

SOUTH AFRICA / JUDGMENT

Mahlangu v Minister of Police (66326/2010) [2017] ZAGPPHC 13; [2017] 5 BLLR 528 (GP); (2017) 38 ILJ 1749 (GP) (25 January 2017) [2017] ZAGPPHC 13

COURT

North Gauteng High Court, Pretoria

BEFORE

D S Fourie

CASE / FILE NUMBER

66326/2010

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

25/1/17

Case

No: 66326/2010

Reportable:

No

Of

interest to other judges: No

Revised.

In

the matter between:

JABULANI

JAMES

MAHLANGU Plaintiff

and

THE

MINISTER OF

POLICE Defendant

JUDGMENT

D S FOURIE, J:

[1] The plaintiff instituted action against the defendant for payment of R625 000.00 on the ground of malicious proceedings. At the commencement of the trial it was agreed between the parties that a legal issue relating to the plaintiff's cause of action should be separated from all other issues and that a finding in this regard be made before any evidence is presented.

[2] The question to be decided has been formulated as follows:

"Whether the disciplinary proceedings as envisaged by the South African Police Service Disciplinary Regulations fall within the ambit of malicious proceedings as a cause of action, assuming that all the elements of the delict are present."

In terms of the provisions of Rule 33(4) an order was made that this issue be separated from all other issues and that the other issues be postponed sine die.

THE PLEADINGS

[3] The relevant paragraphs of the plaintiff's amended particulars of claim read as follows:

- On or about 20 February 2009 at Sunnyside Police Station General Nkomo and/or other unknown members of the defendant wrongfully and maliciously set the law into motion by instigating the laying (of) a false charge of assault with the intention to cause grievously bodily harm against the plaintiff;
- When the charge was laid and the false information given the mentioned General Nkomo and/or other unknown members of the defendant had no reasonable or probable cause for doing so nor did they have any reasonable belief in the truth of the information given;
- As a result of General Nkomo's and other unknown members of the South African Police's conduct the plaintiff was suspended from 24 March 2009 to 31st July 2009 without any remuneration.
- As a further result of General Nkomo and the other unknown members of the South Africa Police's conduct the plaintiff was charged departmentally on 28 July 2009 which was wrongful, malicious (and) without probable cause;
- On 26 August 2009 the charges were withdrawn against the plaintiff due to the fact that there was no evidence.

[4] In the plea it is admitted that a charge of assault with the intent to cause grievous bodily harm was laid against the plaintiff; that the plaintiff was suspended without remuneration for the period 25 March 2009 to 30 July 2009; that the plaintiff was departmentally

charged; and that the charge against the plaintiff was withdrawn.

THE REGULATIONS

[5] I was referred to the South African Police Service Discipline Regulations promulgated under section 24(1) of the South African

Police Service Act No 68 of 1995 (published in Government Notice R643 on 3 July 2006). These regulations make provision for conduct that may warrant disciplinary action as listed in regulation 20, that an employee may be charged for misconduct in accordance with these regulations and certain sanctions which may be imposed in terms of regulation 15. It also provides for a procedure in conducting a disciplinary hearing which includes the leading of evidence by both parties and the questioning of witnesses.

[6] Regulation 15 provides for certain sanctions which may be imposed after a finding of misconduct. These sanctions include, for instance, counselling, a written warning or dismissal. In terms of regulation 20 an employee will be guilty of misconduct if he or she, among other things, commits any common law or statutory offence. Regulation 17 provides for a right of appeal against a finding or sanction and the procedure to be followed in that regard.

[7] It is common cause that the plaintiff was charged departmentally in terms of these regulations after a notice to appear at a disciplinary hearing was served on the plaintiff in terms of regulation 12(2) and (3). According to the "particulars of the charge" the plaintiff was charged with misconduct for contravening regulation 20(z) in that he committed "a common law or statutory offence namely assault GBH".

