CIV/T/647/86

IN THE HIGH COURT OF LESOTHO

In the matter between:

VICTOR MOLOI	PLAINTIFF
V	
DIRECTOR OF PUBLIC PROSECUTIONS	1ST DEFENDANT
THE ATTORNEY-GENERAL	2ND DEFENDANT

Before the Honourable Chief Justice Mr. Justice B.P. Cullinan o the 27th day of June, 1990.

For the Plaintiff : Mr. N. Mphalane
For the Defendants : Mr. T. Mohapi, Crown Counsel

JUDGMENT

Cases referred to:

(1) Beckenstrater v Rottcher & Theunissen (1955)1 SA 129 (A.D.);
(2) Leibo v. Buckman Ltd. and Another, (1952)2 All E.R. 1057;
(3) Corea v. Peiris (1909) A.C. 549;
(4) Estate Logie v. Priest, (1926) AD 312;
(5) Tempest v Snowden (1952)1 K.B. 130;
(6) Moaki v Reckitt & Colman (Africa) Ltd & Anor (1968)3 SA 98 (AD) iha;
(7) Hart & Cohen 16 S.C. 363;
(8) Lemue v. Zwartbooi 13 S.C. 403;
(9) Lederman v Moharal Investments (Pty.) Ltd (1969)1 SA 190 (AD);
(10) Van der Merwe v. Strydom (1967)3 SA 460 (AD);
(11) Foulds v Smith (1950)1 SA 1 (A.D.);
(12) Botha v. Dreyer 1 E.D.C. 74;
(13) Burgers v. Fraser (1907) TS 318;
(14) Li Kui Yu v. Superintendent of Labourers (1906) TS 181;

(15) Re Floyd (1909)53 Sol. Jo. 790;
(16) Seaward v Paterson (1897)1 Ch. 545; 66 L.J. Ch. 267; 16 Digest 10,22;
(17) Lower v Crudge (1580) Cary, 101; 16 Digest 35, 357; 21 E.R.54;
(18) Avery v Andrews (1882)51 L.J. Ch. 414; 16 Digest 35,362;
(19) Phillips v Naylor (1859)4 H.& N.565;
(20) Herniman v Smith (1938) A.C.305.

The plaintiff was charged before the Magistrates' Court at Butha-Buthe with contempt of court, contrary to section 74 of the Subordinate Courts Proclamation No.58 of 1938. He was acquitted. He brings a claim of malicious prosecution against the defendants.

The charge before the Magistrate's Court arose out of the plaintiff's possession of a plot of land at Malere near Marakabei, Butha Buthe. The plot of land, measuring 81 metres x 60 metres, had at one stage been allocated to one Malefetsane Moahloli, now deceased. The land was apparently allocated to him for agricultural purposes. Thereafter he commenced the construction of a building thereon, for commercial purposes. The Chief of Malere, Chief Mojela Joel, after consultation with the local Land Committee instructed Malefetsane to stop building. The latter sought the Chief's permission in the matter and indeed the issue to him of a "Form C" (Third Schedule to the Land Act, 1979), but the Chief refused. Malefetsame was then charged before Hololo Local Court with disobedience of an order duly made by a Chief, contrary to section 30 of the Chieftainship Act 1968. He was

convicted. Although convicted, the President of the Local Court observed that "nobody could prevent or obstruct or restrain the accused from carrying business or trading operations in his agricultural field."

Upon review by the Magistrates' Court at Butha Buthe, the conviction was confirmed. The learned reviewing Magistrate observed that Malefetsane had never formally applied on Form A (section 5 of and Third Schedule to the Land Act, 1979) for the allocation of the land to him: he further observed that under regulation 3(9) of the Land Regulations, 1980 the Chairman of a Land Committee,

> ".... shall ... cause his Land Committee to ensure that agricultural land is used solely for agricultural purposes."

