

SOUTH AFRICA / JUDGMENT

Dituku v National Director of Public Prosecutions (921/2019) [2024]

ZANCHC 115 (6 September 2024)

[2024] ZANCHC 115

COURT

Northern Cape High Court, Kimberley

BEFORE

MC Mamosebo

CASE / FILE NUMBER

921/2019

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IN THE HIGH COURT OF
SOUTH AFRICA
NORTHERN CAPE
DIVISION, KIMBERLEY

Case No: 921/2019

In the matter between: OBAKENG PHILLIP
DITUKU
PLAINTIFF
and
THE NATIONAL DIRECTOR
OF
PUBLIC
PROSECUTIONS
DEFENDANT

Heard on: 19/06/2024

Delivered on: 06/09/2024

Summary:

The plaintiff's claim is against the National Director of Public Prosecutions for malicious prosecution. Defendant raising special plea of failure to serve a s 3 Notice on the NDPP as contemplated in the Notice of Legal Proceedings Against Certain Organs of State Act 40 of 2002. Plaintiff's remedy lying under actio injuriarum. Plaintiff to allege and prove: (a) that defendant set the law in motion (instigated or instituted proceedings); (b) that defendant acted without reasonable and probable cause; (c) that defendant acted with malice (or animus injuriandi); and (d) that the prosecution failed. Requirements (a) and (d) are not in dispute.

ORDER

1.
The defendant is declared liable for malicious prosecution and is ordered to pay the plaintiff's agreed and/or proven damages arising out of the malicious prosecution on charges of stock theft and possession of stolen goats and failing to provide a satisfactory explanation.

2.
The defendant is ordered to pay the plaintiff's agreed or taxed costs in respect of the merits on the prescribed scale A;

3.
The issue of quantum is postponed sine die.

JUDGMENT

MAMOSEBO J

Introduction

[1] In this action, the plaintiff seeks damages against the National Director of Public Prosecutions (the NDPP) arising out of his alleged wrongful and malicious prosecution by certain prosecutors acting in the course and scope of their employment. The trial was confined to the determination of the NDPP's liability, with the issue of quantum standing over for later determination should the plaintiff be successful in his claim.

Heads of Argument

[2] At the end of the trial, the parties were ad idem that a more prudent approach would be to file their written submissions in lieu of arguing orally in court, which I acceded to. Both sets of heads were filed out of the stipulated time without the courtesy of

an explanation or a condonation application. This conduct is deprecated as it causes unnecessary delays in the finalisation of

matters and contributes to backlogs.

The Special Plea

- [3] The NDPP claimed not to have been served with the required Notice as an Organ of State and on that basis alone asked the Court to dismiss the claim with costs. On the contrary, Isang Nakale Attorneys dispatched the said Notice dated 31 August 2018 by registered mail within the six months period as legislated. Ms Zilwa of the office of the State attorney made the submission that seemingly the Notice was also served on the State Attorney. It is on this basis that I find the special plea is without merit and in fact borders on frivolity. Officers of the Court are well advised to litigate conscientiously

and not to throw mud around with the hope that some of it will stick.

The issue

- [4] The question that calls for an answer is whether there were reasonable and probable grounds for the NPA to pursue the charges levelled against the plaintiff or whether they were actuated by animus injuriandi.

Case for the plaintiff

- [5] The plaintiff, Mr Obakeng Dituku, claims damages for malicious prosecution. He was charged with (a) stock theft in contravention of sections 1, 11, 12, 13, 14 and 15 of the Stock Theft Act 57 of 1959, namely, 12 goats valued collectively at R14 400, being the property of Richard Monnapula, as well as; (b) failure to give a satisfactory account of possession of stock or produce in contravention of the provisions of s 2[1] read with the provisions of sections 1, 11, 12, 14 and 15 of the same Act. He resultantly appeared in the Kuruman Magistrates Court over the period 22 September 2017 to 4 July 2018 when he was acquitted. He contends that the National Prosecuting Authority (NPA) persisted with false charges against him without any evidence or any reason to believe that he had actually committed the offence of stock theft as alleged and maintains that in doing so the NPA had acted with malice.
- [6] This is the plaintiff's evidence. On 3 July 2018 he was assisting at his sister's workplace manufacturing window frames and burglar bars. Messrs Pusho Mongotleng and Norman Page requested him to accompany them to load some goats. He knew Mongotleng, as a livestock farmer for the past fifteen years but met Page for the first time. Mongotleng directed them to load the goats from his kraal onto the bakkie. He was told that they were transporting the goats to Taung where they would be sold. He informed Mongotleng and Page that he was returning to his workplace but they persuaded him to accompany them to Taung. Before departing, Mongotleng produced a livestock book and his doubts whether those goats were his, were allayed.

