IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 17967/2012

In the matter between:

ANDRÉ EDWARD LINCOLN Plaintiff

v

MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT 1st Defendant

MINISTER OF SAFETY AND SECURITY 2nd Defendant

Court: Justice J Cloete
Heard: 13, 14, 16, 20, 22, 23 and 28 March 2017, 20, 24, 25 and 26 April 2017, 2, 3, 8, 9, 10, 11, 15, 16, 17, 18 and 22 May 2017, 26 and 27 June 2017.
Delivered: 22 September 2017

JUDGMENT

CLOETE J:

Introduction

[1] The plaintiff, currently a major-general in the South African Police Service (SAPS) seeks damages from the Minister of Safety and Security (the second defendant) for an alleged malicious prosecution instigated against him by

various SAPS members. The plaintiff previously also sought damages from the Minister of Justice and Constitutional Development (the first defendant) but withdrew that claim on 22 September 2016.

[2] The merits and quantum were separated by an earlier order and the trial thus proceeded only on the merits. The plaintiff testified and called one witness. The second defendant led the evidence of six witnesses.

Background

[3] The plaintiff was formerly the deputy head of the African National Congress Department of Intelligence and Security (DIS) in the Western Cape. He was responsible for gathering intelligence on a range of issues but, in particular, infiltrating the operations and structures of the former SAPS security branch in the Western Cape.

[4] Following the end of apartheid, during 1994/1995, former President Nelson Mandela appointed Commissioner George Fivaz to oversee the integration, amalgamation and rationalisation of the entire police and security structures in this country.

[5] This included the integration of members of the DIS into the National Intelligence Agency (NIA), save for about 120 members who were integrated into SAPS. The plaintiff was responsible on a national level to facilitate that process for members of Umkhonto we Sizwe (MK). Once this was completed,

and in about April 1995, the plaintiff was deployed to the National Intelligence Coordinating Committee (NICOC).

[6] According to the plaintiff, NICOC's functions were essentially to facilitate the intelligence process within South Africa among the different intelligence agencies, which consisted of civilian as well as police and military intelligence; to identify security threats, manage and neutralise them; and to oversee all covert operations within these structures.

[7] The plaintiff fulfilled two roles in NICOC. First, he was the SAPS representative on its subcommittee of the National Intelligence Estimate, which collated and identified the intelligence needs of government departments. Second, he was the Chairperson of the Directorate of Covert Collection and he managed and oversaw covert intelligence operations between the military, secret service and SAPS crime intelligence.

[8] Given the legacy of apartheid the integration process, as would be expected, was not plain sailing. In the plaintiff's words: *'on both sides there was mistrust, and in certain instances hostility…we came from opposing backgrounds and we just didn't trust each other when it came to the way forward within the new service…'*.[1]

[1] Record Vol 1 pp22-23.

[9] In 1995 an Inspector David Le Roux approached the plaintiff with a report containing highly classified and alarming information concerning the activities of Mr Vito Palazzolo (Palazzolo) who was alleged to be the sixth highest ranking member of the Italian Mafia, the Cosa Nostra, and who was based in Cape Town. It was alleged in that report that Palazzolo had on his payroll the then head of the SAPS Organised Crime Unit, Commissioner Neels Venter, as well as Mr Pallo Jordan who was a cabinet minister at the time.

[10] Given his mistrust of the SAPS "old guard" the plaintiff did not approach Fivaz with this information but rather the Head of NICOC, Mr Dennis Nkosi. After discussing the report the plaintiff and Nkosi approached the then Minister of Safety and Security, Mr Sidney Mufamadi, and this ultimately resulted in them having a meeting with Mandela.

[11] Thereafter, on about 11 June 1996, Mandela met with Fivaz and instructed him to establish a special unit to investigate the matter. This was confirmed in a handwritten letter from Mandela to Fivaz of that date, which read as follows:[2]

> *'Attention: General Fivaz.*
>
> *11th June 1996.*
>
> *The following people are members of a special investigation task unit. It is requested that they be relieved of all other duties and responsibilities with immediate effect:*

[2] Exhibit B1.

Director Andre Lincoln,
Captain D. Van der Westhuizen,
Inspector John Nicholson,
Inspector David Le Roux
Inspector Phillip Wright
Inspector Steve Burnett
Sergeant Bruce Smith
Marjorie Nicholson.

It is further requested that Director Andre Lincoln be relocated to Cape Town so that he takes overall responsibility for the unit as well as the management of the entire operation.

Monthly running costs *R28 000.00*

Technical Resources

2 motor vehicles
3 Pentium Computers and Printers.
3 notebook computers
1 fax machine
1 shredder
1 Photocopy Machine
2 Cellular phones & sim cards.
6 Pearlcorders.

N Mandela (signature)
President.'

[12] Mandela decided that due to the seriousness of the allegations in the report, the unit would operate outside of normal SAPS structures. According to the plaintiff the unit would report only to Mandela (and subsequently, Deputy President Thabo Mbeki) and/or Mufamadi instead of following the usual reporting lines within the SAPS hierarchy. The unit was called the Presidential Investigation Task Unit (PITU) and the project it undertook Operation Intrigue.

PITU began operating out of the Western Cape in about June 1996 with the plaintiff as its commander.

[13] The plaintiff described the mandate of the unit as follows:

> *'…to investigate the allegations contained in the report, with special reference to the activities of Mr Vito Palazzolo, his links to the criminal underworld and his links to that of members of the South African Police Service. It was also meant to investigate the allegations contained about the possible corrupt relationship between Mr Palazzolo and Mr Jordan as well as between Mr Palazzolo and Commissioner Neels Venter.'*[3]

[14] On 18 June 1996 a letter written by the plaintiff and signed by General Wouter Grové (the Divisional Commissioner and Head of the National Crime Intelligence Service) was addressed to Venter, Assistant Commissioner Smit (the Provincial Head, National Crime Intelligence Service, Western Cape), Director Claasen (the Provincial Commander, Organised Crime) and Senior Superintendent Van Rooyen (the Provincial Commander, Commercial Crime). This letter informed its recipients that the individuals referred to in Mandela's handwritten letter of 11 June 1996 were to be relieved of all duties and responsibilities so as to take up their positions in PITU and further that:

> *'2. Due to the extreme sensitivity of this investigation it has been decided by both the President and the National Commissioner that this unit will report directly to the President and Commissioner Fivaz.*
>
> *3. It is estimated that this investigation will run for approximately one year.*

[3] Record Vol 1 p27.

> 4. *Even though this unit reports directly to the President and the National Commissioner it still remains a part of the South African Police Service and therefore you are requested to give it your full support and assistance where needed…'*[4]
>
> [emphasis supplied]

[15] Captain Dorothea Van der Westhuizen was appointed as PITU's financial officer to deal with the financial and logistical requirements of the unit. Given that Operation Intrigue was a covert operation, it would ordinarily have been funded from the SAPS *'secret'* account. However, because Venter served on the Secret Services Account committee it was decided that Operation Intrigue would be funded from the *'open'* SAPS account. The arrangement was that PITU's claims (informers' fees, subsistence and travel, rental, etc) would be dealt with separately by the SAPS Provincial Office. The latter's officials were tasked with ensuring that claims received from Van der Westhuizen had been properly certified; however they were not entitled to query such claims, were obliged to treat them preferentially and pay them without delay, and thereafter forward them to head office in Pretoria for auditing.

[16] During its investigation, PITU uncovered criminal activities of a police officer attached to the Commercial Crimes Unit, Simon Nothnagel, who was involved in counterfeiting, racketeering and fraudulent transactions with US counterfeit dollars.

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[4] Exhibit B3.

[17] In collaboration with the American Secret Service, PITU also uncovered the so-called Operation Donna in which counterfeit US dollars were being printed in the basement of the SAPS head office in Pretoria together with counterfeit matric certificates, university degrees and drivers licences.

[18] According to the plaintiff, PITU also took over the dormant investigation into an attempted assassination plot of President Mandela and in the process retrieved a handcrafted rifle. In collaboration with Interpol PITU investigated the international fugitives Jurgen Harksen and Uwe Bold, ultimately securing their successful extradition to Germany.

[19] The above investigations were taken over by PITU from various units of SAPS, such as the Commercial Branch, Cape Town, the Organised Crime Unit, the Intelligence Unit in Pretoria and the Detective Branch of the Cape Town Police Station.

[20] The plaintiff's evidence was that the reaction of SAPS officers to PITU's activities was resistance and obstruction. On 15 October 1996 he addressed a letter to Mbeki, Mufamadi, Fivaz and Divisional Commissioner Craemer (the SAPS National Head of Finance), complaining of interference and sabotage of the investigations of the unit by SAPS members.[5] The plaintiff complained that senior members of the Intelligence Coordination Unit in the Western Cape were attempting to spy on PITU and uncover the content of the investigation; that a senior member of the Technical Support Unit, Pretoria, had interfered in

[5] Exhibit B14-16.

the purchase of furniture for the unit's safe house; and that there had been *'various attempts by members of* [SAPS], *in particular Detective Services, Western Cape to badmouth members of this Unit and myself'*, but that *'the above-mentioned problems have been dealt with, without creating too much of a scene'.* The rest of the letter complained about a Superintendent Venter insisting that the plaintiff return his cell phone to NICOC as it was registered as NICOC's property. The plaintiff's sim card had been suspended and he threatened to take the matter up with Mandela if it was not immediately reinstated.

[21] According to the plaintiff, his letter resulted in a meeting between himself, Mbeki and Mufamadi at which his complaints were discussed and that *'I know that General Fivaz was given instructions to deal with the allegations contained in my letter'.*[6]

[22] On 15 July 1997 (9 months later) the plaintiff again wrote to Mbeki and Mufamadi[7] complaining that the investigation into Palazzolo's activities had been severely hampered *'by an orchestrated campaign by a member of this unit* [one Smith]*, the office of the Attorney-General of the Western Cape and the Anti-Mafia Division of the Italian State Police'.* He advised that an internal investigation was underway into Smith who, he suspected, had been recruited by the Italian Police. No details were given about the involvement of the Attorney-General's Office, but the claim was made that Smith, together with

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6 Record Vol 1 p49.
7 Exhibit W.

members of the Organised Crime Unit in Bellville, had attempted to falsely implicate Palazzolo in petty crimes. He requested an urgent meeting.

[23] On 15 August 1997 Fivaz summonsed the plaintiff to a meeting at his office in Pretoria. Instead the plaintiff, accompanied by another unit member, Inspector Piet Viljoen, approached Mbeki. He in turn arranged a meeting for later that day which was attended by Mbeki, the plaintiff, Fivaz, Mufamadi and Viljoen. During that meeting the plaintiff again complained to Mbeki that the unit's members were being targeted and there was severe interference which was hampering their investigations. Fivaz in turn reported that he had received complaints about serious irregularities in the affairs of PITU, potentially of a criminal nature, that required investigation. It was agreed by all present at the meeting that Director Leonard Knipe (the head of the Serious and Violent Crimes Unit in the Western Cape) was the appropriate person to lead the investigation into the alleged PITU irregularities.

[24] Thereafter a meeting took place on 20 August 1997 between members of PITU, Fivaz and his two chief deputies, Deputy National Commissioner Lavisa and Assistant Commissioner Williams. On 29 August 1997 Fivaz addressed a letter to the plaintiff which was copied to Mbeki, Mufamadi, Lavisa and Williams. This was the first time that the unit's mandate, and the parameters in which it could operate, were clearly spelt out and it read as follows:

'ACTIVITIES AND RESPONSIBILITIES: PRESIDENTIAL INVESTIGATION TASK UNIT (PITU) – CAPE TOWN

1. *I refer to the meeting between members of the PITU and myself, Deputy National Commissioner Lavisa and Assistant Commissioner Williams on 1997-08-20. During the meeting we were briefed about the operations of the PITU, progress made by the unit since its establishment ± 12 months ago, obstacles in the way of the unit etc. Furthermore, the mandate of the unit and the official line of command of the unit were thoroughly discussed. This letter serves as formal confirmation of the issues discussed and decisions taken and must be seen as a directive for the activities of the unit.*

2. *<u>MANDATE</u>*

2.1 *The unit is hereby mandated to continue with the investigation into possible illegal activities of Vito Roberto Palazzolo and any other person(s) or group of persons directly involved with or related to Palazzolo activities. All existing files, dockets or other documentation in the South African Police Service relating to the subject must be handed over to the PITU and an inventory of all the relevant items must be submitted to me for record purposes.*

2.2 *The unit is furthermore mandated to continue with the so-called "Nothnagel investigation" and also with the investigation of information indicating the possible involvement and/or corruption of other police officers in that regard. This investigation is presently being conducted by D/Insp P Viljoen, but because senior officers are allegedly involved the investigation and any other investigation emanating from it should be done under the direct command of Deputy National Commissioner Lavisa. The latter will ensure the participation of the AG Pretoria and other role-players in this regard.*

3. *<u>GENERAL DIRECTIVES</u>*

3.1 *The PITU shall not receive further briefs unless it is approved by the National Commissioner or Deputy National Commissioner Lavisa.*

3.2 The reporting line of the Unit is to the coordinating committee which was set up for that purpose, namely: The National Commissioner, Deputy National Commissioner Lavisa and Asst Comm Williams.

