.

Who instigated or instituted the proceedings

[31] Inherent in the concept of 'set the law in motion', 'instigate' or 'institute the proceedings' is the causing of a certain result, namely a 'prosecution' or, in present circumstances, disciplinary proceedings. This involves the question of causality.⁴ The legal position has been expressed as follows:⁵

'The first matter the plaintiff has to prove is that the defendant was actively instrumental in the prosecution of the charge ... Where a person merely gives a fair statement of the facts to the police, and leaves it to the latter to take such steps thereon as they deem fit, and does nothing more to identify himself with the prosecution, he is not responsible, in an action for malicious prosecution, to a person whom the police may charge. But if he goes further, and actively assists and identifies himself with the prosecution, he may be held liable. "The test," said Bristowe, J., in *Baker v Christiane*, 1920 W.L.D. 14, "is whether the defendant did more than tell the detective the facts and leave him to act on his own judgment" ... [on the other hand] when an informer makes a statement to the police which is wilfully false in a material particular, but for which false information no prosecution would have been undertaken, such an informer "instigates" a prosecution.'

[32] Leaving aside Maj-Gen Kunene's role, the plaintiff has proved that Col Mtshagi, rather than WO Mbokodi, set the disciplinary proceedings in motion. WO Mbokodi did little more than report what she believed she had heard, put her complaint in writing and testify based on her recollection of events. There is no evidence that she went further or that she made a wilfully false statement. The plaintiff conceded that WO Mbokodi was not the person responsible for determining whether the alleged misconduct was serious. In terms of the regulations, it is also evident that she was not empowered to decide whether a disciplinary hearing ought

³ *Minister of Safety and Security v Lincoln* 2020 (2) SACR 262 (SCA) (*Lincoln*) para 21.

⁴ *Lederman v Moharal Investments (Pty) Ltd* 1969 (1) SA 190 (A) at 196H–197A.

⁵ *Lederman* above n 4 quoting *Waterhouse v Shields* 1924 CPD 155 at 160 and *Madnitsky v Rosenberg* 1949 (1) P.H. J5 with approval; Also see *Lincoln* above n 3 para 27.

to be conducted.⁶ As the plaintiff understood the position, it was Col Mtshagi, the station commander, who took that decision.

[33] The claim of malicious proceedings based on the docket opened by WO Mbokodi is a non-starter. Inherent in the concept of ‘set the law in motion’, ‘instigate’ or ‘institute the proceedings’, is the causing of a certain result, namely a prosecution.⁷ In this respect, the prosecution never commenced and WO Mbokodi’s conduct in opening a docket did not set the law in motion or result in any prosecution.⁸ To the extent that this conclusion is erroneous, the evidence reveals that WO Mbokodi laid the criminal complaint in her personal capacity, so that no liability can attach to the defendant.

[34] In any event, the plaintiff testified that she had generally enjoyed a good working relationship with WO Mbokodi since August 2020. This changed for various reasons, notably because of the plaintiff’s role in arresting an officer Sauls, who had been romantically linked to WO Mbokodi, because of an issue pertaining to a year-end function and WO Mbokodi’s alleged unauthorised use of a vehicle. Considering both the plaintiff’s evidence and that of WO Mbokodi, however, it cannot be said that the original complaint was contrived to settle a previous score. More than a month had passed since Sauls’ arrest and the crux of the complaint pertained to the use of the word ‘monkey’, which the plaintiff admitted. On the plaintiff’s version, their relationship returned to a professional level by the middle of January 2021.

[35] The Labour Appeal Court has held that unfounded accusations of racism are inherently demeaning, insulting and an attack on human dignity.⁹ While WO

⁶ Regulation 8(1): ‘A supervisor must ensure that the investigation into the allegations of misconduct is completed within thirty (30) calendar days or as soon as practically possible thereafter, and if satisfied that the alleged misconduct is of a serious nature and justifies the holding of a disciplinary hearing, refer the outcome of the investigation to the employer representative within seven (7) working days to initiate a disciplinary enquiry. The employee must be informed of the alleged misconduct and pending investigation.’

⁷ *Lederman* above n 4 at 196H–197A.

⁸ See *Holden v Assmang Limited* above n 1 para 10: a claim for malicious prosecution can ordinarily only arise after the successful conclusion of the criminal case in the plaintiff’s favour. In a criminal matter, this would occur on acquittal or withdrawal of the charges.

⁹ *Legal Aid SA v Mayisela & Others* (2019) 40 ILJ 1526 (LAC) (*Mayisela*). Also see M van Staden ‘Unfounded accusations of racism as workplace discrimination: *Solidarity obo K v Western Cape Education Department and Others* [2024] ZALCCT 59’ (2025) 46 ILJ 1573 at 1579.

Mbokodi continued to press the matter, it must be accepted that this was because she remained concerned that her complaint was not being taken seriously by her employer. This makes it clear that she did so in her own name, as pleaded by the defendant. She opened the docket the day after the disciplinary hearing was postponed for the second time, on 21 April 2021. The plaintiff's criticism of her decision to do so at a different police station is without substance, given that her dissatisfaction was with the pace of the disciplinary proceedings and the key involvement of various personalities from Joza. As Lt Col Havenga rightly explained, it was WO Mbokodi's prerogative to do so. The plaintiff made a statement explaining her conduct at the parade and the Director of Public Prosecutions declined to prosecute during June 2021. By that time, the disciplinary proceedings were in motion and WO Mbokodi did not pursue the criminal complaint further. This is consistent with WO Mbokodi's version that she had wanted to be heard and for the matter to be investigated properly, without specifically desiring the plaintiff's dismissal. Her testimony makes it clear that she was genuinely troubled by the incident, based on her view that the plaintiff had articulated herself in a way that revealed that she considered her to be an animal. To the extent that it may nevertheless be said that she instigated or instituted either the disciplinary or criminal proceedings, so that the defendant may be liable as a result, and applying the tests discussed below, I find that she had reasonable and probable cause to do so based on what she honestly believed she had heard, and that she acted without malice or animus injuriandi in doing so.

