THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable
Case no: 472/05

In the matter between:

RELYANT TRADING (PTY) LIMITED **APPELLANT**

and

S P SHONGWE **FIRST RESPONDENT**

MINISTER OF SAFETY & SECURITY **SECOND RESPONDENT**

Coram: CAMERON, NUGENT, MLAMBO JJA *et* COMBRINCK, MALAN AJJA

Date of hearing: 7 September 2006

Date of delivery: 26 September 2006

Summary: Liability for wrongful arrest and malicious prosecution – grounds for – reasonable and probable cause

Neutral Citation: This judgment may be referred to as Relyant Trading (Pty) Ltd v Shongwe [2006] SCA 111 RSA

JUDGMENT

MALAN AJA/…

MALAN AJA:

[1] This is an appeal with the leave of this court against a judgment and order of Legodi J upholding the claims of the plaintiff, Mr Shongwe, against the appellant trading as ‘Geen and Richards’, arising out of his arrest, detention and prosecution and awarding damages to him. The claims against the second respondent (the ‘Minister’) were dismissed. Mr Shongwe does not appeal that outcome and abides the decision of this court regarding Geen and Richards’ appeal. This appeal therefore concerns the liability of Geen and Richards only.

[2] The claims have not been elegantly pleaded but it is nonetheless clear, and that was the basis upon which the matter was argued in this court, that two separate claims were pleaded. The third claim was dependent on the success of either of the first two claims, but it need not be considered for reasons that will become apparent. The main claims were for damages for wrongful arrest, and for malicious prosecution. These are two quite separate causes of action, each having its own discrete elements, but the pleadings tend to attribute some of the elements of one cause of action to the other, and in any event do not accurately reflect the elements of the respective causes of action. It is no doubt because the claims were inaccurately pleaded that the court a quo fell into the same error of incorrectly attributing elements of one cause of action to the other.

[3] The claims arise from events that occurred after a person who called himself Mr Makgabo purchased a computer from Geen and Richards. On 30 May 2002 Makgabo negotiated with Ms Mahlangu, a salesperson employed by Geen and Richards, to

purchase the computer, provided her with his identity document, an illegible copy of which was made, details of his employment, residential address and next of kin, and paid a deposit. Ms de Beer, a credit manager of Geen and Richards, confirmed these particulars and approved the hire purchase agreement which was concluded on the next day. The computer was duly delivered and signed for at the address provided. Makgabo, however, failed to make payment of any of the instalments and had left the residential address provided by him. The employment particulars proved to be false and Geen and Richards reported the matter to the police. On 24 August 2002 a fraud docket was opened and a warrant for the arrest of Makgabo was obtained. On 26 August 2002 Mahlangu observed Mr Shongwe passing the Geen and Richards store; convinced that he was the purchaser, Makgabo, she approached Ms de Beer and pointed out Mr Shongwe to her. They followed him and enquired about his identity. They had a discussion, the particulars of which are in dispute, and Mr Shongwe informed them that he would return to their store with his identity document to prove that he was not Makgabo. He returned later that morning only to be arrested by Inspector du Plessis and taken to the police station where he was handed over to Inspector Sishange, the investigating officer, who interviewed him and caused him to be detained. Mr Shongwe appeared in court on 28 August 2002 but was released on bail on 4 September 2002. Charges against him were withdrawn on 2 December 2002 without reference to either Ms Mahlangu or de Beer.

[4] *Wrongful arrest* consists in the wrongful deprivation of a person's liberty. Liability for wrongful arrest is strict, neither fault nor awareness of the wrongfulness of the

arrestor's conduct being required.[1] An arrest is *malicious* where the defendant makes improper use of the legal process to deprive the plaintiff of his liberty.[2] In both wrongful and malicious arrest not only a person's liberty but also other aspects of his or her personality may be involved, particularly dignity.[3] In *Newman v Prinsloo and another*[4] the distinction between wrongful arrest and malicious arrest was explained as follows:

'[I]n wrongful arrest . . . the act of restraining the plaintiff's freedom is that of the defendant or his agent for whose action he is vicariously liable, whereas in malicious arrest the interposition of a judicial act between the act of the defendant and apprehension of the plaintiff, makes the restraint on the plaintiff's freedom no longer the act of the defendant but the act of the law.'

[5] *Malicious prosecution* consists in the wrongful and intentional assault on the dignity of a person comprehending also his or her good name and privacy.[5] The requirements are that the arrest or prosecution be instigated without ireasonable and probable cause and with 'malice' or *animo iniuriarum*.[6] Although the expression 'malice'

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[1] *Smit v Meyerton Outfitters* 1971 (1) SA 137 (T) 139D; *Minister of Justice v Hofmeyr* 1993 (3) SA 131 (A) 154E-157C; *Tödt v Ipser* 1993 (3) SA 577 (A) 586F-587C; *Donono v Minister of Prisons* 1973 (4) SA 259 (C) 262B.

