

Reportable:	YES / NO
Circulate to Judges:	YES /NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES /NO

**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE HIGH COURT KIMBERLEY)**

Case number: **120/2016**

In the action between:

KEVIN DESMOND CLARKE	First Plaintiff
ALTUS COETZER	Second Plaintiff
ERROL LIONELL VAN ADE	Third Plaintiff
KEAMOTSO MATTHEWS MAFURA	Fourth Plaintiff

and

THE MINISTER OF POLICE	First Defendant
COLONEL PERUMAL	Second Defendant
CAPTAIN LIZELLE SMITH	Third Defendant

Coram: Erasmus, AJ

Delivered: 22 September 2023

JUDGMENT

ERASMUS, AJ

INTRODUCTION AND BACKGROUND

- [1]. The first to fourth plaintiff instituted action against the first to third defendant on 27 January 2016 each claiming damages for malicious prosecution against the defendants in the amount of R500 000.00 and costs.
- [2]. The fourth plaintiff withdrew his claim against the defendants after the trial had commenced.
- [3]. The trial on the merits of the claim commenced before me on 29 November 2021. After the evidence was concluded in August 2022, the parties agreed to have the record transcribed and submit written heads of argument. The written heads of argument were filed in June 2023 and the parties agreed that oral argument before me was not necessary.

THE PLEADINGS

- [4]. In the plaintiffs' amended particulars of claim, it was alleged that the second and third defendants and/or other unknown employees of the South African Police Service:
 - [4.1] Unlawfully and maliciously set the law in motion by 'the laying of a false charge of theft against the plaintiffs under case number RCZ477/11 and CAS 1334/03/2010;

- [4.2] Were in the employment of the first defendant and acting within the course and scope of their employment with the first defendant;
- [4.3] Had no reasonable grounds and/or reasonable suspicion and/or reasonable belief that the allegations pertaining to the charge against the plaintiffs were true.
- [5]. It was further pleaded that:
- [5.1] As a result of the actions of the police officials, the plaintiffs were unlawfully and maliciously prosecuted when there was no probable cause to do so;
- [5.2] The plaintiffs appeared in court on several occasions and were eventually acquitted on 23 April 2013;
- [5.3] As a result of the actions of the police, the plaintiffs suffered damages, as claimed;
- [6]. In their plea to the amended particulars of claim, the defendants disputed:
- [6.1] That they unlawfully and maliciously set the law in motion and pleaded that they merely acted on the information received from Ursula Palm and evidence that was before them at the time of the arrest;

- [6.2] That there was no probable cause and or belief that the plaintiffs had committed the offence charged with, based upon the evidence before the police;
- [6.3] They had the intention to injure the plaintiffs' dignity as they were acting on a complaint and information presented to them and the evidence obtained during the investigation;
- [6.4] The damages allegedly suffered, alternatively, if the plaintiffs had suffered damages, such damages were justified;
- [6.5] That the plaintiffs had complied with the provisions of Act 40 of 2002.
- [7]. During the trial, the plaintiffs applied for a further amendment to paragraph 9.1 of the particulars of claim to delete the words 'by laying of a false charge of theft'. The amendment was granted, resulting therein that in paragraph 9.1 it was now alleged that the second and third defendants and/or other unknown employees of the South African Police Service unlawfully and maliciously set the law in motion against the first, second third and fourth plaintiffs under case number RCZ477/11 and CAS number 1334/03/2010.

THE LEGAL POSITION

- [8]. In this matter, I deem it appropriate to set out the legal position before dealing with the evidence led during the trial.

[9]. In *Minister of Safety and Security v Slabbert*¹, Mhlantla JA stated:

"...The purpose of the pleadings is to define the issues for the other party and the court. A party must allege in the pleadings the material facts upon which it relies. It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at the trial. It is equally not permissible for the trial court to have recourse to issues falling outside the pleadings when deciding a case. ...There are, however, circumstances in which a party may be allowed to rely on an issue which was not covered by the pleadings. This occurs where the issue in question was canvassed fully by both sides at the trial."

[10]. To succeed with a claim for malicious prosecution, the *onus* is on the plaintiff to prove all jurisdictional facts on a balance of probabilities.

[11]. The jurisdictional facts were laid down in *Minister for Justice & Constitutional Development v Moleko*². These requirements were confirmed in *Minister of Safety and Security NO and another v Schubach*³, *Minister of Justice and Constitutional Development v X*⁴ and *Magwabeni v Liomba*⁵. To summarise, a plaintiff is required to prove that the

[11.1] defendant set the law in motion (instigated or instituted the proceedings),

[11.2] the defendant acted without reasonable and probable cause,

¹ [2010] 2 All SA 474 (SCA) paras [11] to [12].

² 2009 (2) SACR 585 (SCA); See also *Van Heerden v Minister van Veiligheid en Sekuriteit en Ander* 2014 (2) SACR 346 (NCK) from para [51] to [123]

³ [2015] JOL 32615 (SCA)

⁴ [2014] JOL 32437 (SCA)

⁵ (198/13) [2015] ZASCA 117 from para [9]

[11.3] the defendant acted with malice (or *animo iniuriandi*); and

[11.4] prosecution failed.