3.3 No extraordinary expenditure (e.g. rental of buildings, motorcars etc) shall be incurred by the PITU unless it is approved by the National Commissioner or Deputy National Commissioner Lavisa.

3.4 Duplication of effort and cost should be avoided. Investigations must be coordinated and the existing capacity of the Service and sister departments (e.g. counter intelligence, surveillance, technical services etc.) should be utilised where appropriate.

3.5 Verbal and written progress reports must be submitted to the above committee once every month.

3.6 Obstacles, needs and problem areas must, immediately when they arise, be reported to one of the coordinating committee members.

3.7 The PITU is not allowed to act outside the framework of the rules and regulations applicable to the South African Police Service. The unit operates with the approval of the President and all efforts must thus be made not to create any form of embarrassment for the President, his office or the South African Police Service in general – this must be the motto of the unit.

3.8 The offices, dockets, financial statements and general administration of the unit shall only be inspected under the direct instructions of the National Commissioner.

4. <u>OTHER ARRANGEMENTS</u>

4.1 Additional members and other resources for the unit will be provided by the Coordinating Committee on the basis of the workload of the Unit.

4.2 An urgent meeting between the Coordinating Committee, and NIA will be held to discuss the secondment of personnel to the unit, specifically for utilization as agents and the gathering of intelligence.

5. The commander and members of the PITU must please acknowledge receipt of this directive.'

[25] On 3 October 1997 the Mail & Guardian published an article, claiming *inter alia* that PITU was a political unit working outside of the SAPS framework and that serious charges were being investigated against it on the instructions of Fivaz. The report also included reference to various covert operations being conducted by the unit. Incensed, the plaintiff wrote to Fivaz on 5 October 1997,[8] stating *inter alia* that:

'4. [The report] *clearly indicates that certain members of the South African Police Service with very devious intentions have passed on information to the press with the intention of discrediting this Unit and its members. This newspaper report and the continuous radio reports over the weekend have blown a considerable part of our investigation as well as putting the lives of the Unit members, our agents and sources in danger.*

5. One of this Unit's best sources was attacked on 1997-10-04 at a nightclub and while he was beaten up it was clearly told to him by his attackers that they now know what he and DIRECTOR LINCOLN are busy with…

8. It is very clear that certain elements in the SAPS are becoming scared of the results of our investigations and that they are now trying to go all out to shut down this Unit… It would now seem that not only myself but every one of my Unit members are under investigation…

[8] Exhibit A pp4744-4746.

> *12. We now ask you COMMISSIONER what is the future of this Unit now that the investigation has been blown in the press and furthermore that one of our sources has been attacked as a result of the newspaper report.*
>
> *13. According to the* [Mail & Guardian article and a subsequent article on 4 October 1997 which appeared in the Cape Argus] *this office is under investigation without any written notification as stipulated by your letter…dated 1997-08-29, paragraph 3.8 and signed by yourself.*
>
> *14. With reference to the abovementioned letter (paragraph 3.7) it is clear from press reports that this office has in no way caused any embarrassment to the PRESIDENT and the DEPUTY PRESIDENT but that elements within the SAPS acting under your instructions have caused embarrassment…'*
>
> [emphasis supplied]

[26] Fivaz responded to the letter by instructing that departmental steps be taken against the plaintiff, stating the following in a handwritten note:

> *'I am of the opinion that* [the] *letter is indicative of a total lack of respect and contains a number of false accusations. The style of the letter is furthermore arrogant and I intend to direct that Departmental steps be taken against* [the plaintiff].*'*[9]

[27] On 11 November 1997 the plaintiff wrote to Fivaz complaining about difficulties experienced in relation to PITU's expenditure.[10] These pertained to the refusal to pay increased rental for the unit's premises as a result of a rates increase (where the Provincial Office was of the view that agreed rental should not be affected thereby) and the refusal of the Provincial Office to

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9 Fivaz handwritten note to Lavisa and Williams, Exhibit A p4743.
10 Exhibit A pp4722-4724,

make payment of subsistence and travel expenses without head office approval although the plaintiff himself had approved them. These complaints were coupled with a request that this expenditure, along with various operating costs of the unit, be approved. The plaintiff complained that the approach of the Provincial Office *'…clearly leaves one with the conclusion that Director Lincoln has no authority whatsoever and is of questionable character…with respect, it has become clear that Director Lincoln is treated differently…'*.

[28] In a letter dated 25 November 1997 Assistant Commissioner P J Bosman, the SAPS Assistant Head of Finance, replied (the letter was copied to Fivaz and to Western Cape Provincial Commissioner Wessels).[11] He granted permission for payment of the increased rental, and further stated that:

> *'2.2.1 It has been confirmed that all claims for travel and subsistence approved by Director Lincoln have been paid in the past and will be paid in future and thus no aspersions are cast upon the authority or character of Director Lincoln.*
>
> *2.2.2 It is however important to note that in accordance with directives issued by the Auditor-General, Director Lincoln's personal claims will have to be authorised by an Assistant Commissioner or higher which is the case at all centres where senior officers are available to certify claims of Directors…*
>
> *3.1 The Presidential Task Unit is obliged to comply with financial regulations and directives and I know that I can rely on your fullest co-operation in this regard as Director Lincoln has full authority as*

[11] Exhibit B pp24-25.

prescribed in the Delegations of Authority and will not be treated any differently to any other officer in this respect.'

[29] On 18 February 1998 the plaintiff was arrested on a number of charges, including fraud and drunken driving. He ultimately stood trial in the Wynberg regional court on 47 counts, comprised of 44 counts of fraud, one of theft, one of drunken driving and one of leaving the scene of an accident. The counts of fraud and theft all pertained to alleged financial and related irregularities by the plaintiff within the unit, in particular his rental of two vehicles without authority, claims that he made for subsistence and travel allowances; rental of two safe houses without the necessary authority, payment of fees to three informers, and theft of furniture from a unit safe house. The remaining charges of drunken driving and leaving the scene of an accident arose from a collision in Higgovale in which the plaintiff was involved early on the morning of Sunday 27 July 1997.

[30] The marathon trial in the Wynberg regional court commenced on 22 May 2000. On 18 November 2002 the plaintiff was convicted on 17 of the 47 counts and was sentenced on 24 January 2003 to a total of 9 years imprisonment without the option of a fine, and ordered to pay compensation in terms of s 300 of the Criminal Procedure Act.[12]

[31] He subsequently appealed against both his conviction and sentence. The appeal was heard by Traverso DJP and Le Grange J and on 16 October 2009

[12] Act 51 of 1977.

the plaintiff's appeal succeeded and the convictions and sentences were set aside.

[32] The salient portions of the appeal court's judgment read as follows:[13]

> *'The counts of which the appellant was convicted were the following:*
>
> *(a) Counts 1 to 10, which referred to the alleged unauthorised rental of a Mazda 626 and an Audi…*
>
> *(b) Counts 36 to 37 were charges of fraud in respect of the alleged fraudulent payment of informers' fees and operational expenses in amounts of R2 000,00; R2 000,00 and R2 530,00 respectively.*
>
> *(c) Count 39 was a charge of fraud relating to a trip which the appellant undertook with Mr Roberto Palazzolo to Angola. It is alleged that he defrauded the State out of an amount of R12 744,53 in respect of the costs of that trip, in that Mr Palazzolo paid for those expenses and accordingly the appellant did not enjoy a claim in respect thereof.*
>
> *(d) The next count on which the appellant was convicted, was count 41, which referred to accommodation expenses and the cost of a flight ticket incurred in respect of Alvira Williams, who the appellant flew down from East London for an interview, because he regarded her as a potential agent. It was anticipated that he would place her in the offices of Mr Palazzolo.*
>
> *(e) Then count 46 is a drunken driving charge and count 47 is a charge of leaving the scene of the accident before the police arrived.*
>
> *The record of this case runs into some five and a half thousand pages. The entire trial consisted of intrigue, name dropping and very little else. Because there are high ranking officers involved and because names such as that of President Mandela, Mr Mbeki, Commissioner Fivaz, Minister Mufamadi and more, were bandied about, I had every intention of giving a detailed judgment.*

[13] Exhibit FF.

> *However, in view of the concessions made by the State in response to* [counsel for the plaintiff's] *very competent argument I do not believe that it is necessary for me to do so. I will, therefore, briefly deal with the respective counts…'*
>
> [emphasis supplied]

[33] The *'concessions made by the State'* obviously referred to those of counsel for the first defendant, and not any representative of the second defendant, who is now the only defendant before the court.

[34] In his amended particulars of claim[14] the plaintiff alleged that during July 1997 Superintendent Bouwer, Superintendent Senekal, Inspector Abraham Smith, Director Knipe and Superintendent Rossouw of SAPS wrongfully and maliciously set the law in motion by instigating the 47 charges against him, when they had no reasonable or probable cause or any reasonable belief in the truth thereof. In particular, it was alleged that false statements against the plaintiff were procured by one or more of these members in terms of s 204 of the Criminal Procedure Act from junior officers, informers and other witnesses who did not wish to give statements voluntarily. It is to be noted that the plaintiff did not allege that *Fivaz* had any role to play in the alleged malicious instigation. Nor did he specifically allege that the SAPS members in question acted in concert to conspire against him.

[35] The second defendant denies any wrongful or malicious acts by these members. Bouwer and Senekal were superintendents in the Evaluation

[14] Paragraph 8 of the amended particulars of claim pursuant to an amendment moved from the Bar when the matter was argued on 27 June 2017, granted without opposition.

Services Unit at SAPS headquarters; Smith was a former member of PITU; Knipe – as previously stated – was appointed as the lead investigator; and Rossouw was appointed by Knipe as his co-investigator. All of these officers, save for Bouwer, testified during the trial.

[36] Before turning to deal with the evidence on the disputed issues it is convenient to summarise the applicable legal principles. It should be mentioned that I was also referred to several other authorities by counsel for the plaintiff, including foreign authorities, but I do not consider them to be helpful given the settled legal principles contained in the judgments of our highest courts.

Applicable legal principles

[37] In order to succeed in his claim, the plaintiff must prove that:[15]

37.1 The second defendant set the law in motion by instigating the prosecution against him;

37.2 The second defendant acted with malice (or *animus injuriandi,* for which purpose *dolus eventualis* will suffice);

37.3 The second defendant acted without reasonable and probable cause; and

[15] *Woji v Minister of Police* [2015] 1 All SA 68 (SCA) at para [33].

37.4 The prosecution against the plaintiff has failed.[16]

[38] It is common cause that the first and fourth requirements have been met.[17] Accordingly, what must be determined is whether the plaintiff has proven the second and third requirements. The role of the first defendant's employees in the investigation and prosecution is *not* under scrutiny, given that the claim against the first defendant has been withdrawn.

[39] In *Rudolph v Minister of Safety and Security*[18] the requirement of malice was set out as follows:

> *'[18] The requirement of "malice" has been the subject of discussion in a number of cases in this court. The approach now adopted by this court is that, although the expression "malice" is used, the claimant's remedy in a claim for malicious prosecution lies under the* actio injuriarum *and that what has to be proved in this regard is* animus injuriandi*. See* Moaki v Reckitt and Colman (Africa) Ltd and Another*; and* Prinsloo and Another v Newman. *By way of further elaboration in* Moleko *it was said:*
>
> > *"The defendant must thus not only have been aware of what he or she was doing in instituting or initiating the prosecution, but must at least have foreseen the possibility that he or she was acting wrongfully, but nevertheless continued to act, reckless as to the consequences of his or her conduct (*dolus eventualis*). Negligence on the part of the defendant (or, I would say, even gross negligence) will not suffice." '*[19]

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[16] *Rudolph v Minister of Safety and Security* 2009 (5) SA 94 (SCA) at para [16] and *Minister van Polisie v Van der Vyver* (861/2011) [2013] SASCA 39 (28 March 2013) at para [21].

