CIV/T/91/88

IN THE HIGH COURT OF LESOTHO

In the matter between:-

PETER LETEKA THORELA..... Plaintiff

and

MOHALE'S HOEK WHOLESALERS LESOTHO (PTY) LTD.....Defendant

JUDGMENT

Delivered by the Honourable Mr. Justice J.L. Kheola
on the 7th day of July, 1989.

In this action the plaintiff claims damages in the sum of M10 000-00 for wrongful and malicious arrest and imprisonment, and costs of suit.

The facts of this case are fairly simple and straightforward. The plaintiff was employed by the defendant as a stores clerk in the mealie-meal department of the wholesale. He was responsible for the dispatch of the goods. His duties included issuing invoices to customers before personally handing over the goods.

On the 26th June, 1987 a customer named Mr. D.S. Mahomed came to the wholesale and bought 100 x 50 kg. bags of mealie-meal and

/2.....

30 x 35 kg. bags of wheat bran. The plaintiff issued an invoice for all 130 bags and allowed the employees of Mr. Mahomed to start loading the bags onto a truck and van. While the loading was going on a certain Mr. D.T. Jandrel, who is the manager of the respondent, happened to pass near the storeroom where the loading was going on. He asked the plaintiff to show him the invoice and suddenly became suspicious that there was something wrong. He went back to his office and brought some of his employees to come and off load the mealie-meal in order to count the bags. When he came back the van had already left but before he went to his office he had noticed that six (6) bags of mealie-meal had already been loaded on the van.

The off-loading of the truck was done and it was discovered that there were 119 bags of mealie-meal instead of 100 bags. Mr. Jandrel immediately called the police. The plaintiff and Mr. Jandrel were taken to the charge office where the latter made a statement in the presence of the former. That statement was handed in Court as Exhibit B. The plaintiff admitted that it contained what Mr. Jandrel said to the police. I shall deal with that statement later in this judgment.

In paragraph 3 of his declaration the plaintiff alleges that on the 26th June, 1987 defendant's employees, acting within the scope and during the course of their employment, wrongfully and maliciously set the law in motion without any reasonable and probable cause by swearing to Mohale's Hoek police at Mohale's Hoek charge office a false charge of theft against the plaintiff and instigating and causing his arrest and imprisonment.

He further alleges that on the 27th October, 1987 he was summarily tried by the Resident Magistrate of Mohale's Hoek for the same crime and was found not guilty and was discharged. He alleges that by the defendant's employees' wrongful and malicious acts as aforesaid the plaintiff has been injured in his character and reputation in the sum of M10 000.00 being a fair and reasonable estimate of damages so suffered for which the defendant is vicariously liable.

In its plea the defendant admits that on the day alleged its employees set the law in motion but denies that in so doing they acted wrongfully and maliciously and without reasonable and probable cause. Defendant denies that its employees swore a false charge as alleged or at all and pleads that they had a reasonable and probable cause for suspecting that certain goods belonging to the defendant had been stolen by persons unknown and the defendant's employees consequently requested the Mohale's HOek police to investigate the complaint of theft. It denies that if the plaintiff was arrested and imprisoned it was at the instigation of the defendant's employees. It alleges that the criminal proceedings against the plaintiff were instituted by the police acting on their own discretion after having completed the aforesaid investigations.

In his evidence before this Court the plaintiff testified that after he had issued the invoice, one Thabang Khuto, the assistant manager of the defendant, allowed the employees of the customer to do the loading because defendant's labourers were unloading goods from another truck. He showed the labourers how to

load i.e. how many rows of six bags were to be made. His intention was to come back and check the load by merely multiplying the number of the rows on the floor of the truck by number of rows upwards. He did not observe the actual loading because he had other things to attend to while the loading was going on. He checked the load after the loading was done and came to the conclusion that the load was in accordance with the invoice.

He admits that when the bags were unloaded it was discovered that there had been overloading by 19 bags plus 11 bags which were subsequently found in the van by the police, making a total of thirty (30) bags. He says that Mr. Jandrel accused him of having stolen the 19 bags and immediately called the police. He said he wanted to see him locked up. Mr. Jandrel never demanded any explanation from him before he called the police. He says that he may have been careless but there was no dishonesty involved. After the discovery of 19 bags he was taken to the charge office where Mr. Jandrel made a statement. Sergeant Mokoqo opened a docket and charged him with theft. He was arrested and imprisoned for five (5) days.