Reasonable and probable cause

[36] Reasonable and probable cause means an honest belief founded on reasonable grounds that the institution of proceedings is justified.¹⁰ The concept therefore involves both a subjective and an objective element.¹¹ In the criminal context, a prosecutor must subjectively have a belief in the existence of reasonable and probable cause, and that belief must be justifiable from an objective point of view.¹² '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

¹⁰ *Prinsloo and Another v Newman* 1975 (1) SA 481 (A) at 495G–H.

¹¹ *Moleko* above n 2 para 20.

¹² *Beckenstrater v Rottcher and Theunissen* 1955 (1) SA 129 (A) (*Beckenstrater*) at 136A–B.

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.'

[37] The test may require some moderation in the employment context, also because of the different nature of the proceedings, including the distinct consequences of a finding of guilt and the opportunity to pursue conciliation and arbitration, which is typically a *de novo* rehearing of the alleged misconduct. In the present matter, the specific disciplinary offence was also determined by a person other than the person who set the proceedings in motion, so that a literal application is inapposite. It is trite that the rules relating to procedural fairness in employment disputes deliberately do not replicate the criminal justice model of procedural fairness or the accoutrements of a criminal trial, including technical and complex charge sheets.¹³ The arguments relying on the formulation of the charges against the plaintiff are accordingly misplaced. In addition, the focus in the pleadings on WO Mbokodi and Col Mtshagi overlooks the role played by various other senior SAPS employees, notably Maj-Gen Kunene.

[38] For present purposes, reasonable and probable cause exists if a reasonable person would have concluded that the plaintiff was probably guilty of a disciplinary offence on the facts available to Col Mtshagi. The SCA has recently confirmed, in the criminal context, that a prosecutor need not have evidence establishing a prima facie case or proof beyond a reasonable doubt when deciding to initiate a prosecution. Suspicion of guilt on reasonable grounds suffices. The question is what a reasonable prosecutor would have done considering the information available at the relevant stage.¹⁴ The test is not whether plaintiff was innocent of the charges but whether there was reasonable and probable cause for the disciplinary proceedings, which is dependent on the careful assessment of the material available at the time the proceedings were instigated.¹⁵

¹³ See *Avril Elizabeth Home for the Mentally Handicapped v Commission for Conciliation Mediation and Arbitration and Others* [2006] ZALC 44; [2006] 9 BLLR 833 (LC); (2006) 27 ILJ 1644 (LC).

¹⁴ *National Director of Public Prosecutions v Mdhlovu* 2024 (2) SACR 331 (SCA) (*Mdhlovu*) para 21.

¹⁵ *Ledwaba v Minister of Justice and Constitutional Development and Others* [2024] ZASCA 17 para 24.

[39] Answering that question requires some appreciation of the sensitivities associated with racism, including racist utterances and the use of the word ‘monkey’.¹⁶

‘South Africa’s special sect or brand of racism was so fantastically egregious that it had to be declared a crime against humanity by no less a body than the United Nations itself. And our country, inspired by our impressive democratic credentials, ought to have recorded remarkable progress towards the realisation of our shared constitutional vision of entrenching non-racialism. Revelations of our shameful and atrocious past, made the Truth and Reconciliation Commission, were so shocking as to induce a strong sense of revulsion against racism in every sensible South African. But to still have some white South Africans address their African compatriots as monkeys, baboons or kaffirs and impugn their intellectual and leadership capabilities as inherently inferior by reason only of skin colour, suggests the opposite. And does in fact sound a very rude awakening call to all of us.’

[40] The Constitutional Court has remarked that the terms ‘monkey’ and ‘baboon’ are ‘weapons of gross insult regularly resorted to pulverise whatever racists thought was left of the dignity and self-worth of the African people.’¹⁷ In *Strydom v Chiloane*,¹⁸ the court relied on *Mangope v Asmal*¹⁹ to confirm that, given the connotation attached to such words, a person so described ‘may rightfully perceive them to be hurtful’. This is because the purpose of the use of such a word is to indicate that the recipient is ‘base and of extremely low intelligence’ and because it can be inferred from the use of the word, depending on the circumstances, ‘that the person mentioned is of subhuman intelligence and not worthy of being described as a human being.’²⁰

[41] It is unnecessary to determine precisely what was said at the parade for purposes of the present proceedings, assuming that this is possible on the evidence adduced. There are at least two distinct versions. According to Ms Stevens, the

¹⁶ *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration and Others* [2016] ZACC 38; 2017 (1) SA 549 (CC) (SARS) para 2. Also see the remarks of Cele J in *Edcon Ltd v Cantamessa & Others* (2020) 41 ILJ 195 (LC) (*Edcon*) para 17.

¹⁷ SARS above n 16 para 5; Also see *Lebowa Platinum Mines Ltd v Hill* (1998) 7 BLLR 666 (LAC) para 12.

¹⁸ *Strydom v Chiloane* 2008 (2) SA 247 (T) (*Chiloane*).

¹⁹ *Mangope v Asmal* 1997 (4) SA 277 (T) at 286J–287A.

²⁰ *Chiloane* above n 18 para 13.

plaintiff 'stated that she will look after the components vehicles, Captain Manona must take charge of the CPU vehicles, because he is in charge of CPU. She then stated that if *she* "picks up the monkey that means *she* must feed the monkey"' (own emphasis). While Stevens' recollection aligns closely with that of the plaintiff, it is subtly different and constitutes a third version. This itself demonstrates the subtleties of language, coupled with questions pertaining to the genuine ability to recall and articulate what has been heard.