DISCUSSION

[8] It was contended on behalf of the plaintiff that the disciplinary proceedings as envisaged by these regulations fall within the ambit of malicious proceedings as all the elements for such a cause of action have been pleaded, assuming that the plaintiff would be able to prove all of them. It was also submitted that this cause of action is not limited to malicious criminal or civil proceedings, but that it also includes disciplinary proceedings established by statute.

[9] Counsel for the defendant submitted that malicious prosecution is an abuse of the process of the Court by intentionally and wrongfully setting the law in motion on a criminal charge or in civil proceedings. It was therefore contended that this cause of action is limited to malicious criminal or civil proceedings instituted in a court of law and does not include disciplinary proceedings as relied upon by the plaintiff.

[10] The cause of action for a claim for damages caused by malicious legal proceedings is the *actio iniuriarum* (Wille's Principles of South African Law, 9th Ed, p 1192, and also *Lederman v Moharal Investments (Pty) Ltd* 1969 (1) SA 190 (A) at 196H). In order to succeed with a claim for malicious prosecution, a claimant must allege and prove:

- that the defendant set the law in motion (instigated or instituted the proceedings);
- that the defendant acted without reasonable and probable cause;
- that the defendant acted with "malice" (or animus injuriandi); and
- that the prosecution has failed.

(Minister for Justice & Constitutional Development v Moleko [2008] 3 All SA 47 (SCA) par 8).

[11] With regard to the requirement that the defendant must have set the law in motion (or instigated the proceedings) it is pointed out by the learned authors of Wille's Principles of South African Law (supra, p 1193) that in the case of civil proceedings the record of the civil suit speaks for itself as to the identity of the person who instituted the proceedings. Criminal proceedings, on the other hand, are instituted in the name of the State and consequently to

render a particular person liable for malicious prosecution it must be proved that such person in fact instigated the proceedings, or that he was actively instrumental in the prosecution of the charge. With regard to the requirement that the prosecution has failed the same authors (p 1196) again refer to criminal or civil proceedings which were terminated in favour of the plaintiff. In Thompson & Another v Minister of Police and Another 1971 (1) SA 371 (ECD) at 375A-B it is also pointed out that in an action based on malicious prosecution no action will lie until the criminal proceedings have terminated in favour of the plaintiff.

[12] The question is whether disciplinary proceedings are included in the proceedings referred to above? Counsel for the plaintiff was unable to refer me to case law where this issue was considered and decided pertinently. However, it is necessary to refer to some of the judgments he quoted as authority.

[13] In Nxuba Municipality & Another v Tshingana (CA227/07)

[2008] ZAECHC 97 the plaintiff relied on malicious prosecution as his main cause of action. Prior to the hearing of the appeal notice was given to the parties to address the Court on whether a claim for malicious prosecution exists in our law where there has been no criminal prosecution or civil proceedings, but only a disciplinary inquiry in an employment relationship. According to the judgment (par

3) neither counsel could provide any authority for such a claim in our law. As it was not necessary to decide this issue, it was assumed (without deciding) that such a claim may exist in our law.

[14] In Mandela v Amsterdam (CA102/2010) [2010] ZAECHC 72 the appellant relied on malicious prosecution as a cause of action with regard to internal disciplinary proceedings instituted against him by the Department of Correctional Services. The issue was whether the plaintiff's claim had prescribed. The Court had to determine the date upon which the appellant's cause of action arose. When concluding that the claim did not prescribe, it was not necessary for the Court to also consider the question whether malicious prosecution as a

cause of action also includes the institution of disciplinary proceedings.

- [15] I was also referred to the case of *Mabusela v The Minister of Safety and Security* (67322/10) [2015] ZAGPPHC 801 where the plaintiff instituted action against the Minister of Police based on malicious prosecution of disciplinary proceedings which had been instituted against him. The issue was whether the plaintiff was entitled to condonation in terms of section 3(4) of Act 40 of 2002 for the late service of the prescribed statutory notice. Although the Court regarded it necessary to consider whether the plaintiff has a reasonable prospect of success, it was not ceased with the issue referred to above. Legodi J specifically pointed out (par 12) that a reasonable prospect of success in the main action should not be dealt

with "as if one is dealing with the trial".

