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[1] THE SUPREME COURT OF APPEAL

[2] OF SOUTH AFRICA

[3] CASE NO: 131/07

Reportable

[5]

[4] In the matter between:

[5]

[6] THE MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT First Appellant

[7] THE DIRECTOR OF PUBLIC PROSECUTIONS Second Appellant

[8] THE MINISTER OF SAFETY AND SECURITY Third Appellant

[9]

[10] and

[11]

[12] SEKELE MICHAEL MOLEKO Respondent

[13]

[14] Coram: Farlam & Van Heerden JJA et Kgomo AJA

[15]

[16] Heard: 12 March 2008

[17]

[18] Delivered: 31 March 2008

[19]

[20] ***Summary: Malicious prosecution – requirements for –– act or omission by magistrate in the exercise of his judicial functions –section 60(11)(a) of Criminal Procedure Act 51 of 1977 –release on warning of persons charged with Schedule 6 offences without any evidence being led.***

[21]

[22] **Neutral citation: This judgment may be referred to as *Minister for Justice & Constitutional Development v Moleko* (131/07) [2008] ZASCA 43 (31 March 2008)**

[23] _____

[24]

[25] **JUDGMENT**

[26] _____

[27]

[28] **VAN HEERDEN JA:**

[29] Introduction

[30] The respondent, Mr Moleko, instituted an action for damages in the Transkei High Court against the Minister for Justice and Constitutional Development (the first appellant), the Director of Public Prosecutions (DPP) (the second appellant) and the Minister of Safety and Security (the third appellant) based on his alleged malicious prosecution by the defendants. By agreement between the parties, the trial in the court a quo was confined to the merits of the claim, with the question of quantum standing over for later determination if necessary.

[31] Matthee AJ held that Mr Moleko had established that he was the victim of a malicious prosecution and that, as a result of such prosecution, his dignity and self-respect were impaired. The learned judge ordered the first and third appellants (the two Ministers) to pay the costs of the matter, jointly and severally. The present appeal comes before us with leave of this court granted on petition. (A further claim by Mr Moleko, based on his alleged unlawful arrest, was dismissed by the trial court and no cross-appeal has been noted against that part of the judgment.)

[32] Mr Moleko is a magistrate at Engcobo in the Eastern Cape. On 16 January 2002 whilst he was presiding as a magistrate, a case involving three persons accused of armed robbery and ‘hijacking’ came before him. Two of the accused (accused no’s 2 and 3) were in custody after they had previously been refused bail by another magistrate at Engcobo in October 2001, after a fully-fledged bail hearing. Accused no 1, who appears to have been arrested shortly before the other two, had been released by Mr Moleko on bail of R500, with the agreement of the control prosecutor, Mr Nogcanzi, on 13 September 2001, without any evidence being led.

[33] The other two accused were due to appear in court on 16 January 2002 in order for them to bring a renewed bail application based on new facts. However, on that day, only one of them appeared in court, the other apparently being ill and in hospital. The defence attorney, Mr Songo, thus informed the prosecutor, Mr Mgudlwa, that he would request a postponement for hearing of the bail application and a suitable date was set. According to Mr Mgudlwa, the State was at that stage ready to proceed to trial and was awaiting a date in the regional court.

[34] From the record before Mr Moleko, it appeared that the two accused had been in custody since their arrest in September of the previous year. The matter had been postponed on a number of occasions since the accused first appeared in court. When Mr Mgudlwa called the matter, Mr Moleko expressed his displeasure at the fact that accused no's 2 and 3 had been in custody since September 2001 and intimated that he was intent on releasing them on warning. According to Mr Mgudlwa, he expressly informed Mr Moleko that the accused were charged with Schedule 6 offences and of the provisions of s 60(11)(a) of the Criminal Procedure Act 51 of 1977.[1] He also allegedly drew Mr Moleko's attention to the fact that the previous bail application by the two accused had been rejected, that the investigation had been completed and that the matter was ready to be postponed for a regional court date, but for the fresh bail

[1]Section 60(11)(a) provides that:
[2] '(11) Notwithstanding any provision of this Act, where an accused is charged with an offence referred to –
(a) in Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional circumstances exist which in the interests of justice permit his or her release.'
[3] (The effect of this subsection is discussed by the Constitutional Court in *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat* 1999 (4) SA 623 (CC) paras 61 to 65.)
[4]
[5]

application which had been arranged for that date (16 January 2002). In the event, however, Mr Moleko granted the request for a postponement to a specified date, but ordered the release on warning of both accused until such date.

[35] The State immediately brought an urgent application in the Transkei High Court to review and set aside Mr Moleko's order releasing the accused on warning. On 25 January 2002, the High Court issued a rule *nisi*, which rule was confirmed four days later, setting aside Mr Moleko's earlier order. This led to the re-arrest of the two accused and the subsequent decision by the DPP to prosecute Mr Moleko for 'defeating the course of justice in contravention of section 40(a) and/or (c) of the Transkei Penal Code, 1983, read with sections 17 and 32 of the Transkei Penal Code'.[2] In the charge sheet it was alleged that Mr Moleko –

[36] '(…) did unlawfully, with the intent to defeat and/or obstruct and/or prevent the course of justice and *mala fide*, commit an act to wit

[37] Releasing an accused person, charged with offences in terms of Schedule 6 of Act 51 of 1977, on warning contrary to the provisions of Section 60 of Act 51 of 1977 and/or;

[38] Releasing an accused person on warning without receiving evidence contrary to section 60(11)(a); and/or

[2] Section 17 reads as follows:
'Except as expressly provided by this Code, no judge or other judicial officer shall be criminally liable for anything he has done or omitted in good faith in the exercise of his judicial functions, even if the act so done was in excess of his judicial authority or if he was bound to do the act omitted.'
[7] In terms of s 40 of the Code:
[8] 'Any person who –
(a) accuses any person falsely of any crime or does anything to obstruct, prevent, pervert or defeat the course of justice; or
(b) . . .
[9] obstructs or in any way interferes with or knowingly prevents the execution of any legal process, civil or criminal, shall be guilty of an offence'.

