IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 3644/2008

In the matter between:

GCINA S. KHANYILE **Plaintiff**

And

SWAZILAND WATER SERVICES CORPORATION **Defendant**

Neutral Citation: Gcina S. Khanyile v Swaziland Water Services Corporation 3644/2008) [2012] SZHC 203 (14th September 2012)

Coram: M. Dlamini J.

Heard: 17th July 2012

Delivered: 14th September 2012

Delict –actio injuriarum – institution of internal disciplinary hearing – three requisites: defendant set law in motion; acted without reasonable and probable cause; activated by indirect or improper motive (malice) to be established by plaintiff…. balance of probabilities discussed.

Summary: The plaintiff instituted action proceedings by way of combined summons alleging that the defendant set the law in motion by instituting disciplinary hearing against him without any reasonable or probable cause. The action is strenuously opposed by the defendant.

[1] In establishing his cause of action, the plaintiff gave *viva voce* evidence. His evidence was that he was presently engaged in the agricultural business. He was under the employment of defendant since 1997 to 6th September 2011when he retired.

[2] He was occupying the position of a supervisor based at Ezulwini Waste Treatment depot. While on leave on 12th February 2007, he received a cellular phone call from defendant to attend to Ludzidzini royal residence where there was shortage of water supply, having proceeded on leave on 8th September 2007. He called one Themba Kunene who was holding fort in his absence. Themba Kunene informed him that he was away from Ludzidzini. He decided to attend to the problem as he was within the same vicinity of Ludzidzini, Lobamba, a walking distance. He met security from Ludzidzini who were in fact on their way to collect him from his Lobamba residence. They all proceeded to Ludzidzini royal residence.

[3] Upon reaching Ludzidzini royal residence he confirmed the water shortage. On the instruction of the headman, he called defendant's management who were public affairs manager, Director Operations his immediate supervisor and a supervisor for water distribution. It was his evidence that the need to call management was precipitated by the havoc attended by the security of water in the royal residence.

[4] At the meeting he, together with two other employees of defendant were commissioned to investigate the cause of the water shortage. One of his colleagues suggested that from the report that has been delivered on how the water supply was cut short, they should check the valves. By shear chance, one of his colleagues went straight to the problematic valve and discovered that it had been interfered with. They immediately attended to the valve and their discovery was reported back to management. On the basis of the interference with the valves, management suggested that they keep all valves under key and lock and for this reason plaintiff was informed to suspend his leave. He obliged.

[5] While on duty on 18th April 2007, he received a call from Sgt. Kunene of Lobamba Police station who informed him that he had been commissioned to investigate water shortage at Ludzidzini royal residence and he was a suspect. After interrogations, the officer informed him that he was excused and would call him later and excused him saying he would deliver a report to plaintiff. The officer never called him again.

[6] What followed however, was a letter of suspension slapped at plaintiff with a subsequent charge which were tabulated as follows:

> *"Charge 1: "You are charged with dishonesty and/gross misconduct in that on or about 8th February, 2007, you interfered with the Corporation's network system when you shut down the pipeline which transmits potable water from the Lobamba Treatment Plant to Ludzidzini and surrounding areas*

Charge 2: *You are charged with gross misconduct in that you brought the name of the Corporation into disrepute in that as a supervisor while you were accommodating the Corporation's premises, you failed and neglected to attend the water supply interruption at Ludzidzini during the period between 8th and 12th February, 2007.*

Charge 3: *You are charged with gross misconduct in that you brought the name of the Corporation into disrepute in that in a meeting with officials from Ludzidzini when the issue of interruption of water supply was being discussed you placed blame for the interruption of water supply in the Corporation for what you termed as Corporation's failure to provide you with motor vehicle when you knew or ought to have known that as supervisor you were not entitled to a company vehicle, furthermore, you knew or ought to have known that such an issue was internal and could not be used to discredit the Corporation.*

Charge 4: *You are charged with gross misconduct in that your conduct on the aforesaid subjected the Corporation to serious detrimental consequences as those listed in the offences scheduled of the Recognition Agreement."*

[7] He was acquitted on all but one count *viz.* Count 3. The penalty meted was one of transfer to another station and a final written warning. I will revert to subsequent action taken by plaintiff later in my judgment.

