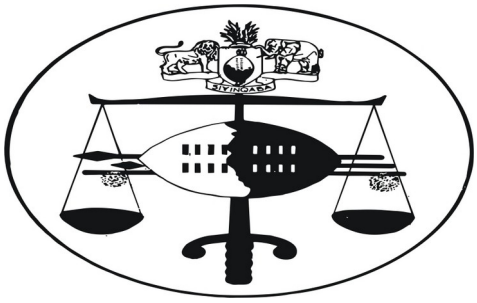

IN THE SUPREME COURT OF SWAZILAND

HELD AT MBABANE CIVIL APPEAL NO. 27/07

In the matter between:

PROFESSOR DLAMINI APPELLANT

v

THE ATTORNEY-GENERAL RESPONDENT

FOR APPELLANT : MR. P.M. SHILUBANE
FOR RESPONDENT : MR. S. KHUMALO

CORAM : BROWDE JA
TEBBUTT JA
RAMODIBEDI JA

JUDGMENT

TEBBUTT JA

A claim for damages by the appellant against the

Swaziland government, represented by the Attorney General, for E250,000 for malicious prosecution was dismissed by Banda CJ. in the High Court, hence this appeal to this Court against that decision.

In his particulars of claim the appellant averred that on 20 September 2000 at Mbabane the Royal Swaziland Police and/or the Director of Public Prosecutions (DPP) acting as employees of the Swaziland Government "wrongfully and unlawfully set the law in motion by causing (appellant) to be indicted for murder, robbery and possession of arms of war", without having reasonable and probable cause for so doing or having any reasonable belief in the truth of the information contained in the police docket on which the charges were based. He averred that as a result of the conduct of the police and/or the DPP he was arrested and held in custody from 20 September 2000 to 18 June 2001, when he was released on bail. He was duly prosecuted in the High Court but was acquitted on 8 December 2003 at the close of the Crown case. He had, he alleged, suffered damages in the sum of E250,000 being E25000 which were the costs incurred in his defence, E75 000 for contumelia and loss of freedom and E150

000 for discomfort suffered by him.

The Swaziland Government's denial of liability to the appellant was that the indictment and prosecution of the appellant was lawful and justified in that the appellant was reasonably suspected of having committed the offences with which he was charged. This was based on the evidence contained in the statements to the police of the Crown witnesses and, in particular, that of a witness who was alleged to have been an accomplice of the appellant in the commission of the offences, one Colin Magagula. The appellant's acquittal at the close of the Crown case was because Magagula had in cross-examination during his evidence in the trial of the appellant, reneged on what he had said in his statement to the police about the appellant's participation in the alleged offences.

It is necessary now briefly to refer to those offences and to the statements of the Crown witnesses, especially that of Magagula. I need not do so in any great detail, that having been done by the learned Chief Justice in his careful and comprehensive judgment. I shall content myself, for the purposes of

this judgment with highlighting the salient aspects of the evidence.

Although the appellant averred in his particulars of claim that he was charged with murder, that is not so. He was not. He was charged with having, in common purpose with one Nelson Maseko, robbed at gun point one Samuel Shawa Dlamini at Mantenga Bottle Store on 1 August 2000 of E1900 and one Bhekithemba Mbokodvo Sikhondze of his Toyota Corolla motorcar at Mdzimba area on 8 August 2000. He was also accused of robbing, in common purpose with the said Maseko and two others viz. Meshack Dvuba and Vusani Manikela, at Ngwenya area, one Mandla Jacob Matse of E16 500 on 9 August 2000. Again, a firearm was used to threaten Matse to hand over the money.

It would appear that during August and September 2000 there was a spate of robberies in the Ezulwini area. In all of these AK 47 rifles were used. The robberies with which the appellant was charged were some of these. Following a tip-off, two Swazi nationals, one Shongwe and the said Maseko were arrested. They handed two AK 47rifles to the police,

saying they belonged to the appellant. Magagula was also arrested. He told the police that the guns had been given to him by the appellant to use in the robberies. I shall refer to his statement in more detail in due course, but in it he mentioned a teacher at S.O.S. Primary School, Richard Nkambule. Nkambule told the police in a statement to them that the appellant, whom he knew, asked him on 16 September 2000 to direct him to Magagula's house saying that he wanted to fetch his "machines" from Magagula. The latter was not at home when they got there but Magagula's wife was. They came back later when Magagula had returned. Magagula and the appellant talked to each other but he did not hear their conversation.