[42] Without delving into detail regarding the racial composition and language preferences of the group that heard the utterance, and as an aside, it may be noted that the innocent expression was itself unfortunate given South Africa's painful history. What may be emphasised is that the innocent expression included both a word that could be construed as a racial slur on its own, as well as a separate allusion to that same word, combined in a metaphor or unfamiliar idiom. While WO Mbokodi was conversant in English and Afrikaans, leaving aside the plaintiff, the home language of all those present on parade was either isiXhosa or Afrikaans. As ended up being the case, a listener could, rightly or wrongly and bearing in mind the vagaries of language, hear a racial undertone, feel demeaned or targeted when hearing the word or conclude that the speaker was ignorant of or insensitive to the possible racial implications. To compound matters, the utterance followed an enquiry pertaining to vehicles for Cpt Manona's members. Even on the plaintiff's version, the innocent response was a comment to those assembled that made indirect reference to Cpt Manona ('if *you* pick up the monkey...'). The subsequent clarification that referred to a 'problem' was ambiguous. It could have been construed as a problem pertaining to 'vehicles', as the plaintiff would have it, or a problem pertaining to 'vehicles for members'. WO Mbokodi's concern had emanated from members on foot patrol, so that she would have had these people in mind. That being the case, it is apparent how even the innocent expression could have been perceived by her as referring to members as monkeys, despite this not having been the plaintiff's intention.

[43] More importantly, Col Mtshagi had received WO Mbokodi's written complaint, containing reference to the racist expression which included the use of the word 'monkey' by the plaintiff amidst several black colleagues. Col Mtshagi discussed the

allegation with the plaintiff shortly after having received the verbal complaint, to which the plaintiff responded. She informed the plaintiff that a written statement from WO Mbokodi was awaited. Having received the complaint in writing, including a serious allegation of racism, Col Mtshagi cannot be criticised for triggering an investigation, irrespective of her personal sentiments. Where a serious charge is levelled against an employee, the Labour Relations Act: Code of Good Practice: Dismissal²¹ requires an employer to investigate the allegations prior to disciplinary proceedings being initiated. Col Mtshagi sought the appointment of an investigator and, having engaged with Lt Col Strydom, contacted Cpt Prince, provided him with WO Mbokodi's statement and requested him to investigate and report to her so that she could 'make an informed decision on future action'. This suggests a diligent and good faith attempt to assess the merits before proceeding.²² The decision not to follow Lt Col Strydom's recommendation, even if supported by Lt Col van der Merwe, cannot be criticised. The decision to be made was within her discretion, which she exercised by adopting the view that mediation should be reserved for more minor issues.

[44] Having obtained statements from those in attendance, Cpt Prince determined that a prima case existed. Considering the information before him, it is difficult to fault that conclusion. There were at least two different versions of what had occurred, one of which constituted a racist expression that had been heard by WO Mbokodi as well as other members, although only WO Mbokodi had complained. Having received this report, following investigation, Col Mtshagi proceeded to inform the provincial office that the matter was serious and necessitated a disciplinary hearing. Her approach was based on persuasive objective information leading to a compelling and legitimate inference, following a complaint through the appropriate channel.²³ The decision was sound in principle and reflects an honest belief founded on reasonable grounds that formal disciplinary proceedings were warranted. This was confirmed by Col Mtshagi's responses during cross-examination. The matter could not have been addressed informally. The language used contained reference to both

²¹ Schedule 8, Act 66 of 1995.

²² *Mdhlovu* above n 14 para 28. See *Weitz v Goodyear SA (Pty) Ltd and Others* (2014) 35 ILJ 441 (ECP) (*Weitz*) para 18: a pre-hearing investigation is precisely what its name suggests, the employer investigating the offence to decide whether formal disciplinary action may be justified.

²³ See *Mayisela* above n 9 para 48.

an animal and a human being so that Col Mtshagi had triggered an investigation, even if only one person had complained. It was, as she said, not her place to try to determine the dispute of fact herself or to conclude that the incident had been nothing more than a misunderstanding. The plaintiff had uttered words that had shocked WO Mbokodi and Col Mtshagi was alive to the plaintiff's version that she had only expressed a metaphor or idiom. There is no evidence to support the suggestion that she had tried to appease WO Mbokodi by proceeding in the manner she did. Her conduct demonstrates that she had no axe to grind with the plaintiff. She obtained input from Lt Col Strydom and testified in support of the plaintiff. Her approach also finds support in Maj-Gen Kunene's determination that a hearing was necessary to determine the issue of context, notwithstanding Cpt Booth and Brig De Klerk's conclusions to the contrary.

[45] The result is that the plaintiff has failed to prove that the information before Col Mtshagi was insufficient to lead a reasonable person to conclude that the plaintiff had probably committed misconduct. WO Mbokodi's verbal and written complaint, while that of a single person, raised a reasonable suspicion of impropriety that warranted further investigation as it suggested possible serious misconduct.²⁴ This was subsequently supported by Capt Prince's recommendation, which was based on various statements supportive of WO Mbokodi's version. Subjectively too, Col Mtshagi had concerns about the possible reference to police officers as monkeys and has not been shown to have proceeded with disciplinary steps absent a belief as to the plaintiff's guilt.²⁵ That the plaintiff was subsequently retrospectively reinstated does not negate the earlier existence of reasonable and probable cause.²⁶

[46] In *Beckenstrater*, the court held that it was important to the community that persons with reasonable and probable cause for prosecution should not be deterred from setting the criminal law in motion against those whom they believed to have committed offences, even if in so doing they were actuated by indirect or improper motives.²⁷ Bearing in mind the constitutional right to fair labour practices for

²⁴ *Mdhlovu* above n 14 para 26.

²⁵ *Beckenstrater* above n 12 at 136. Also see *Edcon* above n 16 para 18.

²⁶ *Mdhlovu* above n 14 para 30.

