G.P.-S.43575—1969-70—2,000

14 Feb, 74

236/73

J 219

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(APPELLATE Provincial Division)
(Provinsiale Afdeling)

Appeal in Civil Case
Appèl in Siviele Saak

1.CAPT. J. M. PRINSLOO;2.GOVERNMENT OF R. S. A. *Appellant,*

versus

SYDNEY CHARLES NEWMAN *Respondent*

Appellant's Attorney Dep. ~~xxxx~~.S.A.(Bmftn)
Prokureur vir Appellant

Respondent's Attorney
Prokureur vir Respondent Siebert & Honey

Appellant's Advocate H.W. Wootton I.C.
Advokaat vir Appellant R. Krugel

Respondent's Advocate J.A. Maisels Qc.
Advokaat vir Respondent J.C. Kruger S.C.

Set down for hearing on
Op die rol geplaas vir verhoor op 5-6-9-74

1.2.4.6.7.

Coram: Rumpff CJ, Botha, Wessels, Jansen et Miller JJ.A.

(W. L. D.) Thursday, 5-9-74: 9.45 am — 11.00 am
11.15 am — 1.00 pm
2.15 pm — 5.00 pm

Friday, 6-9-74 9.45 pm — 11.00 pm
11.15 pm — 12.45 pm
2.15 pm — 3:00 pm

Mostert reply. 3.00 — 4.00

CAV.

P.T.O.

Writ issued
Lasbrief uitgereik

Date and initials
Datum en paraaf

Bills Taxed—Kosterekenings Getakseer

Date Datum	Amount Bedrag	Initials Paraaf

IN THE SUPREME COURT OF SOUTH AFRICA.

APPELLATE DIVISION.

In the matter between

CAPTAIN J.M.PRINSLOO .....FIRST APPELLANT.

THE GOVERNMENT OF THE
REPUBLIC OF SOUTH AFRICA. .....SECOND APPELLANT.

and

SYDNEY CHARLES NEWMAN .....RESPONDENT.

CORAM : Rumpff, C.J., Botha, Wessels, Rabie et Muller, JJ.A.

Heard: 5 and 6 September 1974.

Delivered: 22 November 1974

J U D G M E N T.

MULLER, J.A.

This is an appeal against an award by Margo, J., in the Witwatersrand Local Division, of damages for alleged malicious prosecution and malicious arrest.

The...../2

The first appellant is a captain in the South African Police Force. At all material times he served in the Commercial Branch of the S.A.Police, and was stationed at John Vorster Square, Johannesburg. For convenience I shall refer to him as Captain Prinsloo or simply as Prinsloo.

The second appellant is the Government of the Republic of South Africa, nominally represented by the Minister of Police and the Minister of Justice.

The respondent, to whom I shall refer as plaintiff, is a prominent and well-respected businessman in Johannesburg. After a brilliant academic career, he joined the Rand Mines Limited group of companies. He was rapidly promoted in the group, and eventually held the position of General Manager in the Mining Division of Rand Mines Limited and was also a director of the said company. In 1970 the plaintiff terminated his services with Rand Mines Limited and joined a company, Lonrho South Africa Limited. He was appointed as Managing Director of the said company with effect from 1 January 1971 and later became Chairman of the

company..../3

company. The said company (referred to hereinafter as the company) is a subsidiary of Lonrho Limited, a company registered in England having interests in industrial and mining enterprises in a number of countries, including South Africa, Zambia and Rhodesia.

During March 1971 Captain Prinsloo, in the execution of his duties as a police officer, commenced investigations into allegations of fraud made against persons who had been directors of the company (Lonrho South Africa Limited) during 1969. The plaintiff was in no way connected with such offences which were alleged to have been committed before he joined the company. In carrying out his investigations Captain Prinsloo examined various documents in the records of the company and interviewed personnel of the company.

In the course of the aforementioned investigations Captain Prinsloo obtained information - from the records of the company and from employees of the company - concerning a housing loan which had been made by the company to the

plaintiff.../4

plaintiff. Particulars of the said loan which were at the time within the knowledge of Captain Prinsloo were the following:

(a) that the amount of the loan was R35 000-00, which said amount was paid by the company to the plaintiff by cheque on 22 December 1970,

(b) that the said cheque was requisitioned and countersigned by one Raath, the financial director of the company,

(c) that the cheque was deposited in the bank by the plaintiff on 22 December 1970 when the amount of R35 000-00 was credited by the bank to his personal account,

(d) that the loan was recorded in the books of the company by debiting the plaintiff's current account with the sum of R35 000-00,

(e) that the plaintiff became the Managing Director of the company on 1 January 1971 - the formal resolution of the board of directors appointing the plaintiff was taken on 7 January 1971, but the appoint-

ment..../5

ment was with effect from 1 January 1971,

(f) that after such appointment was made, the debit in the company's books was transferred (on 31 March 1971) from the plaintiff's current account to a loan account, and

(g) that on 23 July 1971 the loan was repaid to the company by Henderson's Transvaal Estates Limited.

On the facts known to him as aforestated, Captain Prinsloo considered whether the making of the loan to the plaintiff was a contravention of section 70 oct.(1) of the Companies Act, 46 of 1926. The said section, at the time, provided as follows:

> "It shall not be lawful for a company to make a loan of money, shares or debentures to any person who is its director or a director of its holding company ----------"

(The rest of the section, which in part made provision for certain exceptions, is not material to the present enquiry).

If it was a contravention of the section then, in Captain Prinsloo's view, the plaintiff and Raath were liable to prosecution - the former for having accepted the loan from the company, and the latter for having, in his capacity

as financial director, effected payment of the amount of the loan. Prinsloo was, however, in some doubt as to whether there had indeed been a contravention of the section. His doubt arose from the fact that payment of the money (R35 000-00) which was to serve as a loan, was made some two to three weeks before the plaintiff became a director of the company, whereas the section, in explicit terms, prohibited the making of a loan by a company to a person who "is the director". Prinsloo consulted his superior officer, Lieutenant Colonel Sherman. The latter was of the view that the facts disclosed a contravention but, as he had some doubt, he told Prinsloo to refer the matter to the Senior Public Prosecutor. At the same time Lieutenant Colonel Sherman referred Prinsloo to a decided case (R.v.Herbold and Others) in which a charge under the section in question had been considered. Sherman remembered the case because he had been concerned with the investigations in the case.

After his discussion with Lieutenant Colonel Sherman, Captain Prinsloo prepared and signed an affidavit setting out the facts of the case as established by the documents and

statements ...../7

statements then in his possession. Having done so, he proceeded to the offices of the company and there informed the plaintiff and Mr. Raath of the alleged contravention. After having been duly warned and apprised of their rights, plaintiff and Raath were asked whether they wished to make statements. Raath declined to make a statement, but the plaintiff elected to do so and made a written statement, the material portion of which reads as follows :

> "I joined Lonrho on 1.1.1971 from Rand Mines, with whom I had a housing loan. One of the conditions of employment of Lonrho was that I would receive a housing loan. This was granted in December 1970 and when I joined the company I received the loan. At this stage I was not a director."

On this occasion the plaintiff informed Prinsloo that the "charge was baseless".

During the afternoon of the same day (27 September 1971) Captain Prinsloo went to see Mr. Fourie, a Control Prosecutor on the staff of the Senior Public Prosecutor at the Magistrate's Court, Johannesburg. Prinsloo put the case dossier before Mr. Fourie and referred the latter to the case of

R.v.Herholdt and Others mentioned by Lieutenant Colonel Sherman. Fourie obtained the report of the case from the library (1957 (3) S.A. 236 (A)) and had a look at the report. (The charges under section 70 oct. in that case are dealt with at p. 264 of the report.)

Mr. Fourie informed Prinsloo that, in his opinion, the making of the loan to the plaintiff constituted a contravention of the section. He (Fourie), however, decided to refer the matter to the Acting Senior Public Prosecutor, Mr. Kotze. The latter thought that the plaintiff's contract of employment with the company might be relevant and asked Prinsloo to obtain it.