Magagula's "wife", Ncamsile Martha Dlamini (they lived together as man and wife but were not married) also gave the police a statement in which she said that two men, whom she later got to hear from Magagula, were the appellant and "a teacher", had come to their home on 16 September 2000 looking for Magagula. He was not there at the time but they returned later and the appellant and Magagula conversed. They again came to the house at about

1800 hours. Magagula was once more not then at home. They said they would return at about 2300 hours. She asked them what was wrong and they said Magagula "knows the oath" and that "a soldier dies in his work".

I turn then to Magagula's statement. Again, I need not set it out in extenso. The crux of it is contained in the following paragraphs:

> ***"I was arrested by the police from my house for 2 x AK 47 assault riffles (sic) which I and other friends had used in committing two armed robberies, one at Mantenga Bottle Store and Hawini Bottle Store respectively. I got two (2) AK 47 assault riffles (sic) from Professor Dlamini who is a member of 'Pudemo' from his homestead at Forbes Reef area. When going to collect or fetch the gun from Professor Dlamini I was in the company of my friends namely (1) Nelson Mandela Maseko and (II) Sabelo***

Shongwe and two other men…".

Magagula stated further that on 16 September 2000 his wife said two men were looking for him when he was away from home. Later the teacher, Richard Nkambule, and the appellant arrived and he, Magagula, and the appellant went off a short distance from Nkambule to talk to one another. Magagula's statement goes on:

> *"Professor told me that he had come to collect the guns of the organisation, that I wanted. I told him that the people whom I gave the guns to are arrested and I am not in a position to know where they had hidden it".*

Magagula said he repeated this to Nkambule. Nkambule said that they did not care about what he had told them; Magagula had to tell them when they could collect the guns. He added:

> *"Professor further said I must get the guns. Since he is in danger and might die at any time and then if he dies first I will follow him".*

The police also had a statement from one Tito

Mandlazi implicating the appellant. In the summary of witnesses' evidence supplied by the prosecution to the defence at the trial of the appellant his name appears as a witness "who will corroborate PW 23 (another Crown witness) in so far as fetching the firearms". At the trial Mandlazi's evidence was that he accompanied Magagula when the latter went to a forest and emerged carrying a bag from which protruded two sticks which he took to be the barrels of guns.

It is common cause that at the criminal trial of the appellant, Magagula gave evidence that was not "in accordance with" the statement he had made to the police. It was following that and pursuant to an application by defence counsel at the close of the Crown case, that counsel for the Crown conceded that in the light of what had transpired in respect of Magagula's evidence, the Crown case against the appellant had collapsed and the appellant was then acquitted.

At the trial of the appellant's claim for damages before the learned Chief Justice, the police sergeant who was in charge of the investigations of the

robberies concerned in the charges against the appellant, Joseph Bhembe, and the Deputy DPP, McMillan Maseko, who prosecuted the appellant in the criminal trial gave evidence. Once more I need not refer in detail to their testimony. It suffices to say that Bhembe said that "collecting all that evidence, we felt that (the appellant) is liable to face the armed robbery cases and the arms and ammunition…" and that Maseko said that it was on the basis of the statements in the police docket that he preferred the charges against the appellant. The crux of Maseko's evidence is to be found in the following passages:

> ***"When the docket was brought to me there was a statement which implicated the Plaintiff. The statement was of one Colin Magagula who had already been made an accomplice witness by the time the docket was brought to me My Lord. My Lord the essence or gist of the statement of Colin Magagula was to the effect that he had received some AK 47 assault rifles***

from the Plaintiff and he had in turn handed over those firearms to one Nelson Maseko who was a co-accused together with other co-accused persons for the purpose of carrying out robberies. It was on the basis of that My Lord that I then preferred charges against the Plaintiff together with the other accused persons before the trial Court.

Asked if there was any corroboration of Magagula's evidence, Maseko said,

"Yes, my Lord, there was corroboration. The firearms themselves, the evidence of one Richard Nkambule; if I am not mistaken My Lord there was a gentleman who was driving the motor vehicle when they went to fetch the firearms I think by the name of Tito Mandlazi. There was just a lot of evidence and with the

excellent and brilliant evidence of Colin Magagula."