[12]. Although, in the amended particulars of claim, the plaintiff did not explicitly plead when and how the police set the law in motion, the issues of instituting and instigating the prosecution were canvassed during the trial and I deem it necessary to address the requirement of setting the law in motion and/or instigating the prosecution.

[13]. In *Lederman v Moharal Investments (Pty) Ltd*⁶, the court stated the following:

"... Inherent in the concept 'set the law in motion', 'instigate or institute the proceedings', is the causing of a certain result, i.e. a prosecution."

[14]. Section 179(2) of the Constitution⁷ expressly empowers the National Prosecuting Authority ('NPA') to institute criminal proceedings on behalf of the state. The National Prosecuting Authority Act, No 32 of 1998 (the 'NPA Act') ratifies s 179 of the Constitution which endorses the National Prosecuting Authority ('NPA') as the country's sole prosecuting authority.

[15]. Section 20 of the NPA Act grants the NPA power to institute and conduct criminal proceedings. This authority extends to all prosecutors carrying out

⁶ 1969 (1) SA 190 (A) at 196 - 197

⁷ The Constitution of the Republic of South Africa, 1996

any necessary functions to institute and conduct criminal proceedings and discontinue criminal proceedings in the interest of justice.

[16]. In *Boshoff v Minister of Safety & Security & another*⁸, the court specifically set out the duties of the prosecutor when deciding to institute a prosecution. In short: the prosecuting authority must observe the policy directives in the prosecution policy determined by the National Director of Public Prosecutions ('NDPP') in deciding whether or not to prosecute an accused.

[17]. In *S v Lubaxa*⁹ it was stated:

"... 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."

[18]. It is the duty of a prosecutor, when deciding whether or not to prosecute, to take into account, *inter alia*, the strength of the state's case, the admissibility of the evidence and availability of the state witnesses, the strength of the defence's case, the public interest, the interests of the community, the seriousness of the offence and the circumstances of the offender.¹⁰

[19]. In terms of s 205(3) of the Constitution the objects of the police service are to prevent, combat and investigate crime, maintain public order, protect

⁸ [2005] JOL 15310 (W) para [18]

⁹ 2001 (2) SACR 703 (SCA) para [19]

¹⁰ *Boshoff supra* para [18]

and secure the inhabitants of the country and their property and uphold and enforce the law.

[20]. In *Moleko*,¹¹ concerning instigating a prosecution, the court stated:

“With regard to the liability of the police, the question is whether they did anything more than one would expect from a police officer in the circumstances, namely to give a fair and honest statement of the relevant facts to the prosecutor, leaving it to the latter to decide whether to prosecute or not”.

[21]. In *Minister van Polisie v Van der Vyfer*¹², the court stated that

“daar ‘n oorsaaklike verband moet wees tussen die verweerder se optrede aan die een kant en die strafregtelike vervolging, aan die ander kant”.

[22]. Ad the requirement of ‘absence of reasonable and probable cause’, the test was set out in *Beckenstrater v Rottcher and Theunissen*¹³:

‘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.’

¹¹ Supra para [11]

¹² 2013 JDR 0634 (SCA) para [21]

¹³ 1955 (1) SA 129 (AD) at 136A-B; See also *Prinsloo v Newman* 1975 (1) SA 481 (A) op 495

¹³ *Minister of Safety and Security NO and another v Schubach* Supra par [13] to [15]

[23]. The *requirement* for malice or *animus iniuriandi*, was explained in *Moleko*¹⁴ and in *Rudolph and others v Minister of Safety and Security and another*¹⁵ and followed by the court in *Schubach*¹⁶:

[23.1] In *Moleko*¹⁷:

"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".

[23.2] In *Schubach*¹⁸:

"The ineluctable inference to be drawn is that those responsible for initiating the prosecution against the respondent on the charges under consideration were aware of what they were doing in initiating the prosecution and foresaw the possibility that they were acting wrongfully, but they nevertheless acted, reckless as to the consequences of the conduct (dolus eventualis)..."

[24]. The requirement that the prosecution failed simply means that the plaintiffs had to show that they were acquitted of the charge against them.

¹⁴ *Moleko* supra par [61] tot [65]

¹⁵ 2009 (5) SA 94 (HHA) in par [18]

¹⁶ Supra paras [14], [15] and [18]

¹⁷ Supra para [64]

¹⁸ Supra in par [18]

[25.] A plaintiff has to prove compliance with the provisions of s 3 and s 4 of the Institution of Legal Proceedings against certain Organs of State Act, No. 40 of 2002.¹⁹

[25.1] In terms of s 3, no legal proceedings for the recovery of a debt may be instituted against an organ of state, in this instance the Minister of Police, unless the creditor has given the organ of state in question notice in writing of his or her or its intention to institute the legal proceedings in question; or the organ of state in question has consented in writing to the institution of that legal proceedings.