Captain Prinsloo went to the plaintiff on 28 September 1971. The plaintiff informed him that there was no service contract but that he had a letter of appointment. He was reluctant to hand over the letter of appointment because it contained confidential information concerning his emoluments. Eventually, however, a copy of the letter of appointment was handed

to...../9

to Prinsloo who, on the same day, submitted it to the prosecutor, Mr. Fourie. This letter, dated 23 December 1970 and signed by the Deputy Managing Director of the company, was addressed to the plaintiff. It reads as follows :

"Dear Mr. Newman,

I have pleasure in confirming the arrangements made between Mr. Ball, Mr. Rowland and yourself concerning your appointment as Managing Director of Lonrho South Africa, with effect from 1st January, 1971, as follows :-

1. Your salary will be at the rate of .... per annum, payable monthly in arrear, plus an annual allowance of .....for entertainment expenses incurred on the Company's business and .....for 'out of pocket' travelling expenses.
2. The Company will take over the housing loan of R35,000 at a rate of interest of 2% calculated annually in advance on the reducing capital balance, such interest being deductible from your salary payments. The capital amount of the loan will be reduced in the Company's books by R4,800 per annum.
3. You will be entitled to the free use of a company car.
4. With regard to pension and medical benefit arrangements, leave regulations and other general terms and conditions of employment, you will be placed on the same basis as the other Senior Staff of the Johannesburg Office.

I should like to take this opportunity of welcoming you to the Lonrho Group and I hope that the association will be a long and happy one."

(I have deleted the particulars concerning the plaintiff's salary and allowances in paragraph 1.)

Having considered the contents of the letter of appointment, the prosecutors, Kotze and Fourie, agreed that the facts disclosed an offence. The same view was expressed by Mr. Nel, the prosecutor in the Insolvency Court, who was also consulted. Mr. Kotze, the senior prosecutor, decided that a prosecution be instituted against plaintiff and Mr. Raath.

Particulars of the charge, drafted by Mr. Fourie, read as follows :

"THE STATE - versus - M.R.RAATH AND S.C.NEWMAN

THAT THE accused are guilty of the offence contravening section 70 oct (4) read with sections 70 oct (1) and 229 of Act No. 46 of 1926, as amended.

IN THAT during the period 22/12/1970 to 23/7/71 and at or near Johannesburg in the Regional Division of Transvaal the said accused being officers of the company LONRHO SOUTH AFRICA LIMITED, did wrongfully and unlawfully authorise or knowlingly permit or were parties to a default in complying with the provisions of section 70 oct (1) to wit by authorising or knowingly permitting or being parties to the granting of a loan to S.C. Newman by LONRHO SOUTH AFRICA LIMITED, contrary to the provisions of the Companies Act No. 46 of 1926, as amended, the said

Newman...../11

Newman being a director of the said Lonrho South Africa Limited."

Immediately after the decision to prosecute was taken, Captain Prinsloo, who was present during the discussion of the case between the prosecutors, told Messrs. Fourie and Kotze that he had certain information concerning Mr. Raath and he disclosed that information to them. The information disclosed was the following (I quote from the evidence of Fourie):

"Nou maar goed, op een of ander stadium op die 27ste of 28ste het Kapt. Prinsloo vir u gesê?---Hy het vir my gesê dat hy oor inligting beskik dat Mnr. Raath, wie een van die persone was teen wie daar n vervolging ingestel sou word, moontlik nie sy verhoor sou bywoon nie indien hy deur middel van n waarskuwing of deur middel van dagvaarding aangesê word om die hof by te woon nie.

Het hy dit enigsins motiveer?--- Hy het aan my aangedui dat Mnr. Raath volgens sy inligting in besit was van n paspoort of paspoorte, en dat volgens sy inligting een van die paspoorte uitgereik was deur die Zambiese owerheid, as my herinnering korrek is.

Ja?--- Hy het verder gesê dat Mnr. Raath verbonde is aan - dit was uit die stukke ook duidelik - maar hy het gesê dat Mnr. Raath verbonde was aan die Lonrho groep van Maatskappye wat wêreldwye belange het, gehad het; dat hulle kantore het in verskeie wêrelddele. Hulle hoof-

kantoor..../12

kantoor, sover ek weet, was in London, en dat Mnr. Raath baie maklik in een van die ander lande geakkomodder kon word, terwyl hy in dieselfde groep maatskappye bly.

Wat het hy vir u gesê ten opsigte van die eiser in hierdie saak, Mnr. Newman?---- Kapt. Prinsloo het dit pertinent onder my aandag gebring dat sover dit Mnr. Newman aangaan, hy nie oor sodanige inligting beskik dat Mnr. Newman nie sy verhoor sou bywoon nie.

Op sterkte van daardie inligting is daar 'n besluit geneem?---- Dit is korrek.

Wat was die besluit? ----Ek het besluit dat ek op die inligting wat aan my verstrek is, aansoeke sou onderteken vir die inhegtenisname van albei die persone om te verseker dat hulle die hof bywoon, die verhoor van die saak bywoon, en ook sodat daar 'n proses sou wees waarvolgens beslaggelê kon word of daar voorwaardes gestel kon word met betrekking tot Mnr. Raath se paspoort of paspoorte.

Nou u het vir ons gesê hoekom u die besluit geneem het ten opsigte van Mnr. Raath. Hoekom is die besluit geneem ten opsigte van Mnr. Newman? ---- Ek kon geen regverdiging vir my sien op daardie stadium om te onderskei tussen die twee here nie. Ek het ook die misdryf oorweeg, die aard van die misdryf, en na my mening was dit 'n ernstige oortreding.

Is die aangeleentheid van borg bespreek? ---Die aansoek om borg is geopper in die kantoor van Mnr. Kotze, as ek reg onthou, in elk geval was dit gewees waar ons vier, en as ek sê ons vier dan is dit Mnr. Kotze, Kapt. Prinsloo, Mnr.

Nel...../13

Nel en myself, teenwoordig was.

En die besluit?---Daar is besluit dat borgtog in die bedrag van R500 ten opsigte van elke beskuldigde aanvaar sou word en dat ten opsigte van Mnr. Raath die voorwaarde sou wees dat hy sy paspoort of paspoorte moes inhandig en dat hy geen aansoek om n nuwe paspoort moes doen voor afhandeling van die saak nie.

Wat het toe gebeur as gevolg daarvan?---Ek het die aansoek onderteken."

It is clear from the above evidence that the decision to arrest the plaintiff and Raath was that of Mr. Fourie acting in his capacity as prosecutor. The written (printed) application for the issue of a warrant for the arrest of the plaintiff, which was signed by Fourie, is in the following terms:

"APPLICATION UNDER SECTION 28 OF ACT No. 56 OF 1955
FOR WARRANT OF APPREHENSION.

Application is hereby made for the issue of a warrant for the arrest of _____ SYDNEY CHARLES NEWMAN, on a charge of C/S. 70 oct (4), read with (1) of Act 46 of 1926 (as amended) - Unauthorised loan to Director.
there being from information taken upon oath reasonable grounds of suspicion against him that he committed the alleged offence on or about the During period 7.1.1971 to 23.7.1971.
_____ in the Johannesburg District
(_____ Ward).

+The.../14

+The said SYDNEY CHARLES NEWMAN
is at present known or suspected on reasonable grounds to be within the JOHANNESBURG District.

F.A. Fourie,
Public Prosecutor."

(The application for the issue of a warrant for the arrest of Raath is in identical terms).

Captain Prinsloo took the written applications for warrants to a magistrate who, in terms of section 28 of the Criminal Procedure Act, issued warrants for the arrest of the plaintiff and Raath. It should be explained that the written applications for warrants for the arrest of the plaintiff and Raath were prepared by Captain Prinsloo even before the decision to prosecute had been taken. Prinsloo, however, explained to the Court, and his explanation was confirmed by the prosecutors, that this procedure is not unusual; indeed, it is very often followed to save time and for the convenience of the prosecutor. If the latter decides to prosecute, and that the person concerned should be arrested, he can use the written application already prepared and submitted with the case dossier. If, however, the prosecutor decides not to prosecute, or if he decides to

prosecute ...../15

prosecute but to have the person concerned brought to trial otherwise than by way of arrest (for example, by summons), the written application for a warrant is simply destroyed.