He added:

"As far as I was concerned it was a good case, my Lord".

Malicious prosecution as an action has been recognised in the English law for some hundreds of years (see per Denning L.J. in Leipo v Buckman Limited and Another 1952 (2) All E.R. 1057) and in the Roman – Dutch Law, as it has been applied in South Africa, for over a hundred years. Although the authors of some articles in the South African Law Journal have questioned whether the Roman – Dutch, which is of course, the common law of Swaziland, is in harmony with the English law (see Professor Lee on Malicious Prosecution in Roman – Dutch Law (29 SALJ 22) the Privy Council in Corea v Peires 1909 AC 549 expressed a firm view that the Roman – Dutch law and the English law on the subject of malicious prosecution were practically identical. This opinion was adopted with approval by the South African Appellate Division in considering what the essential

requirements were that a plaintiff had to prove in order to succeed in an action for malicious prosecution (see Beckenstrater v Rottcher and Theunissen 1955 (1) SA 129 (A) at 134H – 135 A).

It concluded that a plaintiff had to show that the respondents in such an action had set the prosecution proceedings in motion and that the prosecution had ended in his or her favour. In addition, and more important, the plaintiff must establish that the respondents, in setting the proceedings in motion, had no reasonable and probable cause for doing so and were actuated by an indirect or improper motive.

Beckenstrater's case has been followed in a large number of South African cases (see e.g. Van der Merwe v Strydom 1967 (3) SA 460 (A) at 1966 H; Prinsloo and Another v Newman 1975 (1) SA 481 (A); Ochse v Kingwilliamstown Municipality 1990 (2) SA 855 (E).)

In all the above cases it has been repeatedly stressed that a plaintiff in an action for malicious prosecution bears the onus of proving (a) that the police or the prosecution instituted the prosecution or, as it has also been expressed, set the law in motion; (b) that in so doing they acted without

reasonable and probable cause; (c) that they were actuated by an improper motive or malice, and (d) that the proceedings terminated in the plaintiff's favour.

In my view the principles set out in those cases also represent the legal position which should be applied in actions for malicious prosecution in Swaziland.

In casu, it was common cause that the first and fourth of these essentials had been established. It was in regard to the second and third essentials that the Court a quo was required to make a determination.

The inclusion of proof of an absence of reasonable and probable cause among the matters to be proved by the plaintiff has been said in England in the Corea case, supra, to be a "most sensible one" and similar sentiments were expressed by Schreiner J.A. in the Beckenstrater case supra at 135 D where he said:

> ***"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."***

And he added:

"even if in so doing they are actuated by indirect or improper motives."

It seems to me to be logical that if there was reasonable and probable cause for the police and the DPP to believe that the appellant had committed the offences with which they charged him, they would not have been acting from some indirect or improper motive in instituting the prosecution against him. It would however, require an honest belief on the part of the instituter. If it is proved by a plaintiff that the defendant in a malicious prosecution case did not believe that the plaintiff was probably guilty of the offences concerned he would not have had reasonable and probable cause for instituting the prosecution. Reasonable and probable cause" means

"an honest belief in the guilt of the accused founded upon reasonable grounds on circumstances which, assuming them to be true, would reasonably lead any ordinarily 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".

(see May v Union Government 1954 (3) SA 120 (N) at 129 A citing with approval the definition of reasonable and probable cause in Hicks v Faulkner 8 Q.B. D at p 171.)

That test is, of course, an objective one. If, however the accuser is shown not to have believed in the accused person's guilt then a subjective element comes into play and would disprove the existence for the accuser of reasonable and probable cause (see Beckenstrater's case supra at 136 A-B; Prinsloo and Another v Newman supra at 495 H; M v Heavy Metal: Belfry Marine Ltd v Palm Base Maritime SDN BHD 2000 (1) SA 286 (c) at 294 F –I). It would probably also go a long way in establishing the third essential requirement for success in the action viz. evidence that the accuser acted from an improper or ulterior motive or, as it has been expressed in the cases cited above, that he was actuated by malice.

Malice has been defined as "a desire to do harm to some one; ill-will" (Concise Oxford Dictionary s.v."malice). In certain of the South African cases it has been said that it means an absence of an honest belief in the guilt of the accused or an improper or indirect motive which may, but need not be, spite or ill-will.

