IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

REPORTABLE

CASE NO: AR297/2019

REGIONAL COURT CASE NO: VRCC114/2016

In the matter between:-

FRANCE SIBUSISO NXUMALO **APPELLANT**

and

THE MINISTER OF POLICE **FIRST RESPONDENT**

NATIONAL DIRECTOR OF PUBLIC PROSECUTION **SECOND RESPONDENT**

This judgment was handed down electronically by transmission to the parties' representatives and circulated to SAFLII by email. The date and time for hand down is deemed to be 09h30 on 30 September 2020.

ORDER

The following order is made:

1. The appeal is dismissed with costs.
2. The order of the court a quo is set aside and replaced by the following order:
   'On the issue of liability, it is ordered as follows:
   1. Claim 1: Judgment is granted in favour of the Plaintiff against the First Defendant with costs on a party and party scale, such costs to include the costs of counsel.
   2. Claim 2: The claim of malicious prosecution against the First and Second Defendants is dismissed with costs.

3. The Second Defendant is ordered to pay the Plaintiff's wasted party and party costs occasioned by the adjournment on 8 February 2019, such costs to include costs of counsel.'

JUDGMENT

Delivered on:30 September 2020

Moodley J (Bezuidenhout J concurring):

Introduction/background

[1] This is an appeal against the dismissal of the Appellant's action for damages arising from his alleged malicious prosecution by the First and Second Respondents ('the Respondents'). The appeal was enrolled for hearing during lockdown under the Disaster Management Act 57 of 2002, and is determined, with the consent of the parties, on their written submissions in the heads of argument and supplementary heads of argument.

[2] The Appellant instituted action in the Regional Court, Vryheid on 23 June 2016 against the Respondents, seeking damages for wrongful arrest and detention (claim 1), and malicious prosecution (claim 2). The action was defended by both Respondents (as First and Second Defendants respectively).

[3] At the commencement of the trial on 10 August 2018, the court a quo issued an order in terms of Rule 29(4) of the rules to the Magistrates' Courts Act 32 of 1944, separating the issues of liability and quantum. The trial proceeded on liability only.

[4] On 26 April 2019, the court a quo granted judgment on the issue of liability in favour of the Appellant against the First Respondent, and dismissed the claim of malicious prosecution against the Second Respondent only with costs. The issue of quantum has since been finalised. The Appellant now appeals against the dismissal of the claim of malicious prosecution with the leave of the court a quo.

[5] Mr *Chithi*, counsel for the Appellant, submitted that the court a quo had erred in finding that the Appellant had failed to prove that the Respondents had acted without reasonable and probable cause and with malice in prosecuting the Appellant. He contended that when, at the commencement of the criminal trial, the prosecutor, Mr Thokozani Jomo Ngcobo, added further

charges to Count 1(discharge of a firearm in built up area or any public place), he would have done so in the context of all the available evidence. Further, Mr Ngcobo had ratified the decision of his colleague, Mr M.S Khoza, to prosecute based on the statements in the docket. Moreover, while the Appellant's testimony was consistent with his warning statement, there were material contradictions between the evidence of the two police witnesses, Captain Jabulani Dlamini and Constable N M Khuzwayo. Further, Mr Ngcobo admitted that had the Appellant offered an alibi, he would have instructed the police to investigate it. Mr Ngcobo also failed to follow up on the protection order mentioned in the Appellant's warning statement, and he was not aware that the complainant had laid charges on the same day that the Appellant's protection order was served on the complainant. Nor was he aware of the entry in the occurrence book which recorded that the complainant did not lay charges against the Appellant on the day the offence was allegedly committed.