- [16] Counsel for the defendant referred me to English case law for the proposition that disciplinary proceedings are excluded "from the tort of malicious prosecution" and that this tort was only restrictively extended to special instances of the abuse of civil proceedings (*Gregory (A.P.) v Portsmouth City Council* [2000] UKHL 3; [2000] 1 All ER 560). It was contended that, having regard to this case, the cause of action for a claim for damages caused by malicious proceedings should not be extended in our law to the institution of disciplinary proceedings. In the *Gregory* decision the House of Lords stated that a distinctive feature of the tort of malicious prosecution is that the defendant has abused the coercive powers of the state (p 565a-b) and that this tort does not extend to disciplinary proceedings (p 566h and p 570f-g).
- [17] What reliance should be placed on foreign law as a persuasive source? The learned authors Neethling, Potgieter & Visser (*Law of Delict*, 7th Ed, p 4) point out that in the English law a casuistic approach is followed where the law of delict consists of a group or set of separate delicts (or torts), each more or less with its own rules. The aggrieved party may thus only render the wrongdoer liable if his conduct satisfies all the requirements of a specific delict. They then proceed as follows (p 5):

"It is self-evident that a legal system embracing general principles of delictual liability is able to accommodate changing circumstances and new situations more easily than one that adopts a casuistic approach, since the latter approach requires the constant creation of new delicts ... while general principles, because of their flexibility and pliancy, need only be adapted or applied in a new way ... The South African Law of delict, unlike the English law of torts, has therefore been able to recognise and protect individual interests (such as privacy and the goodwill of a corporation) which have only come to the fore in modern times".

- [18] Van der Walt & Midgley (*Principles of Delict*, 3rd Ed, p 30, par 23) also point out that the essential characteristic of the South African law of delict is that it is founded on general principles of liability. They explain as follows:

"This is the product of a long historical evolution. In this respect it differs fundamentally from the English law of torts which, despite the unifying force and influence of the concept of negligence, is still basically a casuistic system. The South African law of delict is therefore not a random collection of miscellaneous, unrelated wrongs, but a detailed body of principles, rules and concepts founded on historically-developed broad basis of liability ... The influence of English law has not changed or replaced the basic foundations of the law of delict. Although English law has certainly

contributed to the superstructure of the South African law of delict, it is still founded on the principles and concepts of Roman and Roman-Dutch law."

[19] In *K v Minister of Safety and Security* [2005] ZACC 8; 2005 (6) SA 419 (CC) the Constitutional Court had to consider the scope of vicarious liability under our law. It was pointed out by O'Regan J (par 34) that there can be no doubt that it will often be helpful for our Courts to consider the approach of other jurisdictions to problems that may be similar to our own. This approach was explained as follows (par 35):

"It would seem unduly parochial to consider that no guidance, whether positive or negative, could be drawn from other legal systems grappling with issues similar to those with which we are confronted. Consideration of the responses of other legal systems may enlighten us in analysing our own law, and assist us in developing it further. It is for this very reason that our Constitution contains an express provision authorising Courts to consider the law of other countries when interpreting the Bill of Rights. It is clear that in looking to the jurisprudence of other countries, all the dangers of shallow comparativism must be avoided. To forbid any comparative review because of those risks, however, would be to deprive our legal system of the benefits of the learning and wisdom to be found in other jurisdictions."

[20] In *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC) the Constitutional Court had to consider the meaning of the two phrases "within a reasonable time" and "after having been charged" as they appeared in section 25(3)(a) of the repealed interim Constitution. With regard to comparative research Kriegler J said the following (par 26):

"In this context I wish to repeat a warning I have expressed in the past. Comparative research is generally valuable and is all the more so when dealing with problems new to our jurisprudence but well developed in mature constitutional democracies. Both the interim and the final constitutions, moreover, indicate that comparative research is either mandatory or advisable. ... Nevertheless the use of foreign precedent requires circumspection and acknowledgement that transplants require careful management. Thus, for example, one should not resort to the Baker test or the Morin approach without recognising that our society and our criminal justice system differ from those in North America."