[39] Failing to implement the relevant provisions of section 60 of Act 51 of 1977 after he had been informed that it was applicable.'

[40] At his subsequent trial in the regional court, Mr Moleko was eventually acquitted of the charge. This gave rise to his claim for damages for malicious prosecution which forms the subject of the present appeal.

[41] Claim for malicious prosecution: requirements

[42] In order to succeed (on the merits) with a claim for malicious prosecution, a claimant must allege and prove –

(a) that the defendants set the law in motion (instigated or instituted the proceedings);

(b) that the defendants acted without reasonable and probable cause;

(c) that the defendants acted with 'malice' (or *animo injuriandi*);[3] and

(d) that the prosecution has failed. (In this case, of course, Mr Moleko was acquitted at the end of his criminal trial and requirement (d) need detain us no further.)

[43] Ad (a) – Instigation or institution of proceedings

[44] The trial judge dealt with the first requirement rather perfunctorily, finding that it was clear 'that various servants of the appellants were all involved in setting the law in motion which led to the prosecution of the

[3] See *Relyant Trading (Pty) Ltd v Shongwe* [2007] 1 All SA 375 (SCA) para 5, referring to *Lederman v Moharal Investments (Pty) Ltd* 1969 (1) SA 190 (A) at 196G–H; *Thompson v Minister of Police* 1971 (1) SA 371 (E) at 373F-H and J Neethling, JM Potgieter & PJ Visser *Neethling's Law of Personality* 2 ed (2005) pp 124-125 (see also pp172-173 and the authorities there cited). Cf 15 *Lawsa* (*sv* 'Malicious Proceedings' by DJ McQuoid-Mason) (reissue, 1999 para 441; François du Bois (General Editor) *Wille's Principles of South African Law* 9 ed (2007) pp 1192-1193; LTC Harms *Amler's Precedents of Pleadings* 6 ed (2003) p 238-239.

plaintiff'. According to the trial judge, he understood counsel for the appellants to have conceded this point.

[45] Leaving aside the fact that the court cannot be bound by an incorrect concession by a litigant with regard to a legal issue, it was submitted before us that the trial judge erred in failing to have regard to the fact that the prosecution occurred at the instance of the DPP and that the role of the police was merely to gather relevant information.

[46] With regard to the liability of the police, the question is whether they did anything more than one would expect from a police officer in the circumstances, namely to give a fair and honest statement of the relevant facts to the prosecutor, leaving it to the latter to decide whether to prosecute or not.[4]

[47] On behalf of the third appellant (the Minister of Safety and Security), a certain Captain Gwayi (attached to the Serious Violent Crimes Unit based in Mthatha) testified that, as a result of a report ('in the nature of a complaint') by one of his subordinates, Inspector Didiza, he went to Engcobo on 17 January 2002 to investigate the events giving rise to the complaint. Inspector Didiza's complaint related to the abovementioned incident on 16 January 2002. Captain Gwayi interviewed the public prosecutor involved (Mr Mgudlwa) and also spoke to the senior public prosecutor (Mr Nogcantsi) and to the Chief Magistrate. He was told that Mr Moleko was on leave. Mr Mgudlwa 'echoed' Inspector Didiza's complaint about how Mr Moleko had released two accused on warning despite the fact that they were charged with Schedule 6 offences which

[4] *Prinsloo & Another v Newman* 1975 (1) SA 481 (A) at 492C–F and 495A. See also 15 *Lawsa op cit* para 445.

'required an enquiry about bail to be heard'. Mr Mgudlwa informed him that he was going to report the matter to the DPP in Mthatha.

[48] It is important to note that the case docket in this matter (about which more later) contains two affidavits deposed to by Captain Gwayi, both of which refer to a letter (what he calls 'an official correspondence') written by him to 'both the Local Prosecutor and Magistrate of Engcobo . . . appealing for the review of Mr Moleko's decision /ruling of releasing the robbery accused on warning'. This letter, dated 17 January 2002, also forms part of the case docket (as document B.1). It is addressed by Captain Gwayi to the Chief Magistrate and the Control Prosecutor of the Engcobo Magistrate's Court and purports to be a formal complaint against 'the judicial officer, Mr Moleko'. In this letter, Captain Gwayi recounts the report given to him by Inspector Didiza regarding the incident on 16 January 2002 during which Mr Moleko had released on warning two persons charged with Schedule 6 offences without hearing any evidence and 'without making any enquiries to other role players who are very conversant with the merits of the case nor referring to the court record that was [available] to him as to what the reasons for such "elongated" detention were'. He also stated that the 'other role players' (referring to the public prosecutor (Mr Mgudlwa), the investigating officer (Inspector Didiza) and the defence attorney (Mr Songo) 'were more than ready to proceed with the formal bail application but he (Mr Moleko) simply [shouted] everybody down'. Captain Gwayi asked for answers to a series of questions posed in the letter and requested the addressees of the letter to treat it seriously. There is no indication in the case docket or in the record that either the chief magistrate or the control prosecutor ever responded to this letter.

[49] Captain Gwayi eventually received an instruction from Mr Lusu, the Head of the Office of the DPP in Mthatha, to investigate the matter. He therefore returned to the Engcobo Magistrate's Court on 5 February 2002, that being the day on which, according to his information, Mr Moleko was due to return from his leave. He informed Mr Moleko of the nature of the charges which were being investigated against him, first at the Magistrate's Court and thereafter at the police station opposite the court. At the request of Mr Moleko, he agreed to continue the interview on 7 February 2002 at Mr Moleko's office.

[50] On 7 February 2002, Captain Gwayi met with Mr Moleko at the Engcobo Magistrate's Court and informed him of the allegations against him and of his constitutional rights. Mr Moleko elected to make a 'warning statement' and wrote it out himself. Captain Gwayi issued Mr Moleko with a 'provisional summons' for trial, provisional in the sense that the matter had to be returned to the office of the DPP for further instructions. The Captain filed Mr Moleko's warning statement in the case docket which was thereafter submitted to the office of the DPP for a decision. On 19 February 2002, the DPP's office informed Captain Gwayi of its decision to prosecute Mr Moleko and the latter was then arraigned for trial at the regional court in Mthatha.