- [7] Page was the driver of the said vehicle with Mongotleng in the passenger's seat. The plaintiff huddled at the back of the van with the goats. They were stopped on the way by the members of the stock theft unit of the SAPS, W/O Metri and Cst Thatayaone Modise. Cst Modise, having introduced himself to all of them, asked the plaintiff to explain his presence in the bakkie. He responded that the gentlemen seated in front were the ones who asked him to accompany them. The police only arrested the plaintiff and Mongotleng. The plaintiff stated that the police never asked him for his version of events but it will become clearer as the evidence unfolds.
- [8] In order to comprehend or make sense on what basis the plaintiff was arrested and prosecuted regard should be had, first, to the statement of the arresting officer, Cst Modise, then the explanation by Page, who was exonerated from the inception and not arrested by Modise, followed by what Richard Monnapula, whom both Page and Mongotleng implicated, had to say. Modise's deposition dated 3 July 2015 reads:

'On Friday 2015.07.03 I was officially on standby duties and in the morning, I received a telephone call from my informer regarding a white Chev Utility with canopy registration number DL [...] GP that it will transport suspected stolen goats to Taung but they will take the Reivilo Road.

On the same day at about 09:00 I started to patrol the same road. While I was patrolling the Reivilo Road at about 13:30 the said vehicle came and it was on the way to Reivilo and I was from Reivilo to Kuruman. I stopped that vehicle and there were two men in front and I identified myself as a police officer to them. The driver told me that he is Mr Norman Page and the passenger told me that he is Mr Pusho Mongotleng. I asked them to check the vehicle at the back and they went to open and I found another man, together with the goats.

I asked that man his name and he told me he is Mr Phillip Dituku. The time I found the goats I asked [for] the permit from the driver and he told me that those goats belonged to Mr Pusho and Mr Dituku, they hired him. Then Mr Pusho gave me the permit that says those goats belonged to Mr Richard Monnapula and he explained to me that they were sent by Mr Richard Monnapula.

I physically checked the markings of the goats and they were newly tattooed and I also counted them as I found 12 goats in total all of them were newly tattooed. Some of those goats were having earmarks as left ear swallowtail and right ear swallowtail and left ear half-moon on top and bottom and right ear slit. I started to suspect because the mark was new and the driver told me that those two men had marked those goats while they were on their way to Taung.

I requested Mr Mongotleng to contact Mr Monnapula for confirmation because I also found Mr Monnapula's tattoo plier and stock card with Mr Mongotleng. Mr Monnapula told me that he is at Kagung and I went to him and asked him about those goats and he denied and told me that he never sent Mr Mongotleng and his friend to sell the goats and he also don't know those goats. I also asked Mr Dituku about the goats and he told me that he was just helping Mr Mongotleng.

On this matter, I was not satisfied about Mr Mongotleng, Mr Monnapula and Mr Dituku's explanations and I took them to the police station. I told them that I was arresting them for possession of suspected stolen stock and I explained to them their constitutional

rights. For these 12 goats they were using Mr Monnapula's stock card to sell and they also marked the goats with Mr Monnapula's

tattoo [plier]. All those 12 goats were seized from them and impounded. Those 12 goats are valued at R14 400.00. I [also]

seized the tattoo plier and the stock card.' (own emphasis)

[9] The statement deposed to by Mr Norman Page marked "A2" under Kuruman CAS 54/07/2015 made on 3 July 2015 reads as follows in its entirety:

'I am an African male adult with ID no 7[...] residing at Mapoteng House No K2[...], New Stands, employed at Brand House Company as a sales representative with cell no 081 [....].

I state that on Friday 2015-07-03 I was at work at Kuruman town and received a call from Pusho Ernest Mongotleng who is well known to me. He requested me to assist him to transport his goats to Taung station to sell to the Indians.

I then proceeded to Seven Mile as agreed and we loaded 12 goats and we proceeded to Taung. On the way Mr Mongotleng and Phillip started to tattoo the goats because they were having a tattoo plier and ink.