The learned Magistrate further observed that under section 11 of the Act, an allottee of land used for agricultural purposes would have to apply to the Commissioner of Lands, if he wished to secure a lease or licence in respect of the land: also, that under section 12(3) of the Act, a Land Committee could not exercise its power of granting title to land for commercial or industrial purposes without first referring the application to the Minister. The learned reviewing Magistrate observed therefore that the local Chief and the Land Committee would be acting contrary to the law

if, without reference to higher authority, they allowed Malefetsane to utilise the land for commercial purposes. The learned Magistrate concluded that

> "whether the agricultural land belonged to accused or not, he was not at all entitled to erect any buildings on it before any lawful grant could be made to him converting the agricultural field to a commercial site...
>
> I therefore set aside the President's comments in this regard, since the accused can be prevented, obstructed or restrained from carrying on business or trading operations in his agricultural field without due authority; and he is thus restrained by this Court." (emphasis supplied)

That order was made on 2nd November, 1984, Malefetsane having refused on 24th May, 1984 to obey the Chief's Order. In the intervening period the plaintiff had apparently been allocated the same plot of land, and had been issued with a Form C2 in respect thereof (Third Schedule to the Act) date stamped 28th August, 1984.

Chief Mojela Joel testified that despite the Magistrates' Courts order of 2nd November, 1984, he subsequently found Malefetsane continuing with the building on the plot of land. He

also saw the plaintiff building there too. He reported the matter to the Clerk of the Magistrates' Court, who accompanied the Chief to the police. The Chief went to the site again with the head of the local CID Lt. Matela. When they got there they found building in progress. Malefetsane was not there, as he was sick. They found the plaintiff there however: the latter said that "Malefetsane had told him to be there". Lt. Matela ordered that the building be stopped. The Chief discovered that nonetheless the building continued, so he approached the police once more. This time he went to the site with Warrant Officer Mkosi. They did not find the plaintiff there. On a subsequent occasion he did find the plaintiff there, when Mkosi "took the plaintiff and others" to Butha Buthe.

The Chief testified that the plaintiff had never made any application to him in the matter of allocation of the plot of land. He described the procedure of application (upon Form A) and attendance before the "Allocation Board". He was surprised to see the plaintiff on the field. As far as he was concerned "the plaintiff had taken that field on his own", and again "he (the plaintiff) interfered with Malefetsane's field allocating that field to himself". Indeed, he said, there was a case pending since 1985 in the Magistrates' Court where the Committee had "sued him (the plaintiff) for allocating himself this field". When Malefetsane had transgressed, the Land Committee had declined to revoke his allocation as

"we thought we should take him to law. We thought we shouldn't use our powers."

When asked why he did not institute the same proceedings against the plaintiff as he had instituted against Malefetsane, he replied,

"Because I knew the field belonged to Malefetsane. This one (plaintiff) proceeded with the building after the death of Malefetsane. Malefetsane was in hospital and he was the person I had sued."

Without necessarily accepting all of the Chief's evidence at this stage, it sufficiently indicates the background against which, Malefetsane, as the first accused, the plaintiff, as the second accused, and seven others, all builder's employees, were jointly charged with contravening section 74 of the Subordinate Courts Proclamation. The particulars of offence read as follows

"In that upon or about the day between the 2nd and 16th November, 1984 and at or nea Marakabei In Butha-Buthe district the said accused each or other or all of them and while the said accused had been ordered by the Subordinate Court of Butha-Buthe to refrain from erecting a building, carrying on business or Trading operations

on the said Agricultural field without due authority the said accused wrongfully, unlawfully wilfully disobeyed or neglected to comply with the said order."

The first accused Malefetsane did not attend the trial, as he was at the time in hospital. The trial was conducted before the same Magistrate as had reviewed the Local Court proceedings. After the close of the defence case he simply recorded

"Verdict: Not Guilty."

He did not deliver a reasoned judgment. In any event, what emerged from the review proceedings and the trial, and what is not disputed, is that the reviewing Magistrate's order was directed against Malefetsane, that the plaintiff was not a party to the review proceedings and further, that no order was ever served upon the plaintiff in the matter.