[51] Captain Gwayi testified that he had nothing to do with the decision to prosecute Mr Moleko – he merely conducted the investigation and collected evidence. As far as he was concerned, the decision to prosecute was 'the prerogative of the National Prosecuting Authority'.

[52] Based on these facts, it is clear to me that Captain Gwayi at all times acted on the instructions and under the direction of the office of the

DPP. Neither he nor any other policeman employed by the third appellant was responsible for the decision to prosecute the plaintiff. For this reason alone, I am of the view that the appeal must therefore succeed in so far as the third appellant is concerned.

[53] As far as the first appellant, the Minister for Justice and Constitutional Development, is concerned, the National Prosecuting Authority Act 32 of 1998 provides that the Minister exercises final responsibility over the national prosecuting authority established in terms of s 179 of the Constitution, but only in accordance with the provisions of that Act (s 33(1)). Thus, the National Director of Public Prosecutions (NDPP) must, at the request of the Minister, inter alia furnish her with information in respect of any matter dealt with by the NDPP or a DPP, and with reasons for any decision taken by a DPP, 'in the exercise of their powers, the carrying out of their duties and the performance of their functions' (ss 33(2)(a) and (b)). Furthermore, the NDPP must furnish the Minister, at her request, with information regarding the prosecution policy and the policy directives determined and issued by the NDPP (ss 33(2)(c) and (d)). However, the prosecuting authority is 'accountable to Parliament in respect of its powers, functions and duties under this Act, including decisions regarding the institution of prosecutions' (s 35(1)). It is therefore clear that the Minister (the first appellant) is not responsible for the decision to prosecute Mr Moleko and the appeal must also succeed as far as the first appellant is concerned.

[54] It follows that the remaining requirements are only relevant insofar as they concern the potential liability of the DPP.

[55] Ad (b): Absence of reasonable and probable cause

[56] Reasonable and probable cause, in the context of a claim for malicious prosecution, means an honest belief founded on reasonable grounds that the institution of proceedings is justified. The concept therefore involves both a subjective and an objective element[5] –

[57] 'Not only must the defendant have subjectively had an honest belief in the guilt of the plaintiff, but his belief and conduct must have been objectively reasonable, as would have been exercised by a person using ordinary care and prudence.'[6]

[58] Mr Moleko was charged with defeating or obstructing the course of justice. The essential elements of this crime at common law[7] are described by JRL Milton *South African Criminal Law and Procedure* Vol II *Common Law Crimes* 3ed (1996) as follows (p 102):

[59] 'Defeating or obstructing the course of justice consists in unlawfully doing an act which is intended to defeat or obstruct and which does defeat or obstruct the due administration of justice.' (Footnote omitted.)

[60] It is immaterial whether the alleged conduct has merely a tendency to defeat or obstruct the course of justice or is capable of defeating or obstructing the course of justice.[8]

[61] Counsel for the appellants pointed out that the *actus reus* which forms the basis of a charge of defeating or obstructing the course of justice may take a number of different forms,[9] and contended that the

[5] *Prinsloo v Newman* at 495H and the cases referred to therein. See further *Relyant Trading (Pty) Ltd v Shongwe* para 14.
[6] 15 *Lawsa op cit* para 449 and the authorities there cited. See also *Wille's Principles of South African Law* pp 1193-1194.
[7] Which for the purposes of this case are clearly the same under s 40 of the Transkei Penal Code (see note 2 above).
[8] JRL Milton *op cit* p 117.
[9] JRL Milton *op cit* pp 118 et seq and the authorities there cited.

unlawful and unprocedural release by a judicial officer of an accused person may fall within the type of conduct which may be characterised as defeating or obstructing the course of justice. For the purposes of this judgment, I will assume in favour of the appellants that this proposition may well, in appropriate (and, it is to be hoped, rare) circumstances, indeed be correct.

[62] In determining whether or not the decision by the DPP to prosecute Mr Moleko amounted to malicious prosecution, it must also be remembered that, in the relevant charge sheet,[10] the State alleged that Mr Moleko had acted 'with the intention to defeat and/or obstruct and/or prevent the course of justice and ***mala fide***'.[11]

[63] Ms Neveling, the Senior State Advocate in the office of the DPP in Mthatha who took the ultimate decision to prosecute Mr Moleko, testified that at the time she took this decision, she had before her the following documents:

- the case docket, a copy of which was, by agreement between the parties, handed in to the court a quo at the conclusion of the trial;[12]
- the 'warning statement' by Mr Moleko, which formed part of the abovementioned docket; and
- affidavits by Mr Mgudlwa and by Inspector Didiza (both of whom were present in court on 16 January 2002), which affidavits were used in support of the urgent application

[10] The wording of which is quoted in para 6 above.
[11] Emphasis added.
[12]The docket did not form part of the record and copies thereof were only furnished to this Court on 4 March 2008 at the request of the presiding judge.

(launched in the Transkei High Court on 24 January 2002) to set aside Mr Moleko's order of 16 January 2002 releasing the two accused on warning.[13]

[64] According to Ms Neveling, she also had before her at that time an affidavit by the interpreter who was on duty in the Engcobo Magistrate's Court at the time the incident took place on 16 January 2002.[14] However, as this affidavit was only deposed to on 15 May 2002 and her decision to prosecute was taken by no later than 19 February 2002, this was clearly not the case.