[25.2] In terms of s 4(1)(a) such a notice must be served on an organ of state by delivering it by hand or by sending it by certified mail or, subject to ss (2), by sending it by electronic mail or by transmitting it by facsimile to the designated official, prescribed in the Act. In the case where the organ of state is the department of police, the notice must be sent to the **National Commissioner** and the Provincial Commissioner of the province in which the cause of action arose, as defined in s 1 of the South African Police Service Act, No. 68 of 1995.

THE ISSUES

¹⁹ *Sixakwe v Minister of Safety & Security & another* [2009] JOL 24171 (ECP)

- [26]. Compliance with the provisions of Act 40 of 2002 was placed in dispute in the pleadings and remained in dispute during the trial. The plaintiffs had to prove that, in respect of the first defendant, the required notice was sent to the National Commissioner of Police. If not, the plaintiffs had to prove that a court granted condonation for such failure to serve a notice in terms of ss (2) (a) per s 4(1)(a) of Act 40 of 2002 or that the first defendant had, in terms of s 3(1)(b), consented in writing to the institution of the legal proceedings *in casu*.
- [27]. If the prosecution against the plaintiffs was instituted by the NPA, I must decide whether the police officials set the law in motion by 'instigating' the criminal prosecution. Put differently: whether the second and/or third defendant or any other member of the South African Police Service did anything more than one would expect from a police officer in the circumstances, namely to give a fair and honest statement of the relevant facts to the prosecutor, leaving it to the latter to decide whether to prosecute or not.
- [28]. If found that members of the police instigated the prosecution, whether there is a causal link between their conduct and the prosecution.
- [29]. If found that the second or third defendant or any other police official instigated the prosecution, then the issue of whether they had acted without reasonable and probable cause arises. If they acted without reasonable and probable cause, it must be decided whether the defendants acted with malice (or *animo iniuriandi*).

THE EVIDENCE

[30]. The plaintiffs' bundles were received as Exhibit 'A1' to 'A4'. The defendants' as Exhibit 'B1' to 'B4'. The contents of the police docket CAS 1334/03/2010 formed part of the defendants' bundle. At the pre-trial conference, the parties had agreed that the discovered documents are what they purport to be but that the contents thereof will remain in dispute until proven. I shall therefore only take into account the documents proven or not disputed if referred to such documents during the trial.

[31]. The first, second and third plaintiffs testified in support of their claims. Although not pleaded as such, it was the case of the plaintiffs that the criminal prosecution resulted from the incriminating statements they had made on 19 March 2010.

[32]. The third defendant, Captain Smith, testified on behalf of the defendants.

THE PLAINTIFFS' CASE

THE EVENTS OF 17 DECEMBER 2007

[33]. The plaintiffs testified in detail about the events of the evening of 17 December 2007 when they attended a scene of an accident where a truck had overturned and the events after they had left the scene of the accident. In short, they denied that they had stolen anything from the

scene of the accident or that they had received any property that had been stolen/removed from the scene, as alleged in the criminal trial.

[33.1] According to the first plaintiff, he did not see any item being removed from the scene of the accident.

[33.2] The second plaintiff testified that the load of the truck was spread on the road and that there was debris lying around at the scene of the accident. He saw a certain warrant officer who packed the police vehicle with boxes and items that had fallen off the truck and also saw members of the public removing items from the scene of the accident.

[33.3] According to the third plaintiff, he was on duty with Bitterbosch. At the time they arrived at the scene of the accident, the road was nearly clean. No items were removed from the scene in his presence.

[33.4] According to the first, second and third plaintiffs, they did not meet with Constable Palm after they attended the scene of the accident and did not receive any goods from him.

THE EVENTS OF 19 MARCH 2010

THE SECOND PLAINTIFF

[34]. I shall deal with the version of the second plaintiff first. On 19 March 2010, he received a call from the second defendant (Colonel Perumal), requesting

his assistance with the investigation of a case. He was fetched from his home by the third defendant (Smith) and another police officer (Mogale). Smith was well-known to him and she requested him to co-operate with Perumal.

[35]. On arrival at the office, Perumal questioned him about his relationship with Constables Palm, Van Ade (third plaintiff) and Bitterbosch. Perumal requested him to provide more clarity on a complaint he attended where a truck carrying chocolates had overturned. Perumal stated that he was aware that they had stolen items from the scene. The second plaintiff denied this. Perumal's attitude towards him changed and he then threatened to call the Provincial Commissioner. Perumal threatened that the second plaintiff would lose his job and pension and that he would be arrested. Perumal was aggressive and requested the second plaintiff to write down the incident and was told to implicate Palm, Bitterbosch and Van Ade and to state that he also received items from them. If he did not comply, he would be locked up. This conversation took place in the presence of Smith and two other police officers, Luis and Mogale. Perumal promised him that he would be used as a witness in terms of s 204 of the Criminal Procedure Act and be placed in witness protection.

[36]. Smith handed the second plaintiff paper and he wrote his statement in her presence. Perumal and Luis were in and out of the office and left shortly before he completed his statement. On completion of his statement, Smith read it and commissioned it. He was taken home at about 10:00. Later

that day, he, Constables Palm and Bitterbosch, the first and third plaintiffs, and their shift commander approached their union to register a grievance.