The plaintiff's evidence before this Court, to which I shall return, was very brief. It dealt mainly with the quantum of damages. He testified that he was building a restaurant and cafe, six of the accused persons at the trial being his employees at the site.

One of the plaintiff's workers, Mokomalithare Raleihloane, gave evidence on behalf of the plaintiff. He testified that no

order had ben served upon them, that he and other workers had been arrested on the site, imprisoned over the week-end and then released. He and the others were ultimately acquitted before the Magistrates' Court.

Thabiso Maleta, at the relevant time a Lieutenant in the police stationed at Butha Buthe, gave evidence for the defendants. He testified that in November, 1984 the Clerk of the Magistrates' Court reported to him that a building was being erected at the particular site and that "there was a court order against it". Chief Mojela Joel then reported likewise, specifying that Malefetsane had been prohibited from building. The Lieutenant did not have a copy of the relevant Order, but the report of the Clerk and the Chief in the matter was sufficient to indicate that "the Order restrained Malefetsane". He then instructed Warrant Officer Mkosi to investigate.

The latter accompanied by Chief Mojela Joel and a driver, went to the site. He found the plaintiff's workers building on the site: they said they were acting under the instructions of the plaintiff. The Warrant Officer had been instructed that "there was a court order against building" and to "take measures against persons building". He did so: he arrested the workers and took them to the police station. The Warrant Officer recalled that Malefetsane had been fined and "interdicted from building", and that the court order referred to Malefetsane and no one else. He

had been instructed to stop those on the site presently building: he had his doubts about the instructions, but nonetheless felt obliged to carry them out. He denied that he had been instructed to arrest the plaintiff in particular, "only those found building", he said. When he brought the workers to Lt. Matela at the police station, the latter asked them if they were aware of the court order. "They said they were told by Victor to continue the building",the Lieutenant testified.

Lt. Matela said that the plaintiff approached him the same day, enquiring why he had stopped his workers. The Lieutenant asked him "if the site belonged to him or Malefetsane". The plaintiff stated he was "in possession of documents proving the site was his". It was agreed that the plaintiff would produce such documents. The Lieutenant then received a telephone call from the plaintiff's Attorney asking why he was "interfering with his client". The Lieutenant expressed surprise that the plaintiff had not returned with any documents. He considered that the plaintiff had violated the court order, so he had him charged.

The Public Prosecutor at Butha Buthe at the time, Moeketsi Sheline, testified that upon receipt of the docket from the Police he observed that Malefetsane the plaintiff, and others had been charged by the police with contempt of court. The docket indicated that the Police had advised the plaintiff of the court order. Some three or four days later he issued a warrant for their arrest.

When the workers were arrested, he decided to prefer the specific charge of contempt of court contrary to section 74 of the Subordinate Courts Proclamation, which provides that "any person wilfully disobeying or neglecting to comply wth any order of a Subordinate Court" shall be guilty of such contempt.

The Prosecutor testified in particular that after the court review order in the matter, a Policewoman Kumari, to whom the plaintiff was "closely related", brought the plaintiff to his office: he had not asked the plaintiff to come. He explained the effect of the court order to the plaintiff, "prohibiting the building of any building on that court site". He advised him that "anyone carrying on business on site would be committing an offence," whereupon the plaintiff said that "he was going to stop those people from building": the building however continued on the site. The Prosecutor testified that subsequently the plaintiff agreed to come to his office to be formally charged: he did so, in the company of his Attorney. At that stage, six of the plaintiff's workers had appeared before the court on 16th November, had been remanded in custody to the 19th November, when they were released on bail. The plaintiff agreed with the Prosecutor to appear before the court on 25th November.