[8] I must mention from the onset that it is not every instance of malicious prosecution that would justify a cause of action. **R.V.F. Henston** in **"Salmond on Torts" 11th Ed** at page **739** stated as follows in regard to this position of the law:

> "*The bringing of an ordinary civil action (not extending to any arrest or seizure of property) is not a good cause of action, however unfounded, vexatious, and malicious it may be (o). The reason alleged for this rule is that an unfounded and unsuccessful civil action is not the cause of any damage of which the law can take notice. Even for the injury which baseless accusations made in a civil action may inflict upon the reputation of the defendant, it would seem that no action lies. It seems that a litigant may maliciously and without any reasonable ground make the gravest charges of fraud or other disgraceful conduct without incurring any other liability than that of paying the costs of the proceedings*"

[9] At page 737 he explains the circumstance much clearer:

> "*The rule applies only to prosecutions which involve scandal – that is to say, which attack the fair fame of the accused – or which may result in a sentence of imprisonment or other corporal punishment, or which in fact cause pecuniary loss to the accused (c). A charge which is not scandalous in its nature, and which can result in a fine only, cannot therefore be made the grounds of an action for malicious prosecution unless it causes actual pecuniary loss*".

[10] Although **Heuston** was discussing malicious criminal prosecution, I see no reason why such should not be extended to civil prosecution.

[11] It is on this basis that the court in **Delange v Costa 1989 (3) S.A. 857** laid down three general prerequisites applicable in this cause of action viz.,

i) *animus injuria*;
ii) wrongful act which;
iii) causes plaintiff's *dignitas* to be impaired.

[12] At the close of plaintiff's case, the defendant moved an application for absolution from the instance on the basis that the evidence adduced falls far too short of establishing malice. This court is now seized with the enquiry; has the plaintiff established his cause of action in that on a balance of probabilities he has proved the elements in an action of malicious prosecution?

[13] The elements of malicious prosecution were canvassed in **Lederman v Moharal Investment (Pty) Ltd 1969 (1) S.A. 190** at **1969 H** where the court held that the onus were on the applicant to establish:

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)

[14] Such elements were further discussed in **Ramakulukusha v Commander Venda National Force 1986 (2) S.A. 813** where the court also in H**euston** *supra* on the subjects lucidly highlights on a sub-topic "C**onditions of Liability**" at page 739 -740:

"*In order that an action shall lie for malicious prosecution or the other forms of abusive process which have been referred to, the following conditions must be fulfilled:*

1) The proceedings must have been instituted by the defendant;
2) He must have acted without reasonable and probable cause;
3) He must have acted maliciously;
4) In certain classes of cases the proceedings must have been unsuccessful – that is to say, must have terminated in favour of the plaintiff now suing."

[15] As discussed above my first task is to ascertain whether the circumstance of the case *in casu* justify the cause of action. Put precisely; were the charges leveled against the plaintiff by defendant of a scandalous nature and could they have resulted in pecuniary loss once sustained?

[16] *Ex facie*, nothing turns out from the charges *per se* as outlined above, and in his evidence in chief, the plaintiff informed the court that an outsider had to be invited to give evidence in his defence. This therefore, rendered the internal proceedings to be public. Further, to be accused of interfering with water supply of an area such as Ludzidzini, a royal residence was scandalous on its own.

[17] It is common cause that the witness who was defendant non-employee was invited by plaintiff. On that note, I cannot see how the matter which was internal could be said it became public and as such the defendant should bear the blunt for such as in actual fact, it is the plaintiff who chose to invite the outsider. As the principle goes: one cannot benefit from his wrong, should sustain in the circumstances of this case.

[18] I will however accept that as a result of the charges, plaintiff incurred pecuniary loss as he had to solicit the services of an attorney who, as per his evidence under cross-examination, was consulted from time to time in preparation for the disciplinary hearing. He was justified as of right by law to consult an attorney more-so as the charges if sustained, could have resulted in his dismissal from work.

[19] My next enquiry is to find out who actually instigated or instituted the proceedings. Unlike in matters of public prosecution where it becomes an upheaval for the plaintiff to differentiate as to who between the complainant and the public prosecutor or we could add the police, who instigated or set the law in motion, *in casu*, the question is quickly disposed off as the complainant and the person who arranged for the disciplinary action is the same, that is the defendant.

[20] An onerous task lies in the question as to whether the defendant acted without reasonable and probable cause and that it was actuated by *animus iniuriandi.* *C*ommenting on this position, **Heuston** *op cit.* states at page 741:

> *"First, the burden of proving absence of reasonable and probable cause is on the plaintiff, who thus undertakes the notoriously difficult task of proving a negative. Secondly, the existence of reasonable and probable cause is a question for the judge and not for the jury.*"

[21] He explains that for the judge, by virtue of being presumed to be a question of law and not fact.