In a number of the South African cases it has been held that malice in the context of malicious prosectution also includes animus injuriandi and there has been much judicial pronouncement on whether malice has been replaced by animus injuriandi in the third of the requirements that a plaintiff has to prove (see e.g. Lederman v Moharal Investments supra at 196; Moaki v Reckitt and Colman 1968 (3) SA 98 (A) at 103 – 104; Prinsloo and Another v Newman supra at 492A – C; Thompson and Another v Minister of Police and Another 1971 (1) SA 371 (E) at 3736 – 374F). The author of the section on malicious prosecution in the Law of South Africa (LAWSA) feels this is open to question (see para 612 line 12) and submits that malice should still be required to establish wrongfulness. It seems to me that the two concepts, although one is concerned

with lawfulness and the other with fault (see LAWSA para 612 note 2 and cases there cited), within the context of an action for malicious prosecution, differ but little from one another. Animus injuriandi has been defined as "consciously wrongful intent" (see Maisel v van Naeren 1960 (A) SA 836 (C)) or an intention to injure" i.e. a deliberate intent to cause harm. In order to succeed in his action a plaintiff would therefore have to establish a desire on the part of the defendant to cause him harm or a conscious or deliberate intention to injure him by setting in motion the legal proceedings against him.

In the present case, therefore, in order to succeed in his action the appellant would have had to prove that the police and the D.P.P. had a desire to do harm to him i.e. that they bore him ill-will or that they had a deliberate intention to injure him when they put the law in motion against him. The very definition of the action is that it is one of "malicious" prosecution viz that the prosecution was instituted with ill will towards him i.e. with a desire to harm, or an intention to injure, him. No evidence was produced by the appellant to support his bald suggestion that he was prosecuted because the police and the D.P.P. had

been actuated by malice towards him and that he had been prosecuted because of his political affiliations. He testified that he was a political activist and that he belonged to the People's United Democratic Movement (PUDEMO), a political organisation. He averred that the police were interested in his movements, and used to follow him, that he had been arrested in 2000 and interrogated by the police on the pretext that they were looking for arms. He had been kept in custody and was initially denied bail but this was later granted to him by this Court. Both witnesses emphatically denied that this was their motive in instituting the prosecution against the appellant.

The learned Chief Justice, in a well-reasoned judgment, considered whether the appellant had discharged the onus of establishing the second and third requirements necessary for him to succeed in his action.

As to the second of these he found that the appellant had not succeeded in proving an absence of reasonable and

probable cause on the part of the police and the D.P.P. in instituting the prosecution against the appellant. He was, in my view, perfectly correct in doing so.

They had before them the clear and unequivocal statement of Magagula which was corroborated in many essential aspects by the statements of Nkambule, Magagula's "wife", Ncamsile Martha Dlamini, and Tito Mandlazi. Looking at these statements any ordinarily prudent and, cautious person would, in my opinion, have been quite reasonable in believing in appellant's guilt.

The appellant, in my view also did not prove that the police and the D.P.P. did not have an honest belief in his guilt. The learned Chief Justice, who had the benefit of seeing the witnesses at the trial found them to be credible witnesses. His finding in this regard reads thus:

> ***"I carefully observed the manner in which both witnesses for the defendant gave their evidence. They impressed me as credible witnesses. They gave their evidence in a calm and collected manner and I did not form the***

impression that they are the kind of people who would frame up charges against any person for any interior motive".

They were both quite adamant, as set out above, that they had an honest belief in the appellant's guilt and that, as Maseko put it, "it was a good case".

It is well-established that a court on appeal will not disturb findings of credibility by a trial court unless it is satisfied that such findings were clearly and manifestly wrong. I am not so satisfied. On the contrary, a careful reading of their evidence convinces me that the court a quo was completely justified and correct in making the findings it did.

As to the third requirement viz. whether the police and the D.P.P. were actuated by malice or animus injuriandi, in view of the finding that there has been no proof of an absence of reasonable and probable cause, cause the question whether the police and the D.P.P. were actuated by some indirect or improper motive becomes irrelevant. However, as the appellant contended at the trial that the police and the D.P.P.

had such a motive for instituting the prosecution and Mr. Shilubane persisted with that contention before this Court, I shall say something about it.