For the moment, those are the relevant facts. As to the law applicable, there are the illuminating dicta of Schreiner J.A. (van den Heever and Fagan JJ.A concurring) in the case of Beckenstrater

v Rottcher & Theunissen (1). I propose to set out those dicta in extenso. The learned Judge of Appeal in dealing with the judgment in the court below, dismissing a claim for malicious prosecution, observed at pp. 133/134:

> "In his judgment Malan, J. stated the law to be that in order to succeed the appellant had to show, apart from the undisputed fact that the prosecution had ended in his favour, that the respondents had set the proceedings in motion and had actively assisted in the prosecution, that in so doing they were actuated by an indirect or improper motive and that they had no reasonable or probable cause for instituting the prosecution."

and further on at p.134/135

> "Before this Court it was argued on behalf of the appellant that the South African law on the subject of malicious prosecution had been stated by Malan, J., in a sense too favourable to the respondents, inasmuch as the element of reasonable and probable cause is either not a relevant element at all or, if it is, is one

which must be proved as a defence and not negatived as part of the plaintiff's case. We were referred in this connection to several articles in the 1911 and 1912 volumes of the South African Law Journal; and in particular to one by Professor Lee on "Malicious Prosecution in Roman-Dutch Law" (29 S.A.L.J. 22). The learned author, after reviewing the Roman and Roman-Dutch law, concludes that the modern law might, in harmony with its past, have reached either of two sets of rules for actions for malicious prosecution, neither of which would require the plaintiff to prove the absence of reasonable and probable cause. Instead, says Professor Lee,

'the courts of the Roman-Dutch colonies preferred to take over holus bolus the English action of malicious prosecution, a thing of doubtful antecedents, of no great antiquity, and out of harmony with the body of the law'."

I take the first two of the concluding criticisms to be intended to apply to the action as it exists in English law, although,

according to Denning L.J., in Leibo v. Buckman Ltd. and Another, (2), that action has been used in England for some hundreds of years. The comment that the action is out of harmony with the body of the law presumably has reference to the modern Roman-Dutch law represented by the law of South Africa. However that may be, there is no doubt that the pre-Union Courts and the Divisions of the Supreme Court of South Africa which succeeded them in the Provinces have, over a fairly long period, always required of the plaintiff, if he was to succeed, proof both of an indirect or improper motive on the part of the defendant and of the absence of reasonable, or, as it is more usually put, reasonable and probable, cause. In Corea v. Peiris, (3), moreover, the Privy Council approved the conclusion, which had been reached by the Supreme Court of Ceylon, that the principles of the Roman-Dutch law and the English law on the subject of malicious prosecution are practically identical. But the matter is concluded by Estate Logie v. Priest, (4). In that case the action was for the wrongful obtaining of a sequestration order, but it is not on that

account of less authority in relation to malicious prosecution. For public policy clearly requires that a plaintiff should have to prove no less against the defendant in a malicious prosecution action than in an action based on the wrongful sequestration of his estate. What was said by Sir William Solomon, therefore, at p.315 in giving the judgment of the Court is of full application to the present proceedings. After referring to a provision in the 1916 Insolvency Act, he proceeded,

"this action, however, is admittedly brought not under the statute, but under the common law. It was incumbent, therefore, upon the plaintiff to prove not only that there was no ground for sequestrating his estate, but also that the proceedings were instituted maliciously, and without reasonable and probable cause."

The inclusion of absence of reasonable and probable cause among the matters to be proved by the plaintiff was unquestionably part of the ratio decidendi of the case (see pp.323 to 325) and is binding upon us, unless, indeed, we were

satisfied of its incorrectness. I am certainly not so satisfied. Assuming that upon a re-examination of the authorities it might be possible to question the reasoning whereby the law has come to be stated as it has been, that would be far from establishing the conclusion that such statement was wrong. And in fact, if I may respectfully say so, the requirement of proof of absence of reasonable and probable cause seems to be a most sensible one. For it is of importance to the community that persons who have reasonable and probable cause for 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 or improper motives. In my view, accordingly, the general principles governing the action were correctly stated by Malan, J." (emphasis supplied)

As to "reasonable and probable cause" the learned Schreiner J.A. observed further at p.136:

"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. This statement of the legal position seems to me to accord with the judgments of the English Court of Appeal in Tempest v Snowden, (5), and Leibo v. Buckman Ltd. & Another, (2); if it should appear by comparison to be an oversimplication, this may be due in part at least to the fact that our system does not use a jury in civil cases."