[17] Para 17 second defendant's heads of argument in the application for absolution where it is stated that *'*(i)*t is accepted that they initiated the criminal prosecution against the plaintiff'.*

[18] At para [18].

[19] Counsel for the plaintiff relied on *Heyns v Venter* 2004 (3) SA 200 (T) as authority for introducing gross negligence as a ground for liability for malicious prosecution. I am of course bound by the Supreme Court of Appeal authority to the contrary.

[40] In *Woji v Minister of Police*[20] it was held:

> *'[34] The minister admitted that Inspector Kuhn had set the law in motion against Mr Woji on a charge of armed robbery, but alleged that he acted lawfully and reasonably in doing so. The minister further alleged that prosecutors employed by the National Prosecuting Authority correctly decided to prosecute Mr Woji on a charge of armed robbery. With regard to the liability of the SAPS, the question is whether Inspector Kuhn 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. See* Moleko *at paragraph 11. Whether Inspector Kuhn did so, will be determined in conjunction with an examination of whether Mr Woji proved the necessary element of malice on Inspector Kuhn's part.'*
>
> [emphasis supplied]

[41] In *Minister of Justice and Constitutional Development v Moleko*[21] the court, in considering the role of the police in the context of a claim for malicious prosecution, stated that:

> *'[16] Captain Gwayi testified that he had nothing to do with the decision to prosecute Mr Moleko – he merely conducted the investigation and collected evidence. As far as he was concerned, the decision to prosecute was "the prerogative of the National Prosecuting Authority".*
>
> *[17] Based on these facts, it is clear to me that Captain Gwayi at all times acted on the instructions and under the direction of the office of the DPP. Neither he nor any other policeman employed by the third appellant was responsible for the decision to prosecute the plaintiff. For this reason alone, I*

[20] At para [34].
[21] 2009 (2) SACR 585 (SCA) at [16] – [17].

am of the view that the appeal must therefore succeed insofar as the third appellant is concerned.'

[42] The court went on to explain "reasonable and probable cause":[22]

'[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."*

[43] Neethling, Potgieter and Visser *Law of Delict*[23] deal with the test for the absence of reasonable and probable cause as follows:

'There is an absence of reasonable and probable cause for the prosecution either (i) if there are, from an objective viewpoint, no reasonable grounds for the prosecution, or (ii) if, where such grounds are in fact present, the defendant does not, viewed subjectively, believe in the plaintiff's guilt. The defendant will thus be acquitted if, on the one hand, there existed reasonable grounds for the prosecution and, on the other hand, he also believed in the plaintiff's guilt.

(i) The question of whether reasonable grounds exist may only be answered by reference to the facts of each particular case. The facts must then reasonably, or according to the reasonable person, indicate that the plaintiff probably committed the crime.'

[emphasis supplied]

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[22] Para [20].
[23] 7th Ed. at pp366-367.

[44] The evidence revealed the thrust of the plaintiff's case to be that the SAPS members conspired to instigate charges against him, not for any lawful purpose, but to deliberately thwart his investigations in PITU. In *Tsose v Minister of Justice and Others*[24] Schreiner JA held, in the context of motive for an arrest, that:

> *'If the object of the arrest, though professedly to bring the arrested person before the court, is really not such, but is to frighten or harass him and so induce him to act in a way desired by the arrestor, without his appearing in court, the arrest is, no doubt, unlawful. But if the object of the arrestor is to bring the arrested person before the court in order that he may be prosecuted to conviction and so may be led to cease to contravene the law the arrest is not rendered illegal because the arrestor's motive is to frighten or harass the arrested person into desisting from his illegal conduct. An arrest is not unlawful because the arrestor intends and states that he intends to go on arresting the arrested person till he stops contravening the law if the intention always is after arrest to bring the arrested person duly to prosecution. In such a case the only remedy of the arrested person would be an action for malicious prosecution in which he would have to prove not only an improper motive but also the absence of reasonable cause for the prosecution. An arrest is, of course, in general a harsher method of initiating a prosecution than citation by way of summons but if the circumstances exist which make it lawful under a statutory provision to arrest a person as a means of bringing him to court, such an arrest is not unlawful even if it is made because the arrestor believes that arrest will be more harassing than summons. For just as the best motive will not cure an otherwise illegal arrest so the worst motive will not render an otherwise legal arrest illegal.'*

[45] This approach was followed by the court in *National Director of Public Prosecutions v Zuma*[25] in the context of a malicious prosecution claim:

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[24] 1951 (3) SA 10 (A) at 17C-H.
[25] 2009 (2) SA 277 (SCA) at para [37] – [38].

'[37] The court dealt at length with the non-contentious principle that the NPA must not be led by political considerations and that ministerial responsibility over the NPA does not imply a right to interfere with a decision to prosecute (para 88 et seq). This, however, does need some contextualisation. A prosecution is not wrongful merely because it is brought for an improper purpose. It will only be wrongful if, in addition, reasonable and probable grounds for prosecuting are absent, something not alleged by Mr Zuma and which, in any event, can only be determined once criminal proceedings have been concluded. The motive behind the prosecution is irrelevant because, as Schreiner JA said in connection with arrests, the best motive does not cure an otherwise illegal arrest and the worst motive does not render an otherwise legal arrest illegal. The same applies to prosecutions.

[38] This does not, however, mean that the prosecution may use its powers for "ulterior purposes". To do so would breach the principle of legality. The facts in Highstead Entertainment (Pty) Ltd t/a "The Club" v Minister of Law and Order and Others *illustrate and explain the point. The police had confiscated machines belonging to* Highstead *for the purpose of charging it with gambling offences. They were intent on confiscating further machines. The object was not to use them as exhibits – they had enough exhibits already – but to put* Highstead *out of business. In other words, the confiscation had nothing to do with the intended prosecution and the power to confiscate was accordingly used for a purpose not authorised by the statute. This is what "ulterior purpose" in this context means. That is not the case before us. In the absence of evidence that the prosecution of Mr Zuma was not intended to obtain a conviction, the reliance on this line of authority is misplaced as was the focus on motive.'*

[emphasis supplied]

[46] It bears emphasis that the onus rests upon the plaintiff to prove both malice and the absence of reasonable and probable cause. This much is clear from *Woji*.[26] The contents of all the dockets handed over by Knipe and Rossouw to the prosecuting authority, although available to the plaintiff, were not placed

[26] *Supra* para [33].

before the court during the trial. In his testimony the plaintiff dealt only with parts of the dockets on the Williams count and the counts of drunken driving and leaving the scene of an accident.

[47] During the second defendant's application for absolution at the close of the plaintiff's case it was argued that his failure to deal with the contents of the dockets in relation to almost all of the charges against him was fatal to his case, because he bore the onus of proving what was placed before the prosecution by Knipe and Rossouw when the decision to prosecute him was made. On the other hand it was argued on behalf of the plaintiff that he bore no such onus because, but for the actions of the SAPS members, there would have been no dockets to be placed before the prosecuting authority in the first place. Given that the test for absolution at the close of a plaintiff's case is different from a determination on the merits at the end of a trial, I declined to make any specific finding on the issue at that point. I did however take it into account when refusing absolution, but merely on the basis that the plaintiff's argument might have some merit at that stage.

[48] At the end of the trial the plaintiff's counsel submitted that although, strictly speaking, the burden does not pass to the second defendant insofar as the "overall onus" is concerned, given my finding at absolution stage that the plaintiff had met the low threshold of a *prima facie* case, an evidentiary burden was placed upon the second defendant to rebut that *prima facie* case.

[49] However, as pointed out by counsel for the second defendant, in Zeffertt *et al* The South African Law of Evidence:[27]

> *'(c) The shifting of the evidentiary burden during the trial*
>
> *It is important to notice that there are only two occasions during a trial when the judge will give a ruling concerning the evidential burden or duty to adduce evidence. First, he or she will rule upon the incidence of the burden in order to decide who has the right to begin. This may involve deciding, as in* HA Millard & Son (Pty) Ltd v Enzenhofer*, whether the duty has been "shifted" by admissions on the pleadings. Secondly, there may be an application for the discharge of the accused or absolution from the instance. Here the judge will rule upon whether or not the evidential burden, in the sense outlined above in this chapter, has been discharged.*
>
> *Apart from these two instances, a "shifting" of the evidential burden during the trial has no legal or other significance because it cannot form the subject of a ruling by the judge. Judges nevertheless frequently speak of further shiftings produced by evidence given in the course of the action. The trial appears to be regarded as a tennis match in which the evidential burden is kept in play between the parties. But the metaphor is misleading, because there are no points to be gained merely by sending the evidential burden back across the net, and what is more, no one is keeping score. Once the trial has begun:*
>
> > *"…the judge…trying the case is not concerned to form provisional conclusions from time to time as to which party then has the balance of probabilities on his side and there is no means of knowing whether such conclusions have been formed."*
>
> *Even a refusal of absolution tells a defendant no more than that the plaintiff has discharged his initial duty to lead some evidence in his or her favour: if he or she closes his or her case without leading any evidence he or she may still find that he or she has won. The only other stage at which the court will give a ruling is after it has heard all the evidence, and then it will simply decide whether the party who bore the onus has discharged it.'*

[27] Chapter 5 pp131-132, 2004 edition.

Evidence on the disputed issues

[50] During his testimony the plaintiff was referred to the letter of 18 June 1996 in which its recipients were informed that PITU's reporting line would be to Mandela and Fivaz (and not Mandela and Mufamadi). His explanation was that:

> *'…it would have been very suspicious…and suspect to these people…that we are reporting directly to the President…the sensitivity of* [the] *information…led us to establish this unit in a covert matter and this is why we addressed this letter so that there are no questions asked, it is understood within police circles that when you have a covert operation that no further questions are asked about it.'*[28]

[51] He confirmed however that he reported his complaints about interference with the unit, not only to Mbeki and Mufamadi, but to Fivaz as well. At the meeting in August 1997 Fivaz told Mbeki that he was in possession of a lengthy statement from a former member of the unit and had instructed that an investigation be carried out *'to determine the validity of that affidavit'*.[29] It is common cause that it was Smith who deposed to that affidavit.

[52] Prior to the issue of the new mandate of 29 August 1997 there were no limitations placed on what could be investigated by PITU:

> *'When an area of concern was raised … through any of the other government structures it was simply shifted over to the PITU by either Minister Mufamadi or the Deputy President himself.'*[30]

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[28] Record Vol 1 p31.
[29] Record Vol 1 p56.
[30] Record Vol 1 p60.

[53] The first occasion that Fivaz expressed concern about the reporting line was at the meeting with Mbeki, Mufamadi, the plaintiff and Viljoen in August 1997. Before that meeting the plaintiff was unaware that he was, as he put it, being investigated by Knipe and Rossouw:

> *'I had no idea that they were investigating me up and until the National Commissioner said that he would order such an investigation.'*[31]

[54] According to the plaintiff Fivaz did not provide him with feedback about the complaints contained in his letter of 5 October 1997 (prompted by the Mail & Guardian article). Members of his unit (Van der Westhuizen, Captain Michael Benn and Viljoen) were threatened and intimidated by Knipe and Rossouw during their investigation (as was Smith, although he had already left the unit by then). The plaintiff was not treated in a similar manner. According to him the first interaction he had with Knipe and Rossouw was when he was arrested on 18 February 1998.

[55] On the eve of his testimony in the regional court trial, the plaintiff was approached by a Mr Fraser, the provincial head of the NIS. He tried to persuade the plaintiff *'not to contest'* the evidence of Mufamadi (who testified as a state witness):

> *'…the reason being that it was said to have implications for the country…I should rather just plead guilty to some of the lesser charges…*[32]

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[31] Record Vol 1 p72.
[32] Record Vol 1 p78.

> *…that should I plead guilty I would be sentenced to a term in prison but the Agency will ensure that I don't spend more than a week in prison.'*[33]

[56] The plaintiff later disclosed this to the presiding magistrate during the course of his cross-examination. He also reported it to Director Veary of the NIA and laid a charge. He was then summonsed to Adv Niehaus of the prosecuting authority who advised him not to proceed with the charge because he would be found guilty anyway. The evidence of Mufamadi that the plaintiff was asked *'not to contest'* was not explained and neither Veary nor Niehaus testified.