Our Constitution also authorises recourse to foreign legal systems when interpreting the Bill of Rights (section 39(1)(c)) and to refashion and develop the common law in order to promote the spirit, purpose and objects of the Bill of Rights (subsection (2)).

- [21] In our law, the *actio iniuriarum* is available where a defendant has wrongfully and intentionally injured the bodily integrity, dignity or reputation (*corpus, dignitas or fama*) of the plaintiff (Wille's Principles of South African Law, *supra*, p 1166). Because malicious prosecution is an *iniuria*, it has been stated that the personality aspect involved here is primarily *fama* or good name (Neethling, Potgieter & Visser, Law of Personality, 2nd Ed, p 182, par 3.1.2.5). However, it must also be remembered that the different personality interests often overlap and therefore no sharp line can be drawn between these injuries to personality rights.
- [22] In *Khumalo v Holomisa* [2002] ZACC 12; 2002 (5) SA 401 (CC) the Constitutional Court had to consider the law of defamation (which is also based on the *actio iniuriarum*) in South Africa. O'Regan J pointed out (in par 27) that in the context of the *actio iniuriarum*, our common law has separated the causes of action for claims for injuries to reputation (*fama*) and *dignitas* (dignity). *Dignitas* concerns the individual's own sense of self-worth, but included in the concept are a variety of personal rights including, for example, privacy. The fact of there not being a sharp line between the different forms of *iniuria*, appears from the following dictum (par 27):

"In our new constitutional order, no sharp line can be drawn between these injuries to personality rights. The value of human dignity in our Constitution is not only concerned with an individual's sense of self-worth, but constitutes an affirmation of the worth of human-beings in our society. It includes the intrinsic worth of human-beings shared by all people as well as the individual reputation of each person built upon his or her own individual achievements. The value of human dignity in our Constitution- therefore values both the personal sense of self-worth as well as the public's estimation of the worth or value of an individual."

- [23] The right to human dignity is entrenched in section 10 of the Constitution. It provides that everyone has inherent dignity and the right to have their dignity respected and protected. Taking into account that the *actio iniuriarum* is a flexible remedy in our law, as well as the constitutional framework for the protection of personality rights in South Africa, one should avoid the danger to apply a strict dogmatic approach with regard to the different forms of a personality infringement which may be suffered by a plaintiff. Therefore, the injury to personality suffered by a plaintiff as a result of malicious prosecution should not be confined to *fama* or good name, but may also include, depending on the circumstances, an infringement of the plaintiff's *dignitas* or dignity.
- [24] Having regard to all these considerations it appears to me that a Court, when considering the responses of other legal systems in a matter like this, should avoid an uncritical adoption of foreign law principles. The consideration of foreign precedent is encouraged, but the use thereof requires circumspection. It may be followed insofar as those principles are not in conflict with our well established legal principles, taking into account (in a matter like this), the general principles of our law of delict, their flexibility and our constitutional order.