Van den Heever J.A., while concurring with Schreiner J.A., additionally observed inter alia as follows at p.140:

"I am not in agreement with Malan, J., however in holding that, if the respondents had been actuated by a desire to secure conviction of the appellant with the object of ridding the neighbourhood of him, their motive was

improper. Such a motive would naturally tend to cast doubts on the bona fides of the steps taken by them in order to have the appellant prosecuted. The mere fact, however, that they had an additional and ulterior motive does not seem to me to stamp their conduct as malicious in the legal sense."

The ingredients of a malicious prosecution were once again considered by the Appellate Division in the case of Moaki v Reckitt & Colman (Africa) Ltd & Anor (6). Wessels J.A. (Steyn C.J., Ogilvie Theompson Botha, and Potgieter JJ.A concurring) observed at p.103:

"This court was referred to a number of authorities which laid down in terms that in an action of the kind instituted by the appellant it is essential to allege and prove not only want of reasonable and probable cause but also that the defendant acted "maliciously"."

The learned Judge of Appeal referred to a number of authorities including Beckenstrater (1) and continued at p.104:

"A consideration of the various judgments

in the cases cited in the preceding paragraph leads me to conclude that, despite the use of the terms "malice" and "maliciously", it was not intended to formulate any principle that in the actions in question the motive of the defendant, in acting as he was alleged to have acted, was in any way a determining element of legal liability. It is, however, equally clear from those judgments that the defendant's state of mind in doing the act complained of is a material determining element of liability. In both Hart v. Cohen (7) and Lemue v. Zwartbooi (8), it is indicated that the plaintiff's remedy is provided by the actio injuriarum. 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."......................

"It follows, in my opinion, that, although it became customary to allege "malice"

in pleadings in actions of the type now under consideration, our law has always required a plaintiff to prove only the existence of the requisite legal intention to injure, without requiring him to establish in addition the defendant's motive, i.e., that he acted maliciously."

The Appellate Division once more considered, but briefly, the above aspect in case of Lederman v Moharal Investments (Pty.) Ltd. (9). Jansen J.A. (Ogilvie Thompson, Rumpff, Botha JJ.A and Muller AJA concurring) observed at p.196:

> "In seeking to hold the respondent company liable in damages for this unsuccessful prosecution, the onus was upon the appellant to establish in the Court a quo -
>
> (a) that the respondent set the law in motion (instigated or instituted the proceedings);
> (b) that it acted without reasonable and probable cause; and
> (c) that it was actuated by an indirect or improper motive (malice);
>
> (cf. Beckenstrater v. Rottcher and Theunissen,

(1); Van der Merwe v. Strydom (10).

> There seems little doubt that this is the actio injuriarum and, conceivably, the need may well arise, in appropriate circumstances, to recast the above requisites into a mould more consistent with the terminology of that actio. In the present instance, however, as will appear, the enquiry relates to the first requisite only."

That, in my research, would seem to be the latest dictum of the Appellate Division in the matter. In the present case I do not see that the "first requisite" should give any difficulty. Clearly the procedings were instituted by the Public Prosecutor, who is singled out by the plaintiff in his pleadings, acting under the powers delegated to him by the Director of Public Prosecutions under section 6 of the Criminal Procedure & Evidence Act, 1981. It is the third requisite which apparently needs to be stated "in a mould more consistent with the terminology" of the actio injuriarum. I think it sufficient to then simply say that the plaintiff must prove that the defendant acted animo injuriandi. In this respect I respectfully adopt the further dicta of Wessels J.A. in Moaki(6) at p.105:

> "Where a defendant has acted without reasonable

> and probable cause, it does not necessarily imply that he acted animo inuriandi as well, not-withstanding the fact that the want of reasonable and probable cause might at the trial afford evidence of the fact that he acted animo inuriandi."

and again at p.106,

> "..... proof of the want of reasonable and probable cause does not cast upon a defendant the onus of proving that he did not act animo inuriandi."

