

SOUTH AFRICA / JUDGMENT

## Mandela v Amsterdam (CA 102/2010) [2010] ZAECHGC 72 (23 August 2010)

[2010] ZAECHGC 72

COURT

Eastern Cape High Court, Grahamstown

BEFORE

Chetty, Beshe

CASE / FILE NUMBER

CA 102/2010

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REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE, GRAHAMSTOWN)

In the matter between: Case No: CA 102/2010

ANDERSON LUMKILE MANDELA Appellant

And

SEDRICK SIMON AMSTERDAM Respondent

Coram: Chetty and Beshe JJ

Date Heard: 20 August 2010

Date Delivered: 23 August 2010

Summary: Malicious proceedings – When cause of action arises – Complaint lodged and internal disciplinary proceedings commenced – Investigation endured for twenty four months until charges finally withdrawn- Plaintiff instituting action a year later – Special plea filed alleging action prescribed – Defendant contending cause of action arising when disciplinary proceedings commenced – Special plea upheld – Appeal upheld – Held – Cause of action only arising after successful termination of proceedings in appellant's favour.

JUDGMENT

Chetty, J

[1] During March 2008 the appellant instituted action against the respondent in the Middleburg magistrates' court. In his particulars of claim he alleged the following<sup>1</sup>:

*"4. on or about the 11 February 2005 and at Middleburg (Eastern Cape Province), the Defendant in his capacity as an employee of the*

Department of Education wrongfully and maliciously initiated internal disciplinary proceedings with the Department of Correctional Services against the Plaintiff by giving them false information about the Plaintiff's alleged involvement, misadministration, corruption and other related acts of misconduct.

When initiating disciplinary proceedings and giving disinformation to the Department of Correctional Services, the Defendant:

had no reasonable cause for doing so, not did he have any reasonable belief in the truth of the information given;

did so with the sole intention to defame the Plaintiff and to injure his reputation;

As a result of the Defendant's unlawful conduct, the Department of Correctional Services instituted an internal investigation against the Plaintiff that lasted approximately 24 months.

Ultimately all the charges against the Plaintiff were withdrawn at a disciplinary hearing held at Middleburg on the 7th of February 2007."

It will be gleaned from the foregoing that the appellant's cause of action, notwithstanding its inelegant formulation, was a claim for damages for malicious proceedings.

[2] The respondent filed a special plea alleging that in as much as "ex facie the plaintiff's particulars of claim did (sic) the cause of action arose (sic) on 11 February 2005" the appellant's claim had prescribed in terms of the Prescription Act<sup>2</sup>.

[3] As far back as 1971, this court held that "it is generally accepted that in an action based on malicious prosecution the plaintiff's cause of action only arises after a successful termination of criminal proceedings in the plaintiff's favour, or where the Attorney-General has declined to prosecute"<sup>3</sup>. The learned judge, Eksteen, J, cited, as authority for his proposition - *Lemue v Zwartbooi*<sup>4</sup> and *Bacon v Nettleton*<sup>5</sup>, cases decided at the turn of the century.

[4] As a statement of law the proposition advanced in the aforementioned cases and adopted and articulated by the learned judge was

consistently followed and applied for several decades. In *Els v Minister of Law and Order and Others*<sup>6</sup> the correctness of this established principle of law was sought to be impugned on the basis that the judges in *Zwartbooi* and *Bacon* had misunderstood the old authorities in accepting, as a correct statement of law, the proposition propounded by Eksteen, J, in

Thompson. Foxcroft, J, declined the invitation to find that Thompson was wrongly decided. The learned judge embarked upon a meticulous examination of the old authorities, analyzed the judgment in Zwartbooi, and held it to constitute a correct statement of law, a decision by which he was bound.

[5] It is prudent, given the court below's acute misunderstanding of established principles, to refer to Els in some detail for the magistrate's edification. The issue which arose for decision in Els was, as in casu, the date upon which a cause of action based on malicious prosecution arose. The relevant portion of the judgment reads as follows:-

*"Mr. Van Riet contended that a claim for malicious prosecution can only arise after the successful conclusion of a criminal case in a plaintiff's favour by acquittal or where the Attorney-General decides not to proceed with the prosecution.*

McKerron in The Law of Delict 7th ed at 264 deals with the question under the sub-heading 'Termination of the proceeding in the plaintiff's favour' as follows:

'It is a rule of law that no one shall be allowed to allege of a still depending suit that it is unjust. This can only be decided by a judicial determination or other final event of the suit in the regular course of it.'