[37]. The second plaintiff's statement, Exhibit 'B1' (pp 30 to 33), was canvassed during his evidence in chief and under cross-examination. It contains a detailed account of the incident of 17 December 2007 when the truck carrying chocolates had overturned. It further contains details about an incident that occurred in 2008 and one where a truck, carrying liquor, had overturned.

[37.1] In respect of the 2007 incident, he declared that he, the first- and third plaintiffs, Constables Palm and Bitterbosch attended the scene of the accident. He saw an inspector loading items into the police vehicle. He also saw Constables Van Ade (third plaintiff), Palm and Bitterbosch, loading products and leaving the scene of the accident. At the offices of the dog-unit of the police, the products were divided among them. The second plaintiff received a box containing slab chocolates, deodorant spray, cool drinks and hot chocolate or cocoa. He used the products and divided the chocolates among friends.

[37.2] Regarding the liquor incident, he declared that the third plaintiff put a box of whiskey in the vehicle, and then he and the first plaintiff drove off and went to the dog unit. There, the remainder of the shift members arrived with more liquor: Scottish Leader

Whiskey, Three Ships Whiskey and Olof Bergh brandy which were divided among them. He received 9 bottles.

[37.3] He denied that the statement contained the truth and averred that Perumal instructed him to write about these two incidents.

[38]. During cross-examination:

[38.1] The second plaintiff confirmed that he was instructed to implicate Constables Palm, Bitterbosch and Van Ade; not the first plaintiff.

[38.2] The second plaintiff was confronted with his statement about the liquor incident and that he, despite being requested by Perumal to incriminate Constable Palm, had not mentioned Palm but incriminated himself and the first- and third plaintiffs.

[38.3] He was also referred to a specific paragraph in his statement about an incident that occurred in Pretoria in 2008, involving Palm where Palm had allegedly taken 4 motor vehicle wheels in the store. He included it in his statement because Perumal had instructed him to write everything he remembered about Palm.

[38.4] Although the 2008- and 2009 incidents had nothing to do with the 2007 chocolate truck accident and the charge on which the plaintiffs were prosecuted, the second plaintiff maintained that he was told to write about it and implicate himself because 'there

was a promise of the 204 witness ...'. He could not explain where Perumal got the information about those incidents from.

[38.5] In his statement, the second plaintiff also described an incident where Constable Palm had arrived with a bag containing toiletries, enquiring whether he knew of someone who would want to buy these products. Palm gave him a bottle of shower gel and lotion which he in turn gave to his girlfriend. He conceded that this portion of the statement was true and that it was his own version.

[38.6] The second plaintiff confirmed the contents of his statement about a detailed event that had occurred in Kuruman where jewellery was found in the car of an arrested Nigerian and which had not been 'booked in'.

[38.7] In conclusion, the second plaintiff confirmed that he had provided the details about the scene, but denied that he had ever said that he had received anything from the two scenes.

[39]. During re-examination:

[39.1] The second plaintiff could not explain where Perumal could have obtained the information that the third plaintiff and Constables Palm and Van Ade had been on the scene on 17 December 2007.

[39.2] He persisted that Perumal requested him to include it in his version and everything he knew about Constable Palm and the members involved.

[39.3] The brand names of the whiskey and brandy, as well as the number of bottles that he had mentioned in his statement, were mentioned by Perumal.

[40]. On questions by the court, on his understanding of a '204-witness', he responded that it was explained by Perumal that it is only a court that can classify him as a 204-witness, that he will be a 204-witness and that he had to testify against his colleagues and implicate himself. If he did not do so, he would be arrested and lose his job and pension. If it was not for the promise of becoming a 204-witness, he would still have made the statement because of the intimidation and threat of losing his job.

[41]. On further questioning, the second plaintiff testified that he phoned his shift commander immediately after being dropped at home by the third defendant on 19 March 2010 at about 10:00. At that time, the shift commander informed him that the other members had been questioned at the dog unit and that they were on their way to the offices of their union.

THE FIRST PLAINTIFF

[42]. The first plaintiff testified that, on 19 March 2010, he was coerced by Perumal and Warrant Officer Luis to make a false statement.

- [42.1] Members of the dog unit were called to the parade room at the dog unit. Perumal, Luis and other members of the Hawks arrived at the dog unit. He was then called to an office and interviewed by Perumal who asked him whether he recalled an accident where a chocolate truck and a liquor truck had overturned. He informed Perumal that he did.
- [42.2] Perumal told him that he had received information that he (the first plaintiff) had received chocolates and liquor, from the scenes of the accidents. When the first plaintiff denied having received items, Perumal became bombastic, irritated and aggressive and started to yell at him. Perumal threatened him that if he did not cooperate, he would be fired and lose his pension. He was told that if he admitted to receiving items from Constable Palm and wrote it in his statement, Perumal would present the statement to the commissioner and request that the items taken be deducted from his pension.
- [42.3] The first plaintiff persisted that Perumal told him what to write. He asked Perumal if it would be correct if he wrote in his statement that he had received two chocolates. Perumal was agitated by his remark. Perumal also informed him that it was about Constable Palm; he was the centre of the investigation.
- [42.4] After the interview, Perumal instructed him on what to write in his statement as they had discussed. He agreed to write the

statement because his mother was on her death bed and he was the only breadwinner.