[6] Mr *Chithi* contended further that Mr Ngcobo did not comply with his duty as a prosecutor to act objectively and to protect the public interest. Instead, he acted only in the interest of the complainant, Thembinkosi Skebhe Nxumalo ('the complainant'). As Mr Ngcobo received the docket only a day before the trial and because of the time constraints, he failed to interrogate the docket in its entirety and apply his mind properly before taking a decision to prosecute on the charges against the Appellant. Mr Ngcobo also failed to test the version of the Appellant in his warning statement with the statements of the complainant and other State witnesses. Mr *Chithi* argued that had Mr Ngcobo interviewed Const Khuzwayo properly, he would have established that Const Khuzwayo's statement in the docket was untruthful and intended to prejudice the Appellant. Although the Appellant was charged with the discharge of a firearm, there was no allegation that he actually discharged a firearm, only that he pointed a firearm. Mr Ngcobo ought to have satisfied himself that there was reasonable and probable cause, not just a prima facie case in order to institute a prosecution. Mr *Chithi* submitted that the Appellant had discharged the onus on him to prove that his prosecution had been malicious and his appeal should be upheld with costs.

[7] Mr *Khumalo*, counsel for the Second Respondent,[1] submitted that the Respondents had acted with reasonable and probable cause and without malice, and that Mr Ngcobo had acted objectively and complied with all the duties reasonably expected of a prosecutor. Although he received the docket one day before the trial, Mr Ngcobo had read the statements in the docket

[1] There were no submissions obo the First Respondent

and assessed that there was a triable case, and reasonable and probable cause to prosecute. Because there was direct admissible evidence from eyewitnesses, and the perpetrator of the alleged offence was well known to the witnesses, Mr Ngcobo was satisfied that there was a prima facie case against the Appellant. The protection order did not play a prominent part in proving or disproving the allegations against the Appellant nor was the alibi relevant when the decision to prosecute was taken, because the alibi was only presented at the trial. Similarly, the entry in the occurrence book was not considered as it was not in the docket when the decision to prosecute was taken. Nevertheless, there had been sufficient evidence upon which to prosecute the Appellant. Mr *Khumalo* contended that there was no malice on the part of Mr Ngcobo nor had he intended to injure the reputation of the Appellant or the complainant, both of whom were unknown to him. Consequently, there was no malice or failure on the part of the Respondents to act with reasonable and probable cause, and the appeal fell to be dismissed with costs.

The action and trial in the court a quo

[8] For reasons that will become apparent later in this judgment, it is necessary to set out the pleadings and summarise the relevant evidence in some detail.

Pleadings

[9] Under 'Claim 2 Malicious Prosecution' in the particulars of claim to the summons, the Appellant alleged as follows:

'11

On or about 6 November 2013, the aforesaid Dlamini together with certain other unknown members of the South African Police Service wrongfully and maliciously set the law in motion by laying numerous false charges against the appellant at the KwaNongoma police station, by giving them false information, namely that on or about 02nd November 2013 and at or near Khenani in the District of KwaNongoma, the Plaintiff:

11.1 did unlawfully and intentionally discharge a firearm to wit a 7.65 mm (.32 Auto) Calibre CZ model 70 Semi-Automatic pistol with serial number 676893 in a built-up area or any public place;

11.2 did unlawfully and intentionally point anything which was likely to lead a person to believe that it is a firearm, an antique firearm or an airgun to wit a 7.65 mm (.32 Auto) Calibre CZ model 70 Semi-Automatic pistol with serial number 676893 without a good reason; alternatively,

11.3 did unlawfully and intentionally assault Thembinkosi Skebhe Nxumalo by brandishing a firearm or anything which was likely to lead a person to believe it is a firearm and aiming it at the same Thembinkosi Skebhe Nxumalo thus inspiring fear that force will be applied; further alternatively,

11.4 had control of a loaded firearm to wit a 7.65mm (.32 Auto) Calibre CZ model 70 Semi-Automatic pistol with serial number 676893 in circumstances where it created a risk to the safety or property of Thembinkosi Skebhe Nxumalo and/or Senzo Simon Khumalo and unlawfully failed to take reasonable precautions to avoid the danger; and

11.5 did unlawfully and intentionally failed to lock away his firearm or ammunition in his possession to wit a 7.65mm (.32 Auto) Calibre CZ model 70 Semi-Automatic pistol with serial number 676893, in prescribed safe, strong room or device for the safekeeping when such firearm was not carried on his person or was not under his direct control.

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When laying these charges and giving this information the aforesaid Dlamini together with certain unknown members of the South African Police Service had no reasonable or probable cause for so doing, nor did they have any reasonable belief in the truth of the information given.