In the present case it is pleaded that a Public Prosecutor "duly instructed by the 1st Defendant falsely and maliciously and without reasonable and probable cause" prosecuted the plaintiff and "by reason of the malicious prosecution aforesaid, plaintiff has been injured in his good name and reputation......" There is there no express averment that the prosecutor acted animo injuriandi. In Moaki (6) at p.104 however, Jansen J.A., relying on the authority of Foulds v Smith (11) per Van den Heever J.A. at p.11, held that where the implication of dolus necessarily flows from the other averments in the pleadings, that would be sufficient. In the present case there is an averment of malice, and thereafter an averment of injuria. As I see it, the implication that the Public

Prosecutor acted animo injuriandi flows therefrom.

I turn then to the aspect of reasonable and probable cause. Quite clearly the review order of the Magistrates' Court was never served upon the plaintiff: it was directed solely at Malefetsane. The Public Prosecutor testified however that he relied upon the following passage at page 1125 of South African Criminal Law And Procedure Vol.II by Gardiner & Lansdown (1957):

"In an application to commit for contempt for failure to obey an order of court, it is necessary to prove that the respondent had personal knowledge of the order, but it is not necessary that it should have been actually served on him - Botha v. Dreyer, (12); Burgers v. Fraser, (13). In Li Kui Yu v. Superintendent of Labourers, (14), Mason, J., held that 'where a person knows, or has reason to believe or ought to know, that an application is being made to the court for a certain purpose - where he has that knowledge or that suspicion, then, if he takes any action before the court can be approached, the court will regard that as an interference with the administration of justice, and will exercise its powers to prevent itself being defeated by anything of that kind'."

Those cases deal with the position where service is evaded or circumvented, or where a person seeks to achieve his purpose before court action can be taken at all: they also deal however with the

case where the person so acting was him against whom the order had been issued or against whom the order was sought, in the vast majority of cases, of course, a party in the particular proceedings. It is trite law however that an order can be obtained against someone who is not necessarily a party to the proceedings: see e.g. Re Floyd (15) at p.801.

What however of the situation where a stranger to the action might be said to be acting contrary to a court order made out against a party to the action? The case of Seaward v Paterson (16) (per Lindley L.J.) is a case in point, the only report thereof available to me being that in Vol.16 of the English And Empire Digest, at p.10, which reads:

> "(1) There is a clear distinction between a motion to commit a man for breach of an injunction on the ground that he was bound by the injunction, and a motion to commit a man on the ground that he has aided and abetted defendant in a breach of an injunction. In the first case the order is made to enable plaintiff to get his rights; in the second, because it is not for the public

benefit that the course of justice should be obstructed.

(2) The court has undoubted jurisdiction to commit for contempt a person not included in a injunction or a party to the action who, knowing of the injunction, aids and abets a defendant in committing a breach of it."

The Digest at pp.35/36 also contains the following authorities:

"P. made oath that B. and others, having notice given to them of an injunction awarded out of this court against defendant, had disobeyed it:- Held: an attachment would be awarded against them. Lower v. Crudge (17)."

"Defendants, trustees of a branch of a friendly society, were restrained by injunction from dividing certain money among the members of the branch. Shortly afterwards defendant trustees retired, and new trustees were appointed, who, being aware of the effect of

the injunction, under an order of the branch society, divided the money among the members, including the old trustees. The court considered, on the facts, that the proceedings were an attempt on the part of the branch society and the old and new trustees to avoid the injunction, and a device for disobeying it, in which the new trustees cooperated:- Held: the new trustees, as well as the old, were guilty of contempt of court - Avery v. Andrews (18)."

What emerges from the above authorities is the general principle that no one may act so as to obstruct the course of justice. Everything of course depends on the facts of each case. It seems to me however, generally speaking, that where a court order restrains one from dealing in a particular manner with certain property, that order restrains others, having notice thereof, from acting likewise. Where the use of land is involved, it can be said that an interdict runs with the land.