[42.5] The first plaintiff wrote his statement in the parade room, in the presence of Luis, who perused the statement. He wrote what he was instructed to write and did not sign the statement as he felt uncomfortable with the contents. Luis called him back to sign the statement.

[43]. The first plaintiff and other members of the dog unit went to the offices of their union to report the issue. He was suspended shortly thereafter.

[44]. The first plaintiff was summonsed to appear in court on 17 June 2011 on a charge of theft. The statement he had made was found to be inadmissible in the criminal trial. He was acquitted of the charge.

[45]. During cross-examination:

[45.1] The first plaintiff testified that Perumal told him he had information that he had stolen items from the accident scene and that he had received liquor from Constable Palm.

[45.2] Perumal did not ask him to admit that he had stolen stuff; only that he received items from Constable Palm and incriminate him.

- [45.3] After he had written his statement in the parade room, he did not see whether Luis read his statement. The contents of the written statement were not discussed with Perumal.
- [45.4] The first plaintiff was referred to his written statement, Exhibit B1 p 34 to 36. He included what Perumal had told him to although Perumal did not provide the exact chronology. When confronted with the portion where he stated that he thought the truck driver had given permission to remove items at the scene where the chocolate truck had overturned, he responded that Perumal had not told him to write that. He assumed the truck driver had given permission.
- [45.5] Regarding the liquor truck, the first plaintiff declared in the statement that the liquor was damaged. This was also his version and not prescribed by Perumal. Perumal asked him what he had received and he was honest with Perumal and told him what he had received. As cross-examination continued, he conceded that certain portions of the statement had not been prescribed by Perumal. He included it to satisfy Perumal.
- [45.6] When asked whether the law was set in motion by the contents of his statement, he responded that the law was set in motion by Constable Palm's wife as she had implicated him in that he had brought home suspected stolen goods. The 'chocolate thing' against Palm started with her.

[45.7] The first plaintiff harboured a belief that the information that Perumal had at his disposal, implicating him, had been provided to him by the second plaintiff.

[46]. In re-examination, he stated that Constable Palm's wife did not incriminate him (the first plaintiff) in her statement to the police and that his own statement caused him to be prosecuted and he was charged on the strength of his statement. Palm's wife was the complainant in the police docket, CAS 1334/03/10. He conceded that if she had laid a complaint, the police had to investigate such a complaint.

THE THIRD PLAINTIFF

[47]. The evidence in chief:

[47.1] According to the third plaintiff, only Perumal and Luis, other than members of the dog unit, were present at the dog unit. Before being called into the office where he was questioned, he heard Perumal saying that there was a case or two that he had to investigate.

[47.2] The third plaintiff was also interviewed by Perumal at the dog unit in the presence of Luis. Perumal informed the third plaintiff that there were two cases that he was investigating and that he was not there for him but rather for Constable Palm. Luis said that Palm was the troublemaker. When Perumal asked whether the

third plaintiff knew about the chocolate and liquor incidents, he responded 'no'. He mentioned that it appeared as if Palm had driven stuff away from the scene. Perumal then asked if he knew that Palm had driven chocolates and liquor from the scene. When the third plaintiff denied knowledge thereof, Perumal became aggressive and he started swearing and said they had video footage of everything. Perumal threatened the third plaintiff that if he did not tell him what he knew he would lock him up.

[47.3] Perumal told the third plaintiff to write a statement and say that he had received 'things' from Constable Palm. The third plaintiff again denied that he did. He was again threatened that he would be locked up. Perumal told him to write that he received chocolates, Nivea products and liquor.

[47.4] The third plaintiff went back to the parade room, followed by Luis who then told him that he should not 'play' with his pension and that he should do what the Colonel (Perumal) had told him to do. Whilst busy writing the second page of his statement, Luis read the first page and suggested that he (the third plaintiff) was playing around by stating that he had received chocolates without stating from whom. Luis stood with him and said he must write that he had received it from Constable Palm. On the second page of his statement, he then declared that he had received liquor, Nivea products and other things from Palm.

[47.5] In his statement, Exhibit B1 p 37 to 38, he had written that:

[47.5.1] He received two boxes of 'Chomps', one box of slabs and three Nivea lotions that had been taken from the scene where the truck carrying chocolates had overturned. He mentioned that nobody on the scene said that the items were not allowed to be taken and that the items were damaged.

[47.5.2] He received 7 bottles of liquor from Constable Palm: 3 Scottish Leader and 4 Oloff Bergh, which were taken from the truck carrying liquor that had overturned. The items were handed out in the parade room at the dog unit. He did not mention it during his evidence-in-chief as he had forgotten to mention this earlier.

[47.6] The third plaintiff was never informed that he was a suspect in the case.

[47.7] On completion of his statement, the third plaintiff and other members of the dog unit went to their union.

[47.8] The third plaintiff sought legal advice after his disciplinary hearing in November 2010. He, with the assistance of a legal representative, launched a successful appeal against the findings in the disciplinary enquiry.