…

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The prosecutors who were seized with the case from time to time and members of the First Defendant who arrested, detained and charged the Plaintiff(s) failed to act urgently to investigate and analyse the evidence or lack thereof linking the Plaintiff to the alleged offences and/or to critically analyse the evidence and the circumstances giving rise to the charges being laid.'

The trial: Evidence

[10] Four witnesses testified in the civil trial before the court a quo. The Appellant was the only witness for the Plaintiff.[2] Former South African Police Service (SAPS) Capt Dlamini, and Warrant Officer Musawenkosi John Nxumalo, who were present at the arrest of the Appellant, and the State Prosecutor in the criminal trial, Mr Ngcobo testified for the Defendants. Constable N M Khuzwayo, who accompanied Capt Dlamini and WO Nxumalo when the Appellant was arrested, and was present when the firearm was recovered, did not testify before the court a quo. He was however, the sole police witness in the criminal trial and his testimony as contained in the transcript of the criminal proceedings against the Appellant was utilised in the cross-examination of Capt Dlamini and WO Nxumalo. The Appellant did not testify in his defence and his arrest was not in dispute in the criminal trial, although it was in issue before the court a quo.

[2] The cross-examination of the Appellant was not included in the transcribed record. An enquiry and request for the missing part of the transcript to the Appellant's attorneys proved fruitless, and as it appeared the transcript of the crossexamination of the Appellant would in any event have no impact on the outcome of the appeal, this judgment was finalised without that portion of the transcript.

[11] The Appellant testified that on 6 November 2013, police officers led by Capt Dlamini, arrived at the school where he is an educator, and arrested him in the presence of his colleagues and learners. He was not informed of the charge against him. The Appellant was taken to KwaNongoma police station where his rights were explained to him. He was only informed after the arrival of his attorney that he had been arrested for pointing a firearm at his brother on 2 November 2013. He immediately denied the allegation and explained that on the day of the alleged offence, he was busy with work related duties. He informed the police that his licenced firearm was at his home in a safe. He was taken by the police to his home where he opened the safe, removed the firearm and handed it to the police. He was detained at the police cells that day and granted bail in the amount of R2 000 the next day.

[12] The Appellant alleged that Capt Dlamini was a close friend of his brother, the complainant. On 5 November 2013, the Appellant obtained a final protection order against the complainant in the KwaNongoma Magistrates' Court. On the same date, the complainant laid the charge against him, which led to his arrest, although the pointing of the firearm allegedly occurred on 2 November 2013, as recorded in the occurrence book. The Appellant was legally represented at the police station and during the criminal trial. On 6 June 2014, he was discharged on all counts in terms of s 174 of the Criminal Procedure Act 51 of 1977 ('the CPA'). The Appellant testified that he expected that the prosecutor would apply his mind to the matter, and take into consideration the entry in the occurrence book and the contradictions in the statements. The Appellant's alibi was not investigated by the investigating officer, nor was a statement obtained from his aunt who had been at the scene of the alleged pointing of the firearm.

[13] Capt Dlamini testified that he could only take action after he received the docket which implicated the Appellant from the Community Service Centre on 6 November 2013. Accompanied by WO Nxumalo and Const Khuzwayo, he went to the school where the Appellant was employed. He interviewed the Appellant in a separate office and informed him of the charge against him and his constitutional rights. The Appellant admitted that he had a firearm which was at his residence. They drove with the Appellant to his house. Const Khuzwayo found the firearm under a mattress and asked the Appellant for a licence for it. The Appellant handed the licence to Const Khuzwayo. Capt Dlamini knew the Appellant and the complainant because they grew up in the KwaNongoma area but denied any relationship with the complainant. Capt Dlamini stated that the Appellant was arrested because the reported offence was serious and the firearm was found under a mattress, which constituted Schedule 1 offences.

[14] Under cross-examination, Capt Dlamini conceded that he arrested the Appellant at school before Const Khuzwayo recovered the firearm, and without a warrant for his arrest. He disputed Const Khuzwayo's version that they returned from the school to the police station before proceeding to the Appellant's house, and that more than three police officers had attended the arrest of the Appellant. Capt Dlamini persisted that Const Khuzwayo made the statement about the recovery of the firearm because he had recovered the firearm from under the mattress in the Appellant's house.