After his release from imprisonment he went back to work but Mr. Jandrel refused to accept him and again repeated that he wanted to see him locked up. He says that the charge of theft affected his good character and reputation because wherever he went in Mohale's Hoek people said he was a thief and his former co-workers regarded him as a thief.

In cross-examination the plaintiff denied that after the discovery of the 19 bags he failed to give any explanation. The

mistake was due to the fact that the bags were not packed correctly in accordance with his instructions. He admitted that it is reasonable for Mr. Jandrel to call the police to investigate if he suspects dishonesty or carelessness.

When the plaintiff closed his case without calling any other witness, the defendant closed its case without calling any witness. The statement made by Mr. Jandrel to the police, Exhibit B was handed in Court during cross-examination of the plaintiff. It reads as follows:

> "I know how to read and write. I am the manager of Mohale's Hoek Wholesalers on the 26th June, 1987 it so happened that I went to one of the store of the Wholesale, on my arrival there I found a truck being loaded with 50 kg Mealie Meal and there was also a yellow van which was also being loaded with Meal Meal I asked one of my worker one Peter Thorela to show me the invoice of those Mealie Meal which was being loaded and he showed me the invoice of L.005875-9 I asked him about the mealie meal in the yellow van he said it was part of the mealie meal in the truck. That invoice was the invoice of 100 x 50kg mealie Meal and 30 x 35 kg Bran.
>
> At that time I became suspicious about the load I went to the Wholesale to get more labour to check the load on my return I checked the truck and I found that the load in the truck was over by 19 bags and the yellow van was not there but when I left the store I noticed that there were six bags of Mealie Meal in it. When I asked him where can I find the van he said he doesn't know, but I know the man who was driving the van that was Lira Makoa of Mekaling Ha Nkhetheleng.
>
> From there I called the Police to help me and we went to charge office where I gave this statement, the 19 bags were left there for save keeping and the value of the over loaded bags is R660.00 that is all I can say."

It is the plaintiff's story that when the police came Mr. Jandrel and Mr. Khuto showed them the nineteen bags and said that he had stolen them. Mr. Pheko, attorney for the plaintiff,

/6.....

submitted that the evidence of the plaintiff has not been rebutted because the defendant has not given any evidence. It was put to the plaintiff under cross-examination that Mr. Jandrel never uttered those words and that he merely called the police to help him to investigate the matter. The plaintiff admitted that in the statement he made to the police Mr. Jandrel did not say he had stolen the bags but merely asked the police to help him.

Mr. Phoko, submitted that the issue was whether Mr. Jandrel had accused the plaintiff of theft. Secondly, whether in laying the charge there was any reasonable or probable cause. He submitted that the test was objective. Before laying the charge Mr. Jandrel had not heard the version of the plaintiff. He submitted that a reasonable man would not have laid a charge before he heard the version of the plaintiff. The instigation arose from Mr. Jandrel.

Mr. Edeling, counsel for the defendant, referred to page 261 of The Law of Delict, 7th edition by Mckerron where the essential elements of malicious prosecution are set out as (a) the defendant instituted or instigated the proceedings;

(b) the defendant acted without reasonable and probable cause;

(c) the defendant was actuated by malice; and

(d) the proceedings terminated in his favour.

He submitted that there was reasonable and probable cause because the overload was so large that it was reasonable to suspect

foul play. It was reasonable for Mr. Jandrel to suspect carelessness or dishonesty but incompetence was never suspected because the past efficiency of the plaintiff ruled it out.

In its plea the defendant admits that its employees set the law in motion but denies that in so doing they acted wrongfully and maliciously and without reasonable and probable cause. It denies that its employees swore a false charge and pleads that they had reasonable and probable cause for suspecting that certain goods belonging to the defendant had been stolen by people unknown and called the police to investigate.

The law was stated by Gardiner, J. in Waterhourse v. Shields, 1924 C.P.D. 155 at p. 160 as follows:

> "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 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."

On the other hand, as Price, J. states in Madnistsky v. Rosenberg, 1949 (1) P.H., J.5 (W):

/8.....

> "An honest statement of fact on which the prosecution is instituted is not instigating a prosecution. (Mckerron p. 296/7). In Cohen v. Morgan 6 Dowling and Ryland (Revised Reports 533) emphasis is laid on the falsity of the report to the police and this is so in the case of Pandit Gaya v. Singh (1908) 24 T.L.R. 884. I think there can be no doubt that 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 'instigate' a prosecution. This, I think, must be clear. Apart from this, what kind and degree of identification with the prosecution constitutes a person an 'instigator' is extremely difficult to determine."