The warrants for the arrest of the plaintiff and Mr. Raath were executed by Captain Prinsloo on 30 September 1971. They were, on the same day, brought before a magistrate at the Magistrate's Court, Johannesburg, and were released on bail, the case being postponed to 14 October 1971. The amount of bail was, in each case, fixed in the amount of R150, and one of the conditions of bail, in the case of Mr. Raath, was that he should hand over all passports held by him. Mr. Raath duly handed over his South African passport. This appears to have been the only passport held by him.

The case against the plaintiff and Mr. Raath was, after a further postponement, eventually, on instructions from the Attorney General, withdrawn on 3 November 1971.

To complete the narrative of events, it is necessary, in view of certain findings made by the Court a quo

concerning.../16

concerning Captain Prinsloo's motives, to state that shortly after the arrest of the plaintiff and Mr. Raath (it must have been on or about 3 October 1971) Captain Prinsloo proceeded to Rhodesia, where, in liaison with the Rhodesian Criminal Investigations Department, he conducted investigations into allegations of fraud and other offences on the part of the directors of certain companies in the Lonrho group, including Lonrho South Africa Limited.

In the aforegoing brief narrative of events I have confined myself to facts which I consider to be material for a proper consideration of the issues arising for decision on appeal. The evidence adduced at the trial ranged much further and related also to other facts and surrounding circumstances which, in so far as they have a bearing on the motives of Captain Prinsloo, are not material in the present inquiry because of the basis on which the appeal was argued on behalf of the appellants; a matter which will be referred to later in this judgment.

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On the evidence before it the trial Court found that Captain Prinsloo instigated the prosecution against the plaintiff and Mr. Raath and was directly responsible for procuring their arrest; that in so doing he acted without reasonable and probable cause, and that he was actuated by malice. The ulterior motive ascribed to Captain Prinsloo by the trial Court appears from the following passage in the judgment of Margo,J.:

> "The evidence indicates that the first defendant's dominant motive was to impound Raath's passport to prevent any interference while the first defendant was engaged in important investigations in Rhodesia. To do that Raath had to be arrested, and to justify arrest there had to be a charge. A possible charge under section 70 oct (1) having been found, the plaintiff, as the one who had benefited from the loan, had to be joined with Raath."

And, as stated elsewhere in the judgment, it was with the object of bringing about the arrest of Raath that Captain Prinsloo comveyed information to the prosecutors about Raath being in possession of certain passports, information which, as the Court found, Prinsloo did not believe, but nevertheless conveyed to the prosecutors in the expectation that, on the strength thereof, Raath would be arrested, foreseeing at

the...../18

the same time the possibility that, if Raath were to be arrested, the plaintiff would also be arrested.

The aforementioned findings by the trial Court entitled the plaintiff to succeed on both his claims, namely, the claim for malicious arrest and the claim for malicious prosecution, and substantial damages were awarded against both the defendants (Captain Prinsloo and the State).

On appeal before us it was contended that, having regard to the pleadings and the evidence, the trial Court should have dismissed both the claim for malicious prosecution and the claim for wrongful or malicious arrest. Counsel for the appellants made it clear, however, that, for the purposes of his argument, he would assume (without conceding it as a fact) that Captain Prinsloo was actuated by an ulterior motive, namely, that he sought the arrest of Mr. Raath as a means of laying his hands on the latter's passport so as to prevent him from interfering with his (Prinsloo's) investigations in Rhodesia. Counsel's submission

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with regard to this assumption was that, despite any such ulterior motive on the part of Prinsloo, the proved facts did not establish a case of malicious prosecution nor a case of wrongful or malicious arrest. Counsel referred in this connection to what was said by Schreiner,J.A., in Tsose v. Minister of Justice and Others 1951 (3) S.A. 10 (A) at p. 17 with regard to ulterior motives, and to the remarks of Van Den Heever,J.A., in Beckenstrater v. Rottcher and Theunissen 1955 (1) S.A. 129 (A) at p. 140 B - F.

It is convenient to deal first with the malicious prosecution claim. In his Particulars of Claim the plaintiff alleged:

> "During or about September 1971 the First Defendant (Captain Prinsloo) falsely and maliciously and without reasonable and probable cause preferred against the Plaintiff a charge of contravening Section 70 oct (4) read with Section 70 oct (1)and Section 229 of the Companies Act, No. 46 of 1926, as amended, and caused the prosecution of the Plaintiff on such charge in the Johannesburg Magistrate's Court."

In order to succeed on this claim the plaintiff had to prove -

(a) that.../20

(a) that Captain Prinsloo set the law in motion (instigated or instituted the prosecution);

(b) that he acted without reasonable and probable cause; and

(c) that he was actuated by an improper motive (malice).

(Beckenstrater v. Rottcher and Theunissen (supra) at pp. 133 to 135, Van Der Merwe v. Strydom 1967 (3) S.A. 460 (A) at p. 467 and Lederman v. Moharal Investments (Pty.) Limited 1969 (1) S.A. 190 (A) at p. 196.)

In stating the requirement under paragraph (c) above, dealing with the last of the three elements that have to be established, I have not overlooked the statement by Wessels,J.A., in Moaki v. Reckitt and Colman (Africa) Ltd. and Another 1968 (3) S.A. 98 (A) at pp. 103 to 104 to the effect that in actions of this nature the plaintiff's remedy is provided under the actio injuriarium, from which it follows that what has to be alleged and established is animus injuriandi,

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See also the remarks of Jansen, J.A., in Lederman v. Moharal Investments (Pty) Ltd. (supra) at the bottom of page 196 and McKerron :The Law of Delict, 7th Edit. page 263 footnote 32. Inasmuch, however, as the issues on appeal can, in the present case, be decided without considering the third of the required elements (malice or animus injuriandi) there is no need to discuss this aspect of the matter.

The initial enquiry is whether, on all the facts of the case, it can be said that Captain Prinsloo either instigated or instituted the prosecution. What is involved in such an enquiry was stated as follows by Gardiner, J., in Waterhouse v. Shields 1924 C.P.D. 155 at p. 160:

> "The first matter the plaintiff has to prove is that the defendant was actively instrumental in the prosecution of the charge. This is a matter more difficult to prove in South Africa, where prosecutions are nearly always conducted by the Crown, than it is in England, where many cases are left to the private prosecutor. Where a person merely gives a fair statement of the facts to the police, and leaves it to the latter to take such steps thereon as they deem fit, and does nothing more to identify himself with the prosecution, he

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> is not responsible, in an action for malicious prosecution, to a person whom the police may charge. But if he goes further, and actively assists and identifies himself with the prosecution, he may be held liable. 'The test,' said BRISTOWE,J., in Baker v. Christiane,1920 W.L.D. 14, 'is whether the defendant did more than tell the detective the facts and leave him to act on his own judgment! "

This passage, as well as the following passage from the judgment of Price,J., in Madnitsky v. Rosenberg 1949 (1) P.H. J5, were quoted with approval by Jansen,J.A., in the Lederman case (supra) at p. 197. :

> "when an informer makes a statement to the police which is wilfully false in a material particular, but for which false information no prosecution would have been undertaken, such an informer 'instigates' a prosecution".

From the facts of the present case it is clear that the decision to prosecute was taken by the prosecutor, Mr. Kotze. The only question therefore is whether Captain Prinsloo did anything more than one would expect from a police officer, namely, to give a fair and honest statement of the facts to the prosecutor , leaving it to the latter to decide whether to prosecute or not.

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The finding of the learned trial Judge on this aspect was as follows:

> "In my judgment the evidence shows that the first defendant's (Captain Prinsloo's) activities and interests went a good way beyond the passive and submissive attitude described by Mr. Mostert, and that the information he put before the prosecutors was not in all respects honest. This aspect of the case overlaps to some extent the question of malice, and it will therefore be convenient to refer here to all the relevant facts on both aspects."

The learned Judge then dealt with the facts of the case, and, having done so, concluded

> "These are not the actions of a neutral police officer concerned only to put the facts before the prosecutors and to obtain a ruling. Throughout the first defendant manifested a keen and lively interest in the prosecution, and he was directly responsible for procuring the arrests on information which he himself did not believe."

Counsel for the appellants contended that the facts upon which the learned Judge relied, although perhaps indicative of an ulterior motive on the part of Captain Prinsloo, did not justify a finding that he did more than give a fair statement of the material facts to the prosecutors. Coun-

sel...../24

sel for the respondent, however, argued in support of the Judge's finding.