[15] WO Nxumalo corroborated Capt Dlamini's evidence about the events at the school and that when the Appellant informed them that the firearm was at his home, they drove from the school to his homestead. He, properly in my view, refused to answer questions on Const Khuzwayo's statement although Mr *Chithi* persisted nevertheless.

[16] Mr Ngcobo, who as of 2019 had seven years' experience as a prosecutor, testified that the matter was transferred to his court as the magistrate presiding in the initial court knew the parties. He confirmed his practice was to read the statements in the case docket and consider whether they established a prima facie criminal case, before deciding to prosecute. In his statement (Exhibit A1), the complainant alleged that a firearm was pointed at him at his homestead in broad daylight by a perpetrator whom he knew very well. He also had the statement of Senzo Khumalo (Exhibit A2), an eyewitness to what transpired between the complainant and the alleged perpetrator. As there was direct admissible evidence from witnesses who knew the perpetrator, Ngcobo was satisfied that there was a prima facie case and a reasonable and probable cause for him to prosecute. Further, as he knew neither of the parties or their reputation, he could not have formulated any malice against them, nor did he have the intention to injure the reputation of the Appellant.

[17] Mr Ngcobo confirmed that there was no mention of an alibi in the Appellant's warning statement, which would have been relevant to the decision by the prosecutors to prosecute. Had there been an alibi, he would have instructed the police to investigate the alibi before proceeding further. The Appellant, who was represented by Mr *Kheswa* when the trial commenced, did not raise the alibi defence even during the plea proceedings in terms of s 115 of the CPA. The alibi defence was only raised when Mr *Buthelezi* replaced Mr *Kheswa* on 6 May 2014. Under cross-examination, Mr Ngcobo responded that although he did not have much time to consider the docket, there would have been sufficient time to take a decision whether or not to prosecute had the alibi defence been raised in the docket.

[18] Mr Ngcobo also confirmed that although his colleague Mr Khoza had decided to prosecute, he had first considered the statements in the docket and consulted with the witnesses before ratifying Mr Khoza's decision. He did not know that there was a history of conflict between the complainant and Appellant, although he had questioned Senzo Khumalo during the trial about whether there was bad blood between himself and the Appellant. Mr Ngcobo testified that although the Appellant had stated in his warning statement that he had applied for a protection order against the complainant, he did not follow up on this issue because the protection order did not play a prominent part in his decision to prosecute the Appellant. The protection order did not constitute a defence against the prima facie case established by the direct, corroborated evidence in Exhibits A1 and A2. He could not recall whether he had discussed the protection order with the complainant.

[19] Mr Ngcobo also correctly pointed out that it was unfair to question him about his decision to prosecute based on the occurrence book, which was only presented to him during his testimony. He admitted however, that if the document had been available to him when he made a decision to prosecute, he would have prosecuted differently. Nevertheless, he was adamant that he would still have prosecuted the Appellant and left it to the court to decide on the impact of the relationship between the Appellant and complainant on their credibility. Mr Ngcobo also clarified that he added the charges in Counts 2 and 3 because the Firearms Control Act 60 of 2000 does not define 'discharge of a firearm'. He framed the charges within the provisions of the CPA because to his mind, the allegation that the Appellant reached for his firearm in his motor vehicle and returned carrying it in his hand was tantamount to discharging a firearm.

[20] It was therefore common cause or undisputed before the court a quo that:

(a) On 6 November 2013, the Appellant was arrested without a warrant at the school where he was an educator by members of the SAPS acting in the course and scope of their employment with the First Respondent. The Appellant was taken to his homestead by the police and his licenced firearm was recovered from his residence on the same day. Const Khuzwayo made a statement about its recovery.

(b) The Appellant was detained in the holding cells at KwaNongoma police station on that day. On 7 November 2013, after 21 hours in custody, he was released on bail in the sum of R2 000.