Before I loaded the goats, I requested the permit and (he) Mr Ernest Mongotleng informed me that he doesn't have a permit but he was sent by Mr Monnapula. He then gave me a permit to fill together with the Stock Card which while we were driving I did fill [out] the permit with the Stock Card which belongs to Mr Richard Monnapula. He then gave me a permit to fill it together with the Stock card which belongs to Mr Monnapula Richard. I then completed the permit because I knew that I cannot transport the livestock without a permit.

I then write it and transport [the goats] to Taung. Along the way we [were] stopped by the police official from Stock theft who searched [the vehicle] and we gave them [the] permit.

I then informed them I was hired by Mongotleng to transport the goats to Taung. I further inform them that I was the one who completed the permit. I then gave them (the police) the Stock Card to prove the ownership who belongs to Mr Richard Monnapula.

I state after the police arrested us the goats were newly tattooed and I was instructed to go to the police station.

I know and understand the contents of the statement. I have no objection to take the prescribed oath. I consider that prescribed oath to be binding on my conscience.' (own emphasis)

[10] Page made a second statement marked A16 on 20 August 2016, the contents of which are substantively the same except in the following respects:

- (a) whereas in his A2 statement he explained that Mongotleng had requested him to assist him to transport his goats to Taung station to sell to the Indians, he says in his A16 statement that Mongotleng had asked him to transport the goats to Taung to sell them;
 - (b) In A2 Page says 'we loaded 12 goats', whereas in his A16 statement he says 'they loaded 12 goats on my vehicle'.
 - (c) Whereas in A2 he said: 'He then gave me a permit to fill together with the stock card which belongs to Mr Monnapula Richard. I then completed the permit because I knew that I could transport livestock without a permit.' he says in his A16 statement that 'I filled the permit with the stock card which belongs to Mr Monnapula as I knew that I could not transport the livestock without a permit.'
 - (d) In his A2 statement he said 'and we gave them [the] permit', but in his A16 statement he said 'I gave them the permit.'(own emphasis)
- [11] I pause here to draw attention to the fact that Page in the statement exculpates the plaintiff, except for the fact that plaintiff was already in the company of Mongotleng when he joined them. How, in the circumstances, Page got a "free pass out of jail" when he implicates himself that he fraudulently completed the 'stock card' on behalf of the absent Monnapula, defies logic. This surely strengthens the claim of the plaintiff that he was made a scapegoat (no pun intended).
- [12] The plaintiff refuted the allegation that the goats were loaded at Seven Mile and maintained that they were loaded at a place called Maruping. He also disputed the sequence in which they are alleged to have come together. He further denied branding the goats whilst travelling and said same was done at Mongotleng's kraal. Mongotleng held the goats while the plaintiff branded them. He was not even aware that the goats belonged to the said Mr Richard Monnapula.
- [13] These are the contents in full of the statement made by Monnapule, the supposed owner of the seized goats:

'I am an African male aged 59 years old and residing at Kagung Mandela Park and unemployed with cell no 084 [...].

On Friday 2015.07.03 at about 13:20 I was at the above residential address together with my wife. While I was there I received a call from the police saying that they want me for confirmation of 12 goats, stock card and pliers that were found in the possession of Mr Pusho Mongotleng and he also stated to the police that he was sent by me.

On the same day the police came to collect me at my residential address and we went to Kuruman Police Station. I told them that I never sent Pusho to sell the goats and I don't know where he found my tattoo plier and stock card.

On our arrival they took me to the goats and [I did not know] all of them. I even don't know who gave Pusho my tattoo plier and stock card because [I left them] at Logageng Village where I resided before. I do not know whether Pusho broke into my house to obtain those things because I never gave him permission to fill the documentation to sell [the goats] with my particulars.

I know and understand the contents of this statement. I have no objection to take the prescribed oath. I consider the prescribed oath will be binding on my conscience.' (emphasis added)

[14] In Monnapula's statement the plaintiff is once more not implicated. It is also extraordinary that the police and prosecution to boot, could swallow, without more, the fantastic story by Monnapula that Mongotleng could have broken into his former residence, in Logageng Village[2], hundreds of kilometres from Kuruman, and stole his stock card and tattoo pliers and yet leave it to Page to complete. This statement by Monnapula is undated. However, all indications are that it was obtained on the day of the plaintiff's arrest. In any event,

his oral explanation was given to Modise on that date.

[15] The requirements for a claim of malicious prosecution were elucidated by Van Heerden JA in *Minister of Justice and Constitutional Development v Moleko*[3] that the claimant had to allege and prove –

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

The arrest, detention and prosecution of the plaintiff is not in dispute. Therefore, the requirements in (a) and (d) have been met and need not detain us any further. I now consider (b) and (c) hereunder.