²⁷ *Beckenstrater* above n 12 at 135D–E.

everyone, similar sentiments must be applicable in the employment context.²⁸ It is certainly of importance to an employer that has reasonable and probable cause for instituting disciplinary proceedings that it should not be deterred from setting workplace processes in motion against those it believes to have committed misconduct.²⁹ It may be added that the analysis as it pertains to Col Mtshagi applies with equal force to any other SAPS employees that may be said to have been involved in the institution of the disciplinary action. It must also be noted that the plaintiff went as far as to concede that there was reason for SAPS to investigate the complaint, because of its nature, which accords with Col Mtshagi's evidence. The plaintiff's complaint, as she expressed it during her evidence, was that she had not been asked for an explanation, a matter dealt with above, and consternation that SAPS, while enjoying the prerogative to discipline, had exercised that right in punitive fashion. This submission speaks to malice or *animus injuriandi*, which is dealt with below.

Malice or animus injuriandi

[47] Although the expression 'malice' is used, the claimant's remedy in a claim for malicious prosecution lies under the *actio injuriarum* and what has to be proved in this regard is *animus injuriandi*.³⁰ 'Malice' therefore strikes at least at the subjective motive or true intention of the actor and gives expression to their *animus injuriandi*. It includes the intention to injure, whether in terms of *dolus directus* or *dolus indirectus*.³¹ The 'malice' must be that of the person responsible for initiating the prosecution.³²

[48] *Animus injuriandi* includes not only the intention to injure, but also consciousness of wrongfulness:³³

²⁸ See *National Education Health and Allied Workers Union v University of Cape Town and Others* (2003) 24 ILJ 95 (CC) paras 33 and following: the right is enjoyed by employees and employers.

²⁹ See *Shoprite Checkers (Pty) Ltd v Ramdaw NO and Others* (2001) 22 ILJ 1603 (LAC): discipline in the workplace is the prerogative of the employer.

³⁰ *Rudolph and Others v Minister v Safety and Security and Another* 2009 (5) SA 94 (SCA) (*Rudolph*) para 18.

³¹ *Weitz* above n 22 para 20, 27 and the authorities cited there.

³² *Rudolph* above n 30 para 19. The court accepted that the proceedings were initiated, in that matter, when the appellants were formally charged.

³³ J Neethling, JM Potgieter & PJ Visser *Neethling's Law of Personality* 2 ed (2005) at 181 cited with approval in *Moleko* above n 2 para 63. Also see *Kruger* above n 2 para 52.

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

[49] To succeed on the case as pleaded, the plaintiff had to demonstrate that Col Mtshagi intended to take disciplinary steps with the consciousness of wrongfulness. *Dolus*, at least in the form of *dolus eventualis*, is required and negligence, or even gross negligence, will not suffice.³⁴ Yet the plaintiff failed to show that Col Mtshagi, or indeed any other SAPS employee, had foreseen the possibility that initiating the disciplinary proceedings was wrongful, in that reasonable grounds for it were lacking, and had acted recklessly as to that consequence.³⁵ Matters such as the procedural deficiencies which occurred and the manner in which the charges were formulated do not establish the required intention to injure the plaintiff through baseless proceedings.³⁶ Col Mtshagi's decision to proceed, viewed objectively, is incompatible with consciousness of wrongfulness, recklessness or *animus injuriandi*. Instead, and as the defendant pleaded, the indications are that she genuinely believed that disciplinary proceedings were warranted given the serious nature of the complaint and the conflicting versions of what had been said.³⁷ To the extent that her reasoning, or indeed that of Maj-Gen Kunene or any other relevant functionary, may be said to have been flawed, this on its own is insufficient to impute the necessary intent. Proving malicious proceedings requires egregious conduct, not merely flawed

³⁴ *Moleko* above n 2 para 64; *Mdhlovu* above n 14 para 31.

³⁵ *Mdhlovu* above n 14 para 32.

³⁶ *Mdhlovu* above n 14 para 33. On the standard of care that an employer should take in drafting charges, see *EOH Abantu (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2019) 40 ILJ 2477 (LAC) paras 15–16: employers embarking on disciplinary proceedings, not being skilled legal practitioners, occasionally define or restrict the alleged misconduct too narrowly or incorrectly. The categorisation by the employer of the alleged misconduct is less important than informing the employee of the alleged misconduct and courts and arbitrators must not adopt too formal or technical an approach.

³⁷ Cf *Mdhlovu* above n 14 para 37.

reasoning.³⁸ On this basis too, the first claim must be dismissed so that the defendant is not liable to the plaintiff for any damages suffered.

Defamation

The pleadings and evidence

[50] The plaintiff claims that member(s) of the defendant unlawfully and intentionally published information that was defamatory, namely that the plaintiff had referred to people as monkeys in statements under oath. As a result, the plaintiff pleads that posters referring to the plaintiff as a 'white racist bitch' were placed on fences and doors at Joza.³⁹ The plaintiff claims that member(s) of the defendant, on 2 May 2021, allowed these posters containing defamatory and derogatory statements to be affixed to entrances at the different sections of Joza, including the door of the plaintiff's office and on vehicles parked in the back yard of the station.⁴⁰ On 19 May 2021, the plaintiff pleads that, during an Economic Freedom Fighters (EFF) protest, protestors were in possession of placards containing various defamatory statements, which were tied to the fence of the station.⁴¹ As a result of the publication of the defamatory statements, the plaintiff adds that an unknown individual posted on Facebook that the plaintiff had racially abused black police officers by calling them monkeys. The individual also referred to CAS no. 112/04/2021, being the case opened against the plaintiff.

[51] The defendant accepts that there were some posters containing statements relating to some members of the SAPS, including but not restricted to the plaintiff, placed inside Joza. The defendant denies that the posters were placed on the

³⁸ *Mdhlovu* above n 14 paras 35–37.

³⁹ While the pleadings refer to 'placards', it is convenient to refer to this as 'posters' to differentiate from the alleged EFF-related conduct.