- [25] When considering the Gregory case against this backdrop, it appears that the question on appeal was whether the tort of malicious prosecution is in law capable of extending to the malicious institution of domestic disciplinary proceedings by a local authority against a councillor. The allegation was that Mr Gregory had abused his position as a councillor by using confidential knowledge gained as a councillor for his personal advantage. It was decided by the House of Lords that the enquiry must proceed from the premise of the law as it stands. The tort of malicious prosecution in English law is narrowly defined (p 565e). When considering the argument for a development of the law, it was pointed out that any extension of the tort of malicious prosecution would have to take account of a number of other torts which are capable, depending on the circumstances, of protecting the complex of interests of an individual damaged by disciplinary proceedings. The first is the tort of defamation which serves to protect the reputation of individuals. The second tort to be considered is malicious falsehood (p 569g-j). It was then concluded, taking into account the existence of other closely related torts, that the extension of the tort of malicious prosecution would destroy "the simplistic case that there is no alternative remedy" (p 570e-f).
- [26] The facts in the case before me are different. A formal charge of assault with the intent to do grievous bodily harm was laid against the plaintiff at the Sunnyside police station. The plaintiff was then charged departmentally with misconduct for having committed "a common law or statutory offence". These are serious allegations of a criminal nature formulated as a charge in terms of the Regulations. This charge (assault with intent to do grievous bodily harm) as an offence can, depending on the circumstances, constitute an iniuria where not only the fama or good name, but also the dignity of the person concerned are infringed. It is therefore difficult to accept, from a principle point of view, that a plaintiff can suffer this kind of harm only when he or she was an accused in criminal proceedings, but not also in disciplinary proceedings of this kind.
- [27] The fact that these proceedings were not instituted in a court of law should also not be a decisive factor. In an action for malicious prosecution no action will lie until criminal proceedings have terminated in favour of the plaintiff, but a refusal by the Director of Public Prosecutions to prosecute (before criminal proceedings have been instituted in a court of law), is sufficient (*Thompson & Another v Minister of Police and Another*, supra, 373 and 375). This is a flexible approach which illustrates that, depending on the circumstances of each case, the requirement of "setting of the law in motion" should not in all matters be confined to criminal proceedings instituted in a court of law, although this is usually the case.
- [28] The plaintiff was charged departmentally in terms of the Regulations promulgated under section 24(1) of the South African Police Service Act. In addition to so-called "primary" legislation, such as legislation made by Parliament, there is also subordinate legislation in the form of regulations. Both section 101(3) and section 140(3) of the Constitution refer to regulations in the context of subordinate legislation. There can be no doubt that the plaintiff

was charged departmentally in terms of a (statutory) law promulgated in the form of subordinate legislation as opposed to, for instance, a domestic code of conduct which came into existence by agreement only.

[29] Taking into account that a formal charge of a criminal nature was laid against the plaintiff at the South African Police, that a (statutory) law regulating disciplinary proceedings with regard to this charge (as set out in the regulations) was then set in motion, that these proceedings were unsuccessful and assuming that all the other elements of the delict are also present (as I am required to do according to the formulation of the legal question in paragraph 2 above), why should disciplinary proceedings of this nature be excluded from malicious proceedings as a cause of action? I am of the view that the strict approach of the law of torts as pronounced in the Gregory case, if applied in this case, will inhibit the flexible manner in which the general principles of our law should be applied in a matter like this. It will also not properly take into account the ability to accommodate changing circumstances or new situations, as demonstrated in this matter, according to the general principles of our law of delict, more particularly the *actio iniuriarum*, within the framework of our Constitution. I am therefore not convinced that I should follow the English law of torts in this case.

[30] Having regard to all the considerations referred to above, I conclude that the disciplinary proceedings instituted against the plaintiff on 28 July 2009, as provided for in the South African Police Service Discipline Regulations of 3 July 2006 (R643), fall within the ambit of malicious proceedings as a cause of action. It is important to bear in mind that not all disciplinary proceedings are of a similar nature. It should therefore be pointed out that I have attempted to apply the law as it is found to be, or should be, in the case before me, without suggesting that it should necessarily also apply to all other cases of disciplinary proceedings.

ORDER

In the result I make the following order:

1. It is declared that the disciplinary proceedings instituted against the plaintiff on 28 July 2009, as provided for in the South African Police Service Discipline Regulations of 3 July 2006 (R643), fall within the ambit of malicious proceedings as a cause of action;
2. The defendant is ordered to pay the costs of the trial which was set down for hearing on 12 to 14 September 2016.

D S FOURIE

JUDGE OF THE HIGH COURT

PRETORIA

Date: 25 January 2017

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