[65] Ms Neveling testified further that her office has a manual produced by the National Prosecuting Authority (NPA), containing policy directives for all NPA employees dealing with, *inter alia*, the making of decisions whether or not to prosecute. This NPA policy manual contains specific provisions dealing with judicial officers. In her words:

[66] '[W]e have to treat those matters with the utmost tact and . . . we have to be obviously very sure when we take decisions against judicial officers. But also the penal code [the Transkei Penal Code, 1983] section 17 . . . [a]lso has a specific provision in this regard . . . the judicial officers will not be held responsible or liable for acts or omissions committed by them in the execution of their duty if that omission or act was committed *bona fide*. . . . [T]hat was obviously also one of the considerations that I had to take into account in deciding whether to prosecute or not.'

[67] Ms Neveling stated that it appeared from the case docket that a possible crime of defeating the ends of justice had been committed and that Mr Moleko was 'linked to that offence'. On the documents before her

[13]These affidavits and the Notice of Motion with which they were filed were contained in the docket, but also formed part of the record before Matthee AJ.
[14] Copies of which also did not form part of the record and were only furnished to this Court on 26 February 2008 at the request of the presiding judge.

at the relevant time, she was convinced that there was a reasonable prospect of a 'successful prosecution' of Mr Moleko:

[68] 'It was in my view from the affidavits before me, and even from the warning statement made by Mr Moleko himself. . . clear that there [was] definitely evidence of *mala fides.* I made a decision on the 19 of February to charge him with defeating the ends of justice'.

[69] At the time of making her decision, Ms Neveling did not know (and did not know of) Mr Moleko, had never had any dealings with him, and had never received any complaints about him.

[70] Under cross-examination, it was put to Ms Neveling that, once the Transkei High Court had on 29 January 2002 set aside Mr Moleko's order, it was not necessary for the DPP to prosecute him. Her response was as follows:

[71] '. . . I disagree with that. It is our duty . . . I had the statements the affidavits under oath in my possession and from that it was clear that a crime had been committed. It's our duty then to make decisions on those kind of things. As I have said we had to take into consideration also the circumstances surrounding that. From the affidavit . . . it was clear that there [was] *mala fides*. That we had to make a decision to prosecute. *Not only for that specific case, but also to prevent any other further cases like that happening*.' (Emphasis added.)

[72] It appears from Ms Neveling's evidence that, in concluding that Mr Moleko had acted in bad faith, she had relied on three aspects of the 'evidence' before her at the time:

(a) Mr Moleko had released the two accused, including the one in hospital, despite the 'fact' that he had been informed by the prosecutor that they

were charged with Schedule 6 offences and that they had previously been refused bail by another magistrate. She also relied on the fact that, in his warning statement, Mr Moleko had said that he was 'a seasoned magistrate, implying thereby . . . that he knows the Criminal Procedure Act.'

(b) Mr Moleko had said to the accused who was in court on the relevant day 'that he is being punished by the State without being found guilty'. From this she had 'gained the impression' that Mr Moleko had already made up his mind to release the accused from custody.

(c) She had also 'gained the impression' that Mr Moleko was 'in principle against' all accused persons being held in custody.

[73] As regards point (c) above, Matthee AJ pointed out in his judgment (in my view correctly) that no evidence was led to support this opinion and that it was 'puzzling how she could arrive at this opinion in the light of her evidence that she 'did not know the Plaintiff [Mr Moleko] and had previously never received any report about him'.

[74] Ms Neveling's evidence as a whole makes it clear that her decision to prosecute Mr Moleko for the crime of defeating or obstructing the course of justice was not based *only* on the fact that he had, in contravention of s 60(11)(a) of the Criminal Procedure Act, released the two accused on warning without any evidence being heard. When asked by the court a quo how she drew the distinction between a judicial officer acting inconsistently with the Criminal Procedure Act and hence irregularly (or 'just making a bad legal decision'), on the one hand, and acting with *mala fides*, on the other, she responded as follows:

[75] '[M]y understanding of the difference is that once you have established whether he has acted irregularly is then to establish whether it was a *bona fide* mistake, or whether there [was] *mala fides* involved in that specific action. So . . . my understanding is that the irregular acting comes first, and once that has been established, then you establish whether it was a *mala fide* act, or whether it was a *bona fide* mistake if I can put it that way.'

[76] In this regard, Ms Neveling also testified that:

[77] 'I think the factors that I have mentioned to your Lordship those factors definitely indicated *mala fides* to me . . . I think if it was merely a bad mistake, once the correct facts were brought to his attention he would have acted differently . . . both the fact that the bail had already been refused, as well as the fact that it was a Schedule 6 offence. . . if he made a mistake on one of the two. In my opinion that would still be understandable. But the correct facts were brought to his attention, and despite that he still released them. . . I think also in the warning statement it was never Mr Moleko's version that he made just a mistake that he wasn't aware. I was in possession of his warning statement when I made the decision.'

[78] According to Ms Neveling, Mr Moleko's version was that:

[79] '[I]n his warning statement he said that he agreed that he *released them out on bail*. That it was a Schedule 6 offence, *he was aware of the fact that it was Schedule 6 offences*. But that he had the interest of the accused at heart, as some accused had previously died in Butterworth in holding cells at court . . . He also referred to the fact if I remember correctly, to the effect that the police and the Prosecutors lied to him. . . that accused are being punished . . . *[T]hat explanation coupled with what happened in court on that day to me indicated* ***mala fides***.' (Emphasis added.)

[80] There are several serious factual inaccuracies in the abovequoted portions of Ms Neveling's evidence. First, Mr Moleko did *not* state in his

warning statement that he was aware of the fact that Schedule 6 offences were involved. On his version as set out in the warning statement –

[81] '. . . the Public Prosecutor brought such a bulky roll after 4.00 pm and I was refusing to take such cases and he appealed to me just do the "Remands" and as such [there was no] time to read the records of such cases due to [the] lateness of [the] hour . . . [a]fter all I did not know that such cases were at any stage heard [by] or brought [before] any particular magistrate . . . I also [did] not undermine any rulings previously given by Mr Nangu [the magistrate who had dismissed the previous bail application by accused no's. 2 and 3] as I was not even aware that a ruling regarding this case was ever given the other way.'