⁴⁰ The plaintiff pleads that the posters stated the following:

- a) 'Why is this racist leader called Capt Du Preez still here While she called other officers Monkeys or Baboons PLZ ACT S/COM M.NTSHAGI RACISM must GOOO!!' (sic.)
- b) 'Yooooo!! Call our Collegeus!! As Monkeys!!! Capt Du Preez' (sic.)
- c) 'RACIST BITCH MUST GO ON this Orgsniation E.G. ... Capt Dupreez AND Lt Col Havange' (sic.)

⁴¹ The statements are the following:

- a) 'NO TIME FOR RACISM NOW DUPREE MUST GO' (sic.)
- b) 'ONS IS MOEG VAN DIE BOERE WAT KOM OORVAT IN ONS SE SWART LAND.' (We are tired of the farmers / Afrikaners who came to take over our black country.) (Own translation.)
- c) 'STRYDOM SWART MENSE KAFFER TE ROEP IS VERBY!' (Strydom, calling black people 'k.....' is over.) (own translation.)

boards by SAPS members acting in the scope of their normal duties. Once the posters were noticed, they were removed. No complaint was lodged with the SAPS for the matter to be investigated or pursued. As for the EFF march, the defendant denies any SAPS involvement. In respect of the Facebook post, the defendant pleads that the individual is unknown to the defendant or to any members stationed at Joza. In addition, SAPS cannot control what is posted online and no complaint was lodged by the plaintiff.

[52] An inspection *in loco* was conducted at Joza and the parties signed a minute as to what had been observed, with reference to the testimony of Lt Col Havenga where necessary. The entire police station has walls with palisade fencing that secures the police station. The entrance gate would have been locked at the time of the incident, which fell within the Covid-19 period. After the entrance gate there is another steel gate in front of glass doors that lead to the main entrance. To the right-hand side is a vehicle entrance gate which leads to the parking bays of SAPS officials at the back of the station. This is a motorised gate, accessed only by members with a pin code. A glass double door on the side of the building was always locked. Lt Col Havenga pointed out the covered parking bay where he had observed vehicles with posters on them, and the area on the right of the building where detective vehicles are parked. These vehicles also had posters on them. The back entrance was, during the Covid-19 period, the only entry point for SAPS members, leaving aside the command service centre near the main entrance to the police station. Lt Col Havenga pointed out the various areas within the station that had contained posters, including the entrance of the administrative section against the glass door and notice board, up the staircase to the first floor, on the walls and locked glass door of the detectives' section, on the crime office passage and locked glass door, and behind a glass cabinet. There was a large concentration of posters in the passage towards the plaintiff's office and posters were placed on her office door. During the EFF protest, placards were tied to the palisade fencing at the parking area.

Analysis

[53] A claim for defamation is aimed at compensating the defamed party for any publication that injures their good name and reputation, with its main focus being the protection of the constitutional rights to dignity and privacy.⁴²

[54] The elements of defamation include: (i) the wrongful; and (ii) intentional; (iii) publication of; (iv) a defamatory statement; (v) concerning the plaintiff.⁴³ A plaintiff in a defamation action need not prove each of the aforesaid elements to succeed, once he or she has proven publication of defamatory matter concerning himself or herself, a presumption that the statement was both wrongful and intentional arises.⁴⁴ A defendant who wishes to avoid liability must raise a defence which excludes either wrongfulness or intent. This duty on a defendant constitutes a full onus, which must be discharged on a preponderance of probabilities and facts must be pleaded and proved that will be sufficient to establish the defence.⁴⁵

Was there publication?

[55] Publication means ‘the communication or making known to at least one person other than the plaintiff’ and may take many forms, including print.⁴⁶ The posters were mainly photocopied from four original posters containing the offensive material and the contents were made known to those who were inside the police precinct during the time they were affixed. This constitutes publication.

Were the posters defamatory?

[56] It is common cause that unknown people referred to the plaintiff as a ‘racist’ and a ‘bitch’ in documents affixed to the walls of the police station. The question whether the posters contain defamatory material involves a two-stage enquiry. The first is to establish the natural or ordinary meaning of the writing. The second is to decide whether that meaning is defamatory. The test to be applied to determine the ordinary meaning of the words is objective, namely what meaning the reasonable

⁴² See, in general, *Le Roux & others v Dey (Freedom of Expression Institute & another as amici curiae)* 2011 (3) SA 274 (CC) (*Le Roux*).

⁴³ *Khumalo & Holomisa* 2002 (5) SA 401 (CC); 2002 (8) BCLR 771; [2022] ZACC 12 para 18.

⁴⁴ *Le Roux* above n 42 para 85.

⁴⁵ *Ibid.*

⁴⁶ *Le Roux* above n 42 para 86.

reader of ordinary intelligence would attribute to the words read in context.⁴⁷ The reasonable reader will not take account only what the words expressly say but also what they imply.⁴⁸

[57] The word ‘bitch’ is clearly derogatory and abusive⁴⁹ and, when coupled with reference to the plaintiff, a white woman, and the words ‘racist’, ‘monkeys’ and ‘baboons’, constitutes racially-charged communication.⁵⁰ What the posters imputed to the plaintiff was both demeaning and expressly suggestive of the conclusion that she was racist. The statement that a person is a racist on its own carries a meaning that can defame.⁵¹ As the Labour Court has noted, it is hard to conceive ‘of any place or circumstance or country where, if a person is told that he is racist, it will not be experienced by such person as him or her being insulted and abused’.⁵² This exposed the plaintiff to contempt and animosity that rendered her less worthy of respect by her colleagues.⁵³ The result is that the posters constituted published defamatory statement(s) concerning the plaintiff.