[2] *Thompson and another v Minister of Police and another* 1971 (1) SA 371 (E) 373E-G.

[3] Jonathan Burchell *Personality rights and freedom of expression. The modern actio iniuriarum* (1998) 353ff.

[4] 1973 (1) SA 125 (W) at 127H.

[5] *Heyns v Venter* 2004 (3) SA 200 (T) 208B.

[6] *Thompson & another v Minister of Police & another* 1971 (1) SA 371 (E) 373F-H; *Lederman v Moharal Investments (Pty) Ltd* 1969 (1) SA 190 (A) 196G-H.

is used, it means, in the context of the *actio iniuriarum*, *animus iniuriandi*.[7] In *Moaki v Reckitt & Colman (Africa) Ltd and another*[8] Wessels JA said:

'Where relief is claimed by this *actio* the plaintiff must allege and prove that the defendant intended to injure (either *dolus directus* or *indirectus*). Save to the extent that it might afford evidence of the defendant's true intention or might possibly be taken into account in fixing the *quantum* of damages, the motive of the defendant is not of any legal relevance.'

There is a suggestion in the judgment of the court below that the effect of the decision in *National Media Ltd and others v Bogoshi*[9] has been to introduce negligence on the part of the defendant as a sufficient basis for a claim for malicious prosecution but that mistakes the effect of *Bogoshi* and in my view is not correct.

[6] To succeed in an action based on wrongful arrest the plaintiff must show that the defendant himself, or someone acting as his agent or employee deprived him of his liberty.[10] Generally, where the defendant merely furnishes a police officer with

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[7] *Heyns v Venter* above 208EF; *Moaki v Reckitt & Colman (Africa) Ltd and another* 1968 (3) SA 98 (A) 104A-B; and see the discussion in J Neethling JM Potgieter and PJ Visser *Neethling's law of personality* 2 ed (2005) 124-5.

[8] 1968 (3) SA 98 (A) 104B-C.

[9] 1998 (4) SA 1196 (SCA). The court also relied on *Marais v Groenewald en 'n ander* 2001 (1) SA 634 (T).

[10] *Smit v Meyerton Outfitters* 1971 (1) SA 137 (T) 140D-E; *Cohen v Benjamin* (1885) 4 SC 99 102-3. *Rini v Carr* 1921 EDL 239 appears to have been a case of wrongful arrest: although the police actually made the arrest, the defendant was responsible for it. Graham JP said at 241: 'The defendant was acting in his capacity as assistant superintendent of the location, and was making this raid with the object of arresting persons who in his opinion were not authorised to be in particular huts, and with the object of collecting hut tax and revenue.' See the discussion by Chittharanjan Felix Amerasinghe *Defamation and other aspects of the actio iniuriarum in Roman-Dutch law (In Ceylon & South Africa)* (1968) 239-243 (referred to as Amerasinghe *Defamation*).

information on the strength of which the latter decides to arrest the plaintiff the defendant does not effect the arrest.[11]

[7] The evidence shows that Geen and Richards reported the alleged offence, summoned the police and pointed out Mr Shongwe as the purchaser. Du Plessis' evidence stands undisputed. He stated that he provided assistance to the detective branch on 24 August 2002 and received a telephone call from Geen and Richards concerning theft. He met Ms de Beer, took a statement from her, opened a docket and received the hire purchase agreement as well as a copy of the identity document of Makgabo. Two days later he received a further call from Geen and Richards that the person who had committed the offence was present in the store. He went to the store but did not find him and, on receipt of another call, returned and spoke to Ms Mahlangu who pointed out Mr Shongwe to him as the person who had committed the alleged offence. Inspector Du Plessis thereupon warned and arrested him.

[8] The judge in the court a quo upheld the claim for wrongful arrest on the basis that the employees of Geen and Richards 'instigated' the arrest and prosecution. However, a claim for wrongful arrest can succeed only if it can be said that the defendant, or his or her agent, effected the arrest. On the evidence the claim for wrongful arrest against Geen and Richards must fail because the arrest was effected by the police, and not by Geen and Richards or their employees.

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[11] *Birch Johannesburg City Council* 1949 (1) SA 231 (T) 238-9; *Cohen v Benjamin* (1885) 4 SC 99; *Rini v Carr* 1921 EDL 239 241; *Rademeyer v Van der Merwe* (1895) 12 SC 450 453.