[57] The plaintiff gave evidence in relation to each of the charges that he faced in the regional court. In respect of each charge his version was exculpatory. Had the plaintiff not withdrawn his claim against the first defendant, it would have been necessary to deal with this evidence in order to evaluate whether or not the prosecuting authority should have proceeded with the prosecution. However, given that the plaintiff's claim lies only against the second defendant, what is relevant is the plaintiff's evidence concerning what the SAPS members did to instigate the charges against him. The plaintiff's testimony in this regard was as follows.

[58] Count 39 related to the plaintiff's trip to Angola with Palazzolo. The latter testified as a court witness during the regional court trial. The plaintiff's evidence was that *'…if I am correct he had numerous consultations with Mr Knipe and Mr Rossouw on the topic of the Angola money'.*[34] The plaintiff

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[33] Record Vol 1 p79.
[34] Record Vol 2 p126.

was then referred to Palazzolo's evidence during the regional court trial in which Palazzolo denied any such consultations:

> *'I only was…harassed by him that he wants a statement from me. That is the only reason he came to see me all the time. He was always after me asking for a statement, a statement, a statement, but I never consulted with him.'*[35]

[59] The following passage from the plaintiff's evidence in chief is also relevant:

> *'Have you ever made any enquiries why the investigators in your case went to Mr Palazzolo to make statements in your matter. Palazzolo being the main target of Operation Intrigue--- M'Lady, I did find it strange that they would engage the main target of the investigation but I think that when I look at the – I don't know if it is correct to say the intention, M'Lady, was to discredit the investigation more than to do anything else. The intention was to discredit me and inform Mr Palazzolo that I was in fact investigating him rather than as to what he believed, that I was his friend.'*[36]

[60] Count 41 related to the plaintiff's approval of payment for a flight from East London to Cape Town for a potential informer, Alvira Williams. She was not called to testify on the plaintiff's behalf. She did however testify as a state witness in the regional court trial where, according to the plaintiff, she complained of Rossouw placing pressure on her to make a statement.

[61] Counts 46 and 47 were the charges pertaining to drunken driving and leaving the scene of an accident. It is common cause that a Dr Stofberg examined the plaintiff some hours after the accident. Stofberg made a statement to Knipe and Rossouw. It was the plaintiff's evidence that:

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[35] Record Vol 2 p128.
[36] Record vol 2 p130.

> *'M'Lady, Dr Stofberg made a statement to Mr Knipe and Mr Rossouw. I would just like to add, M'Lady, that statement was altered by the prosecutor where he himself went to Dr Stofberg and informed him that he cannot remember all the details of such a while back…and it was in the own writing of the prosecutor, Mr Bouwer, that he changed the statement of Dr Stofberg.'*[37]
>
> [emphasis supplied]

[62] In respect of the counts on which he was acquitted in the regional court, the plaintiff's evidence in relation to the involvement of the SAPS members was as follows.

[63] Count 32 was a charge of fraud based on the plaintiff claiming an allowance in respect of an overnight stay at a hotel while on detached duty in Johannesburg. The plaintiff referred to Standing Order Finance 35[38] which stipulated *inter alia* that accommodation for *'Nie Blankes'* police officers on detached duty was limited to a suitable tent (white police officers had the choice of a caravan or suitable tent). According to the plaintiff this evidence was adduced during Knipe's testimony as investigating officer in the regional court trial.

[64] Count 38 was a charge of fraud in respect of an informer's fee claimed by the unit. The informer had been placed by the unit in the office of Palazzolo's attorney, a Mr Prisman. The plaintiff's testimony was that:

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[37] Record Vol 2 p141.
[38] Exhibit B p70.

> *'They at all costs wanted to know who this informer was and this is what this charge in my opinion was meant to do, was meant to uncover who the informer was…a range of people wanted to know. The investigators in this matter wanted to know. The prosecutor wanted to know. Mr Prisman wanted to know. Even Attorney-General Frank Kahn at the time wanted to know.'*[39]

[65] Count 40 related to the alleged theft of safe house furniture under the plaintiff's control, which he moved to his private residence because there was no available facility to store it. Rossouw arrived at his home one morning with an official from the Supply Chain Department. Together they confiscated the furniture. The plaintiff recalled having a discussion with Rossouw and/or Knipe about the furniture but could no longer recall the content, other than being told that it was unlawfully in his possession.

[66] Count 42 was withdrawn. Counts 43 to 45 pertained to obstructing or defeating the ends of justice, and the unauthorised removal of a prisoner in contravention of the Correctional Services Act[40] (referred to during the trial as the Mangiagalli counts). The plaintiff's testimony was as follows:

> *'Now during your interview with Mr Knipe and Rossouw prior to the charges being brought against you did you discuss this Mangiagalli count with him?--- Yes M'Lady, it would have been discussed as well.*
>
> *Can you recall any explanation that you were given* [sic] *to Mr Knipe about this?--- M'Lady, I don't think there was anything to hide with regards to the use of Mangiagalli because at the time he was already blown and that*

[39] Record Vol 2 pp163-164.
[40] Act 8 of 1959 – the new Act 111 of 1998 came into effect on 31 July 2004.

> *Correctional Services had given their full authority for it so there was nothing to hide and we told it like it is.'*[41]

[67] The plaintiff testified that the first time he saw Smith's statement, dated 16 July 1997, was when he consulted with his legal representatives to prepare for trial in this matter. His evidence was that:

> *'…it is very clear when one reads through the statement that Mr Smith maliciously went out of his way to attack my person and character in a very dishonest way.'*[42]

[68] By 16 July 1997 the plaintiff's relationship with Smith had completely broken down and the latter had recently left the unit. When Smith was first seconded from the Organised Crime Unit their relationship was, in the plaintiff's words, *'workable'*. Smith had been interacting with Interpol as well as the Italian police on a range of issues pertaining to Palazzolo under a very broad (and apparently uncontrolled) mandate. Smith was thus useful to the plaintiff.

[69] However over time he came to realise that Smith was intent upon continuing to interact, particularly with the Italian police, entirely at his own discretion and without regard to the unit's mandate. The relationship began to sour when the plaintiff took steps to curb this, only to discover that Smith nonetheless persisted. He discovered that Smith falsely told the Italian police that the plaintiff was *'working with'*[43] Palazzolo to prevent them from arresting him in South Africa. He also suspected Smith of leaking false information to the

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41 Record Vol 2 p176.
42 Record Vol 1 p181.
43 Record Vol 1 p184.

press and had proof of such information having been given to the Italian police. During May 1997 the plaintiff thus appointed Captain Michael Benn who took over many of the roles that Smith previously fulfilled. This caused Smith's resentment to increase.

[70] The plaintiff was taken through Smith's lengthy statement[44] in which he was repeatedly implicated in a corrupt relationship with Palazzolo and several of his associates. Not only was this rejected by the plaintiff as an outright lie, but he explained that it was a necessary part of his legend to be on friendly terms with these individuals to promote his investigation into their activities. What is relevant in the context of this matter is that the plaintiff was never charged with corruption on account of his relationships with Palazzolo or any of his associates.

[71] He was also referred to various allegations made by Smith in respect of the latter's involvement in setting up the unit and his status within the unit himself. The plaintiff's response was that Smith self-evidently had an over-inflated sense of his own importance which bore little relation to the reality of what he had in fact been tasked to do.

[72] Smith also made allegations about the plaintiff's regular drinking sprees and consequent disorderly behaviour which the plaintiff testified were entirely devoid of truth.

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[44] Exhibit B pp80-102 is the typed version.

[73] Smith's statement included a number of allegations of the plaintiff's irregular dealings within the unit. The plaintiff responded to each one. Some he rejected as products of Smith's delusions. In respect of the others he gave exculpatory explanations. The plaintiff later conceded that many of these allegations had a direct relation to charges that he ultimately faced in the regional court trial. They were counts 1 to 10 (vehicles); 11 to 32 and 42 (subsistence and travel), 33 to 34 (safe houses), 35 to 37 (informers' fees), 39 (Angolan trip), 40 (furniture) and 43 to 45 (Mangiagalli).[45]

[74] Smith's statement ended as follows:[46]

> *'It is my submission that Director Lincoln has established the Presidential Task Unit purely as a monitoring basis to protect the interest of Vito Palazzolo and his associates, as it is very clear that Director Lincoln has been familiar with Palazzolo for several years. The fact that Director Lincoln pretends and wants to make everybody believe that he is working undercover is a typical intelligence strategy although Palazzolo and his associates know that Director Lincoln is a member of the South African Police Service.*
>
> *I feel that I was misused for my knowledge and expertise as an experienced policeman.*
>
> *The South African police have been placed in total discredit with the Italian authorities.*
>
> *Director Lincoln is abusing his authority as a police officer as well as the police resources which has been allocated to him as well as large sums of state money for his own personal motives and gain.*
>
> *I further feel that Director Lincoln is abusing the politicians who he in the process is compromising in his own activities which creates negativity amongst senior officials in Government Departments. It is a proved fact that on many occasions disinformation was put forward by Director Lincoln to the Deputy President Mbeki and Minister Mufamadi.*

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[45] Record Vol 4 pp342 – 344.
[46] Exhibit B pp100 – 101.

> *To date no arrests have been executed on any of the Italian fugitives and the copies of their arrest warrants have gone missing from the offices of the Presidential Task Unit. I suspect that Director Lincoln had removed the documents.*
>
> *On 1997-07-10 Director Lincoln held a meeting at the office and addressed all members that "Project Intrigue" has now been terminated on the basis that Vito Palazzolo has submitted an application for amnesty for past political crimes committed, including the death of Anton Lubofski* [sic].
>
> *I announced that I have no further function at the Presidential Task Unit and handed in all my equipment and vehicle. I was instructed by Director Lincoln to leave all documentation pertaining to "Project Intrigue" behind.*
>
> *I feel that the Palazzolo investigation must be addressed but should be done in an organised manner by a unit such as Organised Crime without any ulterior motives.*
>
> *I request that on the basis of this affidavit a comprehensive criminal investigation be launched against Director Lincoln and those associated with him.'*

[75] It is common cause that on 14 June 2010 a full bench of this division found that the Italian arrest warrants could not be executed in South Africa. It was the plaintiff's testimony that he had repeatedly informed Smith that this was the legal position before the latter left the unit but that Smith was not prepared to accept it. The plaintiff also testified that there was no substance in the allegations made by Smith about the termination of the unit which continued to execute its mandate even after he was arrested on 18 February 1998. Palazzolo never applied for amnesty; and that, contrary to Smith's allegations, Fivaz issued PITU's "new" mandate the month *after* Smith left the unit. It was Benn who continued the investigation into Palazzolo until February 1998 when the plaintiff was arrested. It was then handed over to Inspector Piet Viljoen.

[76] The following passage of the plaintiff's evidence is also relevant:[47]

> *'Why do you think that Mr Knipe and Mr Rossouw so vociferously investigated all these charges against you? --- M'Lady, I entered the South African Police via the Department of Intelligence and Security of the ANC. Early in my evidence I had given – said that a large part of my work was the infiltration of Security Branch members of the South African Police Force. M'Lady, I believe that my actions in Cape Town were very successful, because there was a total number of five Security Branch policemen who were reporting to me on the activities of the Security Branch. During that interaction, M'Lady, with members of the Security Branch, I also became interested in the activities of the South African Narcotics Bureau and the Murder and Robbery Unit, and in particular the Murder and Robbery Unit, M'Lady, because that unit had a function to play within the apartheid apparatus. In the Western Cape a notorious name in that unit was Mr Leonard Knipe. Now, M'Lady, I know that with the bombing of Community House in Salt River and with the shooting of the Gugulethu Seven in Gugulethu, that the Murder and Robbery Unit had a crucial role to play in sweeping those crime scenes. And when I say "sweeping" those crime scenes, is to clear it of all evidence that will take it back to the activities of the Security Branch or the South African Police. M'Lady, I also knew of times when another notorious Security policeman, Mr Jeff Benzien, had arrested comrades of mine and taken them around what we would call a point-out, and in some of those Mr Knipe was also featured. When I started the investigation in Cape Town, M'Lady, I also made no bones about the fact that I knew about the activities and operations of a certain group of policemen who worked towards looking after each other, and I refer specifically here to Club 35. I think, M'Lady, the conditions that I stand before you here and the conditions in the criminal court are somewhat different, in the sense that I can speak here with a lot more freedom, and I can say to you M'Lady, that <u>I am only of the opinion that Mr Knipe knew that I knew about the activities of the Murder and Robbery Unit</u>. And it's not only those two; there are other activities as well, M'Lady. But <u>those two, the bombing of Community House, as well as the killing of the seven members of the ANC's Umkhonto we Sizwe at Gugulethu, commonly known as the Gugulethu Seven, that</u>*

[47] Record Vol 3 pp321 – 322.