In the present case the defendant's employees admit that they put the law in motion but there is nothing to show that they actively assisted and identified themselves with the prosecution. According to the plaintiff Mr. Jandrel laid a false charge against the plaintiff when he showed the plice the 19 bags and said he had stolen them. I shall assume for the purpose of this judgment that Mr. Jandrel did utter those words. The question is whether those words were an honest statement or false. The plaintiff had been a competent employee of the defendant and did his work as a dispatch clerk very well. On the 26th June, 1987 he suddenly overloaded a customer's truck and van by thirty bags weighing 50kg. each. It is correct that at the time of the discovery of the overload Mr. Jandrel found 19 bags plus 6 bags which he saw in the van before it left.

The police investigations revealed that there were other eleven bags in the van making a total of 30 bags which were overloaded in the presence of the plaintiff or his neighbourhood. He subsequently checked the load and came to the conclusion that it was in order. I am of the opinion that the overload, even if it were by mistake

on the part of the plaintiff, was so big tht it aroused a reasonable suspicion in the mind of Mr. Jandrel. His suspicion was based on reasonable and probable cause. In his own evidence under cross-examination the plaintiff admitted that if there is overloading the management must suspect carelessness or dishonestly and that it was reasonable for Mr. Jandrel to call the police to investigate. He admitted that in fact there were 30 bags over and above what the customer had bought.

In Hicks v. Faulkner (1878) 8 Q.B.D., 167 at p. 171 Hawkin, J. said:-

> "I should define reasonable and probable cause to be an honest belief in the guilt of the accused, based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances which, assuming them to be true, would reasonably lead any ordinary prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed."

In Beckenstrater v. Rottcher and Theunissen, 1955 (1) S.A. 129 (A.D.) the headnote reads as follows:-

> "The plaintiff, in an action for malicious prosecution, is required to prove both an indirect and improper motive on the part of the defendant and the absence of reasonable and probable cause.
>
> When it is alleged that a defendant has no reasonable cause for prosecuting this means 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 disprove the existence, for the defendant, of reasonable and probable cause."

/10.....

The copy of the statement of Mr. Jandrel which was handed in Court as Exhibit B was admitted by the plaintiff as the truth of what Mr. Jandrel said to the police. I have considered the contents of that statement and have found that it was a fair statement of the facts of what had happened. Further investigations revealed that an additional 11 bags were overloaded on the van. In Exhibit B. Mr. Jandrel never said that the accused had stolen the 19 bags, he called the police to help him after he discovered the overload. The police acted on their own discretion after they had made their investigations. Section 5 of the Criminal Procedure and Evidence Act 1981 gives the Director of Public Prosecutions the discretion to institute and undertake criminal proceedings against any person before any court in respect of any offence alleged to have been committed by that person. The public prosecutor exercised his own discretion and the defendant cannot be blamed for that. The police also acted on their own to open a docket and to arrest the plaintiff after they had heard what Mr. Jandrel said.

In an action of this nature the plaintiff must prove that the defendant was actuated by malice. "By malice must be understood not necessarily personal spite or ill-will, but any improper or indirect motive; or, as put by Lord Campbell, "it consists in a conscious violation of the law to the prejudice of another" (Ferguson v. Earl of Kinnoull, 19 C.L. & F. 321) per Kotze, J.P. in Fyne v. The African Realty Trust, LTD., 1906 - 1907 E.D.C. 248 at p. 257. The plaintiff has failed to prove any improper or indirect motive by Mr. Jandrel. He may have acted under anger when he reported the matter to the

/11.....

police but anger is not in itself an improper motive (Brown v. Hawkes (1891) 2 Q.B. 718 at p. 722).

The plaintiff has handed in Court a record of the criminal proceedings as Exhibit A, in which the plaintiff and one Lira Makoa were charged with theft of 30 bags of mealie-meal. They were both found not guilty and discharged. We do not know why the court acquitted them because no reasons for judgment were given. What I know is that it is not the policy of the law to deter people from giving information of crimes, and action for malicious prosecutions are discouraged on the ground of public policy. (Madnistsky v. Rosenberg (supra) at p. 14). I am of the opinion that the mere fact that the plaintiff and his co-accused were discharged does not mean that the defendant was actuated by malice when it set the law in motion, nor does it show want of reasonable and probable cause.

For the reasons stated above the claim is dismissed with costs.

J.L. KHEOLA
JUDGE

7th July, 1989.

For the Plaintiff - Mr. Pheko
For the Defendant - Mr. Edeling.