An appraisal of the facts mentioned by the learned Judge in this part of his judgment leads me to the conclusion that by far the majority thereof could have been relied upon only in so far as they tended to show that Captain Prinsloo was actuated by an ulterior motive. Indeed, many of the facts alluded to by him are concerned with events which took place after the prosecution had been instituted. In the premises I shall confine the present enquiry to an examination only of those matters relied upon by the learned Judge which can in any way be considered relevant to the institution of the prosecution against the plaintiff.

The first of the matters mentioned by the learned Judge is that Captain Prinsloo investigated the charge without any complaint having been made in regard thereto. The fact of the matter is, of course, that while making investigations with regard to other possible charges, Prinsloo obtained information concerning the loan made to

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the Plaintiff. I cannot see how the fact that he thought fit to investigate the matter can be relied on as demonstrating any improper conduct. He merely did what he considered to be his duty as a police officer.

Another matter mentioned in the judgment is that Prinsloo in the course of his investigations obtained from one Wallace, who was about to leave the employment of the company, a confidential document, namely a copy of counsel's opinion on Section 70 nov. of the Companies Act, which document he must have known to be confidential and privileged, and that he, acting in the execution of a search warrant, seized documents relating to the plaintiff which were not covered by the warrant. That he acted improperly in obtaining the opinion referred to above is clear, and he may also be faulted for having seized documents which he had no authority to seize. But that does not appear to me to bear on the matter under enquiry.

Then the learned Judge says the following:

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> "The first defendant's evidence is that he consulted Colonel Sherman, who advised him to refer to the Senior Public Prosecutor. It is true that Colonel Sherman's evidence was that he instructed the first defendant to see the Senior Public Prosecutor, but it is clear that this was meant as advice, for that is how the first defendant interpreted it. The first defendant in his evidence says that Colonel Sherman suggested to him that he should see the Senior Public Prosecutor. In the event he did not go to the Senior Public Prosecutor, but to Mr. Fourie, with whom he was working on the Lonrho case."

There is no evidence that Captain Prinsloo in any way attempted to persuade Mr. Fourie to institute a prosecution, indeed the testimony of Mr. Fourie is that he did not. Fourie thought fit to consult a senior prosecutor, Kotze, and it was the latter who decided that a prosecution be instituted.

Another fact relied on by the learned Judge is that Captain Prinsloo, in answer to a question by the plaintiff, stated on 27 September 1971 that he was the "complainant"; that he was "laying the charge". It would, of course, have been more correct to have said

that..../27

that he was the investigating officer and as such would submit the matter to the prosecutor, which on the evidence was what he in fact did. His inept description of his capacity and function, in my opinion, does not further the enquiry.

Another matter which the learned Judge mentions with regard to this aspect of the case is that

> "The first defendant (Captain Prinsloo) knew that the case against the Plaintiff and Raath was very doubtful, but he drafted applications for both warrants of arrest, and approached Mr. Fourie on 27 September, with the view to applying for warrants. Mr. Fourie's evidence was that the first defendant asked him to consider arresting Raath, and that that was the nature of the discussion with the first defendant. Mr. Fourie said that the first defendant gave him reasons why Raath should be arrested, and that this could be interpreted as persuading him to apply for the arrests."

I have some difficulty with the Judge's wording of this passage as a statement of fact. What Prinsloo did was to convey to Fourie certain information concerning Mr. Raath, which information was calculated to persuade, and

did...../28

did in fact persuade Fourie, that Raath should be arrested. What Prinsloo told Fourie cannot, however, be regarded as conveying the view that the plaintiff should be arrested. In any event, the discussion referred to in the above passage took place after the decision to prosecute had been taken. In so far as attention is drawn in the above passage to the fact that Prinsloo drafted the applications for warrants of arrest prior to the making of the decision to prosecute, I have already, for the reasons stated, indicated that that fact has no significance in the present enquiry.

The learned Judge also referred to what took place when Captain Prinsloo approached the plaintiff for a copy of the latter's contract of service and to the contents of an affidavit signed by Prinsloo as to what happened on this date. Even if, as the learned Judge found, Prinsloo's conduct on this occasion was "extraordinary" and that his affidavit was not a true reflection of what took place, I cannot see how the contents

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of the affidavit could in any way have influenced the prosecutors in their decision that a prosecution should be instituted. Indeed, on the evidence, they were not influenced thereby.

Finally, there is the following passage in the judgment:

> "In his interview with the prosecutors the first defendant, according to Mr. Kotze, put forward his views on the prosecution. That by itself might appear to take the case beyond the mere placing of facts before the prosecutors for their consideration and advice, but care must be taken not to ascribe too much significance to this point, since a police officer is surely entitled to offer his views to the prosecutor on whether or not an offence has been committed."

I agree with the learned Judge's statement that a police officer is entitled to express his views to the prosecutor on whether or not an offence has been committed (see R. v. Patel 1944 A.D. 511 at p. 519). No significance can, in my view, be attached to the fact that Captain Prinsloo did put forward his views to the prosecutors.

The above are the only facts referred to

by..../30

by the learned Judge which, in my view, can in any way be regarded as relevant to the present enquiry.

In view of what has been stated, it is my conclusion that, on the evidence, there was no justification for a finding that the information placed before the prosecutors by Captain Prinsloo went beyond an honest statement of the relevant facts on which the prosecution was instituted and that he left it to the prosecutors to decide whether a prosecution should be instituted or not. It follows that, in my judgment, the trial Court erred in holding that the plaintiff had established that Captain Prinsloo had instigated the prosecution, or, as alleged in the plaintiff's Particulars of Claim, that he had "preferred" the charge and "caused the prosecution of the plaintiff". The appeal on the malicious prosecution claim must therefore succeed in so far as both the appellants are concerned.

I turn now to the second claim, namely that of wrongful or malicious arrest. This claim was

particularized.../31

particularized as follows in the plaintiff's particulars of Claim:

" 7.

CLAIM B.

On or about the 30th September, 1971, and at Johannesburg, a prosecutor whose identity is to the Plaintiff unknown applied for a warrant for the apprehension of the Plaintiff on a charge of contravening Section 70 oct (4) read with Section 70 oct (1) of Act 46 of 1926 and pursuant thereto the Plaintiff was on the same day arrested by the First Defendant on the said charge.

8.

The aforesaid warrant for the apprehension of the Plaintiff and his arrest pursuant thereto were unlawful and without reasonable and probable cause.

9.

The First Defendant wrongfully and maliciously instigated the aforesaid application for a warrant for the apprehension of the Plaintiff and incited and/or encouraged the prosecutor to make such application."

In reply to a request for further particulars, it was alleged that the warrant for the apprehension of the plaintiff was "unlawful in that there was no reasonable and/or probable cause therefor".

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The trial Court found that the plaintiff was arrested by Captain Prinsloo on a warrant, the application for which was not justified inasmuch as there were no reasonable grounds for a suspicion that an offence under Section 70 oct. of the Companies Act had been committed.

It was contended on appeal that the trial Court erred in this regard and that, for that reason, the appeal on the claim for wrongful or malicious arrest should succeed.

Reasonable and probable cause means an honest belief founded on reasonable grounds that the institution of proceedings is justified. The concept involves both a subjective and an objective element (Beckenstrater v. Rottcher and Theunissen (supra) at p. 136 B and the English case Glinkski v. McIver (1962) A.C. 726 at p. 768).