[58] The consequence of this finding is that it is presumed that the statements were both wrongful and published with the intention to injure (*animus injuriandi*). Little needs to be said about the suggestion in argument that the plaintiff’s use of the term ‘monkey’ qualified as a ground of justification for defamation. The defendant has, firstly, failed to prove on a balance of probabilities that the sting of the defamatory statement was true. Secondly, and in any event, the convictions of the community are such that it cannot be said that the defamatory remarks were made in the public interest. In coming to this conclusion, I have considered the time lapse, the manner and the occasion of the publication, including the offensive appellation and publication through multiple posters being placed around the station anonymously.

Is the defendant responsible for the defamation

⁴⁷ *Sindani v Van der Merwe and Others* 2002 (2) SA 32 (SCA) (*Sindani*) paras 10–11.

⁴⁸ *Argus Printing and Publishing Co Ltd and Others v Esselen’s Estate* 1994 (2) SA 1 (A) at 20F–G.

⁴⁹ See *Viviers v Jentile* [2010] ZAGPPHC 239 para 15.

⁵⁰ *Sindani* above n 47 para 12. Cf *Viviers* above n 49 para 15.

⁵¹ *Phaleng-Podile v Dovey* [2022] ZAGPJHC 656 para 40.

⁵² *SA Chemical Workers Union & another v NCP Chlorchem (Pty) Ltd & others* (2007) 28 ILJ 1308 (LC) para 13; *Jankielsohn v Reagan and 3 Others* 2019 (7K11) QOD 23 (FB) para 55.

⁵³ *Le Roux* above n 42 para 91.

[59] The remaining defence relied upon is that the members responsible were not acting in the course and scope of their employment. The defendant argues, on this basis and with reference to case authority, that the plaintiff has failed to prove that the defendant defamed her. In particular, the defendant highlights the absence of any link between the posters and the duties of SAPS members.

[60] On the evidence, it must be accepted that member(s) of the defendant allowed posters containing defamatory and derogatory statements in respect of the plaintiff, notably that she was a 'racist' and a 'bitch', to be affixed at parts of the police station as pleaded. This included at the entrances, on the door of the plaintiff's office and on vehicles parked in the back yard. The police station was a space that was always secured, particularly during the Covid-19 period. Any significant incident ought to have been reported in an occurrence register. The posters were numerous and displayed in various areas close to where those on duty were situated. Yet those on night shift reported no incidents during their hourly station inspections on the evening of Sunday 2 May 2021. The shift changed at 06h00 on 3 May 2021, also without any incident noted. Yet soon thereafter, as Lt Col Havenga testified, approximately 80 posters, mainly photocopies, were discovered affixed on walls, doors and vehicles at the police station. Considering the facts, this was unlikely to have been the conduct of a member of the public who gained access unlawfully and was permitted to stroll through station affixing the posters. The probabilities are that one or more SAPS members drafted, copied and affixed the posters while on night duty.

[61] It remains to consider the argument that the posters were not placed on the boards by SAPS members acting in the course and scope of their duties, and that SAPS members did not order the publication of the posters in the course and scope of their duties. Acts performed by an employee(s) solely for their own interests and purposes and outside their authority are not considered to be 'in the course of employment' even though they may have occurred during employment. This is a question of fact to be decided upon the circumstances of the case, with due appreciation of the constitutional values of openness, responsibility and

accountability.⁵⁴ The modern test for vicarious liability in cases of 'deviation' from authorised duties is based on the majority judgment of Jansen JA in *Rabie*.⁵⁵

- (a) If an employee is seeking, albeit improperly, to advance their employer's interests, the employer may be vicariously liable. This is a subjective test. On the subjective test there would be no vicarious liability if the employee were acting solely in their own interests;
- (b) Even if there is no vicarious liability on the subjective test, the employer may still be liable if objectively there is a sufficiently close link between the employee's acts for their own interests and purposes and the business of the employer.

[62] The test has been developed by the Constitutional Court in *K v Minister of Safety and Security (K)* as follows:⁵⁶

'The objective element of the test which relates to the connection between the deviant conduct and the employment, approached with the spirit, purport and objects of the Constitution in mind, is sufficiently flexible to incorporate not only constitutional norms, but other norms as well. It requires a court when applying it to articulate its reasoning for its conclusions as to whether there is a sufficient connection between the wrongful conduct and the employment or not.'

[63] Various cases have confirmed an employer's liability to a third party for the act of an employee considered to be 'in the course of employment', even though the act itself is unlawful or prohibited.⁵⁷ Courts have confirmed that the application of the general principle does not entail that every act of an employee committed during the time of employment, in the advancement of their personal interests or the achievement of their own goals, necessarily falls outside the course and scope of their employment.⁵⁸ Ultimately, a sufficiently close link must exist between the wrongful act of the employee, on the one hand, and the business or enterprise of the employer, on the other. Put differently, employees act outside the scope of

⁵⁴ *Mkize v Martens* 1914 (AD) 382 at 394; *K v Minister of Safety and Security* [2005] ZACC 8; 2005 (6) SA 419 (CC). The following summary of the legal position is drawn from this court's judgment in *Oudehouthoof Boerdery (Pty) Ltd and Others v Venter* [2021] ZAECHGHC 85.

⁵⁵ *Minister of Police v Rabie* 1986 (1) SA 117 (A) at 134C–F.

⁵⁶ *K v Minister of Safety and Security* [2005] ZACC 8; 2005 (6) SA 419 (CC) para 44.

⁵⁷ See, for example, *Estate van der Byl v Swanepoel* 1927 AD 141.

⁵⁸ *Viljoen v Smith* [1996] ZASCA 105; 1997 (1) SA 309 (A) at 315E–G. Also see *Minister of Safety and Security v Jordaan t/a Andre Jordaan Transport* 2000 (4) SA 21 (SCA).

employment if they disengage themselves completely from their employment and promote their own objectives or interests exclusively.⁵⁹ As Neethling and Potgieter note, whether or not a sufficiently close connection exists between an employee's acts for their own purposes and the business of their employer is particularly problematic in instances of an employee's intentional wrongdoing, since this is the very antithesis of an act in the course and scope of employment.⁶⁰ The authors also note the turnabout occasioned by the *K* judgment.