In the present case the local Chief testified that he found the plaintiff on the land building thereon, and the latter said that "Malefetsane had told him to be there". The Chief also testified that Lt. Matela accompanied him on that occasion. The Lieutenant testified however that he sent others to the site.

Again, the Chief testified that Warrant Officer Mkosi found the plaintiff with his workers on the site, and arrested not alone the workers, but also the plaintiff, which of course is contrary to the remainder of the evidence. The Chief is aged 71 years and it may be that his recollection as to some details is not correct. I found him nonetheless to be a truthful witness. In particular, there can be no doubt about his evidence that he is the Chief of Malere and is thus (under section 12(1) of the Act) Chairman of the local Land Committee and that such Committee allocated the land to Malefetsane, irregularly or otherwise. There can similarly be no doubt about his evidence that such Land Committee did not allocate the land to the plaintiff. In this respect the Form C2 produced by the plaintiff purports to be signed by one "Mopeli", apparently Chief Mopeli Chief of Qalo, in the Butha Buthe district. Hence there can be no doubt about the evidence of Chief Mojela Joel that he was surprised to find the plaintiff on the land and that he challenged his right to be there.

There is then the evidence of Lt. Matela that he apprised the plaintiff's workers of the court order, and of the arrival of the plaintiff that same afternoon at his office. The Lieutenant in particular testified that he did not know if the plaintiff was aware of the court order: nonetheless there was the conversation as to the true ownership of the site, the plaintiff's promise to produce documents of ownership and subsequently the conversation with the plaintiff's Attorney. I cannot but imagine that the

plaintiff was by that stage, that is, 16th November, 1984 fully aware of the court order. But that is not to say that he was so aware at an earlier stage.

In this respect, there is the evidence of the Public Prosecutor that the docket given to him indicated that the police had advised the plaintiff of the court order. Such evidence is hearsay, of course, but not as to the Prosecutor's belief in the matter. And it is the Prosecutor whom the plaintiff has singled out in his pleadings. In any event, there is the specific evidence of the Prosecutor that the Policewoman Kumari brought the plaintiff to his office, upon the plaintiff's request or the Policewoman's suggestion, where he advised the plaintiff of the effect of the order. The Prosecutor was not cross-examined on this evidence.

The plaintiff did testify, and that only at the end of his evidence, when questioned by the Court, that "before being charged I was never approached by the police". That evidence does not preclude any approach by him to the police, nor indeed any approach by the Chief to him in the matter. He initially testified,

"I wasn't aware of any order of court against me".

Subsequently he testified,

"I hadn't appeared before any court beforehand and wasn't

aware of <u>any</u> order. There was nothing on paper on which my name appeared in respect of which the prosecutor could say I was in contempt". (emphasis supplied)

It will be seen that to some extent there is a shifting of position there. Further, nowhere did the plaintiff specifically state that he was not aware of any order made against Malefetsane in respect of the particular site. As I see it, the onus is on the plaintiff in the matter. I can see no basis for rejecting the evidence for the defendants and I find, in all the circumstances, that the probabilities are that the plaintiff was aware of the order against Malefetsane, but nonetheless continued building.

While it cannot now be said that the plaintiff was thus necessarily aiding and abetting Malefetsane, the authorities earlier referred to indicate, prima facie, that the plaintiff was nonetheless obstructing the course of justice. The contents of the reviewing Magistrate's judgment indicated that Malefetsane had been allocated the land, apparently irregularly, as no application on Form A of the Third Schedule had been made. Nonetheless, as far as the Prosecutor was concerned, the land belonged to Malefetsane. The question of title was raised with Lt. Matela, but no documents of allocation were ever produced to him and he had no cause to doubt the efficacy of the Magistrate's recent order. It is not necessary to consider as to whether or not the learned Magistrates' interpretation of the law was a correct one, as it is trite that

an order of the court must be obeyed, until discharged or set aside. There is no evidence before the Court that the plaintiff's claim to the land was ever raised with the Prosecutor. Thus it was reasonable for him at the time to assume, while it cannot now be said, that the plaintiff was aiding and abetting Malefetsane, or in the least that the plaintiff was obstructing the course of justice.