[82] This version, together with the fact that Mr Moleko referred to the case, in his warning statement, as 'case no. 851/2001 (Engcobo) being a charge of Robbery [not *armed* robbery] – three counts', should in my view certainly have alerted Ms Neveling to the reasonable possibility that, at the time Mr Moleko decided to release the two accused on warning, he was *not* aware of the fact that the charges against the accused were Schedule 6 offences or that a bail application previously brought by the two accused before another magistrate had been refused.

[83] It is true that, at the time Ms Neveling made her decision to prosecute, she had 'in front of' her the affidavits deposed to on 24 January 2002 by Mr Mgudlwa and by Inspector Didiza in support of the abovementioned urgent application to the Transkei High Court. In his 'founding affidavit', Mr Mgudlwa stated the following:

[84] 'I called the matter and as I was about to inform the first respondent [Mr Moleko] of the arrangements, he addressed the second respondent [accused no. 2], enquiring from him whether he had been in custody since his arrest in September [2001]. As the second respondent replied in the affirmative, the first respondent

became infuriated . . . The first respondent then said that the prosecutor and police are punishing the second respondent without being found guilty . . .

[85] Mr Songo [the defence attorney for both accused] attempted to explain the position to the first respondent but was prevented by the first respondent who ordered the immediate release of the second respondent as well as the release of the third respondent [accused no. 3] in his absence . . .

[86] I informed the first respondent that the second and third respondents are charged with Schedule 6 offences and that they had to show exceptional circumstances to the court before release. I also drew his attention to the fact that the previous bail application by the respondents was refused. I further informed the first respondent that all investigation had been finalised and the matter was ready to be postponed for a regional court date, but for the application for bail which had been arranged for that day, to wit 16 January 2002. The first respondent did not give any attention to my submissions.'

[87] In his 'supporting affidavit', Inspector Didiza stated that he had read the affidavit deposed to by Mr Mgudlwa, and that he confirmed the 'the contents thereof as being true and correct as [he] was present in court at all material times'. He further stated that '[t]he crimes committed by the second and third respondents are of an extremely serious nature'.

[88] While these affidavits supported Ms Neveling's evidence to the effect that Mr Moleko *was* informed by the prosecutor that the accused were charged with Schedule 6 offences and that a previous application for bail had been rejected by another magistrate, there were also other documents in the case docket before her (quite apart from Mr Moleko's warning statement referred to above – about which more later), which should have alerted her, as a reasonable senior state advocate in her position, that these affidavits did not necessarily reflect what had happened on 16 January 2002 fully and/or with complete accuracy. So, for

example, the case docket also contained (as document A.2) a so-called 'Sworn Declaration' by Mr Mgudlwa (although it was not in fact made under oath). The relevant parts of this statement read as follows:

[89] 'The presiding officer, Mr Moleko, *mero motu* enquired from accused no. 2 if he had been in custody since September 2001. Upon receiving a response in the affirmative he became angry saying that the prosecutor and the police are punishing him before he is found guilty by the court, that it is the duty of the State to expedite the matter. He then ordered that the accused person be released on warning. He actually ordered that he must right away leave the court room. He said this is something that he can't allow unless he does not know why he is here in the first place. He went on to say it would otherwise be better for him to leave the service.

[90] *I tried my level best to reason with him,* stating that in this matter we are only awaiting a date in the Regional Court. I also pointed out that *the offence is quite serious.* I told him that a formal bail application was moved by Mr Songo before Mr Nangu and that the State succeeded in refusing bail. *All my pleas fell on deaf ears.'* (Emphasis added.)

[91] The case docket that Ms Neveling had at her 'disposal' at the time she made the decision to prosecute also contained another affidavit deposed to by Inspector Didiza on 24 January 2002 (document A.3 in the docket), viz the same date as that upon which Inspector Didiza deposed to his abovementioned supporting affidavit. In the former affidavit, the following relevant passages appear:

[92] 'On the 2001-12-20 the case was postponed to the 2002-01-16 for [a] bail application, the accused were supposed to give new facts. On the 2002-01-16 all parties were present except one suspect who was at hospital for medication. This case is at regional court for trial; at district court it was just for bail application.

[93] The prosecutor called the case and the attorney appeared for accused no. 2 and no. 3. Then he addressed the court explaining that he was not going to proceed with [the] bail application. *Before giving the reasons, the magistrate Mr Moleko ordered him to sit down.* The magistrate asked . . . the accused whether [he was] in custody for . . . a long time and [he] agreed. The same question was asked to the prosecutor.

[94] *The prosecutor tried to explain what was happening to the case since the arrest of the accused until 2002-01-16. Without listening to the PP, the magistrate ordered him to sit down . . .*

[95] The magistrate said that police and public prosecutor were punishing the suspects before being found guilty by the court of law. He said he would not allow their conduct. He said he would be failing in doing his job if he allowed the conduct [cited] above. He attacked the police and the public prosecutor in a [bad] manner. . .

[96] He ordered the suspects to go out on warning. No bail conditions were given to them. Necessary administration was not done on the release of suspect because Mr Moleko was very angry. The police and public prosecutor were betrayed by the magistrate to the suspects and the public.'

[97] To return to Mr Moleko's warning statement, Ms Neveling, on her own evidence, also had regard to this statement before making her decision to prosecute Mr Moleko. As appears from the extracts from her evidence quoted above, she testified that, in this warning statement, Mr Moleko said that he was aware of the fact that the accused were charged with Schedule 6 offences and that –

[98] 'in spite of that he ordered the accused to be released *not even on warning.* To be released without hearing any evidence'. (Emphasis added.)

[99] Once again, this evidence is incorrect in two material respects. First, as indicated above, nowhere in his warning statement does Mr Moleko state that he was on the relevant date aware of the fact that the

accused were charged with Schedule 6 offences. Second, Mr Moleko did *not* order the accused to be released without a warning. Under cross-examination, it was put to Ms Neveling that Mr Moleko had testified that he had given the two accused a date upon which they had to return to court. She replied that, as far as she could remember, this was not the case. However, she later testified, in response to questions posed by Matthee AJ, that Mr Moleko had indeed 'released the accused on warning'.