Authority for that proposition is given as the case of Gilding v Eyre (1861) 10 CB (NS) 592 at 604. This question was first considered in the Cape Court according to De Villiers CJ in Lemue v Zwartbooi (1896) 13 SC 403 at 405, where the learned Chief Justice also remarked that there was a wide difference between the functions of the Attorney-General in the systems of criminal prosecution in England and South Africa.

He went on at 406 to say the following:

'I have been unable to discover the first case in which such an action has been held to lie in this Court but, whatever the date might be, I am satisfied that the Roman-Dutch law itself furnishes the principles upon which such an action may be founded.'

Reference is then made to certain authorities, amongst them Matthaëus De Criminibus 642. Matthaëus is quoted as saying that if the former action still lay, that is to say the actio iniuriarum, it could not be brought while the prosecution was pending, but after it had come to an end. The words referred to by De Villiers CJ are:

'Iniuriarum actio, si modo ea in calumniatorem datur, non pendente accusatione, sed finita datur.'

De Villiers CJ goes on to say that, while a prosecution is pending, its result

'... cannot be allowed to be prejudged by the civil action, but as soon as the Attorney-General, in the exercise of his quasi-judicial

function, has decided not to prosecute, there is a sufficient termination of the original proceedings to allow the civil action

being tried'.

This authority is the starting point for the general acceptance in our law, as reflected for instance in Joubert (ed) Law of South Africa vol 15 para 614, that in an action for malicious prosecution no action will lie until criminal proceedings have terminated in favour of the plaintiff. More recent authority for this proposition is given as *Thompson and Another v Minister of Police and Another* 1971

(1) SA 371 (E) at

375. This approach has been followed a number of times in the Eastern Cape Division.

In Thompson's case the plaintiff was arrested on 10 April 1967 and tried on 8 and 9 June

1967. He was convicted and thereafter, on 29 April 1968, acquitted on appeal. He thereafter gave notice in terms of s 32 of the relevant Act on 20 September 1968 and summons was issued on 25 October and served on 31 October 1968. The Court decided that the proceedings from the time of the arrest to acquittal were continuous and that the cause of action arose on the date upon which his appeal succeeded. Mr. Le Roux conceded in para 8 of his heads of argument that this authority was against him and that it was necessary for him to persuade the Court that the decision was incorrect in order for the special plea to succeed. At the same time he submitted that Thompson's case was indeed wrongly decided.

Mr. Le Roux's argument was based on a contention that De Villiers CJ had misunderstood the words *non pendente accusatione* in the quotation from Matthaëus. He submitted that in accordance with our common law the word *accusatio* can be used to refer to the written charge sheet or indictment. That indictment was the forerunner to *litis contestatio* in criminal proceedings, and when the accused pleaded *litis contestatio* would occur. In support of this argument he cited Voet 48.2.2, where it is said that charging is the reporting of a crime to a judge along with the written information ( *inscriptio* ) formally made for the purpose of securing a public avenging. Voet goes on to say that joinder of issue takes place on the charge when the accuser has his say or makes his accusation, the judge puts a question, and the accused either denies or says that he acted rightfully. A passage in Van der Keessel 48.2.1 *Praelectiones ad Jus Criminale* (translation by Beinart and Van Warmelo vol II at 545) contains the statement:

'In this respect a prosecution differs from a civil action in which we claim what belongs to us or is owed to us, and in which accordingly

we act to our own advantage, whereas in a prosecution we perform an act of public retribution and demand that punishment be inflicted on the accused as an example to the public.'

The Latin word for 'prosecution' in this passage is *accusatio* , while it will be seen that under para 2 the following statement appears:

'An indictment is a written declaration of the prosecutor, in which he states that he is reporting someone in terms of some law concerning public crime, and that the accused will be prosecuted by him.'

The Latin word used here for indictment is *inscriptio*. While it is true that the word *accusatio* is sometimes used in the sense of the English word 'accusation', it is more commonly used to refer to prosecution of the charge in its entirety - see, for example, Van der Keessel 48.2.3 (251):

'Quoniam ex potestate accusandi cuilibet apud Romanos competente metus oriebatur, ne quis temerarius accusator per calumniam ad accusandum

reum prositiret, . . .'

translated at 547 by Professors Beinart and Van Warmelo as:

'Since from the fact that among the Romans the power to prosecute was available to any person whatsoever, the fear arose that some reckless accuser would vexatiously rush to prosecute an accused . . .'