(c) The Appellant was subsequently prosecuted in the KwaNongoma Magistrates' Court and charged with the offences as set out in para 9 above on 8 April 2014. The charges

arose from a complaint laid by his brother in respect of an incident which allegedly occurred on 2 November 2013, three days after the incident allegedly occurred.

(d) On 6 May 2014, pursuant to an application in terms of s 174 of the CPA, the Appellant was found not guilty on Count 1, the second alternative count to Count 2, and Count 3. On 6 June 2014, the Appellant was found not guilty on Count 2 and the alternative count of assault. He was therefore acquitted on all charges.

(e) On or about June 2016, the Appellant instituted the action for damages against the Respondents.

Judgment of the court a quo

[21] The arrest, detention and acquittal of the Appellant being common cause, the court a quo had to determine whether the arrest and detention of the Appellant was unlawful, and his prosecution malicious. In its judgment dated 26 April 2019, on the issue of liability, the court a quo held in respect of the claim for malicious prosecution that:

'[9.1] The Plaintiff bore the onus to prove that the prosecution was malicious.

…

[23.1] The prosecutor who took the case to trial did not have much time to study the docket. He established that there was the evidence of the complainant and an eye witness as well as a recovered firearm. Neither the complainant not the accused were known to him. His colleague, a fellow prosecutor had already taken a decision to prosecute. He read the docket and assessed that there was a triable case and reasonable and probable cause to prosecute. He was not malicious and merely performed his duties as prosecutor to the best of his ability.

. . .

[25.1] The prosecution failed.

[25.2] There was no malice on the part of the employees of the second defendant.

[26.1] There was no failure on the part of the prosecution to act urgently to investigate and analyse the evidence.

[26.2] There was no failure on the part of the prosecutors to critically analyse the evidence and the circumstances giving rise to the charges being laid.'

[22] The court a quo dismissed the claim for malicious prosecution and issued the following order:

'Order in respect of liability accordingly is as follows:

1. Judgment is given in favour of the plaintiff against the First Defendant with costs on the party and party scale, such costs to include the costs of counsel.
2. The claim against the second defendant is dismissed with costs. Second defendant is further ordered to pay the plaintiff's wasted party and party costs occasioned on 08 February 2019, including costs of the attorney and his Counsel.'

The appeal

[23] On appeal, it is not in dispute that the court a quo was mindful of the correct legal principles to be applied to a claim for malicious prosecution, as set out in *Minister for Justice and Constitutional Development & others v Moleko*[3] para 8 and *Patel v National Director of Public Prosecutions & others*[4] para 5, viz that for the Appellant to succeed in his claim for malicious prosecution against the Respondents, the following four (4) jurisdictional facts had to be established:

(a) the Respondents set the law in motion (instigated or instituted the proceedings);
(b) the Respondents acted without reasonable and probable cause;
(c) the Respondents acted with malice (or *animo iniuriandi*); and
(d) the prosecution failed.

It is common cause that the first and fourth requirements were established before the court a quo.

[24] In respect of the requirement that the Respondents must have acted with "reasonable and probable cause", the Supreme Court of Appeal (SCA) in *Moleko* explained at para 20:

'Reasonable and probable cause, in the context of a claim for malicious prosecution, means an honest belief founded on reasonable grounds that the institution of proceedings is justified. The concept therefore involves both a subjective and an objective element —

"Not only must the defendant have subjectively had an honest belief in the guilt of the plaintiff, but his belief and conduct must have been objectively reasonable, as would have been exercised by a person using ordinary care and prudence."'[5] (Footnotes omitted).

[25] In respect of the requirement that the Defendant must have acted with "malice" or *animo iniuriandi,* the court said further in *Moleko*:

'[61] In the *Relyant* case, this court stated the following in regard to the third requirement:

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[3] *Minister for Justice and Constitutional Development & others v Moleko* 2009 (2) SACR 585 (SCA).
[4] *Patel v National Director of Public Prosecutions & others* 2018 (2) SACR 420 (KZD).
[5] See also *Prinsloo & another v Newman* 1975 (1) SA 481 (A) at 495H; *Relyant Trading (Pty) Ltd v Shongwe & another* [2007] 1 All SA 375 (SCA) para 14; 15 part 2 *Lawsa* 2 ed para 323.

