IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case number: 927/2015

In the matter between:

MORNE GRANT DELPORT Plaintiff

and

THE MINISTER OF POLICE OF THE REPUBLIC OF SOUTH AFRICA 1st Defendant

EMBRENDSCHIA BUTLER 2nd Defendant

NATIONAL PROSECUTING AUTHORITY OF SOUTH AFRICA 3rd Defendant

HEARD ON: 07 SEPTEMBER 2022

CORAM: MATHEBULA, J

DELIVERED ON: The judgment was handed down electronically by circulation to the parties' legal representatives by email and release to SAFLII on 27 JANUARY 2023. The date and time for hand-down is deemed to be 27 JANUARY 2023 at 10H30.

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[1] The plaintiff claims damages against the defendants for malicious prosecution. This action is a sequel to his arrest and subsequent prosecution on fraud,

common assault and assault with intent to do grievous bodily harm charges. His legal woes lasted a lengthy period of five (5) years to come to finality. On 6 June 2013 the learned District Magistrate Nikamanzi acquitted him and made scathing remarks that the third defendant had “decimally failed to prove the guilt of the accused beyond reasonable doubt on both count 1, 2, 3 and 4”.[1] This appears to be a typo error and I presume he meant “dismally”. Reading the record in context, he found the evidence presented before him on behalf of the State being of poor quality to sustain a conviction.

[2] The four requirements that must be alleged and proved by the plaintiff in a claim of this nature are trite.[2] In this particular matter two questions require determination. Whether the third defendant acted without reasonable and probable cause; and whether the third defendant acted with malice. The other two are common cause and need not be proved. It is also common cause that all officials involved in decision-making were acting within the cause and scope of their employment at all material times.

[3] The plaintiff is forty-nine (49) years old and married with one (1) child. His current rank is that of a Warrant Officer attached to the Vispol Division of the South African Police Service. He has been a policeman for a period of thirty (30) years. At the moment he is responsible for the investigation of firearms, police clearances and filing of reports in such matters.

[4] The core facts that formed the basis of his claims are as follows. The plaintiff stood trial on one (1) charge of common assault, two (2) charges of assault with intent to do grievous bodily harm and one (1) charge of fraud in the Magistrate’s Court, Bloemfontein. It was alleged that the offences occurred on 8 and 15 November 2008 as well as 23 April 2009. The common thread on charges involving physical violence is that he assaulted one Mr Pierre Wilbers, Mrs Cornelia and Mr Marius Olivier with fists displaying pure intention to injure them. Evidence to sustain these charges was in the form of sworn affidavits deposed to by the complainants. It is the lack of particularity and contradictions therein that the plaintiff alleges that his prosecution was tainted

[1] Page 325 of the Paginated Papers.

[2] Minister of Justice and Constitutional Development and Others v Moleko 2008 (3) All SA 47 (SCA) at para 8.

with malice and was from the beginning devoid of reasonable and probable cause.

[5] Before turning to the evidence in the assault charges and decision to prosecute, it is necessary to deal with the charge pertaining to fraud. The plaintiff was involved in a motor collision with the daughter of the complainant Mrs Cornelia Olivier. He pursued a claim to recover damages in the Small Claims Court, Bloemfontein. The main allegations were that the plaintiff in an effort to prove damages to his motor vehicle handed quotations from AAA Panel-beaters for R11,402.39 and R10,964.92 respectively. On the strength of these documents, the Commissioner of the Small Claims Court granted judgment of R7,000.00 in his favour. The turning point is that the plaintiff patently knew that the total damages he suffered amounted to R9.01. Therefore, he committed fraud in the circumstances.

[6] Of the four charges levelled against the plaintiff, the fraud charge is the most bizarre. The charge was put to him and he was asked to plead to it. The prosecution did not lead even a morsel of evidence to prove it. The learned District Magistrate dealt with it in one sentence and found no need to dwell into it. It was a total capitulation on the part of the third defendant when it comes to this charge.