See also at Title 48.3 (intro) ( op cit at 613).

Nathan's Common Law of South Africa vol 4 para 2169 at 2158, which was also called in aid by Mr Le Roux , does not assist him since the Latin word for 'indictment' or 'information' as appears from the passages which I have referred to is not *accusatio* but *inscriptio* and/or *subscriptio*. Where Nathan says that in Roman-Dutch law a criminal trial is considered as pending from the time of issue of summons or the filing of an indictment or information, one must not in my view imagine that he was thinking of the word *accusatio*. The word must obviously be translated depending on its context, and I can see no fault in the translation of the Court in *Lemue v Zwartbooï* (supra).

Mr Le Roux drew attention to the fact that the quotation from Matthaeus's work *De Criminibus*, given as at 642 by De Villiers CJ, does not appear on that page in the first edition of the work in the Supreme Court Library (the 1644 edition). Perhaps the learned Chief Justice had a different edition of which there were many. The passage cited does appear at 704 of the Supreme Court Library copy and is as follows ( *Digesta*

48.13.9):

'Etenim injuriarum actio, si modò ea in calumniatorem datur, non pendente accusatione, sed finita datur, ut manifestum fit ex d 13 I d 1 pen nec non ex 1 fin c de ord cognit quae generaliter docet: concurrente civili quaestione cum criminali, ante causam criminalem terminandam esse, ita ut finis accusationis initium praebeat actioni .'

The full citation is therefore:

'For the actio injuriarum, if brought against one prosecuting vexatiously, is brought not during the prosecution, but after it has come to an end, and as shown by (various cited authorities) what is generally taught is: When civil and criminal actions are both available, before the criminal cause is brought to an end, there must be an end of the prosecution in order to permit the institution of the action (ie the actio injuriarum ).'

(My translation.) It is clear from this passage that Matthaëus was going much further than to deal only with a charge.

In any event there would be little point in prohibiting the bringing of the actio iniuriarum during the time when a charge was being considered. It would have been senseless to make such a statement since pending the bringing of a charge there would be no action for wrongful prosecution in any event. Matthaëus was clearly not dealing with wrongful arrest, but malicious prosecution. Without a charge there is no accusation and the words could only have been intended to provide for the situation where the prosecution had not been completed. Having cited Matthaëus 'view De Villiers CJ went on to explain that it is undesirable for a prosecution to be prejudiced in any way by its possibly being prejudged by any civil action. De Villiers CJ also stipulated the essential requisites of the action, namely proof of malice and want of reasonable and probable cause for the prosecution. It may well be that this statement of the essential requisites is the starting point for many other statements in other decisions as to those being the essential requisites without mention being made of the procedural requisite that the criminal prosecution should have terminated in the plaintiff's favour.

It is fully in accordance with common sense and the practical resolution of litigation that accused persons in criminal cases against whom prosecutions have commenced should not be required to commence civil litigation before the conclusion of criminal proceedings. The extraordinary consequences of such a view would be that many civil actions for wrongful or malicious prosecution would have to be commenced, later in most cases to be abandoned when the criminal case was resolved in favour of the State and where no civil claim could succeed.

Far from being persuaded that Lemue v Zwartbooi misunderstood Matthaëus and laid down an incorrect legal principle, I am satisfied, with respect, that this decision of three Judges of the Cape Supreme Court was correct.

I have gone into this matter in some detail to show, with great respect, that the decision in Lemue v Zwartbooi insofar as it relies on Matthaëus,

is clearly correct."

[6] On the application of these principles the appellant's cause of action clearly arose on 7 February 2007. However, I am compelled to reproduce this somewhat lengthy discourse from the judgment because, notwithstanding the weight of the authority referred to therein, magistrate Mata had no compunction in holding that Els had been wrongly decided. The doctrine of judicial precedent, it seems, held little reverence for the presiding magistrate. Seduced,

no doubt, by the convoluted and fallacious argument advanced by the respondent's attorney he relied on the judgments in *Harker and Fussel and Another*<sup>7</sup>, *Minister of Finance and Others v Gore N.O*<sup>8</sup> and *Nedcor Bank Bpk v Regering van die Republiek van Suid Afrika*<sup>9</sup> in upholding the special plea of prescription. The magistrate's reliance on these cases is entirely misplaced. In each the issue which arose for decision was the prescription of a debt in terms of s 12 (3) of the Prescription Act<sup>10</sup>. Section 12 (3), in dealing with the knowledge of a creditor "of the identity of the debtor and of the facts from which the debt arises" does not refer to "a cause of action" but to "a debt".