[16] According to the charge sheet, the plaintiff was charged with stock theft for having stolen 12 goats, the property of Richard Monnapula. It is common cause that Modise asked Mongotleng to contact Monnapula to confirm his ownership of the goats. Monnapula inspected the 12 goats and having done so denied ownership thereof. Monnapula further denied having sent Mongotleng to sell the goats. Following the discussions with Monnapula, Modise was not persuaded by the explanations proffered and placed Mongotleng, Monnapula and the plaintiff under arrest for possession of suspected stolen stock after explaining their constitutional rights.

- [17] The plaintiff and his co-accused first appeared in court on 6 July 2015 and after several appearances the charges against him were withdrawn during 2016. The withdrawal was, however, short-lived as the charges were re-instated during 2017 where he appeared in the district court over ten times. Even though he was acquitted at the end of the trial, the plaintiff testified that because of this arrest people in the community labelled him a thief. The allegations have left him hurt and defamed.

The plaintiff closed his case without calling any witnesses in corroboration. There was no need.

The defendant's case

- [18] For the NPA the defence called only one witness, Ms Rozanne Trudell Deelie. She is a State Prosecutor at Kathu Magistrates Court. She was permanently employed as a prosecutor since 2013 but resigned in 2018. She has since been re-appointed in that capacity from December 2021 to date. One of her functions was to screen case dockets to determine whether or not there are sufficient grounds to prosecute. In doing so, she has to ascertain whether there is a prima facie case against an accused. Phrased differently, she must establish a link between the alleged offence and the accused. According to her, the decision to prosecute the plaintiff was based on the three statements contained in the docket, namely, Mr Norman Page, Cst Thatayaone Modise and Mr Richard Monnapula.
- [19] Deelie testified that the case against the plaintiff was first enrolled during 2015 where Mongotleng and the plaintiff appeared before the court, accused of theft of stock or stock produce. Her colleague, Mr Thapelo Monyatsegang, was the prosecutor who had enrolled the matter in Kuruman. The matter was on the roll from 2015 to 2016. During the trial, Deelie was the prosecutor. At one stage she decided to withdraw the charges against the plaintiff due to the absence of Mongotleng against whom a warrant of arrest was authorised. Mongotleng was arrested on a J50 warrant and appeared in Court in 2017. Upon his arrest the charges against the plaintiff were re-instated. It was Deelie's decision for the matter to be re-enrolled believing that there was a prima facie case against both Mongotleng and the plaintiff. She says she linked the plaintiff based on the following: He was at the scene where the goats were transported; he could not give a reasonable explanation for his possession except to state that he was only assisting Mongotleng; and that the plaintiff had actively participated in the loading and tattooing of the goats while in transit and took control of the goats.
- [20] Deelie testified that Modise had a reasonable suspicion that the goats were stolen; that the explanation proffered by Mongotleng that they were sent by Monnapula was not satisfactory; and that the plaintiff had exercised his right to remain silent when he was asked to furnish a version in the warning statement and elected to make a statement in court. This can hardly be held against him as he exercised his constitutional right. Besides, in my view, he gave a reasonable explanation upon his arrest. That explanation accords with the pronouncement of Justice Madala in the Constitutional Court in *S v Boesak*[4] where Langa DP said:

[24] The right to remain silent has application at different stages of a criminal prosecution. An arrested person is entitled to remain silent and may not be compelled to make any confession or admission that could be used in evidence against that person. It arises again at the trial stage when an accused has the right to be presumed innocent, to remain silent, and not to testify during the proceedings. The fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching to a decision to remain silent during the trial. If there is evidence calling for an answer,

and an accused person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused. Whether such a conclusion is justified will depend on the weight of the evidence. What is stated above is consistent with the remarks of Madala J, writing for the Court, in *Osman and Another v Attorney-General, Transvaal*, [1998] ZACC 14; [1998 (2) SACR 493 (CC); 1998 (4) SA 1224 (CC); 1998 (11) BCLR 1362 (CC)] when he said the following:

“Our legal system is an adversarial one. Once the prosecution has produced evidence sufficient to establish a prima facie case, an accused who fails to produce evidence to rebut that case is at risk. The failure to testify does not relieve the prosecution of its duty to prove guilt beyond reasonable doubt. An accused, however, always runs the risk that, absent any rebuttal, the prosecution's case may be sufficient to prove the elements of the offence. The fact that an accused has to make such an election is not a breach of the right to silence. If the right to silence were to be so interpreted, it would destroy the fundamental nature of our adversarial system of criminal justice.”