[9] In holding Geen and Richards liable in respect of the claim for malicious prosecution the judge a quo accepted that the laying of a definite charge may be sufficient to create liability and added that by pointing out Mr Shongwe to the police Geen and Richards had instigated the arrest, detention and prosecution. The concept of 'instigation' is one of some complexity,[12] but the statement Ms de Beer made to the police on 24 August 2002 in which Mr Shongwe was not implicated is a fair statement of the facts and amounts to no more than an honest recordal of the facts submitted by a complainant in a criminal matter. Whether Ms Mahlangu's pointing out of Mr Shongwe as the culprit, amounted to an 'instigation' is a different matter and need not be resolved. Liability for malicious prosecution depends not only on an 'instigation' but also on the absence of reasonable and probable cause and the presence of the *animus iniuriandi*. This involves an inquiry into the state of mind of the employees of Geen and Richards, in particular, of Ms Mahlangu, and the grounds for that state of mind.

[10] The judge a quo questioned the reliability of Ms Mahlangu as a witness whom he thought was very talkative and not directly answering questions. Ms Mahlangu's evidence concerning her statement to the police was criticised and, finally, the court a quo remarked that she 'could reasonably not have satisfied herself of the identity of the plaintiff without having had a look at the plaintiff's identity document which she demanded earlier that morning before she identified the plaintiff to the police as the culprit.'

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[12] *Lederman v Moharal Investments (Pty) Ltd* above 197A-F; *Prinsloo and another v Newman* 1975 (1) SA 481 (A) 492C-G; *Heyns v Venter* above 206F-207A and see the discussion in *Neethling's law of personality* 173-6; Amerasinghe *Defamation* 239ff.

[11] I do not share the judge a quo's assessment of Ms Mahlangu's evidence. She interviewed Mr Shongwe on 30 and 31 May 2002. On the first day she had a conversation of some thirty minutes with him; took his particulars and demonstrated the computer to him. He sat in front of her, they conversed, she questioned him and jotted down his answers. She could observe what he looked like and what kind of person he was. On the second day when he came to pay the deposit he spent between fourteen and twenty minutes with her. She, being a salesperson, was trained to know her customers and preferred to address them by name when they entered the store. She did so when he turned up at the store on the second occasion. She also sold clothes and could familiarise herself with the physical appearance of a customer and could visualise how he or she looked. Ms Mahlangu clearly had sufficient opportunity to familiarise herself with the face and physical aspects of the purchaser who resembled Mr Shongwe. She knew that the matter had been reported to the police on 24 August 2002. On the day of his arrest she saw Mr Shongwe walking past the store and identified him as the purchaser. She called Ms de Beer and they rushed after him. He denied that he was Makgabo. Mr Shongwe, when confronted by Ms de Beer and Mahlangu, denied that he was Makgabo but his protestations were discarded: he furnished them with his cheque book and at least one account card. Although his name did not appear on his cheque book it appeared on the card. This did not impress Ms Mahlangu as she knew that people often carried cards belonging to others. Thereafter he told them that he was going to the Department of Labour where he was employed. He returned to the store only to be pointed out by Ms Mahlangu and arrested.

[12] In criticising Ms Mahlangu's evidence the court a quo found that she was uncertain about the identity of Mr Shongwe when first confronting him. This finding is based on Ms de Beer's evidence that Mahlangu had said to her that she 'thought' that Mr Shongwe was the purchaser. Although this is correct I do not find any uncertainty in the testimony of Ms Mahlangu about her identification of Mr Shongwe. In fact she persisted with her allegations that Mr Shongwe committed the offence even at the trial. Nor did Ms de Beer give the impression that Ms Mahlangu was uncertain about her identification: had she been, De Beer said, they would not have followed Mr Shongwe. The judge a quo also referred to Ms Mahlangu's asking Mr Shongwe whether he was Isaac Makgabo, and concluded that some uncertainty was thereby suggested. However, the fact that she called him Isaac or Isaac Makgabo suggests rather that she indeed recognised him as the purchaser. In any event, it seems a sensible way to address him. Nothing turns on the way Mr Shongwe was addressed ie whether as Isaac (as testified by Ms Mahlangu and Mr Shongwe) or as Isaac Makgabo (as stated by Ms de Beer). The court a quo also placed some emphasis on the fact that Geen and Richards' employees allowed Mr Shongwe to leave on the understanding that he would return to the store with his identity document. This, the court said, indicated that they did not or could not have believed that he was the purchaser. I am not convinced that the employees had any other option: they were alone confronting Mr Shongwe and could not detain him. Whether Mr Shongwe had given his cell number to Geen and Richards' employees as he testified is in dispute. The employees stated he undertook to return to the store with his identity document but that he never gave them his telephone number. He, on the other hand, testified that he was telephoned by Ms Mahlangu to whom he

had given his telephone number and told to come to the store. In this respect, I find the evidence of Geen and Richards' employees more likely: they had a brief encounter with Mr Shongwe and did not have the means to write down any number that might have been given to them. It seems more probable that Mr Shongwe returned to the store of his own accord to protest his innocence. There is certainly no basis for describing the evidence of Geen and Richards' employees in this regard as 'speculative' as the court a quo did.