In the judgment of the Court a quo, the learned trial Judge, after having referred to several decisions dealing with the concept of reasonable and probable

cause ...../33

cause (including May v. Union Government 1954 (3) S.A. 120 (N)), dealt with the evidence of the three prosecutors, Kotze, Fourie and Nel. The evidence of each of them was to the effect that they, at the time when the matter was considered by them, believed that the facts placed before them constituted a contravention of section 70 oct. of the Companies Act. Although they expressed themselves differently, their explanations were in effect and substance the same, namely, that the loan to the plaintiff was one of the conditions of his appointment as Managing Director of the company; that it was intended that he would, and that he in fact did, enjoy the benefit of the loan in his capacity as Managing Director, and that, in their view, the object of the section in question was to prohibit such a loan being made. They conceded that, on the facts, it was at all times clear to them that the sum of R35 000-00 was paid to the plaintiff on 22 December 1970, some two to three weeks before his appointment as Managing Director took effect, whereas the section, the provisions of which they were aware of at the time,

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in clear terms speaks of a loan which is made by a company to a person who "is its director". But they explained that, in their opinion, the mere fact that the money was paid over before the plaintiff's appointment took effect, did not alter the legal position as they saw it. It would have been different, they said, if there had been no connection between the loan and the appointment as a diredtor (for example where a person, who is a debtor of a company in respect of a loan, later becomes a director of that company) but that was not the position in the instant case. The making of the loan to the plaintiff was one of the conditions of appointment, and was therefore causally linked with his appointment. In this regard it is important to bear in mind that, in terms of the plaintiff's letter of appointment, the loan would take effect on assumption by him of the position of Managing Director on 1 January 1971. The prosecutors were not then aware of the particular reasons for payment of the amount of the loan before 1 January 1971. That was only disclosed

by...../34 (a)

by the plaintiff in a statement made by him to the Attorney General after his arrest.

After dealing with the evidence of the prosecutors, the learned trial Judge states in his judgment:

> " I can understand the initial view of the first defendant and of the prosecutors that the loan was associated with the agreement to take up employment as a director at a later date, but that is not what the section prohibits. The prohibition is against a loan to a person who is a director. There is no prohibition against a loan to a person

who...../35

who is not a director, but who has agreed to become one at a future date. Compare section 226 (1) of the new Companies Act, No.61 of 1973, which is not yet in force, and which prohibits loans to 'future directors'. The case was simply one in which the plaintiff had agreed with the company that if it lent him R35 000 forthwith to repay a debt which he owed to some other person, he would undertake to go on its board of directors at a future date."

"This was not the type of case in which a prosecutor applies for a warrant on the basis of a doubtful view of the law. Broome,J.P. discussed that position in May's case (supra) at page 128D. It is not necessary to decide whether the proposition formulated by Broome,J.P. should be applied here, because in the present case there was no difficulty on the law. It was accepted by all the prosecutors that section 70 oct (1) means what it says, and therefore that there is no contravention unless the person who receives the loan is a director at the time. The query dealt with by the first defendant and the three prosecutors was not on the interpretation of section 70 oct (1), but simply whether the facts fell within the ambit of the prohibition. What they did was to place an interpretation on the facts which was inconsistent with the information before them, and that interpretation was put forward in the application for the warrant. The warrant was therefore procured in fraudem legis."

I find great difficulty in understanding the

learned...../36

learned Judge's reasoning which led to the conclusion that "this was not the type of case in which the prosecutor applies for a warrant on the basis of a doubtful view of the law" and that "what they (the prosecutors) did was to place an interpretation on the facts which was inconsistent with the information before them".

The true facts were always known to the prosecutors and those facts were such that there was no need to interpret them. What the prosecutors did have some doubt about was whether those facts constituted an offence under section 70 oct. In essence the problem which faced them was whether the section prohibited a loan such as was made under the particular circumstances of the instant case. Their view of the matter was, for the reasons which I have already mentioned, that it did.

Viewing the matter objectively, I am not persuaded that it was unreasonable for them to have come to the conclusion to which they did. Their decision, although it may not have been a correct decision, is understandable and not un-

reasonable...../37

reasonable. Even courts of law often differ as to the construction and application of statutory provisions.

It was however contended before us by counsel for the respondent (the plaintiff) that, inasmuch as the prosecutors were wrong (so counsel submitted) in their conclusion that the known facts constituted an offence, it must be held that they acted without reasonable and probable cause. In support of this proposition counsel relied on MacKenzie v. Hyam Vol 8 N.S.W. 587, Union Government and Another v. Bolstridge 1929 A.D. 240 and on certain passages in the judgment of Broome,J.P., in May v. Union Government (supra).

MacKenzie v. Hyam was a case where a prosecution was instituted against the mayor of a town (South Shoalhaven in Australia) for neglecting to prosecute a council clerk for embezzling municipal funds. No such offence existed. In the case of Union Government v. Bolstridge, the plaintiff was arrested without a warrant in Natal for being in possession of rough and uncut diamonds. There was no such offence under the laws of Natal at that time.

May...../38

May v. Union Government was a case where the plaintiff, who had been arrested on a charge of falsity, claimed damages for wrongful arrest. Broome, J.P., found that, although there was evidence of acts of preparation pursuant to a dishonest scheme, the offence of falsity had not been committed and stated

> "(The prosecutor) had ample ground for suspecting that plaintiff was a party to the dishonest scheme. But as plaintiff's action, known or suspected, did not in law amount to the offence of falsity, there were no reasonable grounds for suspicion."

In the course of his judgment Broome, J.P., referred to the cases of Union Government and Another v. Bolstridge (supra) and Mackenzie v. Hyam (supra) and also to the following passage in the judgment of Gardiner, J., in Waterhouse v. Shields (supra) at p. 168,

> "A person must be presumed to know the law, and when he says he believes that someone was guilty of theft, he must be taken to mean theft as the law interprets the term. A man cannot be heard to say that he believed someone to be guilty of theft because he thought that failure to pay a debt was theft."

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The learned Judge (Broome, J.P.) then stated

> "In my view, the position can be stated in this way. The official who desires to apply for a warrant for the arrest of a person in respect of a particular offence must first ask himself, 'what are the facts?' Some of the facts he will know to be true; others he may only suspect. He is entitled to take into account the suspected facts, provided his suspicion is reasonable. When he has the full picture, he must ask himself: 'Do these facts, known and reasonably suspected, amount in law to the offence in question?' If they do, his suspicion that the offence has been committed is a reasonable one, and he may safely apply for the issue of a warrant, provided, of course, that he has sufficient information taken on oath. But if the facts, known and suspected, do not amount in law to the offence in question his suspicion that the offence has been committed cannot be said to be a reasonable suspicion."

And later

> "It may be objected that this view of the law places an intolerable burden upon prosecuting authorities in that they must, at their peril, come to a correct conclusion of law before they apply for a warrant of arrest. What of cases where the facts are known with certainty but a genuine doubt exists as to whether those facts constitute an offence? Are suspected persons, in such cases, to be allowed to be at large, however serious the offence which their conduct is believed in law to constitute? There are two answers. First, even if the burden upon prosecuting authorities is heavy, the subject's

right ..../40

> right to personal liberty requires that the burden should be imposed. It would be intolerable that a man should be arrested and kept in custody while the Courts were deciding upon the state of the law. Second, there is always the alternative procedure by way of summons; where there is doubt about the law, that would surely be the appropriate method. For it must be remembered that a prosecutor who is in doubt about the law would be quite safe in instituting proceedings by way of summons, provided only that he was free of malice. The danger only arises where he applies for a warrant for the accused's arrest."

As I read the above passages they can mean only one thing, and that is that, if the facts (known and suspected) do not in law amount to an offence, then it cannot be said that there are reasonable grounds for suspicion. I cannot, with respect, agree with that view. As a general proposition, it is, in my view, not a correct statement of the law. In effect it amounts to a restrictive application of the concept of reasonable and probable cause as embodied in section 28 of the Criminal Procedure Act. If the principle laid down by Broome, J.P., were to be accepted as a correct statement of the law, then not only would the operative effect of section 28

be severely restricted, but surprising results could follow. Take, for example, the case of a statutory provision (creating an offence) which has been interpreted by the courts in a certain manner. A prosecutor, relying on that interpretation, applies for a warrant for the arrest of a person suspected of having contravened the section. In so doing, he takes the risk of being held liable in a civil claim for damages should another court place a different contruction on the section.

Indeed, acceptance of the principle stated by Broome,J.P., would, so it seems to me, exclude entirely the possibility of a defence based on reasonable and honest belief in the correctness of competent legal advice taken. (See in this regard Glinkski v. McIver (supra) at pp. 744 to 745 and Malz v. Rosen (1966) 2 All. E.R. 10)

In my view the test of reasonable and probable cause, in so far as the subjective element as well as the objective element is concerned, is not limited to the factual situation, but extends

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also to the other aspect, namely, whether the facts (known and suspected) constitute an offence in law. And, in applying that test, each case must be considered on its merits.