[7] I now turn to the events surrounding the assault charges which prompted the decision to charge him.[3] Prior to the commencement of the trial, Mr P. Wilbers had already deposed to the withdrawal statement that he does not wish to continue with his case against the plaintiff.[4] The third defendant represented by Advocate S. Giorgi declined to accept it. Instead he was forced and coaxed to continue with the matter much to his chagrin. The reason advanced by her for denying Mr P. Wilbers his wishes was to truncate what she perceived to be a pattern. This can hardly be considered to be a fair and just reason to prosecute.

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[3] Page 47(a) and (b) of the Paginated Papers.
[4] Page 63 of the Paginated Papers.

[8] The prosecution against him on other charges was equally problematic. The plaintiff was charged of the assault of mother and son pair of Mrs Cornelia and Mr Marius Olivier. The two (2) deposed to the affidavits about the events of 8 November 2008 on 15 December 2008. They recounted how the plaintiff assaulted them with fists and even cracked the jaws of Mrs Cornelia Olivier.

[9] There were also other statements deposed to by independent witnesses which disavowed the allegations made by the complainants. In his statement Mr David Eduard Oosthuizen made it pertinently clear that the policeman (referring to the plaintiff) did not assault the young man (Marius Olivier). This is contained in his statement dated 22 December 2008. Mrs Leana Vorster also made a statement about her conversation with Mrs Cornelia Olivier. The latter confirmed to her that the plaintiff is not the one who broke her jaw. Her statement was commissioned on 10 December 2010. All these statements were at all material times part of the dockets. There can be no talk that different prosecutors were unaware of them.

[10] Despite the third defendant being in possession of these statements, the deponents were not called as witnesses. There is no cogent reason(s) advanced why the State proceeded with the trial in that manner. Neither was there a reconsideration of continued prosecution which faced a monumental setback at that stage. Clearly there was no *prima facie* evidence upon which prosecution would be justified. The main allegations which formed the case against him were already disavowed by other witnesses. This aspect was correctly conceded by Advocate S. Giorgi that there was an obligation on the prosecutor to refer the matter back to her for reconsideration. The clearest example of them all was the statement of Mrs Lize Drake that she did not see any assault.

[11] The decision and responsibility to institute criminal proceedings on behalf of the State is vested on the third defendant. This makes the role of a prosecutor an important one in the quest to administer equal justice in accordance with the prescripts of the Constitution of the Republic. In a recent decision, the Supreme Court of Appeal buttressed this point in the following manner: -

> "Prosecutors play a critical role in the criminal justice system in response to crime. They generally represent the authority of the State in ensuring that perpetrators of crime are held accountable for their actions and in that way communicate a strong message to the community that crime will not be tolerated. In line with the burden of proof that rests on their shoulders, it is essential that they meticulously ensure that the matters that they bring before courts have been properly investigated and when that has been done, ensure that the evidence is properly presented in court. Sadly, what follows is a model of the very opposite and depicts a picture of a matter that was badly investigated and badly prosecuted".[5]

[12] Prosecutors do not operate in a vacuum in the exercise of the powers vested in them by the law. One of the important tools in the decision-making process is the Prosecution Policy which tabulates the factors to be considered when evaluating evidence. It is the case for the defendants that the third defendant followed it to the latter. The point raised is that there is a difference between the decision to prosecute and the manner the trial was conducted. The argument is that there was no malice in taking the decision because it was done according to the prescripts of the law.

[13] Prosecutors are expected to be conscientious in the manner that they approach their task. Primarily because their actions may pose a serious encroachment on the civil liberties of those who are subjected to court proceedings which should not be. Given the important role they play, they must also inspire confidence in the criminal legal system. They need to act above board without bias, with an independent mind and fearless commitment to the cause of justice. It will be plain wrong to proceed with a matter in order to appease a nagging complainant against what the courts have repeatedly stated about their role. The same can be said where the prosecutor considers irrelevant issues in his/her decision whether to prosecute or not.

[14] It was submitted on behalf of the plaintiff that the decision to prosecute did not measure up to the test found in **Beckenstater v Rottcher and Theunissen**. The court explained the test in the following terms: -

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[5] Zwelithini Maxwell Zondi v The State (1232/2021 [2022] ZASCA 173 (7 Novemver 2022) at para 1. See also: Makhetha v Minister of Police and Another 2020 ZAFSHC 207; Patel v National Director of Public Prosecutions and Others 2018 (2) SACR 420 (KZD).