[64] Applying these principles, the probabilities favour the conclusion that the defendant is vicarious liable both on the subjective and objective tests espoused in *Rabie*. On the subjective leg, each of the posters alluded in some way to the employment context, either through reference to 'our colleagues', or the 'organisation' or by pressing for the plaintiff's dismissal. At least in some instances, the allegedly racist conduct was linked, directly or indirectly, to the power of the defendant to dismiss the plaintiff. To that extent, the employees concerned were acting beyond their own interests, also pressuring their employer to act in a certain manner.

[65] That aside, and for similar reasons, the employee(s) conduct occurred within the confines of the workplace, pertained to an issue that arose during a parade, alluded to and involved one or more fellow employees, including the plaintiff, and suggested a desired response from SAPS. The workplace provided the location, opportunity and, in all probability, the tools to those who caused the plaintiff harm. This occurred during 'working hours', bearing in mind that it is possible for a so-called frolic to amount to a person's neglect to perform their employer's work properly.⁶¹ Instead of utilising their time to act in service of the defendant, to deter harmful conduct and to protect members of society, including fellow colleagues, those involved facilitated harm, despite being best place to prevent it.⁶² Objectively, and applying a multi-faceted test that considers all relevant factors, including value-

⁵⁹ J Neethling and JM Potgieter *Law of Delict* (8th Ed) at 447.

⁶⁰ *Ibid* at 449.

⁶¹ *K* above n 56 paras 47–48.

⁶² See CJ Roederer 'The constitutionally inspired approach to vicarious liability in cases of intentional wrongful acts by the police: One small step in restoring the public's trust in the South African Police Services' (2005) 21 *SAJHR* 575 at 592; *K* above n 56 paras 26–29, quoting *Feldman (Pty) Ltd v Mall* 1945 AD 733, and para 57.

laden questions of policy and fairness, this amounted to a sufficiently close link to the defendant to warrant vicarious liability.⁶³

Republication

[66] There are different considerations that arise in respect of the alleged defamation in respect of the placards carried by those who participated in the EFF protest and the Facebook post. It may be accepted, in the plaintiff's favour, that one of the placards suggested indirectly that she was a racist and that this amounted to defamation. So too the Facebook post. But the link between this conduct and the defendant is tenuous. The plaintiff has failed to prove the involvement of any SAPS member in the protest or in respect of the Facebook post. That aside, there is no evidence to support the conclusion that any member who shared information about the disciplinary and criminal proceedings involving the plaintiff was not acting in their own interests or that, objectively, there was a sufficiently close link between such conduct and the defendant's operations. Furthermore, the established authority provides that the general rule is that a person who publishes a defamatory statement, or is held responsible for the publication of a defamatory statement, is not liable for damages flowing from its unauthorised republication.⁶⁴ In my view, none of the limited exceptions to this principle find application in the circumstances.

Quantum

[67] The purpose of damages for defamation is typically not to punish the defendant but to offer conciliation and solace to the plaintiff by payment of compensation for the harm caused and to vindicate the plaintiff's dignity.⁶⁵ An award for damages in proceeding of this nature should, therefore, compensate the plaintiff for both wounded feelings and reputational damage. The court is obliged to have regard to all the circumstances. It is useful to consider factors such as the nature and content of the defamatory statement, the nature and extent of the publication, the

⁶³ See *Van der Berg v Coopers & Lybrand Trust (Pty) Ltd and Others* 2001 (2) SA 242 (SCA) para 40. Also see Roederer above n 62.

⁶⁴ *Buthlezi v Poorter and Others* 1975 (4) SA 608 (W); *Vengtas v Nydoo and Others* 1963 (4) (SA) 358 (D).

⁶⁵ *Dikoko v Mokhatla* 2006 (6) SA 235 (CC) paras 75–76.

reputation, character and conduct of the plaintiff and the motives and conduct of the defendant.⁶⁶

[68] As alluded to above, the published statements contained serious defamatory material, labelling the plaintiff a racist and alluding to morally reprehensible conduct. It was clear from the plaintiff's evidence that she was extremely hurt by this, both personally and professionally, and that this has had a lingering effect. There was little evidence on the extent of the publication, in the sense of how many police officers would likely have had sight of the posters, which were plastered all over the police station, or precisely how long it took for the posters to be removed. I accept that several people would have observed the posters personally and that verbal republication to those members who arrived at work shortly after the posters had been removed was the natural and probable result considering the manner, location and extent of the original publication. To this extent, there was reputational damage suffered. That said, the actual publication was relatively narrow in its scope, and largely confined to the defendant's employees, as opposed to the wider public. The plaintiff was a senior officer with a spotless record who was facing disciplinary action at the time of this incident. The aggravating features to be considered include the language used and the plethora of copies that were affixed in places designed to draw attention to all those who entered those areas of the precinct. It is relevant that the incident was either not properly investigated, or at least that there was no proper follow-up to the investigation, and that there has been no formal apology to the plaintiff. The posters did target other senior personnel, and the average reader would have construed the material accordingly, and with some appreciation that the author(s) were aggrieved colleagues.

[69] I have also considered that the Constitution places great value on human dignity, including reputation, to be balanced with the right to freedom of expression in the occasionally robust cut and thrust of workplace relations. The extent of sentimental damages for defamation has implications for the properly mediated connection between dignity and free expression in that overly excessive amounts will

⁶⁶ *Meyer v Basset* 2019 JDR 0562 (ECG).

deter and foster intolerance to the latter.⁶⁷ Finally, the court must consider that the general trend of awards in such matters to limits the award of solatium has been commended in various cases.⁶⁸ It has also been said that monetary compensation for harm of this nature is not capable of being determined by any empirical measure and awards in other cases might, at best, provide a measure of general guidance.⁶⁹ Having considered all these factors, I consider an amount of R80 000,00 to be an appropriate award.