[48] During cross-examination:

[48.1] When asked whether he wrote what he had been told to write in his statement, he said yes. When confronted with the differences between his evidence as what he was instructed to write and what was contained in his written statement, the third plaintiff responded by stating that he had said that it was a compelled statement.

[48.2] When confronted with his written statement about receiving 'Chomps', slabs and Nivea lotions and asked who had told him to write this, he initially responded that it was Perumal who told him to write it. He later adapted this version by stating that he had made that up. He could not explain why he included it in the statement.

[48.3] When confronted with the detailed version of the liquor truck that had overturned, he conceded that it was his version. When asked why he included it if not told to do so, he responded that it was what happened on the day. He persisted that Luis insisted that he mention Constable Palm's name.

[48.4] Everything below paragraph 6 of his written statement was what he had made up. It did not happen. He, however, persisted that he was compelled to make the statement.

[48.5] He could not explain why he implicated other persons in his statement when he had not observed them taking items from the scene.

[48.6] According to the third plaintiff, despite many years of service in the South African Police Service, he stated that he did not know what led to the investigation of a case; he responded that he was not a detective and that a detective would know.

THE DEFENDANTS' CASE

[49]. Only the third defendant (Smith) testified on behalf of the defendants. Her evidence was that on 17 March 2010, she was instructed by Colonel Perumal, who acted on instructions of the Head of Crime Prevention, to obtain the statement of Ms Ursula Palm who had requested a meeting with the Police. During the interview:

[49.1] Ms. Palm informed her that Constable Palm and the third plaintiff arrived at her and Palm's house with a vehicle of the dog unit and that there were Cadbury- and Nivea products in the vehicle. These products were off-loaded into the house. Palm told her that the products came from an accident scene where a truck had overturned.

[49.2] According to Ms Palm, there were other incidents where Palm would arrive at home with different items such as Avon products and jewellery.

[49.3] The third defendant asked her whether she was willing to make a sworn statement about what she had informed her, upon which Ms. Palm agreed to do so.

[50]. The third defendant took down Ms. Palm's statement and handed it to Colonel Perumal. On receiving Ms Palm's statement, an enquiry was registered on the CAS system of the South African Police Service. An enquiry is registered when the police receive information under oath to investigate whether there are grounds to register a criminal case. A police investigation ensued.

[50.1] On 19 March 2010, the task team of the South African Police, consisting of the second and third defendants, Luis and Mogale discussed the statement that Ms Palm had provided and how to handle the investigation. Luis suggested that they contact Constable Coetzer (the second plaintiff) because they had a good working relationship with him to find out whether he had information about what Ms. Palm had alleged. Perumal called the second plaintiff to find out if he could be of assistance. He agreed to come to the office and she and Mogale fetched him from home.

[50.2] On the second plaintiff's arrival at the office, Perumal introduced himself and asked for assistance about the chocolate incident. Perumal and Luis interviewed him. The atmosphere was comfortable and the second plaintiff appeared normal as they knew him. Smith overheard Perumal telling him that they had information about a truck that had overturned and that items were stolen from the scene. The second plaintiff was aware of the incident: that chocolates had been taken from the scene and that Constable Palm shared it amongst the members of the dog unit. The second plaintiff also received chocolates from Palm. She was in and out of the room and at some stage when she came back, the second plaintiff was busy writing a statement. At that time the atmosphere was still comfortable, as it had been before she left. They only became aware of the liquor incident through the information that the second plaintiff had provided.

[50.3] Colonel Perumal and Luis left the office to follow up on the information that the second plaintiff had provided. At that time, he was still busy writing his statement. In her presence, nobody instructed the second plaintiff what to write in his statement. On completion of his statement, she commissioned it and she and Mogale took the second plaintiff home. She left the statement on the table in the office.

[50.4] After dropping the second plaintiff at home, she and Mogale joined Perumal and Luis at the dog unit, where they found them in

an office with the third plaintiff. Perumal was speaking to the third plaintiff and Perumal's voice was normal. Perumal informed her that other members were already writing statements. Perumal and Mogale left and she and Luis waited in the waiting area for the members to complete their statements. She and Luis commissioned the statements of the members.

[51]. The third defendant only read the contents of the statement of the second plaintiff after the police docket, CAS 1334/03/2010, had been opened at the end of March 2010. She was appointed as the investigating officer of the case and had sight of all the statements. Ms Palm was the complainant in the case.

[52]. The third defendant completed the investigation and submitted the police docket, accompanied by a summary of the contents thereof, to the Director of Public Prosecutions ('DPP') for decision. She did not make any recommendations to the DPP.

[53]. The DPP instructed that Constable Palm, the third plaintiff and Constable Bitterbosch be charged and that the first and second plaintiffs should be used as state witnesses in terms of the provisions of section 204 of the Criminal Procedure Act. The third defendant complied with the DPP's instructions.

[54]. After a trial date had been set for January 2011, a prosecutor consulted with the first and second plaintiffs in Smith's presence. During this

consultation, the first and second plaintiffs indicated that they were not willing to be state witnesses as they were not happy with portions of their affidavits in which they had implicated Constable Palm and the others. This resulted in the case being provisionally withdrawn by the prosecutor.