The particular Form C2 was produced by the plaintiff, by agreement, after the defendants had closed their case. The defendants were thus deprived of the opportunity of giving evidence to the contrary, much less of cross-examining the plaintiff thereon. The document was accepted by the Court as an "agreed" document, that is, agreed as to its existence, but not necessarily as constituting evidence of allocation under the Act. There is the evidence of the local Chief before the Court that no allocation was ever made to the plaintiff. The document is signed by other than the local Chief. Further, the contents of Form C2 (see section 9 of the Act) require the allottee to apply for a lease within six months, or a further three months after notice from the Commissioner, failing which the allocation "shall be of no effect". The Court was informed, from the Bar, without objection, that no lease had as yet been issued. Again there is the Chief's evidence and further, that of the Public Prosecutor, as to pending litigation in the matter.

Even had the Public Posecutor been aware of any claim by the plaintiff, there is the aspect that the Magistrates' Court had but two weeks earlier in effect recognized the allocation to Malefetsane. Further, the terms of the Magistrate's judgment indicated that no building could lawfully be erected thereon until certain statutory conditions had been met by the plaintiff and the particular Land Committee itself, which clearly could not be the case when the Chairman of that Committee had himself made complaint to the Police concerning the plaintiff. It was then reasonable to assume in the present case that the Magistrate's order would also bind any subsequent allottee, that is, until the statutory conditions were met.

While the Public Prosecutor's interpretation of the particular passage in Gardiner & Lansdown was incorrect, nonetheless that did not affect the plaintiff's liability in the matter, and the Prosecutor's view of such liability was, in my view, correct. In the least it can be said that a difficult question of law was involved and it is not evidence of absence of reasonable and probable cause that a mistake has been made as to such question: see Phillips v Naylor (19). As Lord Atkin said in the leading case of Herniman v Smith (20) at p.319,

> "It is not required of any prosecutor that he must have tested every possible relevant fact before he takes action. His duty is not to ascertain whether there is

a defence but whether there is reasonable and probable cause for a prosecution."

Certainly there is no evidence before the court in the present case that the Prosecutor himself did not believe in the plaintiff's guilt: indeed, he testified that he intended making submissions on the law to the learned trial Magistrate, but was given no opportunity to do so, as the record indicates, the Magistrate, quite irregularly in my view, entering a verdict without reasons and without calling for submissions. As I see it, the information before the Prosecutor was, in all the circumstances, such as to lead a reasonable man to conclude that the plaintiff was probably guilty. The plaintiff has therefore failed to prove want of reasonable and probable cause. The plaintiff's claim cannot then succeed.

In any event, as to whether or not the Prosecutor acted animo injuriandi, there are but two items of evidence which in any way give rise to that aspect. The plaintiff is a well-to-do and well-known local businessman. The Public Prosecutor testified that he knew of the plaintiff, but did not know him pesonally, that is, before the prosecution. There is the aspect that he knew of the relationship of the Policewoman to the plaintiff, but that might well be consistent with the remainder of his evidence. Lt. Matela testified that he believed that the Prosecutor "knew the plaintiff" when the charge was preferred, as "Butha-Buthe is a small district", he said. He did not elaborate however on the extent of

such knowledge. Even if the Prosecutor did not tell the truth in the matter, I do not see that that necessarily indicates an intent to injure the plaintiff.

The only evidence which could be remotely indicative of any such intention, is the aspect that the Prosecutor has charge of a further possible prosecution against the plaintiff, that is, in respect of an allegation of occupying land without proper authority, contrary to section 87(1) of the Land Act. No charge had been preferred however, and it was the Prosecutor's position that he had taken instructions from the Director of Public Prosecutions in the matter. In all the circumstances, I cannot say that such evidence establishes that the Prosecutor probably intended to injure the plaintiff.

Accordingly I dismiss the plaintiff's claim with costs to the defendants.

Delivered at Maseru This Day 27th of June, 1990.

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B.P. CULLINAN

CHIEF JUSTICE