[100] The handwritten record of the proceedings in the case against the three accused is contained in the case docket (as document B.4) and was thus also before Ms Neveling at the time she made her decision to prosecute. From this handwritten record, unfortunately sketchy though it is,[15] it appears that on 16 January 2002, Mr Moleko released accused no's 2 and 3 from custody and at the same time warned them to appear before the Engcobo Magistrate's Court on 11 February 2002, the date to which he postponed the matter. It also appears from the handwritten record for 13 September 2001 that accused no.1, who was charged with the same offences as accused nos. 2 and 3, was on that date released on bail of R500, without any evidence being led. The handwritten notes for both 13 September 2001 and 16 January 2002 are in the same handwriting (thus obviously that of Mr Moleko). On the other hand, the handwritten record of the proceedings in respect of the previous bail application brought in October 2001 by accused no's 2 and 3, including the arguments advanced by the defence attorney on 5 October 2001 in support of the bail application and the response by the public prosecutor (again Mr Mgudlwa), are in a different handwriting altogether.

[15] In view of the fact that the magistrate's courts are courts of record.

[101] The fact that it was evident from the case docket that one of the three accused persons, all of whom were charged with the same Schedule 6 offences, had previously been released on bail of R500, without any evidence being led, should in my view reasonably have alerted Ms Neveling, as a senior state advocate, to the need to make further enquiries as to precisely what had happened in the criminal case up to 16 January 2002. She did not do so.

[102] As already stated, Ms Neveling testified that she considered Mr Moleko's warning statement before taking her decision to prosecute him. (It is unfortunately necessary, for the purposes of this judgment, to quote from this warning statement in some detail.) The statement (dated 7 February 2002) contains the following relevant passages:

[103] 'On the day in question ie 16/01/2002 I was in the normal execution of my duties as a Magistrate at Engcobo Magistrate's Court. Among the cases which I presided over, there also was a case no. 851/2001(Engcobo) being a charge of Robbery – 3 counts.

[104] The accused were called in . . . and it appeared that, from the explanation from the Prosecutor Mr Mgudlwa that one accused person was in absentia, due to [his] being extremely sick and therefore only one accused person appeared before court on that day . . .

[105] I personally made enquiries further about the convalescence of that absentee whether he was in . . . police custody or whereabouts [he was] and the Public Prosecutor gave a confusing answer by saying he does not know where the sickly accused person was. As a Presiding Judicial Officer, I was greatly concerned when the Accused could not stand . . . trial and the Public Prosecutor could not give a direction. I further asked the Public Prosecutor as to what he wanted the Court to do if he did not know the whereabouts of such an extremely sick accused person.

[106] It is at this stage that both the Public Prosecutor Mr Mgudlwa and the Accused's Legal Representative Mr Songo both stood up to make explanations . . . the Court ended up not clear as to what was really taking place.

[107] I asked Mr Mgudlwa further as to why this case was . . . not ready to be taken for trial as it appeared that [the] Accused persons had been . . . incarcerated [since their arrest]. He then told me that he did not have the Police Docket with him. I further told Mr Mgudlwa the PP of my concern for the long dragging [out of] the case and with no indication as to when it would be tried . . .

[108] I then told the Public Prosecutor that, I would come to the rescue of the State as I do not want people to die in the hands of the Police. I further [said] that the Public Prosecutor does not . . . indicate whether the Accused (absentia) was either hospitalised or where he was. I further asked as to when did the man (Accused) become sick; whether the Police have taken him to a Doctor; where is the Doctor's certificate. All the details that were asked by the Court (myself) to Mr Mgudlwa were unanswered as he did not know.

[109] The Public Prosecutor (Mr Mgudlwa) was extremely confused. Then I told the Prosecutor that, lest the man (Accused) dies in the hands of the State, I am remanding the Accused on warning so that the relatives could engage in taking the man [Accused] for medical attention as a matter of [urgency] . . .

[110] Due to such . . . confusion that was brought [about] by the Public Prosecutor, I therefore stated that as soon as all the questions asked . . . are cleared [up] to the court, then the "Prison Stay" can always be re-arranged. *My action of the day was not in bad faith at all but was directed at the welfare of both the State and that of the Accused person.* . . .

[111] Responding to the allegations of . . . defeating the ends of justice, I was not at all acting to commit such crimes. . . I remember that when telling the Prosecutor about the plight of Accused that die in the hands of the State, I quoted to him the incident of Butterworth, where a prisoner died in Court lock-up cells.

[112] As a Magistrate, I feel that my actions were appropriate and aimed at the welfare of the Accused and to safeguard the State . . . The Public Prosecutor was not

helpful at all towards the court about things which needed clarity as he (the Public Prosecutor) was just confused.' (Emphasis added.)

[113] On Ms Neveling's own evidence, the documents referred to above were before her when she took her decision to prosecute Mr Moleko. As illustrated, these documents contained various allegations which were contradictory in many important respects. This being so, I am of the view that Ms Neveling should reasonably have been aware of the very real possibility that, *if* Mr Mgudlwa had indeed informed Mr Moleko[16] that the two accused were charged with Schedule 6 offences, that they had to show exceptional circumstances to the court before release, and that a previous bail application brought by them had been refused, Mr Moleko's 'anger' and 'fury' was such that he simply did not hear this. Indeed, Mr Mgudlwa himself said, in his earlier statement referred to above, that 'all [his] pleas fell on deaf ears'.

[114] Moreover, Inspector Didiza, in the other affidavit (not his 'supporting affidavit') to which he deposed on 24 January 2002, alleged that when Mr Mgudlwa tried to explain to Mr Moleko what had happened in the criminal case from the time of arrest of the accused up to 16 January 2002, Mr Moleko ordered Mr Mgudlwa to sit down 'without listening to him'.

