

PIENAAR v. JACOBS.

1910. November 17, 18. MAASDORP, C.J., and FAWKES and
WARD, JJ.

Malicious proceedings.—Malicious use of civil procedure.—Measure of damages.

Where P had obtained provisional sentence on a mortgage bond on the ground of non-payment of interest alleged to have been due, and J had set up a verbal agreement under which P had undertaken to allow an amount due to J for storage of an oil engine as a set-off against the interest, and on J's reopening the case it had been held that the verbal agreement had been proved, P being the only witness to deny the agreement, *Held*, on a claim in reconvention for damages on the ground of malicious use of civil procedure, that the measure of damages was the market value of the property sold at a loss by J to meet the costs incurred in defending the provisional case and paying the judgment debt and the attorney and client costs, any doubt as to the market value of the property sold being given in favour of J.

The facts sufficiently appear from the headnote and judgment. The claim in reconvention reads as follows:—

(1) Defendant repeats pars. 1, 2, 3 and 4 of the plea in convention.

(2) The defendant, since the date of the said judgment, has *inter alia* paid to the plaintiff, under security *de restituendo*, interest on the said bond to the date of payment thereof, amounting to £17, 2s., and has also paid the plaintiff's taxed costs incurred in respect of the said judgment, amounting to £43, 9s. 4d.

(3) The plaintiff maliciously and without reasonable and probable cause instituted the said legal proceedings and obtained the said judgment thereon, and thereafter took out a writ of execution against the property of the defendant.

(4) By reason of the plaintiff's said wrongful and malicious action the defendant was compelled to sell his said erf and buildings at Trompsburg at a great sacrifice and loss of £200,

and was also compelled to pay attorney and client's costs in the said suit amounting to £24, 7s. 8d.

Wherefore defendant prays judgment:—

- (1) For the sums of £17, 2s. and £43, 9s. 4d.
- (2) For the sums of £200 and £24, 7s. 8d. as special damages.
- (3) General relief and costs of suit.

Blaine, K.C. (with him *Brebner*), for the plaintiff in reconvention, was not called upon.

Rorich (with him *Roux*), for the defendant in reconvention.

MAASDORP, C.J.: In this case the plaintiff sued the defendant provisionally in June last on a mortgage bond and obtained judgment. He carried the judgment into execution, compelling the defendant thereby to sell his property at a sacrifice. Now in the ordinary course, apart from the question of malice or what amounts to malice in the eyes of the law, the judgment would have merely consisted of a reversal of the provisional sentence with costs. But then comes in the counter-claim to the effect that the proceedings were instituted maliciously and without reasonable or probable cause, and that plaintiff in reconvention has suffered damages to the extent of £224, 7s. 8d. thereby—that is to say, £200 for loss sustained by being compelled to sell his property below its market value and £24, 7s. 8d. attorney and client costs in defending the proceedings for provisional sentence. There can be very little doubt as to the truth of defendant's evidence as to the verbal agreement in regard to the storage of the oil engine, which he says was finally made in the course of the interview in Malherbe's office, and he is corroborated by Malherbe, the attorney. Mr. Louw's evidence we accept without reserve, and it amounts to this—that after the interview plaintiff told Louw he had made a settlement with defendant and that the interest on the bond was to be set off against the rent for storage of the engine. Immediately after telling Louw this, plaintiff goes off and instructs his attorney to sue for the interest he has just told Louw had been set off. What conclusion can one come to other than that plaintiff

O.E.C. '10.

deliberately disregarded defendant's rights and his own contractual obligations and proceeded to sue defendant? What is that but malice? This is not a case such as so often happens, where a party acts on information he gets from others, and the court finds out that his witnesses have not spoken the truth or that they take a different view from the court. In this case plaintiff does not act on the information of others: it is his own knowledge he uses to persecute the defendant. Defendant must be entitled to some compensation. The value we place on the buildings is £350, in spite of what Mr. Du Toit said. The present municipal valuator, Mr. Combrink, said that the value only referred to the buildings, and did not cover the machinery. This is a reasonable view, for such machinery may at any time be disconnected and sold separately. Taking £350 as the value of the buildings, we must find the value of the machinery. Durand gives the figures as £40 for the 16 horse power engine used to drive the mill; the mill stones and flour dresser he puts at £70 and the scourer at £10, *i.e.* £120 in all, and he adds that if the engine had not been of an old-fashioned pattern it would have been worth another £80. We may add this £80 to the £120. With the value of the buildings added we get £550, from which must be deducted what defendant received for the property, namely, £350, and we are left with £200 as the difference between the market price and the amount for which the property was actually sold. This is all that is claimed by the plaintiff in reconvention, and we cannot, therefore, give him more. If there is any doubt as to whether this estimate of £200 is at all in excess of the amount due, we must take into consideration the plaintiff's deliberate disregard of the rights of defendant. We are therefore of opinion that the plaintiff in reconvention is entitled to this £200 and £24, 7s. 8d. as attorney and client costs incurred in defending the provisional claim, and in the provisional case judgment must be for defendant with costs, the provisional judgment being thereby reversed.

FAWKES and WARD, JJ., concurred.

Attorneys for Plaintiff in reconvention: *Fraser & Scott*; Attorneys for Defendant in reconvention: *Marais & De Villiers*.