In the instant case it was contended by counsel for the respondent that there were indeed good grounds for concluding that, on a subjective view of the matter, the prosecutors, Kotze and Fourie, did not honestly believe that there was a contravention of section 70 oct. He based this contention mainly on the fact that they had difficulty in the witness box in formulating and particularizing a proper charge and that, when it was put to them that, on the wording of the section, a loan to a person who had not yet become a director, was not expressly prohibited, they attempted to justify their original views on bases which were not consistent with the facts.

Although there is substance in some of counsel's criticisms of these witnesses, I am not

satisfied..../43

satisfied that there is justification for holding that either Kotze or Fourie did not honestly believe that there was a contravention of section 70 oct.

I turn now to another ground upon which the validity of the warrant for arrest was attacked at the trial. The nature of this ground appears from the following passage in the judgment of the learned trial Judge:

> "Mr. Maisels, for the plaintiff, attacked the application for the warrant on the further ground that, on an essential aspect of the charge, false information had been put before the Magistrate. It was an essential element of the charge that the plaintiff was a director at the time of the loan. According to the application, from information taken on oath there were reasonable grounds of suspicion that the plaintiff committed the offence during the period between 7th January, 1971, and 23rd July, 1971. But the first defendant, who drafted the application, and Mr. Fourie, who signed it, knew full well that the information before them was that the loan had been made before the earlier of those dates and at a time when the plaintiff was not a director. I do not wish to suggest that an application for a warrant requires the recital of details, but it seems to me where there would only be an offence if the transaction took place after a certain date, and where it is known that the transaction in fact took place before that date, it would be wholly improper to apply for a warrant on the basis that the transaction

took.../44

took place subsequent to that date. The effect in the present case is that the exercise of the Magistrate's discretion to issue a warrant was procured on an allegation which was not true."

In my view, the pleadings preclude the plaintiff from relying on this ground of attack. In any event, there is, in my opinion, no substance in the point sought to be made by counsel, which rested, as it appears to me, on a misunderstanding of the requirements of section 28 of the Code. When a prosecutor decides to apply for a warrant of arrest, he may, in support of his application, either state in writing that "from information taken on oath" (which would be information contained in statements already obtained) that there "are reasonable grounds of suspicion" that the person referred to in the application, has committed the offence mentioned in the application, or he may produce witnesses to testify to the like effect on oath before the Magistrate. If he follows the first-mentioned procedure, he need not set out the facts upon which he relies for his conclusion that there are reasonable grounds of suspicion, and the Magistrate to whom application is made is not called upon to consider the correctness of the prosecutor's conclusion.

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In stating in the application that the offence was committed "during the period 7.1.1971 to 23.7.1971" neither Prinsloo (who drafted the application) nor Fourie (who signed it) could have intended to mislead the Magistrate, nor is there any reason for believing that he was in fact misled.

In view of the above conclusions, namely, that there was reasonable and probable cause on the part of the prosecutors as to the commission of an offence, and that the warrant was not defective in any other respect, the claim for wrongful arrest could not succeed. Indeed, in so far as the claim for wrongful arrest against Prinsloo is concerned, the warrant is in itself a complete defence. Divisional Commissioner S.A. Police and Others v. S.A. Associated Newspapers Ltd. and Another, 1966 (2) S.A. 503 (A) at pp. 511 to 512 and Groenewald v. Minister van Justisie 1973 (3) S.A. 877 (A) at p. 883/4. (With regard to the lastmentioned case, I should mention that the statement at p. 883 H of the report that "hy (the Magistrate) moet die gronde waarop die Staatsaanklaer steun, oorweeg..." is not a correct statement of the requirements of section 28. As I have

already...../46

already stated, the Magistrate is not called upon to consider the correctness of the prosecutor's conclusion with regard to reasonable grounds of suspicion. But that does not mean that the Magistrate does not exercise a discretion in considering whether to issue a warrant. He must satisfy himself that the alleged offence is an offence in law, and that it is of such a nature and gravity as to justify the issue of a warrant.)

The alternative claim for malicious arrest remains to be considered. The trial Court rejected the evidence of Captain Prinsloo on several aspects of the case. The Court found him to be an unreliable witness. I agree with that finding. Indeed, it is clear that on at least one aspect, namely, his reasons for seeking the arrest of Mr. Raath, he made a false statement in a written report to the Commissioner of Police. The trial Court found, as I have already mentioned, that his statement to the prosecutors that Mr. Raath could have more than one passport, was false. There is no need to consider the correctness of this finding, in view of the assumption on which counsel for the appellant argued the appeal.

The question to be considered is whether a case of malicious arrest of the plaintiff was made out.

As I have already stated, the reasoning of the trial Court was that, in conveying to the prosecutors certain false information concerning Raath, Prinsloo must have foreseen, and did foresee, that if Raath were to be arrested on the strength of that information, then the plaintiff would also be arrested. That is a rather slender basis for a finding that Prinsloo instigated the application for a warrant for the arrest of the plaintiff, as alleged in the pleadings. The fact is that Mr. Fourie made the decision to apply for the warrant and that he did so for reasons of his own. But, be that as it may, the plaintiff's claim for malicious arrest should have been dismissed also for another reason, namely, that, as I have already found, it was the prosecutors who decided to prosecute, and the plaintiff failed to establish want of reasonable and probable cause on their part. They having made the decision, Prinsloo was obliged to act in accordance therewith.

The appeal with regard to the claim for wrongful or malicious arrest must therefore also succeed in so far

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as both the defendants are concerned.

In conclusion I wish to state that this is indeed an unfortunate case. That the prosecutors may have acted properly and well within their rights in preferring a charge is one thing. That the plaintiff was arrested is another. In my view, although an arrest of the plaintiff was permitted by law, there was indeed no need to have resorted thereto, not only in view of the nature of the charge but also in view of the person concerned.

The appeal is allowed with costs, including the costs of two counsel. The order of the Court a quo is altered to read

> "Judgment for the defendants with costs, including the costs of two counsel."

G.v.R.Muller, J.A.

Rumpff, C.J.)
Botha, J.A.) Concur.
Rabie, J.A.)

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

CAPTAIN J.M. PRINSLOO.....First Appellant

THE GOVERNMENT OF THE
REPUBLIC OF SOUTH AFRICA.....Second Appellant

and

SYDNEY CHARLES NEWMAN.....Respondent

Coram: Rumpff, CJ, Botha, Wessels, Rabie et Muller, JJ A.

Heard: 5 and 6 September 1974

Delivered: 22 September 1974

J U D G M E N T

WESSELS, JA:

The issues which arise for determination by this Court, and the facts relevant thereto, are set out in the judgment of Muller, J.A. I agree with his conclusion that, in so far as both appellants are concerned, the appeal succeeds in so far as damages were awarded

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in respect of the claims based on malicious arrest and malicious prosecution. For the reasons which follow I am, however, of the opinion that plaintiff was, as against second appellant, entitled to a judgment awarding him damages in respect of his claim based on wrongful arrest.

In this case a magistrate issued the warrant for plaintiff's arrest pursuant to a written application made to him by a public prosecutor (Mr. Fourie) in terms of the provisions of section 28(1) of Act No. 56 of 1955 (hereinafter referred to as the Code). In so far as it is material hereto, the subsection reads as follows:

> "Any judge of a superior court or any magistrate or justice may issue a warrant for the arrest of any person or for the further detention of a person arrested without a warrant on a written application signed by the attorney-general or by the local public prosecutor or any commissioned officer of police, setting forth the offence alleged to have

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been committed and that, from information taken upon oath, there are reasonable grounds of suspicion against that person, or upon the information to the like effect of any person made on oath before the judge or magistrate or justice issuing the warrant."

In so far as the "setting forth" of the offence alleged to have been committed is concerned, the application reads:

"c/s 70 oct(4), read with (1) of Act 46 of 1926 (as amended) - Unauthorised loan to Director."

The material portion of the section in question reads as follows:

"It shall not be lawful for a company to make a loan of money.....to any person who is its director or a director of its holding company....."

The Afrikaans text reads as follows:

"Dit is nie wettig vir 'n maatskappy om 'n lening van geld.....aan 'n persoon toe te staan wat sy direkteur of 'n direkteur van sy kontrolerende maatskappy is nie....."