Mr Knipe and his unit were actively involved there, and I can think this is the only reason why I was so vigorously pursued by him.

The information that you have just testified about, was that ever part of the TRC proceedings? --- Yes, M'Lady, it was.

Can you recall who testified about the Gugulethu Seven at the TRC? --- Mr Knipe did, M'Lady.'

[emphasis supplied]

[77] During cross-examination, while conceding the direct relation between many of Smith's allegations and a number of the charges that he ultimately faced, the plaintiff maintained that Smith was essentially used as a pawn in the conspiracy against him:

> *'…this statement made by Smith or alleged to be made by Smith is not a statement of Smith on his own. This was a pre-determined document, M'Lady. This document that is before the court is the document that they decided on how they were going to get rid of me out of the Presidential Task Unit and Smith was the weak link who was used to depose to this affidavit…'*[48]

[78] The plaintiff conceded that the conspiracy played no role in the instigation of charges against him on counts 46 and 47 (drunken driving and leaving the scene of an accident):

> *'There is no conspiracy by anybody, nobody instigated the, that investigation. It was because you collided with stationery vehicles. An investigation commenced as a result. Is that right? --- That is correct, M'Lady.'*[49]

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[48] Record Vol 4 pp344-345.

[49] Record Vol 4 pp345-346. Smith deposed to his affidavit on 16 July 1997 and the collision occurred on 27 July 1997.

[79] The plaintiff was referred to an Information Note prepared by Bouwer and Senekal of the Evaluation Services Unit dated 19 August 1997.[50] The document was addressed to Fivaz, referred to a previous information note of 25 July 1997, and contained details of what were referred to as *'certain harrowing factors'* uncovered during a further visit to the Western Cape. In addition to *'findings'* of possible maladministration within PITU, largely at the plaintiff's instance, as well as alleged interference in existing SAPS investigations by PITU, it also referred to *'criminal and/or departmental offences'*. These were listed as follows:

79.1 A docket opened at Goodwood Police Station in December 1996 in respect of charges laid against the plaintiff and Smith of *crimen injuria* and disturbance of the peace, which the Attorney-General declined to prosecute on 7 August 1997;

79.2 A docket opened at Elsies River Police Station during August 1997 following a charge laid against the plaintiff by a Mr Oelofse for allegedly firing a shot at him during a private gathering, which Knipe was investigating;

79.3 The Mangiagalli affair which the Kirstenhof police were investigating (a docket having been opened in August 1997) and which was also the subject of a Ministerial enquiry;

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[50] Exhibit U.

79.4 The docket in respect of the charges of drunken driving and leaving the scene of an accident, being investigated by the Cape Town police; and

79.5 An alleged attempt on the plaintiff's life in which he was shot in the foot in June 1997, which was being investigated by Rossouw.

[80] The plaintiff conceded that Knipe could not have been involved in laying any of these charges. He also conceded that, in the normal course, it would have been appropriate to investigate the allegations contained in the Information Note. He insisted however that in his case the investigation which followed was part of the hidden agenda to oust him. He then claimed that Knipe was in fact involved from the very beginning and *'was part and parcel of it'*, as were others:

> *'Well, on the face of it, if one does not know about any hidden agendas, on the face of this document there are potentially significant irregularities and possible criminal conduct that required to be investigated. Would you agree? --- No, M'Lady, on the face of it, from the National Commissioner, George Fivaz, right down to everybody who was involved in this investigation, knew about the agenda that was being played out. It wasn't a matter of somebody reading this and on the face of it making a decision. Not at all M'Lady.'*[51]

[81] The plaintiff conceded that at the Mbeki meeting of August 1997, it was Viljoen (a member of his own unit) who agreed that Knipe be appointed as lead investigator because of his objectivity. He conceded that he raised no objection to, or misgivings about, the investigation or Knipe's appointment, but maintained that in an earlier private discussion with Mbeki he had briefed him

[51] Record Vol 4 p368.

on Knipe's agenda, and that Mbeki knew all about the conspiracy which was already well under way. Mbeki did not testify on the plaintiff's behalf. Nor did Viljoen who, on the plaintiff's version, was present at that private discussion which took place a few hours before the meeting. The plaintiff maintained that (notwithstanding the concerns allegedly expressed to Mbeki in private) it was immaterial to him who was appointed because he had nothing to hide.

[82] The plaintiff was referred to his evidence during the regional court trial in which he testified that at the Mbeki meeting a discussion took place about who could be trusted to lead the investigation, that it was Viljoen who suggested Knipe, and that he had agreed. When confronted with this testimony the plaintiff was evasive.[52] He conceded that the Attorney-General declined to prosecute him on the attempted murder charge laid by Oelofse and that no police officer was involved in laying that charge. He also conceded that the investigation into the charges of drunken driving and leaving the scene of an accident was initially conducted by police officers other than those named in his pleadings:

> *'M'Lady, the investigation…at the initial stages, yes, it had nothing to do with Mr Knipe or Rossouw or anybody else, but it was ultimately taken over by them.'*[53]

[83] The plaintiff conceded that during their investigation Knipe and Rossouw presented the prosecuting authority with a number of dockets, but as the investigation progressed several decisions were taken not to prosecute him.

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[52] Record Vol 4 pp375-379, Vol 6 pp487-490.
[53] Record Vol 4 p380.

He also conceded that he had not previously voiced any complaint against Knipe or Rossouw about the manner of the investigation, but maintained that:

> *'M'Lady, no, I did not because we took this matter on appeal, it was, it was not about levelling a complaint against them, because I just didn't have the faith at that time that anything would have been done about it.'*[54]

[84] It was demonstrated that the only formal objections noted by the plaintiff were to Knipe's presence when Smith and Van der Westhuizen testified in the regional court on the ground that he had pressurised them. The plaintiff thereafter claimed that he did informally raise his concerns with Mbeki on three occasions. In particular, he told Mbeki that witnesses (including members of the unit) were being pressurised to make statements against him. However Mbeki advised him to let the investigation run its course.

[85] The plaintiff was asked to identify the witnesses who he alleged were forced to make false statements against him. Initially he could only name Benn and then, with some prompting, Van der Westhuizen, Smith and informers April and Gillot. His evidence was that Williams had not lied but was pressurised to make a statement. As far as Palazzolo is concerned he provided the names of an Advocate Joubert and a Director Human who apparently interviewed Palazzolo because Knipe was unable to convince him to make a statement.

[86] He was referred to the evidence of these witnesses in the regional court trial. Smith testified as a section 204 witness and gave evidence about the

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[54] Record Vol 4 p390.

pressure he was placed under by Knipe to tell the truth. Van der Westhuizen denied being pressurised to make a false statement. April, also a section 204 witness, testified that he initially made false statements concerning the motor vehicle collision because he did not want the plaintiff to lose his job. He made no mention of being pressurised.

[87] Palazzolo was called as a section 186 witness by the court and testified that he was an unwilling witness and had not wanted to co-operate with Knipe because the plaintiff was his friend. He did not suggest that he was placed under pressure to falsely incriminate him. Benn, also a section 204 witness, testified that he earlier made a false statement to protect the plaintiff. In her evidence Gillot made no mention of being pressurised to falsely implicate the plaintiff. The latter nonetheless maintained that despite all of this:

> *'…I think the reality that we faced at the time, is that each and every single witness was put under immense pressure to give evidence against me, false as it may be, they were put under pressure.'*[55]

[88] Williams initially made a statement incriminating the plaintiff. She subsequently gave an exculpatory one after a Mr John Adams, who the plaintiff described as *'an old and long-standing friend'* of his, intervened of his own volition. The evidence of Williams in the regional court trial was that:

> *'Mr Rossouw explained to me that I am a witness with regards to Andre Lincoln, that he requires a statement from me. That's all he explained. He didn't actually go into details about the case and my boss was in the office at*

[55] Record Vol 5 p455.

> *the time, when he came there and he heard whatever was said between Rossouw and myself. And I had only started, I was just working for about 2 to 3 weeks, and that's the reason why they actually made it as a retrench…not as firing me, it was more like a retrenchment.'*[56]

[89] Her evidence was thus that she experienced Rossouw having come to her place of work as intimidating, not that Rossouw himself had said anything to intimidate her. It was because her employer overheard their conversation that she was retrenched, not as a result of anything that Rossouw had said or done. It was also demonstrated that when Knipe testified in the regional court trial it was not suggested that he treated any of these witnesses improperly, apart from Smith, or had them lie under oath. Knipe himself readily conceded in that trial that he placed tremendous pressure on Smith. He said he did so because he wanted to be sure that Smith was telling the truth.[57] The plaintiff also conceded that it was never suggested to Rossouw in the regional court trial that he interfered with witnesses or improperly placed pressure on them to testify untruthfully against him.

[90] According to the plaintiff Club 35 consisted of 35 senior ranking white Afrikaans policemen who looked after the interests of the old guard and Rossouw was the chairperson. The plaintiff however conceded that this was never canvassed with Rossouw when he testified in the regional court trial:

> *'Nothing was put to him in his evidence about his involvement in Club 35, or the sinister motives of Club 35. Do you have any comment to that? --- Yes, M'Lady, because Club 35 was not on trial, I was.*

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[56] Exhibit A pp2707-2708 and Record Vol 5 pp461-462.
[57] Exhibit A pp677 and 711-712, Record Vol 5 pp479-482.

> *But I'm simply putting to you, Mr Lincoln, if that had been a complaint with Mr Rossouw, it should have been raised with Mr Rossouw when he testified and it wasn't done. --- As I say, M'Lady, Club 35 was not on trial, I was.'*[58]

[91] The plaintiff agreed that all of the dockets were made available to his legal team before the present trial commenced. He was referred to those on counts 46 and 47 (being drunken driving and leaving the scene of an accident). These dockets show that before Knipe and Rossouw became involved the initial investigating officer, Captain Bock, had already obtained several incriminating statements from independent lay witnesses.[59]

[92] After Rossouw took over others were obtained. Without going into any detail there can be little doubt that the contents of these statements, self-evidently, were such that reasonable and probable cause to prosecute was established. The plaintiff himself conceded as much although he nonetheless clung to his conspiracy theory:

> *'M'Lady, like I've answered countless times in this court, if you look at it on the face of things, then, yes, I can agree with it. But in this particular investigation…I cannot accept that as being the correct version as has been put to me now.'*[60]

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58 Record Vol 5 p486.
59 Exhibit I.
60 Record Vol 5 p519.

[93] The plaintiff then suggested that all of the statements taken by Rossouw were worded in the same manner in order to increase the prospects of his prosecution. However the contents of the statements indicate the contrary.

[94] The plaintiff was referred to an extract from the final report of the Truth and Reconciliation Commission (TRC)[61] in which Knipe was mentioned as having been involved at the scene and subsequent investigation after the Gugulethu Seven massacre, but in no way implicated in any wrongdoing. His response was that for 20 years it was a well-kept secret that Knipe's presence there was to clean the scene and to remove any evidence that could implicate the police. He conceded that Knipe (who testified at the TRC hearings) did not apply for amnesty, but claimed that Knipe had not needed to because he was not a member of the security police at the time, but a member of the murder and robbery squad, and had not murdered anyone.

[95] He denied that Knipe's role at the scene was to take photographs, videos and collect certain exhibits. However when it became apparent that he could not dispute this, the plaintiff suggested that *'…maybe that's why…the forensic evidence was questionable'.*[62] The plaintiff did not offer a single shred of evidence to support this allegation although, on his own version, he must have been able to do so.

[96] The plaintiff could not dispute that Knipe testified a second time before the TRC in June 1997 in relation to the KTC hearings and was thanked for his

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[61] Exhibit K.
[62] Record Vol 5 p546.

helpful input. As far as the Community House bombing in Salt River in 1987 is concerned, the plaintiff was also unable to dispute that the findings of the TRC in no way implicated Knipe. Again his response was that this is because Knipe "took care" of the crime scene. He again failed to offer any evidence in support of this bald allegation. When it was pointed out that Knipe had never attended that scene, the plaintiff responded that he was in charge of the unit whose members did attend and he was thus involved. He was referred to a second extract from the TRC final report[63] in respect of the Community House bombing which made no mention of Knipe's involvement. He nonetheless doggedly maintained that Knipe was involved but still provided no detail.