[22] **Heuston** at page 743 citing **Hicks v Faulkner (1878) 8 Q.B.D. 171** states that **Hawkins J.** outlined:

> *"I should define reasonable and probable cause to be an honest belief in the guilt of the accused, based upon a full conviction, founded on 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 position of the accused, to the conclusion that the person charged was probably guilty of the crime imputed."*

[23] **Lord Denning** in **Tempest v Showden (see page 743** of **Heuston**) on the question of reasonable and probable cause, puts it more direct:

> *"The case is so black against the man that I feel I must prosecute, but I am not going to believe him to be guilty unless the court (disciplinary hearing as the case may be) finds him to be so."* (words in brackets my own)

[24] Page 744 **Heuston** propounds:

> *"This question (reasonable and probable cause) is to be determined by the facts actually known to the defendant at that time when he laid the information and subsequently proceeded with the prosecution, not to the facts as they actually existed."*

[25] *In casu*, the facts "*actually known to the defendant at the time when he laid the information and subsequently proceeded with the prosecution*" are unknown by this court as the defendant moved an application for absolution

from the instance at the close of the plaintiff's case. The defendant did not put its side of the evidence upon which it prosecuted even during cross-examination of the witness. The court cannot therefore make a determination on the question of reasonable and probable cause.

[26] On the question of malice, **Heuston** *op cit*., at page 745 points out:

> "*malice and absence of reasonable and probable cause must unite in order to produce liability*."

[27] As this court cannot make a finding on reasonable and probable cause, there is no need to enquire on malice, although I must point out that as can be deduced from **Gascoyne v Paul Hinter 1917 TPD** at **172**, malice can be inferred from the conduct of the defendant.

[28] However, there is a further aspect of the elements of malicious proceedings which this court has to draw its attention to before making a final determination on the defendant's application for absolution from the instance. This is on the requirement as provided in **Ramakulukusha v Commander Venda National Force 1986 (2) S.A. 813** which is that the proceedings must have terminated in favour of plaintiff.

[29] *In casu*, could the proceedings be said to have ended in favour of plaintiff in that he was acquitted.

[30] Plaintiff then lodged an appeal to the managing director of defendant. After considering his appeal, the managing director of defendant reduced the sentence to a transfer to another work station with a written warning and not a final written warning.

[31] Plaintiff, dissatisfied with the managing director's findings and verdict, reported a dispute to C.M.A.C. (Conciliation Mediation and Arbitration Commission) as follows as appears at page 59 bundle of documents.

> "5.3 *SUMMARISE THE PARTICULARS OF ALL FACTS GIVING RISE TO THIS DISPUTE AS PRECISELY AS POSSIBLE: I was suspended in relation to water shortages at Ludzidzini. I was duly brought before a disciplinary enquiry where I was found guilty of unsubstantiated charges and was given an immediate transfer and a final written warning.*
>
> 5.5 *DESCRIBE THE PROCEDURES FOLLOWS: I appealed internally and the final written warning was reduced to a written warning but the transfer was upheld. Hence my decision to file this dispute."*

[32] The outcome at C.M.A.C. was as reflected at page 66 of the bundle of documents:

> "*2. The undersigned parties record the settlement of their disputes in the following terms:*
>
> *The parties to this dispute agreed that as full and final settlement for this dispute, the written warning issued against applicant on the 3rd August 2007 shall be revoked with immediate effect. That the transfer to Pigg's Peak Plant shall stand with no conditions and the respondent shall issue a new instrument validating same as a normal transfer*."

[33] It is not clear from the reported dispute whether plaintiff challenged his sentence, that is, transfer and written warning alone or both sentence and the guilty verdict. However, what is glaring is that an agreement was reached whereat his sentences were put aside, although a transfer was to be effected but not pursuant to the outcome of the disciplinary hearing.

[34] It can safely be concluded from the totality of the report at C.M.A.C. and the outcome thereof that plaintiff although claimed the penalties to be based on "*unsubstantiated evidence*" was more concerned about the penalties hanging over his head than the verdict. It is for this reason that the report on settlement refers to alteration of the penalty than the verdict. Were it paramount that the plaintiff was not guilty of count 3, he would have challenged the verdict as well and C.M.A.C. final arbitration report would have indicated the position of the parties in that regard.

[35] In the circumstances this court is bound to conclude that the proceedings did not terminate in favour of the plaintiff and therefore the application for absolution from the instance must be upheld.

[36] The following orders are entered in favour of defendant:

i) Plaintiff's action is dismissed with costs.
ii) No order as to cost

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M. DLAMINI

JUDGE

For Plaintiff : **Mr. S. Matsebula**

For Defendant: **X. Shabangu**