[115] This very real possibility that, during the incident in question, Mr Moleko – who was variously described as having been 'infuriated', 'very angry' and 'very disturbed' upon being informed by accused no 2 that he and accused no 3 had been incarcerated since their arrest in September 2001 – is further borne out by what Captain Gwayi said in his

[16] As Mr Mgudlwa stated under oath in his abovementioned 'founding affidavit'.

abovementioned letter of complaint dated 17 January 2002 (document B.1 in the case docket). To reiterate, Captain Gwayi stated that, although Mr Mgudlwa, Inspector Didiza and the defence attorney Mr Songo 'were more than ready to proceed with the formal bail application', Mr Moleko was not prepared to listen to anybody and 'simply [shouted] everybody down'.

[116] Upon reading Mr Moleko's warning statement, Ms Neveling knew that Mr Moleko was adamant that he had *not* acted in bad faith on the day in question, but that all his actions had been taken in the interests of 'the welfare of the accused and to safeguard the State'. As appears from the extracts quoted above, Mr Moleko twice expressed his concern that accused no. 3 – who, he said, was 'extremely sick' according to the explanation given to him by Mr Mgudlwa – might 'die in the hands of' the State. He also referred to an incident at Butterworth, where 'a prisoner had died in the Court lock-up cells'. Ms Neveling herself testified to the effect that:

[117] '. . . in his warning statement he said . . . that he had the interest of the accused at heart, as some accused had previously died in Butterworth in holding cells at court'.

[118] It is quite clear from her evidence that, although aware of these serious allegations made by Mr Moleko, Ms Neveling made no queries in this regard prior to taking her decision to prosecute him. She testified that she had not been informed of, nor was she aware of, a problem of overcrowding in cells in Engcobo, or of (to use the words of Matthee AJ during the trial) 'some sort of decision locally to try and address that issue . . . that people not be kept in custody for too long'. However, she

conceded that she was aware of a big national campaign to address the problem of overcrowding in prisons, to reduce the number of awaiting-trial prisoners and the 'number of cases and backlogs on rolls'. This national campaign included the area under her jurisdiction.

[119] In respect of the requirement of 'absence of reasonable and probable cause' for Mr Moleko's prosecution, counsel for the appellants submitted that Matthee AJ had in effect based his judgment upon a 'central consideration of judicial independence'. Counsel contended that the learned judge seemingly elevated this principle to 'an almost immutable rule'.

[120] In the relevant part of his judgement, Matthee AJ stated as follows:

[121] 'Section 1(c) of Act 108 of 1996 (hereafter "the constitution") makes it clear that the rule of law is one of the cornerstones of the constitution. Central to the implementation of the rule of law is the role of judicial officers. Section 165 of the constitution makes this role clear. If judicial officers are to perform the duty set out in section 165(2) it goes without saying that they *inter alia* must be free from any fear whatsoever that they might be arrested and/or prosecuted as a result of them performing their judicial duties, even where their application of the law is completely wrong. (This obviously cannot exempt judicial officers from criminal prosecution where for example they have accepted a bribe to make a certain finding.) This principle is so fundamental and obvious that anything submitted contrary to it only needs to be stated to be rejected. Sections 165(3) and 165(4) of the constitution emphasises that there is a special responsibility on all organs of state to help judicial officers perform their constitutional duties.'

[122] To my mind, this is too strongly stated. It is correct that the independence of the judiciary is enshrined in s 165 of the Constitution, the relevant subsections of which provide as follows:

[123] ‘(1) The judicial authority of the Republic is vested in the courts.

[124] (2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.

[125] (3) No person or organ of state may interfere with the functioning of the courts.’

[126] These provisions make it clear that, whilst the courts are independent, they are nevertheless subject to the Constitution and the law. A discussion of the principle of judicial independence, as enshrined in the Constitution, is certainly not necessary for the purpose of this judgment. Suffice it to say that, in *De Lange v Smuts NO*,[17] the Constitutional Court (per Ackermann J) stated that –

[127] ‘Judicial officers enjoy complete independence from the prosecutorial arm of the State and are therefore well-placed to curb possible abuse of prosecutorial power.’

[128] So too, in *Van Rooyen v The State*,[18] Chaskalson CJ stated that:

[129] ‘In deciding whether a particular court lacks the institutional protection that it requires to function independently and impartially, it is relevant to have regard to the core protection given to all courts by our Constitution, to the particular functions that such court performs and to its place in the court hierarchy. Lower courts are, for instance, entitled to protection by the higher Courts should any threat be made to their independence. The greater the protection given to the higher Courts, the greater is the protection that all courts have.’

[17] 1998 (3) SA 785 (CC) para 63
[18] 2002 (5) SA 246 (CC) para 23.

[130] Referring specifically to the magistrate's courts, Chaskalson CJ pointed out[19] that 'magistrates are entitled to the protections necessary for judicial independence, even if not in the same form as higher Courts.'[20]

[131] All this being so, however, the provisions of s 165(2) of the Constitution[21] compel the conclusion that the fundamental principle of judicial independence cannot simply be equated with a principle of immunity of judicial officers from criminal prosecutions for all acts and/or omissions in the exercise of their judicial functions, irrespective of the circumstances of the individual case. It goes almost without saying that the criminal prosecution of judicial officers for such acts and/or omissions will – and must – remain an extraordinary and exceptional step. Any decision by the office of the DPP to prosecute a judicial officer must be taken with the utmost caution, due regard being had to the fundamental principle of judicial independence, but also to the related principle that judicial officers are subject to the Constitution and the law and thus cannot be completely immune from criminal prosecution, *in appropriate cases*, for their acts and/or omissions in the exercise of their judicial functions.

[132] In *Relyant Trading (Pty) Ltd v Shongwe*,[22] this court stated the following:

[133] The requirement for malicious arrest and prosecution that the arrest and prosecution be instituted "in the absence of reasonable and probable cause" was

[19] Para 28.
[20] See also *Travers v National Director of Public Prosecutions* 2007 (3) SA 242 (T) paras 20 *et seq* and the numerous authorities there cited.
[21] Quoted in para 54 above.
[22][2007] 1 All SA 375 (SCA) para 14.

explained in *Beckenstrater v Rottcher and Theunissen* [1955 (1) SA 129 (A) at 136A-B] as follows:

> [134] "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."