[97] The remaining witness who testified on the plaintiff's behalf was Mr Zenzile Khoisan, a journalist with 30 years' experience. He testified that he was one of the journalists who covered the plaintiff's trial in the regional court, and the author of various newspaper articles that appeared in the Mail & Guardian and Cape Argus newspapers over that period. He was referred in particular to his article that appeared in the Mail & Guardian in its edition of 24 to 30 November 2000, the salient portion of which read as follows:[64]

> *'**Cop threatened to topple govt***
> *New evidence has emerged of how the national head of violent crimes, Commissioner Leonard Knipe, used his senor position in the police to intimidate witnesses and threatened to topple the African National Congress government.*
>
> *According to tape recordings in the possession of the Mail & Guardian, Knipe threatened to "bring down" the ANC government if it*

[63] Exhibit L.
[64] Exhibit R.

> *continued with a covert operation aimed at exposing senior civil servants and senior policemen connected to Mafia boss Vito Palazzolo…*
>
> *The tape in the possession of the M&G was covertly recorded by former unit member Detective Inspector Abraham Smith, who has been testifying during the trial of the unit's director, Andre Lincoln…*
>
> *On the tape Knipe says: "I'll bring down the government. I'll get every chap to resign,* as 'n ou weer na my kom met a koeverte operasie *[…if another guy comes to me with a covert operation]".'*

[98] His evidence was that he was given the recording by a *'very well-placed…unimpeachable source'*[65] whose identity he was not prepared to disclose for reasons of confidentiality. After listening to the recording and informing his editor, he contacted Smith telephonically and took him through the recording, asking Smith several questions for verification purposes. Smith told him that he made the recording (during one of his interviews with Knipe) to protect himself. Satisfied as to the recording's authenticity he proceeded to have the article published. Khoisan was not approached to retract the article after its publication.

[99] During cross-examination his evidence was that, given the passage of time, he no longer had the recording nor any knowledge of its whereabouts. (It is common cause that Smith made a recording during an interview with Knipe, but that no transcript of that recording was ever produced).

[100] Khoisan was referred to Smith's cross-examination in the regional court trial:[66]

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[65] Record Vol 6 pp647-648.
[66] Exhibit A p484-485.

> *'Now at some stage you tape-recorded a conversation that you had with Assistant Commissioner Knipe, correct? --- That's correct.*
>
> *Why did you do that? --- …I felt it necessary at the time to record Commissioner Knipe because of the verbal abuse… I knew that going into another interview with him it's going to most likely occur that he's going to use abusive language towards me…and I therefore recorded him whereby certain remarks and swearing was directed my way which was putting me under pressure at the time…I never had it directed to tape Commissioner Knipe, but I did this purely to protect my own interests.'*

[101] Khoisan could not dispute that nowhere in his evidence did Smith refer to Knipe's threat to bring down the ANC government. He conceded that he had not made a transcript of the recording, but stated that he would in all probability have made notes which he no longer had. He could not recall whether the Mail & Guardian editor requested a copy of the recording but was *'reasonably certain…that I endeavoured to play the tape…to the editor'.*[67] Contrary to his earlier evidence, Khoisan then testified that he had more than one conversation with Smith. Later this version changed again:

> *'The conversation with Mr Smith – it wasn't a very, very, very long conversation – it was to, number one, verify that I was speaking to Mr Smith; number two that I wanted to look at the issues that were on the tape, and specifically the statements that were made and attributed to, I think it was to Director Knipe. And then the last one was to – where I verified with Mr Smith that he made the recording.'*[68]

[102] He conceded that he did not meet Smith in person. When told that Smith would deny having had any conversation with him, he responded that Smith had never taken issue with the contents of the article. He was told that both

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[67] Record Vol 8 p670.
[68] Record Vol 8 p677.

Smith and Knipe would deny that the tape contained any threat to bring down the ANC government but he maintained that this was indeed on the recording. He could not dispute that, following the publication of the article, the police conducted an internal investigation at ministerial level. They obtained a copy of the tape but, due to its poor quality, it could not be properly transcribed. The allegations were nonetheless investigated and Knipe was cleared of any wrongdoing. He similarly could not dispute that some five months after the Mail & Guardian article was published, Knipe was awarded the South African Police Service Star for Outstanding Service by the Minister of Safety and Security who at the time was Minister Steve Tshwete. However he demonstrated his personal bias against Knipe when he immediately thereafter testified that:

> *'Ja, I take exception to that, M'Lady, because there are certain matters that come from the TRC time that would really question why a police service would give such a prestigious award to a person who has the history of the police officer known as Leonard Knipe."*[69]

[103] Knipe testified that he retired as Assistant Commissioner (the equivalent of the current major-general) of the Serious and Violent Crime Division after 37 years of service in the SAPS. He received several awards for outstanding service during his career.

[104] In July/August 1997 he was instructed by Fivaz to investigate allegations of possible criminal activities by the plaintiff and members of PITU. He was to report to Fivaz and authorised to select the members of his team. He selected

[69] Record Vol 8 p692.

Rossouw, Captains Cooper and Harri, and Brigadier Van Dyk, who was one of the legal officers attached to the Provincial Head Office in Cape Town.

[105] Fivaz told him that a meeting had been held with the plaintiff, Mbeki and Viljoen and that the plaintiff, who was then under investigation by members of the Evaluation Unit in Pretoria, objected to the *'methodology'* of that investigation. Knipe's name had been mentioned and the plaintiff apparently agreed to his appointment:[70]

> *'And was this a run-of-the-mill type investigation that you were about to conduct? --- Most decidedly not, M'Lady.*
>
> *Why do you say that? --- The mandate which had been given to Director Lincoln had been given by no lesser person than the President of this country. The mandate was given on a handwritten note addressed to Commissioner Fivaz by the President. The unit worked under the title of the Presidential Unit.*
>
> *What was the significance of that in terms of the investigation you conducted? --- …I approached it as any other criminal investigation, but it was obvious to me that this was a prestige unit.*
>
> *The unit you were investigating? --- Yes, that Director Lincoln must have been held in high esteem by no lesser person than the President of the country.'*

[106] Knipe had a meeting with the Evaluation Unit's investigating team, Bouwer and Senekal, at which he was briefed and handed Smith's statement. Using this statement as a *'base document'* he and his team commenced their investigation in late July/early August 1997. He was also subsequently provided with the Information Note dated 19 August 1997 prepared by Bouwer

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[70] Record Vol 10 p767 - 768.

and Senekal but testified that the information contained therein had been conveyed to him at their meeting.

[107] Adv Andre Bouwer of the prosecuting authority became actively involved in the investigation at a very early stage (that Adv Bouwer and Superintendent Bouwer of the Evaluation Unit have the same surname is coincidental):[71]

> *'It was almost a Scorpion-type investigation, where the prosecutor played a very prominent and leading role in the progress of the investigation. We probably met with the advocate once a week, when we would discuss what had happened that week, show what statements we had obtained, received guidance and advice, and proceed. He also had a reporting line directly to the Director of Public Prosecutions, who at the time was Adv Kahn, and regular reports were made to the advocate on the …progress of our investigation.'*

[108] Not all of the allegations contained in the Information Note were investigated by Knipe and his team, because they fell outside his mandate, which was to investigate possible criminal activities. Those they did investigate included the Oelofse attempted murder docket which the prosecuting authority later declined to prosecute, the Mangiagalli affair, the allegations of serious irregularities and financial mismanagement of the unit, and the charges of drunken driving and leaving the scene of an accident.

[109] As regards the latter charges, Knipe assigned Rossouw to take over the investigation from Benn who was a PITU member serving under the plaintiff at the time. By that stage a docket had already been open for several months

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[71] Record Vol 10 p778.

but after Benn took it over from Bock, ostensibly on the plaintiff's instructions, no apparent progress had been made.

[110] During the course of the investigation a range of dockets were opened and investigated but, almost from the outset, under the supervision of the prosecuting authority. If a docket was opened and the prosecutor was of the opinion that it appeared to be of an administrative nature, he would decline to prosecute and refer it to Brigadier Van Vuuren of the SAPS Disciplinary Unit in Pretoria for decision. As far as Knipe knew departmental steps were not ultimately taken against the plaintiff because following his conviction and sentence in the regional court he was dismissed from the police service. (He was reinstated following his successful appeal).

[111] The investigation culminated in the plaintiff's arrest on 18 February 1998. During this period Knipe was promoted to National Head of Serious and Violent Crime in Pretoria. To the extent that anything further was required by the prosecutor this was delegated to Rossouw although he and Knipe remained in contact.

[112] Knipe denied having any personal agenda against the plaintiff, who had never complained about the manner in which he conducted the investigation. It was only Smith who complained of rudeness towards him. Knipe was asked to describe his relationship with Smith:[72]

[72] Record Vol 10 pp793-795.

'…How was your relationship with him at the beginning? --- Rocky.

Rocky. Why do you say that? --- I don't know if I believed Smith at the start. Some of the stories in that long affidavit seemed so incredulous. I was also concerned about the obvious breakdown between him and his commander, and I wanted to make sure that he was telling us the truth, that it – that he was not being vindictive against his former commanding officer. But as I delved into his statements, I was forced to change my mind and realise that he was not taking me for a ride…I can remember telling Rossouw that we must tread very carefully, and before we open any case docket or take any action we must get corroboration…I was investigating a high-ranking police officer, a police officer who had been instructed by the President of this country to lead an investigation. I was aware that there was animus between the two parties, and did not want to prejudice Director Lincoln if there was a vendetta against him. But as I said, M'Lady, as Smith stood up to interrogation and we found corroboration, I changed my mind towards him.'

[113] Knipe candidly conceded that he had sworn and been abusive to Smith, explaining that it was because he wanted to get to the truth and to make sure that Smith was not lying. He conceded that he had been openly critical of covert and intelligence operations, going back to the early days of his police career:[73]

'I think what was proven, with great respect, in the TRC hearings [about] *so-called intelligence-driven or covert operations, on that basis, I don't think it's anything to be proud of. I believe that, even if it's a covert operation, it must be in terms of the law.'*

[114] Knipe confirmed that, following the Khoisan article in the Mail & Guardian, he was investigated at the highest level. The investigation was assigned to the

[73] Record Vol 10 p796.

SAPS principal legal officer, Dr Jacobs, and he was subsequently informed that no charges would be brought against him, nor would any departmental steps be taken because there was no substance to the allegation that he had threatened to topple the ANC government. He also denied ever having threatened to do so. This had moreover never been raised with him during his cross-examination in the regional court trial.

[115] Knipe denied putting pressure on Smith to lie:[74]

> *'Never. Never, ever. It's actually nonsensical, with great respect. I was charged to investigate against Director Lincoln. To get the evidence against Director Lincoln, I had to find evidence that would link him to a crime. Smith was linking him to crime…so it would have gone against the very purpose of what I had been instructed to do.'*

[116] Knipe denied that he pressurised other witnesses to provide false statements or to give false testimony against the plaintiff. Other PITU members were also potential suspects, including Smith and Benn, who testified as section 204 witnesses:[75]

> *'We investigated across the board. If an allegation was made and it involved three persons, then the evidence would have been solicited against the three persons. <u>That decision to prosecute obviously did not rest with us, but we did not shield anyone from any responsibility which they might have had in any allegation of criminality</u>.'*
>
> [emphasis supplied]

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[74] Record Vol 10 p799.
[75] Record Vol 10 p801.

[117] He agreed with Palazzolo's evidence in the regional court trial that he had attempted on many occasions to obtain a statement from Palazzolo without success.

[118] In respect of those dockets on which the prosecuting authority decided to prosecute, as an investigator of 30 years' experience at the time, Knipe was satisfied that they showed reasonable and probable cause for prosecution.

[119] Knipe was not aware of any complaint having been made by the plaintiff about the manner in which Rossouw conducted the investigation. He described Club 35 as a *'braaivleis and brandy and coke club'*. He believed that Rossouw was chairman of the club at a stage. Knipe himself was never a member.

[120] Knipe contextualised the "threats" of criminal prosecution made to members of PITU if they failed to co-operate:[76]

> *'Did you threaten any members of the PITU and did you say to any of them that they might be charged? --- It is possible and probably that I would have cautioned them that they must be careful what they say, they must be truthful, I mean there were incidents where I think Smith broke the law…I think that was fair on my part to do that, to make them aware of that possibility…'*

[121] Knipe openly conceded that he believed Operation Intrigue to be a farce because the evidence he obtained during his investigation indicated that the unit, and in particular the plaintiff, were trying to protect Palazzolo rather than investigate him as they were mandated to do. He had also testified to this

[76] Record Vol 12 pp815-816.

effect at the Palazzolo hearing in Cape Town. He emphatically denied any improper involvement in the Gugulethu Seven or the Community House bombing and had not even been called to testify at the TRC in relation to the latter.