Costs

[70] There are competing considerations in respect of the question of costs. It goes without saying that the proper exercise of this court's discretion demands an approach that is fair to both sides.

[71] The court must look to the substance of the judgment and not merely its form in determining who is the successful party. I have considered that the plaintiff has succeeded in obtaining a damages award and, there being no suggestion of any tender, that she had to approach the court to obtain this award.⁷⁰

[72] Where issues are distinct and severable, the general rule is that a successful party on each issue is entitled to their costs. This is, however, not a hard and fast rule and considerable discretion is left to the trial judge.⁷¹ The following sentiments appear apposite:⁷²

'But if there are technically separate issues [and] if all these issues had to be raised in order to lead evidence so as to enable the trial judge to give a correct judgment upon the issue on which the litigant succeeds, then there must be some exceptional reason for not adopting the general principle that the successful litigant is entitled to all his costs.'

[73] The evidence reveals, factually, a clear connection between the parade incident and the plaintiff's successful claim for defamation. Moreover, at least one of

⁶⁷ *Dikoko v Mokhatla* above n 65.

⁶⁸ See, for example, *Mogale and Others v Seima* [2005] ZASCA 101; 2008 (5) SA 637 (SCA) para 18.

⁶⁹ *Tsedu and Others v Lekota and Another* 2009 (4) SA 372 (SCA). See, for example, *Media 24 Limited t/a Daily Sun and Another v Du Plessis* [2017] ZASCA 33; *Van der Berg v Coopers & Lybrand Trust (Pty) Ltd & Others* above n 63.

⁷⁰ *Norwich Union Fire Insurance Society Ltd v Tutt* 1960 (4) SA 851 (A) at 854.

⁷¹ *Estate Wege v Strauss* 1932 AD 76 at 86.

⁷² *Penny v Walker* 1936 AD 241 at 260.

the pleaded defences to the defamation claim was grounded upon the plaintiff's utterance of the word 'monkey' during the parade. The result is that some, but not all, of the issues that emerged in respect of the malicious proceedings claim were interwoven with the defamation claim, so that I prefer not to award separate costs order per claim.⁷³ This provides sufficient justification, in my view, for making a costs order in favour of the plaintiff, rather than awarding the defendant the costs of the malicious proceedings claim: the defendant has not been entirely successful on a distinct issue wholly unconnected with the issue upon which the plaintiff has succeeded.⁷⁴ To add to this, the award obtained is not insubstantial and the plaintiff has succeeded in vindicating a substantial right.⁷⁵

[74] On the other hand, the plaintiff succeeded only respect of part of the lesser of her two claims and much of the evidence led was in respect of the unsuccessful claim. The costs of the action were increased appreciably by the issue upon which the plaintiff failed.⁷⁶ This, on its own, appears to me to justify an award of only a percentage of the plaintiff's costs.

[75] That the plaintiff unduly increased the costs of the proceedings adds to this conclusion.⁷⁷ In particular, the emphasis placed on the disciplinary hearing, including the provision of the full transcript and much of the time spent with reference to the conduct of Col Nkwenkwe, was unnecessary and remained disconnected to the pleaded basis of the action.

[76] To compound matters, the figures attached to the plaintiff's claims were grossly extravagant. The plaintiff claimed R5 million for the alleged malicious proceedings and R1 million for defamation. Yet heads of argument submitted on behalf of the plaintiff, at the conclusion of the trial, suggested that payment in the amount of only one third of the sum of those figures was appropriate. This amount was itself markedly higher than any of the comparable authorities relied upon in

⁷³ See *Invernizzi v Port Elizabeth Municipality* 1954 (2) SA 288 (E) at 299D–F.

⁷⁴ *May v Union Government* 1954 (3) SA 120 (N) at 131–132 quoting *Fripp v Gibbon & Co* 1913 AD 354 at 358.

⁷⁵ See *Featherby v Zulu* 2021 (8K11) QOD 1 (KZD) para 27.

⁷⁶ *Norwich Union Fire Insurance Society Ltd v Tutt* above n 70. Also see *Premier Attraction 300 trading as Premier Security v City of Cape Town* [2016] JOL 35769 (WCC).

⁷⁷ *Rowles v Isipingo Beach Recreation Court* 1966 (3) SA 751 (D).

support of the quantum to be awarded and constitutes, at the very least, an irresponsible claim. The failure to assess quantum realistically is to be deprecated. So too the practice of allowing an inflated amount to remain unamended in particulars of claim, in the face of authorities suggestive of a far lower amount. While this may not be a basis for depriving the plaintiff of her costs, it contributed to the incurrance of unnecessary costs and is a factor to be considered in the present circumstances.

[77] Considering all these factors, I consider it appropriate to award the plaintiff thirty per cent of her costs. As to the scale of costs of counsel, in terms of the rules, I have considered the complexity of the matter, the value of the claim, the importance of the relief sought and the fact that the respondent engaged the services of senior counsel. Costs of counsel on scale B appear to me to be warranted.

Order

[78] The following order is issued:

1. The defendant is ordered to pay damages to the plaintiff in the amount of R80 000,00.
2. The defendant is ordered to pay interest on the aforesaid amount at the legally prescribed rate, from the date of service of summons to date of payment.
3. The defendant is ordered to pay thirty per cent of the plaintiff's costs of suit, including costs of counsel on scale B.

A GOVINDJEE
JUDGE OF THE HIGH COURT

Heard:

Heads of argument received: 23 – 28 October 2025
3 November 2025

Delivered: 2 December 2025

Appearances

For the Plaintiff: Adv M du Doit

Instructed by: NN Dullabh & Co
Makhanda

For the Defendant: Adv A Rawjee SC

Instructed by: The State Attorney
Gqeberha