"Although the expression 'malice' is used, it means, in the context of the *actio iniuriarum*, *animus iniuriandi*. In *Moaki v Reckitt & Colman (Africa) Ltd & another* Wessels JA said:
'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.'"

[62] In so doing, the court decided the issue which it had left open in *Lederman v Moharal Investments (Pty) Ltd* and again in *Prinsloo & another v Newman*, namely that *animus injuriandi*, and not malice, must be proved before the defendant can be held liable for malicious prosecution as *injuria*.

[63] *Animus injuriandi* includes not only the intention to injure, but also consciousness of wrongfulness:
"In this regard *animus injuriandi* (intention) means that the defendant directed his will to prosecuting the plaintiff (and thus infringing his personality), in the awareness that reasonable grounds for the prosecution were (possibly) absent, in other words, that his conduct was (possibly) wrongful (consciousness of wrongfulness). It follows from this that the defendant will go free where reasonable grounds for the prosecution were lacking, but the defendant honestly believed that the plaintiff was guilty. In such a case the second element of *dolus*, namely of consciousness of wrongfulness, and therefore *animus injuriandi*, will be lacking. His mistake therefore excludes the existence of *animus injuriandi*."' (Footnotes omitted).

[26] The aforegoing excerpts from *Moleko* were cited with approval by the Constitutional Court in *Kruger v National Director of Public Prosecutions.*[6] The court added per Zondo DCJ as follows:
'[53] It is clear from the passage quoted in paragraph 63 in *Moleko* that the "*animus injuriandi*" requirement entails that in an action for malicious prosecution the plaintiff must allege and prove that the defendant acted "in the awareness that reasonable grounds for prosecution were absent". In terms of that passage the plaintiff must allege and prove this because, as is stated in the passage, "the defendant will go free where reasonable grounds for the prosecution were lacking but the defendant honestly believed that the plaintiff was guilty".'

Evaluation and discussion

[27] In its determination of the issue of liability, the court a quo failed to take into consideration that in his particulars of claim, the Appellant made allegations against the police and the prosecutor in claim 2 (malicious prosecution).[7] Therefore, his claim for malicious prosecution lay against both Respondents. However, in her order, the learned magistrate appears to have granted judgment against the First Respondent in respect of the unlawful arrest claim (claim 1), and dismissed the claim of malicious prosecution in its entirety, although her order specifies the

[6] *Kruger v National Director of Public Prosecutions* 2019 (6) BCLR 703 (CC).
[7] Para 9 above.

Second Respondent only. Her order in respect of claim 2 ought to have been in respect of both Respondents. As a result of that misdirection, this court is at liberty on appeal to consider the allegations of the Appellant in the light of all the evidence before the court a quo, and determine whether or not the Appellant proved his claim for malicious prosecution against either or both of the Respondents.

[28] The allegations in para 11 of the particulars of claim are clearly unsustainable. The police officers who were present at the Appellant's arrest and when the firearm was recovered, of whom Capt Dlamini was one, did not lay charges against the Appellant. The complainant made a statement at the Community Service Centre to the effect that on 2 November 2013, he and Senzo Khumalo went to his father's homestead to see his stepmother. Whilst at the gate of the homestead, they saw the Appellant, who enquired what they wanted. He then took out a firearm from his car and came straight at the complainant. He pointed the firearm at the complainant's face and told him that he did not want him there and ordered him to leave. The police followed up on this complaint on 6 November 2013, after Capt Dlamini received the docket containing the statement made by the complainant. The Appellant was arrested at school and taken to his place of residence where the firearm was recovered, because he informed the police that his firearm was there. Const Khuzwayo made a statement about the recovery of the firearm, in which he stated that the firearm was under a mattress and not in a safe.

[29] It is common cause that the charges as listed in para 11 of the particulars of claim were formulated by Mr Ngcobo, on the basis of the statements in the docket and his interview of the witnesses who testified in the criminal trial, and he added Counts 2 and 3 at the commencement of the trial. In para 11 of *Moleko*, the SCA held that in an action premised on malicious prosecution*:*

'With regard to the liability of the police, the question is whether they did anything more than one would expect from a police officer in the circumstances, namely to give a fair and honest statement of the relevant facts to the prosecutor, leaving it to the latter to decide whether to prosecute or not.' (Footnote omitted).