[122] In response to the plaintiff's complaints to others of interference with the unit, Knipe testified that none had been levelled against him. He was made aware of the existence of these complaints during his investigation, but not tasked to investigate them himself.

[123] About 200 witnesses were interviewed by Knipe and/or members of his team during their investigation. He was referred to the transcript of an interview held with the plaintiff on 14 January 1998 (just over a month before his arrest).[77] He was criticised for having waited until then to provide the plaintiff with the opportunity to *'prove his innocence'*.[78] He responded that he had needed to obtain corroboration before addressing the primary suspect in the investigation.

[124] Knipe agreed that when appointed by Fivaz he was instructed, as part of his mandate, to determine the veracity of the allegations made by Smith. Knipe was referred to the plaintiff's letter of complaint to Mbeki and Mufamadi dated 15 July 1997 which primarily targeted Smith.[79] Given that Smith's statement was made a day later, Knipe was asked whether he had interrogated him on the contents of that letter. Knipe replied that he was not provided with the

[77] Exhibit V.
[78] Exhibit V p1.
[79] Exhibit W.

letter and to the best of his recollection, it only surfaced on the day of the plaintiff's arrest on 18 February 1998 during a search of PITU's premises. However allegations of a similar nature were made by others against Smith, and duly investigated, in the months leading up to the plaintiff's arrest.

[125] Knipe was taken to task about why he continued with the investigation after Bosman's letter of 25 November 1997 in which, so the plaintiff's counsel contended, PITU was given the all clear:[80]

> *'Yet you proceeded with the investigation for the safe house which Bosman now said no problem, with the S&T, Bosman said it's no problem, with the claims by Mr Lincoln, Bosman said no problems, you persisted with those charges. --- M'Lady, with great respect many of the charges were withdrawn. The charges that were proceeded with were proceeded with by the prosecutor who would've had this documentation, all the documentation was handed in by the defence, …and I'm not even sure if all of these matters…were subjects of the…eventual charge sheet…*
>
> *…It's very difficult, M'Lady, we had several dockets and as evidence came in to substantiate the complaint or to provide evidence that the complaint did not have substance, this was the basis on which cases were nollied or decided to prosecute on…as I stand here I cannot even remember all the charges that were brought in against Director Lincoln, there were so many and even more were nollied* [i.e. the prosecuting authority declined to prosecute and issued certificates of *nolle prosequi*].'
>
> [emphasis supplied]

[126] Knipe also testified that statements had been obtained from both Bosman and Commissioner Craemer (the Divisional Commissioner for Financial Services at SAPS head office) long before the decision to prosecute was made. It is

[80] Record Vol 13 pp893-894.

common cause that Bosman and Craemer both testified for the state in the regional court trial. Knipe testified that:[81]

> *'Our modus operandi…was that all people that…could provide evidential value whether for or against the investigation…we obtained and placed before the relevant prosecutor for a decision, so we obtained statements from all those parties, we obtained a statement from the Minister, we tried to be as thorough as we could…'*
>
> [emphasis supplied]

[127] Regarding the plaintiff's allegations of interference with the unit and its activities, Knipe responded:[82]

> *'I think I was* [appointed investigator] *for the very reason that the National Commissioner would've realised that I was not one of those that made any complaints to him, and that I was neutral, and as I understand it when the conversation took place with the Deputy Commissioner it was suggested that because of my neutrality I would be the person that should investigate, that's my understanding, I wasn't there.'*

[128] Knipe was referred to several documents which were handed in as exhibits during the regional court trial and which, on the face of it, appeared to be exculpatory of the plaintiff. The difficulty with this line of questioning – and it was raised with counsel for the plaintiff – was that selected portions of the available evidence were put to Knipe, roughly 20 years after his investigation, in an apparent attempt to show the absence of reasonable and probable cause to pursue the investigation. As correctly submitted by counsel for the

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[81] Record Vol 13 pp900-901.
[82] Record Vol 13 p904.

second defendant, in order for the court to evaluate whether there was an absence of reasonable and probable cause, Knipe should have been presented with the full contents of the dockets placed before the prosecuting authority and cross-examined on those contents. Despite being afforded this opportunity the plaintiff's counsel did not do so.[83]

[129] In re-examination Knipe was again referred to the transcript of his interview with the plaintiff in January 1998 and in particular the following passage:[84]

> *'…my whole thing, Director Lincoln is to be as fair in terms of law with you as possible, and I think, if you have any complaints about that, that you must level with me. --- For sure, look I don't have any complaints, I think from day one, I don't have complaints about the way you've done the investigation. I have often said in this office that…from your side, I don't think I've ever had any problem. I said to Comm. Fivaz, and I said it in front of the Deputy President, Piet Viljoen, Piet and myself were at that same meeting, I said I have no problem at all with you investigating this case.'*

[130] Knipe was also again referred to the plaintiff's letter to Mbeki and Mufamadi dated 15 July 1997[85] where, after requesting the urgent meeting with them, the plaintiff continued:

> *'If the above mentioned meeting is agreed to I would also like to discuss with you the investigations into this office by the office of the National Commissioner.'*

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[83] Record Vol 13 pp918-921, 926, 928, 952.
[84] Exhibit W p37 (Exhibit A p5333).
[85] Exhibit W.

[131] Knipe agreed that if this was accurate there were already investigations by the office of the National Commissioner underway on 15 July 1997, but fairly stated that they might have related to matters other than irregularities within PITU. It is noted however that what was contained in the plaintiff's letter is consistent with what Fivaz told Knipe when appointing him to lead the task team.[86] His evidence was further that the new mandate issued by Fivaz on 29 August 1997 had no bearing on his investigation, given that it was focused on PITU's activities prior to that mandate being issued. Knipe was never informed by Fivaz or anyone else that, given the new mandate, he should halt his investigation.

[132] Senekal now holds the rank of Brigadier in the SAPS and is attached to its Complaints Management Coordination Section in the Management Intervention Division at Pretoria Head Office. He has almost 37 years' experience.

[133] He testified that during 1997 he was attached to both the National Inspectorate and the SAPS Complaints Investigation Unit. He was the co-author with Bouwer of the Information Note dated 19 August 1997.[87] On 3 July 1997 he received an instruction from Fivaz to investigate PITU's request for additional resources. This was not unusual because requests of this nature fell within the general mandate of the unit. Senekal was referred to a

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[86] Para 105 of this judgment.
[87] Exhibit U.

statement he made to Rossouw on 10 February 2000[88] from which the following appears.

[134] On 6 July 1997 Senekal and Bouwer travelled to Cape Town to start their investigation. On 7 July 1997 they met with Provincial Commissioner Wessels for a briefing. On 10 July 1997 they met with Smith and a Superintendent Marais. Smith made a number of allegations about irregularities within PITU for which he maintained the plaintiff was responsible. Senekal advised Smith to collate any available documents to support his allegations and arranged to meet him again on 14 July 1997. When they met that day Senekal began to take Smith's statement which ultimately ran to about 70 handwritten pages and was only finalised on 16 July 1997.

[135] Smith volunteered all of the information in that statement without any prompting on Senekal's part. Senekal's role was to formulate the statement, as far as possible, in chronological order. Thereafter he and Smith had sporadic telephonic contact once he returned to Pretoria.

[136] On 31 July 1997 Senekal returned to Cape Town. He had a further meeting with Smith on 7 August 1997. Smith was accompanied by Oelofse. Both gave statements about the shot allegedly fired by the plaintiff. On the same day a docket was opened on a charge of attempted murder. Knipe had no involvement at that stage.

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[88] Exhibit X.

[137] This was the sum total of Senekal's interaction with Smith. According to Senekal it was Smith who had made contact with him:[89]

> *'Did you attempt to influence Mr Smith in any way in this process? --- Not at all M'Lady. As I said, he volunteered the information. I did not contact him. He was the one that contacted me. And I did not. No, M'Lady.*
>
> *Did you, Mr Senekal, have any ulterior motive in this process and your interaction with Mr Smith? --- Not at all, M'Lady.*
>
> *And was your conduct in this process in any way motivated by malice in respect of Mr Lincoln? --- Not at all…I received an instruction that I had to go and look at the resources that were requested and that's what I did. The mere fact that Inspector Smith approached me in the process, I could not ignore that and I obviously had to take that matter further and take an affidavit from him with regard to the allegations. But that is as far as it went…'*

[138] Senekal had previously visited Cape Town in May/June 1997 to investigate a complaint received from the office of the Minister of Safety and Security in relation to the Mangiagalli affair. As far as he could recall he met with the plaintiff during the course of that investigation, given that PITU was involved. Earlier investigations by Senekal did not involve any complaints against the plaintiff or PITU.

[139] The Information Note was the *'final product'* of Senekal's investigation. The reference therein to *'possible maladministration'* was a response to a specific request made by Fivaz to report on PITU's management so that Fivaz, as accounting officer for the SAPS, could make an informed decision on whether additional resources for the unit were warranted. The fruits of Senekal's investigation into possible maladministration included references to *'audit of*

[89] Record Vol 14 p974.

claims', which were the findings of the SAPS head office Finance Division, including the rental of a safe house occupied by the plaintiff and his family and personal claims submitted by the plaintiff for a daily subsistence allowance. Others included Senekal's reasoning and conclusions in respect of the misuse of government vehicles and mismanagement of projects.

[140] Senekal was taken through the information he had gathered as well as his recommendations on possible criminal and/or departmental investigations into the plaintiff and PITU. One of his recommendations was that Knipe be appointed to ensure the effective co-ordination and speedy finalisation of these investigations. He contextualised this as follows:[90]

> *'…at the time I know that Director Knipe was the Commander of the Serious and Violent Crimes Unit in the Western Cape and when this report was compiled he had already, according to my knowledge, been instructed by the National Commissioner to ensure that all the criminal…and departmental investigations that had surfaced pertaining to the* [PITU] *be investigated…'*

[141] Senekal regarded the allegations of PITU interference in investigations of other units as a cause for concern. Although PITU had a mandate, it was broad, with no clear parameters, and when PITU members instructed other units to hand over their dockets this caused conflict. Senekal's view was that PITU appeared to be occupying itself with matters unrelated to its mandate without having the necessary capabilities, expertise or any particular success, whereas there were already well-established specialist units which were perfectly qualified to continue investigating these matters.

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[90] Record Vol 14 p985.

[142] Senekal also identified concerns with the reporting line. Fivaz told him that he was being side-lined by the plaintiff who insisted on reporting only to Mandela or Mbeki.

[143] After producing the Information Note he had no further involvement other than to give requested information and documentation to Rossouw during the latter's investigation. Senekal did not testify in the regional court trial. He had not consulted Lincoln during the course of his own investigation:[91]

> *'…you deal with the fact that as of the date of this report, 19 August, Director Lincoln has not yet been consulted. --- That is correct, M'Lady, I did not consult or we did not consult Director Lincoln on this. We had finalised what we needed to finalise and it was left then in the hands of the senior management of the South African Police Service to address the matter further in whichever way they would deem fit.'*

[144] During cross-examination Senekal testified that he was not informed about the plaintiff's latest complaints of interference in PITU before commencing his investigation. Nor was he aware that Fivaz had taken umbrage at the tone and content of the plaintiff's letter of 5 October 1997 in response to the Mail & Guardian article.