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The application contains the following statement:

> "there being from information taken upon oath reasonable grounds of suspicion against him that he committed the alleged offence.....During period 7.1.1971 to 23.1.1971."

The plaintiff's case on the pleadings was that the warrant in question "was unlawful in that there was no reasonable and/or probable cause therefor". First appellant's liability was based on the averment that he had "wrongfully and maliciously instigated the aforesaid application for a warrant for the apprehension of the Plaintiff and incited and/or encouraged the prosecutor to make such application". The second appellant's liability was based on the acts of Mr. Fourie, a servant of the State, acting "within the scope of his duties as such". The defence pleaded on appellants' behalf was that "the warrant and the consequent arrest were lawful and for good and reasonable cause". In so far as first appellant is concerned it was pleaded in the alternative, inter alia,

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that, in the event of the Court finding that the warrant was irregularly issued, it was issued "without any malice or instigation on the part of" first appellant.

In so far as the case against first appellant, Captain Prinsloo, is concerned, it appears from the evidence of Mr. Fourie, in the passage quoted by Muller, J.A., that he (Fourie) decided to apply for a warrant for the apprehension of plaintiff because he saw no reason for distinguishing between plaintiff and Raath, notwithstanding the fact that Prinsloo told him that he had no information indicating that plaintiff might not attend his trial. To my mind that ought to have been sufficient indication to Fourie that a warrant for plaintiff's apprehension was quite uncalled for in the circumstances. But this evidence also negatives plaintiff's complaint that Prinsloo had instigated the application for a warrant or had in any way incited or encouraged Fourie to make it.

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The role played by Prinsloo in regard to Raath's arrest was, for obvious reasons, quite different from that played by him in regard to plaintiff's arrest. It appears from the evidence that Prinsloo was intent on securing an order impounding Raath's passport in order to facilitate his investigations beyond the borders of the Republic. He had no such motive in mind as far as plaintiff was concerned.

Before considering whether the warrant in question was wrongfully issued, I propose referring to certain legal principles relevant to the issue thereof which were discussed in two decided cases, namely, May v. Union Government, 1954(3) S.A. 120 (N) and Groenewald v. Minister van Justisie, 1973(3) S.A. 877 (A.D.).

In May's case, Broome, J.P., in dealing with the provisions of section 34 of Act 31 of 1917, which correspond with those of the section now under consideration (i.e., section 28 of the Code) concluded at p.125B, that section 34 "does not prescribe as an essential prerequisite of the

issue.....7/

issue of a warrant that all the material facts necessary to obtain a conviction should have been deposed to on oath". This passage should, however, not be read without regard to the context in which it appears. The learned Judge-President makes it clear that regard may be had to all the known facts, whether deposed to on oath or not, in order to determine whether the information on oath gives rise to a reasonable suspicion that the person to be apprehended is guilty of the crime set forth in the application for a warrant. The essential facts on which the application for a warrant is based, must never-the-less appear "from information taken upon oath". The requirement that the application should be based on "information taken on oath", is specifically designed to protect persons against the deprivation of their liberty on information, the truth of which is not supported by the sanctity of the oath of the person furnishing that information. In my opinion, the alternative procedure provided

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for in section 28 of the Code furnishes support for the conclusion that the Legislature contemplated that information upon which the application for a warrant is substantially based should be taken on oath in order to protect persons against the possibility of an unjustified invasion of their liberty. The section provides, firstly, that the application must set forth that "from information taken upon oath, there are reasonable grounds of suspicion" against the person named in the warrant. It is, however, further provided that the person issuing the warrant may also act "upon the information to the like effect of any person made on oath" before him. If the last-mentioned procedure were to be followed, the applicant would be required to satisfy the person to whom the application is addressed by means of oral evidence on oath that there are "reasonable grounds of suspicion" that the person named therein has committed the offence set forth.

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Where the applicant for a warrant employs the first-mentioned procedure he may,no doubt, also have regard to facts which are notorious or within his personal knowledge. He may also have regard to the guidance afforded by decided cases and the opinions expressed by authors in text-books in considering whether the information on oath gives rise to a reasonable suspicion that the person to be arrested is guilty of an offence. It would also be correct for the applicant for a warrant to give consideration to facts, not deposed to on oath, which tend to negative the conclusion that there is a reasonable suspicion that the person whose arrest is under consideration has committed an offence. I emphasize, however, that in the ultimate result, the question whether reasonable grounds of suspicion exist, must be determined with due regard to "information taken upon oath".

At p.127F - G of the above-cited report of May's case, the learned Judge-President stated it as his opinion that

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if the facts, known and suspected by the applicant for a warrant, do not in law amount to the offence set forth in the application, his suspicion that the offence has been committed cannot be said to be a reasonable suspicion. I am in respectful agreement with Muller, J.A., that the opinion expressed by the learned Judge-President requires qualification. As I have already pointed out, section 28 of the Code requires the applicant for a warrant to set forth "the offence alleged to have been committed". The issue of a warrant is only justified if the "information taken upon oath" discloses reasonable grounds of suspicion that the person to be arrested is guilty of "an act or omission punishable by law", the nature of which is required to be set forth in the application for the warrant (vide the definition of "offence" in section 1 of the Code).

If regard is had to the various provisions in chapter IV of the Code dealing with the circumstances in which

suspected.....11/

suspected offenders may be arrested, either without or with a warrant, it will be noted that the Legislature was indeed intent upon ensuring that the power of arrest should only be exercised where the relevant information reasonably gives rise to a suspicion that the person to be arrested is guilty of an act or omission punishable by law. It is noteworthy that good faith on the part of the person applying for the issue of a warrant or carrying out an arrest pursuant thereto, is not, without more, regarded as a sufficient justification for the invasion of the liberty of the arrested person. In every case the honest belief must be founded on reasonable grounds. See, inter alia, the provisions of section 31 and 32 of the Code. In the case of section 28, additional safeguards are provided, e.g., by limiting the class of persons who may issue warrants and those who may apply in writing for the issue thereof. Moreover, as pointed out above, the

information.....12/

information relied upon by the applicant must be taken on oath.

The applicant for a warrant is required to consider the available information in order to determine whether it discloses that the person concerned is guilty of "an act or omission punishable by law". It must, however, be borne in mind that the applicant is authorised to make the application if the information discloses "reasonable grounds of suspicion" that the person concerned is guilty of "an act or omission punishable by law". It is not required that the suspicion should eventually prove to have been well-founded. It is, in my opinion, sufficient if the available information is such that it could reasonably give rise to the suspicion entertained by the applicant. The applicant is required to entertain a <u>suspicion</u> that an offence has been committed; he is not required to consider whether the information demonstrates with certainty

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that an offence has been committed by the person mentioned in the warrant. In order to determine the question, the applicant must consider the facts and the law. To that end, he may avail himself of competent legal advice. Ultimately, however, the responsibility of deciding whether the application is to be made is that of the applicant himself. If, in all the circumstances, it appears that the suspicion of the applicant was honestly entertained by him, and is one which the available information could reasonably give rise to, the application falls within the terms of section 28. The question is : was the suspicion reasonably entertained, and not, was it rightly entertained by the applicant?

The question arises whether or not the magistrate, who considers and decides upon the application for a warrant, exercises a discretion of a judicial nature. In Groenewald's case (supra), at p.883H - 884B, the following passage appears:

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"Deur art.28(1) van die Strafproseswet, wat die landdros met die bevoegdheid beklee om 'n lasbrief uit te reik, lê die Wetgewer 'n verantwoordelikheid op dié beampte om 'n diskresie uit te oefen; hy moet die gronde waarop die Staatsaanklaer steun, oorweeg en hy kan op grond daarvan of op grond van inligting met dieselfde strekking deur iemand onder eed afgelê voor hom, 'n lasbrief uitreik. By die uitreiking van die lasbrief oefen die landdros 'n diskresie uit. Die bona fide uitoefening van sodanige diskresie is nie by wyse van objektiewe benadering deur 'n Hof beregbaar nie. (Sien, Shidiack v. Union Government, 1912 A.D. 642 op bl.651). Dit sou volg dat daar geen onus op die verweerder rus om te bewys dat redelike gronde wel bestaan het nie. (S.A. Police, Divisional Commissioner of Witwatersrand v. S.A. Associated Newspapers Ltd., 1966(2) S.A. 503 (A.D.) op bl.511). Hierdie beslissing het gegaan oor 'n visenteerlasbrief wat uitgereik was ingevolge die bepalings van art.42(1) van die Strafproseswet wat nie wesentlik van art. 28(1) verskil wat betref die gronde vereis vir 'n aansoek om 'n lasbrief en wat betref die verantwoordelikheid wat die wetgewer gelê het op die uitreiker van die lasbrief om 'n diskresie uit te oefen nie."