As set out above the appellant had to establish ill-will or a desire to harm him or a deliberate wrongful intention to do so. Apart from his own averment that the respondent's witnesses had prosecuted him because he was a member of Pudemo, there was no evidence to support him in his averment. Moreover, the trial court found him to be an unreliable witness. Reading the record of his evidence at the trial, I agree. Both witnesses for the respondent emphatically denied that they had been actuated by any improper motive. They had an honest and reasonable belief in his guilt. The learned Chief Justice found that they had not been actuated by malice or an alterior motive. I agree with him.

> ***Mr. Shilubane, however, contended that there had become an absence of reasonable and probable cause during the course of the criminal trial and that there was evidence of malice on the part of the respondent when the D.P.P. did not immediately stop the prosecution at the end***

of Magagula's evidence when it became apparent, as the D.P.P. conceded, that the Crown case against the appellant had failed. Continuing with the trial until the conclusion of the Crown case when the defence had to apply for the appellant's discharge, which was not contested, evidenced the respondent's malice, so the contention went.

In the first place it must be remembered that the appellant was one of several accused persons who were all involved in the trial allegedly with a common purpose and, as Maseko testified, he still had other witnesses to call in the trial after Magagula and before closing the Crown case.

But, in any event, in my view the operative time in considering whether the respondents had reasonable and probable cause or were actuated by malice is when they instituted the proceedings and set the law in motion. Mr. Shilubane referred to a statement in LAWSA that if facts come to the knowledge of the prosecution at any time during the proceedings that no offence has been committed by the accused, the

prosecutor must stop the prosecution.

I am in disagreement that this is a correct reflection of the position in a malicious prosecution action. All the authorities cited above are ad idem that one of the requirements that a plaintiff must prove is that the prosecution set the law in motion. It is then in my opinion, that it must have had reasonable and probable cause to do so. For the statement in LAWSA a decision of the old Cape Supreme Court in 1882 viz van Noorden v Wiese 2 SC 43 is cited as authority.

Quite apart from a change in approach by the Courts post-union in South Africa to malicious prosecution (as to which see Beckenstrater supra at 134) I do not think that van Noorden v Wiese is authority for the statement in LAWSA cited by Mr. Shilubane. In that case, which was also an action for malicious prosecution, Wiese laid a charge of theft against van Noorden saying he had stolen a certain receipt for £600 from him. It then appeared that he had no cause for his allegation as Wiese had in fact given him the

receipt which he said Wiese had stolen. He did not withdraw the charge saying that if he could get Van Noorden in gaol for 24 hours he would be satisfied. The prosecutor declined to prosecute. The Cape Supreme Court held that Wiese had no reasonable and probable cause for his actions and had been actuated by malice. All three Judges of the court gave judgments. Some vague support for the statement in LAWSA may be found in an obiter dictum by de Villiers C.J. where he said at p 54

> ***"I do not know of any case in which it was held that if a person believes an offence has been committed and other facts are brought to his notice which show that no offence was committed, he is still justified in proceeding with his original intention"***

Dwyer J, in his judgment, however, said this:

> *"If the defendant bona fide believed that the plaintiff had stolen the receipt and had reasonable*

and probable cause for such belief, nothing that subsequently occurred and which had not changed the state of facts could affect his right to bring the case before the Magistrate".

It will be appreciated that the dictum of Dwyer J, which was also obiter, appears to be directly contrary to what is said in LAWSA. It is rather support for the view that it is when the police and/or the prosecution set the law in motion that they must have reasonable and probable cause for doing so. In any event, the prosecutor in casu was justified in not immediately withdrawing the case after Magagula's evidence. He still had other witnesses to call. Mr. Shilubane's submission I therefore find to be ill-founded. In my view it is when the prosecution is instituted that requirements two and three that a plaintiff must prove come into effect.

The appellant failed to establish the two essential elements for success in his action viz an absence of reasonable cause for instituting the prosecution and that the respondent was actuated by an improper motive in doing so. The court a quo was therefore clearly correct in dismissing the appellant's action.

Accordingly the appeal must fail.

It is therefore ordered:

The appeal is dismissed, with costs.

P.H. TEBBUTT
JUDGE OF APPEAL

I agree
_____J. BROWDE
_____JUDGE OF APPEAL

I agree
_____M.M. RAMODIBEDI
_____JUDGE OF APPEAL

Delivered in open court at Mbabane this 16th day of November 2007.