- [21] The following aspects were canvassed by Mr Mtsweni, for the plaintiff during cross-examination of Deelie. She was aware of the Prosecutorial policy and what it aims to achieve. Deelie understood prosecution to be malicious where the prosecutor, despite not having implicative evidence nevertheless proceeds with the prosecution of an accused person. A prosecutor has a duty to ensure that there is prima facie evidence to prove all the elements of an offence.
- [22] During cross-examination, Deelie conceded that the plaintiff ought not to have been charged on the main count of stock theft because there was no complaint that the goats were stolen and therefore no evidence to substantiate the charge of theft. Deelie could have easily discerned this averment from the statement of Monnapula and demanded further investigation, but she did not. In fact, she conceded, during cross-examination, that it was a mistake to allege that Monnapula was the owner of the goats as he never was.
- [23] The second charge pertains to the plaintiff's alleged failure to give a satisfactory account of possession of the 12 goats, an issue discussed in para 20 above. She conceded in cross-examination that the goats were found in Page's bakkie and not the plaintiff's. This ruled out the requirement that the plaintiff was in physical control. It was put to Deelie that Page was an accomplice because the goats were found in his vehicle and she agreed. It was further put to Deelie that Page exercised control over the goats and he furnished a statement to the police implicating the plaintiff and others merely to exculpate himself. I may add, in

addition he fraudulently completed the pro forma permit which reflected Monnapula as the owner of the goats.

- [24] Deelie was unable to furnish a satisfactory answer when the following was put to her: Page said he was hired by Mongotleng to transport his goats. The plaintiff said he was requested by Mongotleng to assist him to load the goats. The question was if they were both assisting Mongotleng why would the prosecutor find Page's explanation to be satisfactory and reject the explanation by the plaintiff as unsatisfactory. Deelie rather pinned her colours to the mast of the say-so of Page.
- [25] Page wrote in his statement that the goats were Mongotleng's. He did not say the goats were 'theirs'. Deelie was cross-examined on the aspect of the mental element by being referred to the response by Mongotleng to Modise when he said: 'I was sent by Monnapula.' He did not use the plural 'we'. This showed that the control was with him and not the plaintiff. Deelie also acceded to the assertion that they were following the navigation of Mongotleng and not that of the plaintiff, who was squatted at the back of the van.
- [26] Deelie conceded that when the charges were proffered against the plaintiff, the State relied mainly on the say-so of Page because his written statement was taken a month later on 20 August 2015. What Deelie could further not explain pertains to the statement by Page marked 'A2' where he said: 'we loaded the goats' and in his supplementary statement he exculpates himself and used the word 'they' instead of 'we'. Deelie agreed, as she had to, that the contents of Page's statement formed part of the considerations that had informed her

decision to charge the plaintiff. It is clear from the 'A2' statement that Page assisted with the loading when he said: 'Before I loaded the goats I then request[ed] the permit and (he) Mr Ernest Mongotleng informed me that he does not have a permit but he was sent by Mr Richard Monnapula.' As pointed out earlier, there was also a dispute regarding whether Page had found the plaintiff and Mongotleng at Seven Miles or at Maruping as contended by the plaintiff. Deelie was unable to explain her failure to ask Page for his vehicle's tracking unit information. She simply relied on his word and this, argued the plaintiff, substantiates her malice when determining the case against him. This would have been part of the investigation. The record does not show the mode of the vehicle or whether it was equipped with a modern sophisticated device and to attribute malice to Deelie for this aberration would be an overreach. Nevertheless, in the future scheme of things this had no material impact on the outcome of the case.

The defendant closed its case without calling any further witnesses.

- [27] In *Relyant Trading (Pty) Ltd v Shongwe and Another*[5] Malan AJA elucidated the test as follows:

[5] Malicious prosecution consists in the wrongful and intentional assault on the dignity of a person comprehending also his or her good name and privacy. The requirements are that the arrest or prosecution be instigated without reasonable and probable cause and with ‘malice’ or animus iniuriarum. Although the expression ‘malice’ is used, it means, in the context of the actio iniuriarum, animus iniuriandi. In *Moaki v Reckitt & Colman (Africa) Ltd and another* Wessels JA said:

“Where relief is claimed by this actio 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.”