[55]. The police docket was re-submitted to the DPP for further instructions. The DPP then instructed that the first and second plaintiffs be charged with Constables Palm, Bitterbosch and Van Ade. She complied with the instructions of the DPP.

[56]. During cross-examination, Smith was questioned at length on the contents of Ms. Palm's statement and the events of 19 March 2010. She confirmed that Ms. Palm did not implicate the first and second plaintiffs. She confirmed that Ms. Palm implicated the third plaintiff in her statement.

[57]. Counsel for the plaintiffs put to Smith that it is not the case of the plaintiffs that she had participated in the alleged coercion by Perumal (and Luis). No unlawful, let alone malicious conduct, was put to her or attributed to her.

EVALUATION OF THE EVIDENCE

[58]. It was not disputed and is common cause that:

[58.1] Ursula Palm laid the complaint about the alleged illegal/unlawful actions of certain police officials. She made a sworn statement, confirming her allegations under oath. She incriminated the third plaintiff in her statement to the police.

- [58.2] Ms Palm's complaint resulted in a police docket, CAS 1334/03/2010, being registered and investigated by the South African Police Service, as it is required to do in terms of the law. During the investigation members of the dog unit of the South African Police Service were questioned by the investigative team of the Hawks.
- [58.3] After being questioned, the three plaintiffs made statements which were commissioned on the same day and included in the docket.
- [58.4] On completion of the investigation, the police docket CAS 1334/03/2010 was referred to the DPP for decision who initially decided that the first and second plaintiff be utilised as state witnesses in terms of section 204 of the Criminal Procedure.
- [58.5] After the first and second plaintiffs retracted portions of their police statements during the consultation with the prosecutor, the police docket was again submitted to the DPP who then decided to prosecute the first and second plaintiffs with the other accused under case number RCZ 477/11 and their appearances in court from June 2011, until their acquittal.
- [58.6] The third defendant did not make recommendations to the DPP and there was no evidence or even a suggestion that the second or

third defendant or any member of the South African Police Service was involved in or influenced the decisions of the DPP in any manner and that such conduct caused the prosecution against the first, second and third plaintiffs.

[58.7] The prosecution against the plaintiffs failed and they were acquitted.

SETTING THE LAW IN MOTION/INSTIGATING THE PROSECUTION

[59]. Ms Palm set the law in motion by reporting the conduct of Constable Palm to the police. The police were duty-bound to investigate the complaint. In her statement under oath, filed in the police docket, CAS 1334/03/2010, she incriminated the third plaintiff, thereby setting the law in motion against him.

[60]. The prosecution under case number RCZ 477/11 was not a private prosecution, as envisaged in ss 7 or 8 of the Criminal Procedure Act, No. 51 of 1977, but one instated by the NPA in terms of the NPA Act.

[61]. There was neither an allegation nor any evidence that the DPP or prosecutor failed to act in accordance with his/her duties, or that he/she was influenced by any member of the South African Police Service.

[62]. The DPP and/or the prosecutor were not cited as defendants in the matter before me and the prosecutor who decided to prosecute the plaintiffs did not testify during the trial. It stands to be accepted that, based on the

contents of the police docket, the prosecutor had facts at his/her disposal from which a reasonable prosecutor in his position concluded that the plaintiffs had committed the offence(s) on which they were charged. If there was no such evidence, it was the DPP (or its representative) who had instituted the prosecution without reasonable and probable cause.

[63]. The defendants can only be held liable if they or any member of the South African Police Service instigated the prosecution by going further than providing a fair and honest statement of the relevant facts to the prosecutor, leaving it to the latter to decide whether to prosecute or not.

[64]. During the investigation, the sworn statements of the first, second and third plaintiffs were obtained and filed in the said police docket.

[64.1] The plaintiffs, being police officials, must have been aware of the consequences of making the statements, let alone false statements under oath.

[64.2] With regard to the plaintiffs' version that they were coerced into making false sworn statements in the police docket and that Perumal had told them what to include in their statements, I agree with Mr. Manye's submission that the contents of these statements led to the only reasonable conclusion and this is that the account of the events could only have been provided by someone who had first-hand knowledge of the events.

[64.2.1] The statements of the three plaintiffs contain explicit details of the events. Many of these details differ from what Perumal had allegedly told them to include in the statements;

[64.2.2] When and how Perumal (or any other police officer) could have obtained many of the details which the first, second and third plaintiffs included in their statements, remain unanswered. On the second plaintiff's evidence, Perumal had not read his statement before he departed to the dog unit to question the other members.

[64.2.3] There is no evidence that Perumal was even aware of what the second plaintiff, who had been questioned first, or any of the plaintiffs had included in their written statements.

[65]. It was conceded on behalf of the plaintiffs that the third defendant did not participate in the alleged coercion. There is no evidence that she, as the investigating officer, or any other member of the South African Police Service, withheld any information from the prosecutor or misled the prosecutor in any manner. There is no evidence that anything else, other than the contents of the police docket, as the third defendant testified, was placed before the prosecutor.