[13] Too much should not be made of Geen and Richards' denial in their plea that its employees had identified Mr Shongwe as the purchaser and had informed the police that they could not do so. The allegations in the plea, it seems, relate primarily to the charge laid by Ms de Beer on 24 August 2002. The latter's evidence is that she was unable to identify Mr Shongwe as the person who had defrauded her employer. Despite the court a quo's criticism of her evidence and its description of it as a 'fishing expedition' I can find no reason to fault her testimony. Moreover, Ms Mahlangu was hardly cross-examined as to the statements contained in Geen and Richards' plea and no adverse inference against her can be drawn in this respect. Nothing turns on the fact that she may have been talkative when giving evidence. Furthermore, she could in the circumstances not have verified Mr Shongwe's identity document because he never produced it: production of this document would in any event have yielded nothing because Makgabo in all likelihood used a false one to defraud Geen and Richards. Nor can the conclusion that she honestly believed that Mr Shongwe was the person who

had defrauded her employer be questioned by some or other difference between her evidence and that of Inspector du Plessis.

[14] The requirement for malicious arrest and prosecution that the arrest and prosecution be instituted 'in the absence of reasonable and probable cause' was explained in *Beckenstrater v Rottcher and Theunissen*[13] as follows:

'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.'

It follows that a defendant will not be liable if he or she held a genuine belief founded on reasonable grounds in the plaintiff's guilt.[14] Where reasonable and probable cause for an arrest or prosecution exists the conduct of the defendant instigating it is not wrongful.[15] The requirement of reasonable and probable cause is a sensible one: 'For it is of importance to the community that persons who have reasonable and probable cause for a prosecution should not be deterred from setting the criminal law in motion against those whom they believe to have committed offences, even if in so doing they are actuated by indirect and improper motives.'[16]

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[13] 1955 (1) SA 129 (A) 136A-B.

[14] *Prinsloo and another v Newman* 1975 (1) SA 481 (A) 498H-499C; *Fyne v African Realty Trust Ltd* (1906) 20 EDC 248 256; *Ramakulukusha v Commander, Venda National Force* 1989 (2) SA 813 (V) 844J–845B; *Madnitsky v Rosenberg* 1949 (1) PH J5 (W) 14.

[15] *Neethling's law of personality* 178.

[16] *Beckenstater v Rottcher and Theunissen* above 135D-E.

[15] The court a quo found that it had not been shown that reasonable and probable cause was present. I do not consider that this conclusion is correct. I have already dealt with Mr Shongwe's returning to the store after his confrontation with Mss de Beer and Mahlangu, the main consideration on which the judge a quo based his finding. Where the evidence of Ms Mahlangu is concerned the inference that she honestly believed in Mr Shongwe's guilt and lacked any intention to injure him is unavoidable. Her belief that he was the person involved in defrauding Geen and Richards is based on two interviews she had with him where she had ample opportunity to observe and evaluate him. She was well trained to form an opinion of her customers and, when she observed him passing the store, acted promptly in accordance with her belief. Any reasonable person in her position and on the information available to her[17] would have concluded that Mr Shongwe was probably the person who committed the offence concerned. Accordingly, I find that Mr Shongwe did not show that Geen and Richards acted without reasonable and probable cause.

[16] In its notice of appeal Geen and Richards stated that in respect of the claims for wrongful arrest and malicious prosecution the court a quo should have found ('at worst for Geen and Richards') that Geen and Richards and the Minister were jointly and severally liable. The same contention is advanced in Geen and Richards' heads of argument. However, neither at the trial nor in this court was it argued that the Minister should have been held liable together with Geen and Richards (there is no appeal by the first respondent). Geen and Richards' plea contains no statement to that effect. The Minister was represented during the hearing of the appeal and it was submitted in

[17] Cf *Madnitsky v Rosenberg* 1949 1 PH J5 (W) 14-15.

argument on his behalf that Geen and Richards should be ordered to pay his costs on appeal. The Minister's heads of argument, however, contain no such request and in my view, although Geen and Richards' attempt to procure the imposition of joint and several liability on the Minister on appeal was misbegotten, the Minister's decision to appear on appeal cannot in fairness be ascribed to Geen and Richards. In the circumstances there is no justification for ordering Geen and Richards to pay the Minister's costs of appeal.

[17] The following order is made:

1 The appeal is upheld with costs;

2 Paragraphs 1, 2, 3 and 4 of the order of the court a quo are set aside and replaced with the following:

'The plaintiff's claims against the second defendant are dismissed with costs.'

FR Malan

Acting Judge of Appeal

CONCUR:
CAMERON JA
NUGENT JA
MLAMBO JA
COMBRINCK AJA