> "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".[6]

[15] It is a cornerstone principle of our legal system that a prosecutor must not act arbitrarily, he/she must instead always act in the interests of the community. The court has emphasized the perception and knowledge that prosecutors should possess before proceeding to prosecute.[7] In her oral evidence, Advocate Giorgi stated that she took the decision to prosecute in order to arrest a particular pattern. This is a flimsy and illogical reasoning. Even if one has good intentions to stem the tide against certain acts of criminality, it does not mean the principles underpinning such prosecution must be forsaken. The test is the existence not only of a *prima facie* case but that there is a reasonable and probable cause to prosecute. The J88 on Mr Marius Olivier did not show any injuries. There was no medical evidence to be considered by the learned District Magistrate. On the evidence that was available, it was apparent that it did not meet the threshold of the test. The case against him was a non-starter.

[16] Even before the trial commenced, there were contradictory statements in the dockets which negated prosecution. She conceded that even if she did not gain sight of the same, her colleague should have referred the matter to her in changed circumstances.

[17] The other piece of evidence that stood out is the manner in which a witness was forced to testify. It is self-evident that Mr P. Wilbers signed a withdrawal statement. This was deemed unacceptable and he was told in no uncertain terms that he must present himself before court. There are no reasons given to him why his withdrawal statement was declined. It is not enough to simply hold the position that it is the prerogative of the third defendant to prosecute or

[6] 1955 (1) SA 129 (A) at 136A-B.
[7] Patel v National Director of Public Prosecutions and Others *supra*.

not. Such a stance is irrational if other factors are not considered at all. The evidence of Advocate S. Giorgi that she did not know the plaintiff does not take the matter any further on this point. Surely there must have been a name attached to the pattern she wanted to turn around. This lends credence to the existence of malice on the part of the prosecution. Not only was the intention there but also consciousness of wrongfulness existed.

[18] That the prosecution proceeded in a way oblivious of the set requirement, is also found in the manner the fraud charge was handled. It was a monumental failure. No evidence was led and it cannot be said that she was not aware of the inherent weaknesses in their case. Regardless they proceeded with the unmeritorious charges.

[19] It is my considered opinion that the plaintiff has proved his case on balance of probabilities against the third defendant.

[20] This brings me to the issue of the appropriate quantum to be awarded. Strangely the legal team of the defendants did not deal to any significant extent with the issue of quantum for damages. Perhaps they were so certain about their case that they deemed it unnecessary to dwell in the issue that is not worth it. The criminal proceedings took a long time before they could be finalised. There can be no doubt that the plaintiff was subjected to prolonged period of uncertainty and stress. According to the medico-legal reports filed, which are uncontested, he suffers from depression, chronic post-traumatic stress disorder and anxiety.

[21] The onus rests on the plaintiff to prove quantum as well. The approach in determining the appropriate award is a flexible one and not adherence to strict rules. In matters of this nature, I must apply my discretion guided by the principles of law considering broad generalisations and what I consider fair in the circumstances. Counsel for the plaintiff referred me to a long list of comparative cases to serve as a baseline. The cases relied upon do not have similar facts to the matter on hand.

[22] The submission made is that the appropriate award should be the sum of R500,000.00. The sole fact relied on seems to be the severity of the failed prosecution on his career and personal life. The main point is that all this is undisputed. I agree with the submissions advanced on behalf of the plaintiff. The counsel for the defendants was steadfast on the point that the claim must be dismissed. He made no meaningful contribution on this aspect. My view is that the amount of R400,000.00 with costs will be a fair and reasonable award given the circumstances. I also took into consideration the fact that other legs of the claim were jettisoned and no longer pursued.

[23] There seems to be no reason to depart from the general principle. Costs must follow the outcome in this matter.

[24] The following order is made: -

24.1. Judgment in favour of the plaintiff against the third defendant in the sum of R400.000.00 with interest thereon at the applicable rate from the date of this judgment to date of payment.

24.2. Costs of suit on a party and party scale.

M.A. MATHEBULA, J

On behalf of the Plaintiff: Adv. H.E. De La Rey
Instructed by: Peyper Botha Attorneys
BLOEMFONTEIN

On behalf of the defendants: Adv. L Bomela
Instructed by: State Attorney
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