The Court went on to say at para 14:

[14] The requirement for malicious arrest and prosecution that the arrest and prosecution be instituted ‘in the absence of reasonable and probable cause’ was explained in *Beckenstrater v Rottcher and Theunissen* [1955 (1) SA 129 (A) at 136A – B] as follows:

“When it is alleged that a defendant had no reasonable cause for prosecuting, I understand this to mean that he did not have such

information as would lead a reasonable man to conclude that the plaintiff had probably been guilty of the offence charged; if,

despite his having such information, the defendant is shown not to have believed in the plaintiff’s guilt, a subjective element

comes into play and disproves the existence, for the defendant, of reasonable and probable cause.”

[28] Section 179 of the Constitution[6] demands of the National Director of Prosecution to have national legislation in its execution of its prosecutorial functions without

fear, favour or prejudice. Regarding the power to institute and conduct criminal proceedings, s 20(1) of the National Prosecuting

Authority Act[7], the enabling Act, stipulates:

‘(1) The power, as contemplated in section 179 (2) and all other relevant sections of the Constitution, to-

- (a) institute and conduct criminal proceedings on behalf of the State;
- (b) carry out any necessary functions incidental to instituting and conducting such criminal proceedings; and
- (c) discontinue criminal proceedings, vests in the prosecuting authority and shall, for all purposes, be exercised on behalf of the Republic.’

[29] In as far as the prosecution policy and issuing of policy directives is concerned, the National Prosecuting Authority Act provides the following in s 21 (1):

‘(1) The National Director shall, in accordance with section 179 (5) (a) and (b) and any other relevant section of the Constitution-

- (a) with the concurrence of the Minister and after consulting the Directors, determine prosecution policy; and
- (b) issue policy directives, which must be observed in the prosecution process, and shall exercise such powers and perform such functions in respect of the prosecution policy, as determined in this Act or any other law.’ (emphasis added)

[30] Policy No 3 of the Prosecution Policy is the latest applicable policy revised in June 2013. The purpose of this policy is to guide prosecutors in the exercise of their duties and powers resulting in a prosecutorial process that is fair, transparent, consistent and predictable. A prosecutor’s primary function is to assist the court in arriving at a just verdict and, in the event of a conviction, a fair sentence based upon the evidence presented. The policy describes the attributes of a prosecutor as a person who must be impartial, serve in good faith, without fear, favour or prejudice, subject only to the Constitution and the law. A prosecutor is not supposed to allow his or her judgment to be influenced by his or her personal views when assessing the nature of the offence. He or she must be courteous and professional at all times.

[31] Decision-making forms a core function of a prosecutor. After a suspect has been arrested, a prosecutor must decide whether to prosecute or not. This decision must be informed by whether or not the case has been properly investigated. Hence, the policy lists the following considerations available to the prosecutor: (a) request the police to investigate the case further; (b) institute a prosecution;

(c) enter into a plea and sentence agreement; (d) decline to prosecute and opt for pre-trial diversion or other non-criminal resolution; or decline to prosecute without taking any other action. In deciding whether prosecution should follow or not, a prosecutor must assess whether there is sufficient and admissible evidence to provide a reasonable prospect of a successful prosecution. A prosecutor must apply the test of reasonable prospects objectively to avoid an unjustified prosecution. In the NPA’s evaluation of the evidence, the prosecutorial policy demands that prosecutors must consider the following: (i) how strong is the case for the State?

(ii) will the evidence be admissible? (iii) will the state witness(es) be credible? (iv) will the evidence be reliable? (v) is

the evidence available? (vi) how strong is the case for the defence?

[32] Navsa ADP, writing for a unanimous court in *Minister of Police and Another v Du Plessis*[8] made these insightful remarks:

[28] Once an arrestee is brought before a court, in terms of s 50 of the Criminal Procedure Act 51 of 1977 (CPA), the police's authority to detain, inherent in the power of arrest, is exhausted. In this regard see *Minister of Safety and Security v Sekhoto and Another* 2011 (1) SACR 315 (SCA) (2011 (5) SA 367; [2011] 2 All SA 157) para 42. As pointed out by Campbell AJ in the court below, before the court makes a decision on the continued detention of an arrested person comes the decision of the prosecutor to charge such a person. A prosecutor has a duty not to act arbitrarily. A prosecutor must act with objectivity and must protect the public interest.'