[135] 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. Where reasonable and probable cause for an arrest or prosecution exists the conduct of the defendant instigating it is not wrongful. 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" [see *Beckenstrater v Rottcher and Theunissen* at 135D-E].[23] (Footnotes omitted.)

[136] In this case, Ms Neveling – although by her own admission aware of the provisions of s 17 of the Transkei Penal Code, 1983, and of the 'utmost tact' and caution required in making any decision to prosecute a judicial officer for something done or omitted in the exercise of his or her judicial functions[24] – did *not* in my view exercise the requisite 'ordinary care and prudence'[25] in making the decision to prosecute Mr Moleko.

[137] It would appear that Ms Neveling did not even ascertain whether Captain Gwayi had received any response, from either the chief magistrate

[23]See also 15 *Lawsa op cit* paras 449-450 and 452; J Neethling, JM Potgieter & PJ Visser *Neethling's Law of Personality* 2 ed (2005) pp 176-179 and the authorities cited by these authors.
[24] See para 26 above.
[25] See 15 *Lawsa op cit* para 449 and see also para 452.

or the control prosecutor of the Engcobo Magistrate's court to his abovementioned letter dated 17 January 2002[26] (document B.1 in the case docket) before deciding to prosecute Mr Moleko. Her decision was taken by no later than 19 February 2002, just more than one month after the date of the incident (16 January 2002) forming the subject of the subsequent prosecution.

[138] It can hardly be said that, *objectively*, Ms Neveling took such reasonable measures as could be expected of someone in her position to inform herself fully of what had happened on 16 January 2002 and whether this provided 'reasonable and probable cause' for Mr Moleko's prosecution. This means that Mr Moleko in my view discharged the *onus* of proving absence of reasonable and probable cause and thus satisfied the second requirement of a claim for malicious prosecution.

[139] Ad (c) 'Malice' or *animus injuriandi*

[140] In the *Relyant* case,[27] this court[28] stated the following in regard to the third requirement:

> [141] Although the expression "malice" is used, it means, in the context of the *actio iniuriarum, animus iniuriandi*. In *Moaki v Reckitt & Colman (Africa) Ltd and another* Wessels JA said:
>
> [142] "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." '

[26] Para 13 above.
[27] Para 5.
[28] Referring to *Heyns v Venter* 2004 (3) SA 200 (T) para 12 at 208B; *Moaki v Reckitt & Colman (Africa) Ltd* 1968 (3) SA 98 (A) at 104A-B (see also 103F-104A); Neethling et al *op cit* 124-125 (see also 179-182).

[143] In so doing, the Court decided the issue which it had left open in *Lederman v Moharal Investments (Pty) Ltd*[29] and again in *Prinsloo v Newman,*[30] namely that *animus injuriandi*, and not malice, must be proved before the defendant can be held liable for malicious prosecution as *injuria*.[31]

[144] *Animus injuriandi* includes not only the intention to injure, but also consciousness of wrongfulness:

[145] 'In this regard *animus injuriandi* (intention) means that the defendant directed his will to prosecuting the plaintiff (and thus infringing his personality), in the awareness that reasonable grounds for the prosecution were (possibly) absent, in other words, that his conduct was (possibly) wrongful (consciousness of wrongfulness). It follows from this that the defendant will go free where reasonable grounds for the prosecution were lacking, but the defendant honestly believed that the plaintiff was guilty. In such a case the second element of *dolus*, namely of consciousness of wrongfulness, and therefore *animus injuriandi*, will be lacking. His mistake therefore excludes the existence of *animus injuriandi*.'[32]

[146]

[147] The defendant must thus not only have been aware of what he or she was doing in instituting or initiating the prosecution, but must at least have foreseen the possibility that he or she was acting wrongfully, but nevertheless continued to act, reckless as to the consequences of his or her conduct (*dolus eventualis*).[33] Negligence on the part of the defendant (or, I would say, even gross negligence) will not suffice.[34]

[29]1969 (1) SA 190 (A) at 196G-H.
[30] 1975 (1) SA 481 (A) at 491H-492B.
[31]But cf 15 *Lawsa op cit* para 455; *Wille's Principles of South African Law* 1194-1196 and Harms *op cit* pp 238-239.
[32]Neethling et al p 181.
[33]See *Heyns v Venter* paras 13-14.
[34]See *Relyant Trading* para 5; but cf *Heyns v Venter* para 14 at 209C-H.

[148] In this case, I am of the view that Mr Moleko did prove *animus injuriandi* on the part of the DPP. Ms Neveling clearly intended to prosecute Mr Moleko and was fully aware of the fact that, by so doing, he would in all probability be 'injured' and his dignity ('comprehending also his . . . good name and privacy')[35] in all probability negatively affected. Despite this knowledge, she took the decision to prosecute without making any of the enquiries which cried out to be made, thus acting in a manner that showed her recklessness as to the possible consequences of her conduct.

[149] *Costs*

[150] It follows that the appeal by the second appellant must fail, while the appeal by the first and third appellants succeeds. In this regard, counsel for the appellants conceded that, if this were the outcome of this appeal, then the second appellant must be held liable for Mr Moleko's costs.

[151] Conclusion

[152] I would therefore make the following order:

1. The appeal by the first and third appellants succeeds.
2. The appeal by the second appellant is dismissed.
3. The second appellant is ordered to pay all the costs of the appeal.
4. Paragraph 5 of the order of the court a quo to the effect that 'the first and third defendants jointly and

[35] See *Relyant Trading* para 5.

severally are liable for the costs of the matter' is set aside and replaced with the following:

[153] 'The second defendant is liable for the costs of the matter.'

[154]

[155]

[156] B J VAN HEERDEN
JUDGE OF APPEAL

[157] **Concur:**

[158] FARLAM JA

[159] KGOMO AJA