Upon.....13/

Upon reconsideration of the provisions of sections 28 and 42 of the Code, it would appear that in Groenewald's case, the Court did not give sufficient weight to the fact that there are certain material differences between them, particularly in so far as the function of the person issuing the warrant is concerned. In terms of section 42, the person who is empowered to issue a search warrant considers the "complaint made on oath" before him, and it is his function to determine whether the information placed before him discloses "reasonable grounds for suspecting" that there is "upon any person or upon or at any premises....." the articles detailed in paragraphs (a), (b) and (c) of section 42(1) of the Code. In determining whether reasonable grounds for suspicion exist, the person considering whether the issue of a search warrant is justified, exercises a discretion of a judicial nature which is not justiciable in a court of

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law, save in very exeptional circumstances. See, S.A. Police v. S.A. Associated Newspapers, 1966(2) S.A. 503 (A.D.) per Beyers, A.C.J., at p.511H - 512A.

In terms of section 28(1) of the Code, the person considering an application for the issue of a warrant is, in my opinion, not required to consider "the information taken upon oath" on which the applicant relies, and to determine whether in his opinion it discloses reasonable grounds for suspicion against the person to be arrested. It is primarily his function to consider whether the application complies with the provisions of section 28(1), e.g., whether there is set forth therein an offence (i.e., an act or omission punishable by law) and a statement by the applicant "that from information taken upon oath, there are reasonable grounds of suspicion against" the person named in the application. He must also satisfy himself that the applicant is empowered by the section to make the application. In regard to

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these matters the person considering the application does not, in my opinion, exercise a discretion of a judicial nature. It may well be that the magistrate has a limited discretion to refuse the application, e.g., where the offence set forth is of such a trivial nature as to render the issue of a warrant utterly unreasonable. But even this discretion could hardly be characterised as judicial. As I have already pointed out above, the terms of section 28(1) require the applicant for a warrant to consider the "information taken upon oath" and to determine whether it discloses reasonable grounds for suspicion. It is the applicant's conclusion as to that which is set forth in the application. It must be borne in mind that the applicant will in every case be a responsible State official (either an attorney-general, a local prosecutor or a commissioned officer of police).

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In the circumstances of this case, it is unnecessary to consider whether the person issuing the warrant exercises a discretion of a judicial nature where the applicant places information before him in the form of evidence on oath.

I revert to the facts of this appeal. The decision to prosecute was taken by Mr. Kotze. Mr. Fourie decided to apply for a warrant for plaintiff's apprehension and signed the written application therefor. If the suspicion entertained by him was bona fide and based on reasonable grounds, he was empowered to apply for the issue of a warrant. His decision to bring the plaintiff before a court by means of a warrant of arrest rather than by way of a warning or summons was, to say the least, unreasonable in the circumstances, particularly since he had no reason to believe that a summons or a warning would not be an effective method of securing plaintiff's attendance before a court. This circumstance, however, does not affect the lawfulness of the issue of the warrant in question.

Mr. Fourie.....19/

Mr. Fourie no doubt honestly entertained the suspicion set forth in his written application. But that is, of course, not the end of the matter. The crucial enquiry is whether the information available to him could reasonably give rise to the suspicion entertained by him. The test is an objective one. It appears from the evidence led at the trial that many minds were anxiously brought to bear on the question whether or not the available information established reasonable grounds for suspecting that plaintiff was a party to a contravention by the company of the provisions of section 70 oct.(1) of the Companies Act, No. 46 of 1926. The first enquiry obviously was whether the information in question reasonably gave rise to a suspicion that the company committed an offence. The offence in question is of a very simple and uncomplicated nature: "It shall not be lawful for a company to make a loan of money.....to any person who is its director....." If it appears that the company

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has contravened the provisions of section 70 oct.(1), plaintiff could be prosecuted by virtue of the provisions of section 70 oct.(4), which, in so far as material hereto, reads as follows:

> "In the event of any default in complying with the provisions of sub-section (1), every officer of the company who authorizes or knowingly permits or is party to the default shall be guilty of an offence....." (My underlining).

What did the available information disclose regarding the question whether or not the company contravened the provisions of section 70 oct.(1)? In my opinion it established no more than that prior to 22 December 1970 representatives of the company (messrs. Ball and Rowland) and plaintiff entered into an agreement in terms of which he was to become a director of the company as from the beginning of 1971. It was, in so far as material hereto, also agreed that the company would "take over a housing loan of R35 000", which plaintiff had with Rand Mines Ltd. The available information also established that in pursuance of the agreement the

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amount of R35 000 was advanced to plaintiff on 22 December 1970. At that time, plaintiff was not a director of the company. After becoming a director of the company, plaintiff remained a debtor until the loan was repaid on 23 July 1971. Having regard to the abovementioned available factual material, it is not a matter for surprise that everybody who brought his mind to bear on the question whether or not it disclosed a contravention by the company of the provisions of section 70 oct.(1) was, initially at any rate, quite uncertain as to the answer to that question. Captain Prinsloo was uncertain and consulted Lt. Col. Sherman who, himself being uncertain, directed that the matter be referred to the Senior Public Prosecutor. Capt. Prinsloo, however, consulted Mr. Fourie who, being uncertain, conferred with two colleagues, one of whom (Mr. Kotze), was the Acting Senior Public Prosecutor. The latter obtained a copy of plaintiff's letter of appointment dated 23 December 1970, which confirmed the fact that the

agreement.....22/

agreement to make the loan to plaintiff was concluded prior to 22 December 1970. On the basis of this information Mr. Kotze decided to institute a prosecution against both Raath and plaintiff. He must presumably have satisfied himself that the available information disclosed, prima facie at any rate, that the company had, in contravention of section 70 oct.(1), made a loan of money to a person who was at the relevant time its director (i.e., plaintiff), and that plaintiff had, therefore, contravened the provisions of section 70 oct.(4), in that at the time of the company's default, he was an "officer" thereof (i.e., a director) who had either authorized, knowingly permitted or was a party to the loan transaction in question. Such a conclusion was in direct conflict with the information placed before both Mr. Kotze and Mr. Fourie. The plain and simple facts before them were that the company agreed to make a loan of money to plaintiff

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and advanced the amount agreed upon to him at a time when he was not a director nor an "officer" of the company in any other capacity. In my opinion, therefore, the available factual material afforded no reasonable grounds for suspicion either that the company had contravened the provisions of section 70 oct.(1) or that plaintiff had contravened the provisions of section 70 oct.(4). The public prosecutors may, no doubt, have entertained an honest suspicion that plaintiff had committed the offence mentioned in the application for a warrant. However, as I have stated above, the evidence led at the trial disclosed that there were no reasonable grounds for that suspicion. Mr. Fourie consulted two of his colleagues. It appears abundantly from the evidence led at the trial that neither Mr. Kotze nor Mr. Nel were sufficiently qualified, nor did they seek to qualify themselves properly,

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to express any reliable opinion on the question whether or not the available information reasonably gave rise to a suspicion that plaintiff was guilty of the offence set forth in the application for the warrant. It follows, in my opinion, that the issue of the warrant and the arrest of plaintiff pursuant thereto, were not justified by the terms of section 28 of the Code. In so far as Capt. Prinsloo (first appellant) is concerned, he was required to execute the warrant in terms of the peremptory provisions of section 29 of the Code. In terms of section 31 of the Police Act (No. 7 of 1958) the production of the warrant in question entitled him to judgment in his favour in respect of the claim based on wrongful arrest.

In view of the fact that this is a minority judgment, I do not propose undertaking the exercise of determining the amount of damages which the Court a quo ought to have awarded plaintiff in respect of the claim based on wrongful arrest.