- [7] The judgment in *Els* was clear and the magistrate was bound by it. It is apposite, therefore, and, purely, once more for the edification of the magistrate, to restate the doctrine of precedent. In *Wille's Principles of South African Law*<sup>11</sup>, the learned authors state the following:-

*"The doctrine of precedent has been endorsed by the Constitutional Court as an incident of the Rule of Law that serves to 'enshrine a fundamental principle of justice: that like cases should be determined alike' and to promote legal certainty. It has also been depicted as a requirement of rationality and as flowing from the very justification of law. These considerations provide support for following past decisions that is independent of the merits of its content. Hahlo & Kahn provide perhaps the fullest explanation:*

'The maintenance of the certainty of law and of equality before it, the satisfaction of legitimate expectations, entail a general duty of judges to follow the legal rulings in previous judicial decisions. The individual litigant would feel himself unjustly treated if a past ruling applicable to his case were not followed where the material facts were the same. It enables the citizen, if necessary with the aid of practicing lawyers, to plan his private and professional activities with some degree of assurance as to their legal effects; it prevents the dislocation of rights, particularly contractual and proprietary ones, created in the belief of an existing rule of law; it cuts down the prospect of litigation; it keeps the weaker judge along right and rational paths, drastically limiting the play allowed to partiality, caprice or prejudice, thereby not only securing justice in the instance but also retaining public confidence in the judicial machine through like being dealt with alike; and it conserves the time of the courts and reduces the costs of lawsuits. Certainty, predictability, reliability, equality uniformity, convenience: these are the principal advantages to be gained by a legal system from the principle of stare decisis.'

- [8] On appeal before us, counsel for the respondent conceded that the magistrate was wrong in finding that the cause of action arose when the internal disciplinary proceedings commenced. That concession, as the preceding paragraphs of this judgment demonstrate, was properly made. For reasons which I find quite inexplicable however, respondent's counsel submitted that the appellant's "claim for defamation" had prescribed and that the special plea thereanent was correctly upheld. I interpolate to say that the special plea was confined to the claim for malicious proceedings. Although the particulars of claim referred to the fact that the respondent's conduct was actuated "by the sole intention to defame (the appellant)" the claim for damages was based on malicious proceedings and not defamation.

An action for malicious prosecution lies under the actio iniuriarum and the element of animus iniuriandi is therefore a requirement which has to be alleged and established. The usage of the word “defame” was wrong but its inclusion could not and does not alter the quintessential character of the appellant’s cause of action which, as adumbrated hereinbefore, was one for malicious proceedings. Such an action encompasses the infringement of a person’s

personality rights which includes bodily integrity, reputation and dignity and the plaintiff’s cause of action was clearly

predicated thereupon.

[9] In the result the following orders will issue:-

The appeal is allowed with costs.

The judgment of the court below is set aside and replaced by the following –

*“The special plea is dismissed with costs.”*

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D. CHETTY

JUDGE OF THE HIGH COURT

Beshe, J

I agree.

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N. G BESHE

On behalf of the Appellant: Adv A.D Schoeman

Instructed by Nolte Smit

42 Beaufort Street

Grahamstown

(Ref: SA/NOL14/0018)

Tel: 046- 6227209

On behalf of the Respondent: Adv M. Simoyi

Instructed by the State Attorneys

29 Western Road

Central

Port Elizabeth

(Ref: Mr. Potgieter)

Tel: 041 – 585 7921

1 Irrelevant portions have been omitted.

2 Act No, 68 of 1969

3 In *Thompson v Minister of Police and Another* 1971

(1) SA 371 (E)

4 13 S.C 403

5 1906 T.H 138

6 1993 (1) SA 12

7 2002 (1) SA 170 (T)

8 2007 (1) SA 111 (SCA)

9

[2000] ZASCA 154; 2001 (1) SA 987 (HHA)

10 Act No, 68 of 1969

11 Ninth Edition, Chapter 4 at 77-78

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