[30] Mr *Chithi* argued that there were material discrepancies between the evidence of Capt Dlamini and Const Khuzwayo. However, Capt Dlamini and WO Nxumalo did not testify in the criminal trial, and the alleged discrepancies emerged during their cross-examination on the transcribed evidence of Const Khuzwayo, who did not testify in the civil trial. Mr *Chithi* submitted incorrectly, in my view, that the evidence of WO Nxumalo was irrelevant to the issues on appeal.

It is common cause that WO Nxumalo accompanied Capt Dlamini and Const Khuzwayo on 6 November 2013 when the Appellant was arrested. WO Nxumalo corroborated Capt Dlamini's evidence that from the school the police proceeded with the Appellant to his house, where Const Khuzwayo recovered the firearm from 'under the bed'. This corroboration is relevant as Mr *Chithi* attempted to undermine the credibility of Capt Dlamini through alleged contradictions between his evidence and that of Const Khuzwayo.

[31] A perusal of the evidence and statement of Const Khuzwayo reveals that there were some inconsistencies between his version and that of Capt Dlamini and WO Nxumalo. Const Khuzwayo testified that after Capt Dlamini arrested the Appellant at the school, they returned to the police station. Capt Dlamini ordered him to take the Appellant to his homestead to recover the firearm. The firearm was under a mattress on a bed inside the house. The Appellant told Const Khuzwayo that 'in the morning while he was leaving he left the firearm on the bed because he was rushing, and he kept the firearm to be near him at night'. The Appellant then showed Const Khuzwayo the safe where he kept the firearm, which was in the same room. The safe was locked. Const Khuzwayo asked the Appellant to open the safe which he did. There was nothing in the safe. The firearm was a 9mm pistol with ten rounds of live ammunition in the magazine, and no barrel. The Appellant produced the licence for the firearm.

[32] Under cross-examination Const Khuzwayo stated that there were about nine or ten policemen present at the arrest and at the homestead of the Appellant. He was adamant that he was present when the firearm was recovered, and he counted the ammunition and observed the serial number on the firearm. He clarified that the Appellant removed the firearm from the room and gave it to a crew member, but he examined the firearm later at the police station when he entered it in the SAP 13 register. Although Const Khuzwayo denied that he told Capt Dlamini about the recovery of the firearm, he testified further that Capt Dlamini heard the crew discussing that the firearm was not in the safe, and then questioned the Appellant about why the firearm was not in the safe. Although he did not record in his statement that he had entered the Appellant's house, Const Khuzwayo persisted that he had, and that he conveyed to Capt Dlamini that the firearm was not in the safe and the Appellant's explanation therefor. Capt Dlamini told Const Khuzwayo to write the statement about the recovery of the firearm because he was present when it was recovered.

[33] Many incorrect propositions based on Const Khuzwayo's evidence were put to Capt Dlamini. Two examples are:

(a) It was put to Capt Dlamini that the bed inside the room where the firearm was recovered was a sleigh bed and therefore, the firearm could not have been under the mattress. Although a sleigh bed is not a base set, it has a mattress. Therefore, there was no reason why the firearm could not have been under the mattress.

(b) It was also incorrectly put to Capt Dlamini that '…what Khuzwayo is saying is consistent with what Nxumalo is saying that he took the firearm out of the safe and handed it to the police?'

[34] From the evidence of both Capt Dlamini and Const Khuzwayo, it is clear that Capt Dlamini was at the Appellant's homestead, but he did not enter the house. Const Khuzwayo entered the house and was present when the firearm was recovered and handed to a police officer. Capt Dlamini who was outside questioned the Appellant about why the firearm was not in the safe and Const Khuzwayo confirmed that the firearm was not in the safe. Therefore Capt Dlamini understood that Const Khuzwayo had recovered the firearm and asked him to make the statement. However, although Const Khuzwayo did not physically retrieve the firearm himself, it common cause that the firearm was recovered in the Appellant's house. More significantly Const Khuzwayo's evidence that the firearm was not in the safe and of the Appellant's explanation why the firearm was under the mattress, was clear and uncontroverted. He also clarified that he had examined the firearm when he entered it in the SAP 13 register. The fact that Khuzwayo did not examine the firearm at the house did not vitiate his evidence that the firearm was recovered in the Appellant's house in his presence and that firearm was not in the safe.