[66]. I cannot find, on a balance of probabilities, that the investigation of Ms. Palm's complaint, the questioning of the plaintiffs and obtaining their statements and inclusion thereof in the police docket that was placed before the prosecutor, constitute instigating the prosecution.

[67]. There is no evidence that there is a causal link between the conduct of any member of the South African Police Service and the criminal prosecution of the plaintiffs.

REASONABLE AND PROBABLE CAUSE

[68]. Even if was accepted that the defendants set the law in motion by instigating the prosecution, the plaintiffs have not shown that there was no reasonable or probable cause to prosecute them. The DPP's reasons or motivation for the prosecution remain unknown.

[69]. The plaintiffs did not prove, on a balance of probabilities, that the prosecutor (who is not a defendant), the second or third defendants or any other member of the South African Police Service lacked an honest belief, based on reasonable grounds, that the institution of proceedings was justified.

[70]. From the evidence, it appears that the plaintiffs had approached their union and sought legal advice at an early stage. There is no evidence from the plaintiffs that:

[70.1] They were not granted or refused the opportunity to provide their defence about the alleged duress or coercion before the prosecutor who decided to prosecute.

[70.2] They or their legal representatives were prevented from making representations to the DPP by any member of the South African Police Service to place their version about the alleged coercion before him/her.

[71]. On the evidence before me, the statements in the police docket contain admissions which, *prima facie*, provide incriminating evidence that the plaintiffs have committed the offence of theft or, at least, that they have received stolen property knowing it to have been stolen or a contravention of section 37 of the General Law Amendment Act, No 62 of 1955) which are competent verdicts on a charge of theft in terms of section 264 of the Criminal Procedure Act. These statements, together with the statement of Ms. Palm, meet the threshold of reasonable and probable cause for instituting a prosecution.

MALICE

[72]. The plaintiffs have also not proven, on a balance of probabilities, that the defendants had acted with malice/*animo iniuriandi*.

[72.1.1] The DPP had initially decided not to prosecute the first and second plaintiffs with Constables Palm, Bitterbosch and the third plaintiff, and to offer them the possibility of immunity from prosecution in

terms of section 204- if they testify on behalf of the prosecution. This is indicative of non-interference in the initial decision to prosecute and the absence of malice on the side of members of the South African Police Service and the second and third defendants.

[72.1.2] Based on the uncontested evidence of the third defendant, it was after the first and second plaintiffs informed the prosecutor during the consultation (in the presence of the third defendant) that they refused to testify against their colleagues and retracted portions of their statements when the DPP decided to prosecute them. It follows that the DPP was aware of the version of at least the first and second plaintiffs when the decision to prosecute them was taken.

COMPLIANCE WITH ACT 40 OF 2002

[73]. Despite the court having raised this issue of compliance with the provisions of Act 40 of 2002 on the conclusion of the evidence²⁰, it was not addressed in the written heads of argument. As compliance remained in dispute on the pleadings and during the trial, I deem it necessary to address this issue.

[74]. The notice in terms of s 3 of Act 40 of 2002, Exhibit 'A1' page 20, was sent to the Minister of Police and not the National Commissioner, as required in section 4(1)(a) of the said Act. There was no evidence that the said notice was served on the National Commissioner of Police.

²⁰ Record: Bundle 14 p 101 lines 10 to 25

[75]. There was no evidence before me that the first defendant had consented in writing to the institution of legal proceedings. Although s 3(4) permits a court to condone a litigant's failure to give a valid notice if the debt has not been extinguished by prescription, good cause is shown and the debtor is not prejudiced by the non-compliance, on the evidence before me, no such condonation was granted. Accordingly, even if the plaintiffs had proven their claim for malicious prosecution against any member of the South African Police Service, the first defendant could not have been held liable.

CONCLUSION

[76]. I find that the first, second and third plaintiff did not prove their claim for malicious prosecution against the defendants.

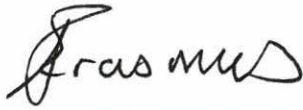
COSTS

[77]. No arguments were presented as to why the costs should not follow the outcome. I have no grounds for finding that it should not.

I make the following order:

- 1 THE PLAINTIFFS' CLAIMS ARE DISMISSED.**
- 2 THE FIRST TO FOURTH PLAINTIFFS ARE ORDERED TO PAY THE TAXED OR AGREED COSTS OF THE ACTION JOINTLY AND SEVERALLY, THE ONE PAYING, THE OTHER TO BE ABSOLVED, ON A SCALE AS BETWEEN PARTY AND PARTY, SUBJECT THERETO THE FOURTH PLAINTIFF SHALL ONLY BE**

LIABLE FOR SUCH COSTS UP AND UNTIL THE DATE OF WITHDRAWAL OF
HIS CLAIM.

A handwritten signature in black ink, appearing to read "SL Erasmus", written over a horizontal line.

SL ERASMUS

ACTING JUDGE

NORTHERN CAPE DIVISION

On behalf of the plaintiffs: Adv A Stanton oio PGMO Attorneys Inc.

On behalf of the defendants: Adv TL Manye oio the State Attorney Kimberley