The SCA continued its caution at para 29 to this effect:

[29] In *Democratic Alliance v President of the RSA and Others* 2012 (1) SA 417 (SCA) (2012 (3) BCLR 291; [2012] 1 All SA 243; [2011] ZASCA 241) this court, after a discussion concerning prosecutorial independence in democratic societies, quoted, with approval, the following part of a paper presented at an international seminar by Mr James Hamilton, then substitute member of the Venice Commission and Director of Public Prosecution in Ireland:

"Despite the variety of arrangements in prosecutor's offices, the public prosecutor plays a vital role in ensuring due process and the rule of law as well as respect for the rights of all the parties involved in the criminal justice system. The prosecutor's duties are owed primarily to the public as a whole but also to those individuals caught up in the system, whether as suspects or accused persons, witnesses or victims of crime. Public confidence in the prosecutor ultimately depends on confidence that the rule of law is obeyed."

We should all be concerned about the maintenance and promotion of the rule of law. Given increasing litigation involving the NDPP, these principles cannot be repeated often enough. We ignore them at our peril.'

[33] Navsa ADP's pronouncements at paragraph 30 of *Du Plessis* are instructive to the NPA:

[30] A prosecutor exercises a discretion on the basis of the information before him or her. In *S v Lubaxa* 2001 (2) SACR 703 (SCA) (2001 (4) SA 1251; [2002] 2 All SA 107) para 19 this court said the following:

"Clearly a person ought not to be prosecuted in the absence of a minimum of evidence upon which he might be convicted, merely in the expectation that at some stage he might incriminate himself. That is recognised by the common-law principle that there should be reasonable and probable cause to believe that the accused is guilty of an offence before a prosecution is initiated and the constitutional protection afforded to dignity and personal freedom (s 10 and s 12) seems to reinforce it. It ought to follow that if a prosecution is not to be commenced without that minimum of evidence, so too should it cease when the evidence finally falls below that threshold."

[34] It is against this backdrop that I consider there was inadequate evidence before the NPA in charging the plaintiff to determine whether there was probable cause or malice on the part of the prosecutor. The remarks by Jones J in *Mabona and Another v Minister of Law and Order and Others*[9] are relevant:

‘The reasonable man will therefore analyse and assess the quality of the information at his disposal critically, and he will not accept it lightly or without checking it where it can be checked. It is only after an examination of this kind that he will allow himself to entertain a suspicion which will justify an arrest. This is not to say that the information at his disposal must be of sufficiently high quality and cogency to engender in him a conviction that the suspect is in fact guilty. The section requires suspicion but not certainty. However, the suspicion must be based upon solid grounds. Otherwise, it will be flighty or arbitrary, and not a reasonable suspicion.’

[35] There can be no question that Ms Deelie was aware of the fact that by charging the plaintiff with the charges as they appear in the charge sheet, the plaintiff would in all probability be injured in his dignity. He testified that he is now regarded as a thief by members of the community. His dignity and privacy has been negatively affected. Before enrolling the matter as trial ready, she was aware that ownership of the goats was in issue and she would not succeed in proving the elements of theft, but in addition, possession of the goats was also crucial. This, notwithstanding, she proceeded to charge the plaintiff and had the proceedings run until terminated in his favour.

[36] In *Rudolph and Others v Minister of Safety and Security and Another*[10] Mthiyane JA et Van Heerden JA pronounced:

‘[18] The requirement of ‘malice’ has been the subject of discussion in a number of cases in this court. The approach now adopted by this court is that, although the expression ‘malice’ is used, the claimant’s remedy in a claim for malicious prosecution lies under the *actio injuriarum* and that what has to be proved in this regard is *animus injuriandi*. See *Moaki v Reckitt and Colman (Africa) Ltd and Another* [1968 (3) SA 98 (A) at 103G – 104E] and *Prinsloo and Another v Newman* [1975 (1) SA 481 (A) at 492A – B]. By way of further elaboration in *Moleko* it was said:

“The defendant must thus not only have been aware of what he or she was doing in instituting or initiating the prosecution, but must at least have foreseen the possibility that he or she was acting wrongfully, but nevertheless continued to act, reckless as to the consequences of his or her conduct (dolus eventualis). Negligence on the part of the

defendant (or, I would say, even gross negligence) will not suffice.’ [Paragraph 64.]”

[37] The courts have repeatedly cautioned that the role of prosecutors is not merely to enrol matters and have them postponed for further investigations but to acutely pay attention to the contents of their dockets. The prosecutorial policy guides them to act with objectivity and must protect public interest. I am not persuaded that Ms Deelie has done that in this case. Ms Deelie acted wrongfully by charging the plaintiff. Ms Deelie’s conduct, in my view, was reckless and demonstrates *animus injuriandi*. I am satisfied that the plaintiff has proved the requirements of malicious prosecution and his claim in this regard ought to succeed.