[35] Therefore there were no material or relevant discrepancies as contended, nor does Const Khuzwayo's evidence vitiate the credibility of Capt Dlamini and his testimony. Capt Dlamini's evidence that he believed that there was reasonable and probable cause to arrest and charge the Appellant based on the offence complained of in the witnesses' statements and the recovery of the firearm, was uncontroverted. The allegation that he was biased in favour of the complainant was also unproven, and no *animus iniuriandi* on the part of any of the police officers involved was established. The Appellant therefore failed to establish the jurisdictional requirements to sustain a case of malicious prosecution against the First Respondent.

[36] Turning to the evidence of Mr Ngcobo, as properly noted by the court a quo, he responded pertinently under cross-examination that he did not rely on Mr Khoza's evaluation of the case docket. He explained his own reasoning, premised on his consideration of the contents of the

docket as received. The statements of the complainant and the eyewitness are consistent and both alleged that the Appellant pointed the firearm at the complainant. In his statement, Const Khuzwayo clearly states that on 6 November 2013, he was ordered to collect a firearm from the Appellant. At his residence, the Appellant took out a firearm from under his mattress and said that he had been in a hurry and forgot to put the firearm away. The Appellant had a safe but the safe was empty. The explanation offered by Mr Ngcobo for adding the charges in Counts 2 and 3, and that he formulated the charges to cover the elements of the offences in accordance with his understanding of the term 'discharge', indicates that he had an honest belief in the guilt of the Appellant and that his belief and conduct were objectively reasonable.

[37] As there was no alibi in the Appellant's warning statement and the alibi was only raised well into the trial, Mr Ngcobo correctly pointed out that the Appellant's alibi could not play a role in his determination to prosecute. The same applies to the occurrence book, which was presented to Mr Ngcobo during the trial. In my view, he was also correct in pointing out that a protection order does not necessarily mean that the parties involved may not be properly prosecuted if they commit an offence. It was also undisputed that the Appellant and the complainant were unknown to him and there was no reason for him to have acted with intent to prejudice either of them. Finally there was no evidence before the court as to how the prosecutor who was previously handed the case docket, Mr Khoza, had made his decision to prosecute.

[38] In my view, the Appellant clearly failed to discharge the onus on him to prove that 'the prosecutors who were seized with the case …failed to act urgently to investigate and analyse the evidence or lack thereof linking the Plaintiff to the alleged offences and/or to critically analyse the evidence and the circumstances giving rise to the charges being laid.' Therefore the conclusion of the court a quo that the Appellant failed to prove that the prosecution by the Second Defendant was malicious, is correct.

[39] In the premises, the appeal must fail and there is no reason why costs should not be ordered in favour of both successful parties. It is also appropriate that the order of the court a quo be amended to reflect that claim 1 relates to the First Respondent, and that in claim 2 on the issue of liability in the claim of malicious prosecution, judgment is granted in favour of both Respondents.

Order

[40] The following order is made:

1. The appeal is dismissed with costs.

2. The order of the court a quo is set aside and replaced by the following order:
   ‘On the issue of liability, it is ordered as follows:
   1. Claim 1: Judgment is granted in favour of the Plaintiff against the First Defendant with costs on a party and party scale, such costs to include the costs of counsel.
   2. Claim 2: The claim of malicious prosecution against the First and Second Defendants is dismissed with costs.
   3. The Second Defendant is ordered to pay the Plaintiff’s wasted party and party costs occasioned by the adjournment on 8 February 2019, such costs to include costs of counsel.’

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MOODLEY J

I agree

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BEZUIDENHOUT J

APPEARANCES

Date of hearing : **26 May 2020**

Date of judgment : **30 September 2020**

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