[38] On the question of costs. Mr Mtsweni urged this court to order the defendant to pay the plaintiff:

- (a) costs of counsel, for consultation with attorney and client, preparation for trial, appearance in court for two days and drafting closing arguments, on scale A; and (b) the attorney's and correspondent attorneys' costs for consultation with attorney and client, preparation on trial bundles and attending court for two days. It is not for this court to deal with the breakdown of the payment of fees and to whom, as the Taxing Master will be in a position to calculate the fees as either taxed or agreed. Were this Court to do so that will amount to usurping the function of the Taxing Master or impeding his or her discretion.

[39] I share the view expressed in *City of Cape Town v Arun Property Development (Pty) Ltd and Another*[11] where the full court, in accepting the modern trend, and relying on *Price Waterhouse Meyernel v Thoroughbred Breeders' Association of South Africa*[12] said the following regarding costs:

[22] This is a convenient juncture at which to reiterate a point of clarification: While the language of some of the cases may suggest that it is wrong or improper for counsel to charge separately for drafting heads of argument and preparation, this is not the case. What is being conveyed is that it is not correct to tax a party and party bill on that basis. The modern trend – if I may call it that – of charging a fee based on time actually expended is both acceptable and in the interest of transparency. It is likely to result in fees that are less troubling than those referred to in, for example, *Ocean Commodities*. In *Price Waterhouse* at para 15 the prevalence of this practice was acknowledged without adverse comment, thus:

“We were also informed that it is the almost invariable practice throughout the country nowadays for

legal practitioners to make their charges time-related and insofar as appeals are concerned, for counsel to charge separately for

preparation, heads of argument and time in court.”

Whilst the plaintiff succeeds in his claim and is entitled to the costs of suit, with the application of the correct principles and taking into account the correct factors coupled with a judicial exercise of the taxing master's discretion, it is sensible to leave the quantification thereof to the taxing master.

[40] The following order is accordingly made:

1. The defendant is declared liable for malicious prosecution and is ordered to pay the plaintiff's agreed and/or proven damages arising out of the malicious prosecution on charges of stock theft and possession of stolen goats and failing to provide a satisfactory explanation.
2. The defendant is ordered to pay the plaintiff's agreed or taxed costs in respect of the merits on the prescribed scale A;
3. The issue of quantum is postponed sine die.

MC MAMOSEBO

JUDGE OF THE HIGH COURT

For the Plaintiff

Adv D Mtsweni

Instructed by:

Erasmus Incorporated

c/o Engelsman Magabane Inc

For the Defendant: Ms P Zilwa

Instructed by:

Office of the State Attorney, Kimberley

[1] Failure to give satisfactory account of possession of stock or produce Any person who is found in possession of stock or produce in regard to which there is reasonable suspicion that it has been stolen and is unable to give a satisfactory account of such possession shall be guilty of an offence.

[1] Failure to give satisfactory account of possession of stock or produce

Any person who is found in possession of stock or produce in regard to which there is reasonable suspicion that it has been stolen and is unable to give a satisfactory account of such possession shall be guilty of an offence.

[2] According to Google the distance between the two villages depending on the route taken can be either 275.5km's or 306.4km's or 336.8 km's

[3] Minister of Justice and Constitutional Development v Moleko 2009 (2) SACR 585 (SCA); [2008] 3 All SA 47; [2008] ZASCA 43 para 8

[4] S v Boesak [2000] ZACC 25; 2001 (1) SACR 1 (CC) para 24

[5] Relyant Trading (Pty) Ltd v Shongwe and Another [2007] 1 All SA 375 (SCA) paras 5 and 14

[6] The Constitution of the Republic of South Africa Act 108 of 1996 as amended

[7] The National Prosecuting Act 33 of 1998

[8] Minister of Police and Another v Du Plessis 2014 (1) SACR 217 (SCA) para 28

[9] Mabona and Another v Minister of Law and Order and Others 2012 (2) SACR 226 (SCA) para 20

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- [10] Rudolph and Others v Minister of Safety and Security and Another 2009 (5) SA 94 (SCA) para 18
- [11] City of Cape Town v Arun Property Development (Pty) Ltd and Another 2009 (5) SA 227 (CPD) para 22
- [12] Price Waterhouse Meyernel v Thoroughbred Breeders' Association of South Africa 2003 (3) SA 54 (SCA)
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