[145] As far as Senekal could recall he and Bouwer visited PITU's premises in July 1997 and met with Benn and possibly Van der Westhuizen. They also visited the other units referred to in the Information Note, but he could no longer recall who he spoke to and what was conveyed other than what was

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[91] Record Vol 14 p1011.

contained in that Note. He had not mentioned Benn, Van der Westhuizen, or the other units in his later statement to Rossouw:[92]

> *'…I'm not sure why he requested me to make an affidavit, but as I said on the content of the affidavit that I made, I deduct that it was for some kind of investigation that was being conducted in relation to Inspector Smith and the use of state vehicles, but I do not know anything further. I do not know if it was part of a case docket, criminal, departmental investigation, I've got no idea…*
>
> *That was three years after I'd submitted the Information Note…it is possible, most likely, that Senior Superintendent Rossouw would have said to me the reason why he needed…a specific statement, but I cannot recall the reason or what he said, if he had said that.'*

[146] Senekal agreed that it was protocol when evaluating or investigating a unit to first inform the unit commander. When asked why the PITU investigation was an exception, he replied:[93]

> *'…I cannot answer that. I cannot recall whether we did in fact see Director Lincoln when we came down on that occasion, whether he was available at the time, I cannot recall that.'*

[147] At the time of receiving his instruction from Fivaz, Smith was not mentioned and Senekal had no knowledge of his existence. The first time he got to know about Smith was when the latter contacted him while in Cape Town. He had no idea how Smith knew to contact him. Although it was not required when conducting an evaluation or investigation to take statements from each

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[92] Record Vol 14 p1023.
[93] Record Vol 14 p1030.

individual interviewed, he took a statement from Smith for the following reason:[94]

> *'…the information that was provided by Smith contained allegations of not only misconduct, but also criminality…and therefore it would've been essential for me to obtain an affidavit from him in order to ensure that those allegations are investigated properly by the correct authorities…*
>
> *Because I put it to you that was exactly not your mandate, to investigate criminality or departmental misconduct, you had to refer that to somebody else, that was not your mandate why you were in Cape Town? --- M'Lady, that's one hundred percent correct, it was not my mandate, but as I explained earlier on it came across my path, I could not ignore it and it formed an integral part of what I had been tasked to do and I had an obligation to report that to the National Commissioner as well, therefore I combined that with the initial instruction for reporting purposes.'*

[148] Smith made Senekal aware of the breakdown in his relationship with the plaintiff. He was not privy to the plaintiff's letter to Mbeki and Mufamadi of 15 July 1997 in which the plaintiff reported his serious concerns about Smith. Nor was he made aware of any allegations of this nature during his investigation. According to Senekal his primary role was to gather information, not test its veracity. Investigating the truth of the information obtained would be the responsibility of other SAPS authorities. Senekal conceded that he had no personal knowledge of the ambit of PITU's mandate at the time he conducted his investigation. He conceded that he could not dispute the plaintiff's version that dockets taken over from other units formed part of PITU's broad mandate.

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[94] Record Vol 14 p1035-1036.

[149] Senekal was referred to the letter from Commissioner Bosman dated 25 November 1997 in which he approved disputed PITU financial claims. Senekal responded that he had never seen this letter (given his unchallenged evidence that his mandate was complete once he submitted the Information Note on 19 August 1997 this is understandable). It was demonstrated that Senekal had proceeded on the wrong premise in respect of some of PITU's expenditure when making his recommendations in the Information Note.

[150] Senekal was cross-examined at some length about his opinions and recommendations regarding the Mangiagalli affair. Given that Senekal had no involvement in the formal investigation after he submitted the Information Note of 19 August 1997, this was not helpful. He was also referred to the previous investigation he had conducted on instructions of Fivaz. It emerged that this related to the plaintiff's complaints of interference in PITU by other units during the course of its so-called Nothnagel Investigation, and resulted in Senekal having recommended that PITU be permitted to continue without interference.

[151] Senekal contextualised the weight to be attached to his recommendations as follows:[95]

> *'…it's got to be borne in mind that these are only recommendations from my side, they don't have to be taken note of, they don't have to be considered, they don't have to be implemented, that's at the discretion of the National Commissioner…'*

[95] Record Vol 15 p1142.

[152] Adv Andre Bouwer (who for convenience I will refer to as AB) was the prosecutor in the regional court trial, and the member of the Attorney-General's office who directed the Knipe investigation. He in turn reported to Deputy Attorney-General Niehaus and Attorney-General Frank Kahn.

[153] AB testified that the Attorney-General's office became involved in the investigation at a very early stage, given the plaintiff's high profile and the fact that PITU had been established on instructions of the President. It was thus necessary for the investigators and prosecuting authority to be extra vigilant in ensuring that sufficient grounds existed for any subsequent prosecution. Smith's statement formed the basis of the investigation.

[154] AB explained his *modus operandi* and the extent of Knipe and Rossouw's involvement as follows:[96]

> *'We started investigating possible defences and most of what I wanted investigated was even direct instructions to their investigating team whom at that stage I met regularly. Knipe I met in the beginning, Knipe was the boss and then he left and I probably saw him three times after that in the year and a half until we went to trial…Piet Rossouw was the Investigating Officer, I met him there, I came…to know him very well because we spent a lot of time together, it was a difficult case.*
>
> *And the matters that were referred to trial, the dockets that were referred to trial once they had been investigated, what do you say about whether there was reasonable and probable cause to proceed to trial in respect of those matters? --- Every single docket that we took to trial was signed off by myself where I said this case is a case, it can go to trial, when I finished the instructions to investigate it was presented to Nollie Niehaus, it*

[96] Record Vol 16 p1165-1166.

> *was after that presented and argued to Frank Kahn and Mr Kahn with respect is not an easy man, he would question you and he would give you scenarios and what about this and what about that and it is my evidence that we had a case when we went to trial on each and every count.'*
>
> [emphasis supplied]

[155] It was AB's evidence that at no stage in his interaction with the investigators, including Knipe and Rossouw, did he detect that they were in any way motivated or driven by malice or some other ulterior motive. In his opinion Knipe treated the plaintiff professionally. As far as Rossouw was concerned:[97]

> *'Mr Rossouw followed instructions and he investigated the Smith affidavit, he followed Director Knipe's instructions and my own and then he still didn't bring me what I wanted and then eventually Mr Kahn flew me up to go and consult with all the Generals for a week…'*

[156] AB readily conceded that some witnesses were placed under pressure to tell the truth, including Palazzolo and Benn. He confirmed that it was he (and no-one else) who caused Stofberg to change his statement. Stofberg ultimately testified on behalf of the plaintiff in the regional court trial. Of the 30 counts on which the plaintiff was acquitted in the regional court, 20 related to S&T claims *'which could've been and should maybe have been one charge'.*

[157] As far as the "old guard versus new guard" allegations were concerned, the following passage in AB's evidence is relevant:[98]

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[97] Record Vol 16 p1167.
[98] Record Vol 16 p1174.

'The court has heard a good deal of evidence…with the theme relating to old guard and new guard and a suggestion that there was some kind of ulterior purpose in the investigation and the prosecution and that there was malice involved in the process. --- That was a topic throughout, from the beginning of the trial, it was there, it was out in the open, everybody was shouting it…

Yes. --- Didn't make it easier for us to make a decision, I knew that.

Yes. --- I don't regard Leonard Knipe as old guard, I regard him as an Engelsman, I don't think he was really accepted in the old guard, but I was aware of this and that made us more careful and if…I say again if anybody knows Frank Kahn they will know that he can see danger coming a mile and he made sure, we made sure that we had a case and if we felt we didn't, we had no case, we would have withdrawn it right there and then.

Which is what happened in respect of certain of the dockets? --- Ja. It is my evidence that we had a proper case on every single count taken to court.'

[158] It was also his evidence that the defence were afforded an opportunity to make representations on the plaintiff's behalf before the regional court trial commenced. They did not want to make representations to Attorney-General Kahn and it was then agreed that they be made to the National Director of Public Prosecutions, who at the time was Mr Bulelani Ngcuka. The state and defence were tasked to provide written heads of argument which they had to present personally to Ngcuka. The defence representations included allegations that the plaintiff was being framed *inter alia* by the old guard. Having heard them and considered their submissions, it was Mr Ngcuka who issued the final instruction to proceed with the plaintiff's prosecution.

[159] Reference was made during the regional court trial to Club 35. AB was asked whether he made enquiries:[99]

[99] Record Vol 16 p1181.

'Did you ever ascertain what Club 35 was? --- I did, I made enquiries and my investigating officer Senior Superintendent Rossouw was in fact the chairman of Club 35.

And what was Club 35? --- …what I established is that it is detectives…in the Cape, Woodstock, Cape Town, Table View, they used to meet once a month or once every two months either at Table View or at Woodstock…it was administered by two secretaries who would gather money to buy a kilogram of meat and then…the detectives would meet and they would braai and they would drink and the most senior guy in this Club was…Rossouw…there was one other colonel there, I can't remember his name, but an unknown person, there was nobody in Club 35 with the remotest kind of influence in any way. The majority of the people were lower ranks, it was a braaivleis club for detectives and it was also…I established it was an open club and it was not only old guard people coming there…'

[160] In the early stages of the investigation there was a definite sense that PITU members were closing ranks around the plaintiff. AB described the lengths he went to in order to obtain the truth from these members, including Van der Westhuizen and Benn. It is clear from his evidence that it was he who drove this process and that the police investigators, particularly Rossouw, acted mostly on his instructions. The same applied to his interactions with Smith, who AB testified he consulted about 20 times, as well as April, Palazzolo, Gillot (who threw a heavy ashtray at him out of anger) and Williams.

[161] During cross-examination he explained that it was Adv Jasper Tredoux of the Attorney-General's office who initially dealt with the Mangiagalli investigation. AB could not recall having interviewed anyone with Knipe although he

conceded that he may have forgotten. He interviewed a number of witnesses with Rossouw, ones who he described as:[100]

> *'…the difficult cases…people who had problems in their statements which I would see is a problem, which I had to clarify before I brought them to court.'*

[162] He conceded that the record of proceedings in the regional court trial indicated that in the very early stages another prosecutor, Mr Kobus Van Dyk, appeared for the state in a postponement, but denied the suggestion that he had therefore only become involved in the investigation and prosecution thereafter. It is to be noted that it was not suggested to Knipe when he testified that Van Dyk was involved in the investigation. AB's evidence was also that Van Dyk was a regional court prosecutor who was not attached to the Attorney-General's office at the time.

[163] AB was taken through all of the witnesses he interviewed, including very senior SAPS members. The following passage in his cross-examination is relevant:[101]

> *'Now your evidence in chief was that in all those, or after your consultations, that in all those dockets* [i.e. on which prosecution followed] *you found there to be reasonable and probable cause, correct? --- That is correct, M'Lady.*
>
> *And that was given after you…consulted or interviewed all these witnesses, including the generals. --- M'Lady, on what we charged Mr Lincoln for, me, Nollie Niehaus and Frank Kahn were of the opinion that we had a more than reasonable chance, that we had good dockets to take to court. And please the feeling that I got from the top, is we would have preferred not to*

[100] Record Vol 16 p1200.
[101] Record Vol 16 pp1209-1210.

prosecute, it would have been easier for us not to prosecute, because of the names involved, because of the high profile, because of the allegations of old guard, new guard, nobody wants to fight for the old guard, not in 1998. So if we could withdraw, we would have. On the evidence, we could not.

Why didn't you, if that was the stance, why did you and your superiors not rather refer all these matters to disciplinary investigations rather than criminal investigations? --- Because in our view, there was nothing disciplinary about this, absolutely nothing. And just to back up my point, M'Lady, Mr Frank Kahn didn't want to make the final call, that's why he referred it to Bulelani Ngcuka, who made the final call, and Bulelani Ngcuka is not old guard…we were extremely more comfortable after it was referred to Mr Ngcuka for representations…'

[emphasis supplied]

[164] He was also taken at some length through the evidence adduced during the regional court trial. It is not necessary to refer to this evidence, given his unchallenged testimony about the decision to prosecute, his role in the investigation, and the plaintiff having withdrawn his claim against the first defendant.

[165] AB corroborated Knipe's testimony that the investigation was very much a Scorpions-type one where the Attorney-General's office actively directed the process. When referred to the comment made by the appeal court in setting aside the plaintiff's convictions that *'the entire trial consisted of intrigue, name-dropping and very little else'* he responded:[102]

'Well, is she saying the state name-dropped because we didn't. We had to respond to all the allegations. I had to walk to Parliament to summons

[102] Record Vol 16 p1241.

> *Mr Sidney Mufamadi. That's not easy. It's not my normal day-to-day activities and I found that stressful. So I would have preferred to keep the politics and the name-dropping out of it, but it's not something that the state did. It's something that the defence did. And the way in which the state case was attacked from the beginning, we just knew that we had to make sure – we had to make sure before we charged. And that was why it was escalated to the level where we had to have sign-off of Mr Kahn, which is not the norm…'*[103]

[166] It is common cause that AB did not represent the state when the appeal was heard, having already left the Attorney-General's office sometime earlier. When reminded that the plaintiff had withdrawn his claim against the first defendant, AB replied:[104]

> *'If the police did not do their work properly, then it's my fault, because my crew managed them from day one.'*

[167] Fivaz, previously the National Commissioner of the SAPS, was appointed by Mandela to this position in January 1995 and retired from service at the end of December 1999. He testified that on 11 June 1996 he met personally with Mandela at the latter's request. He was handed a sealed envelope containing a handwritten note. Mandela explained that the note contained a personal request to appoint a special investigation unit to investigate specific activities of Palazzolo, who was alleged to have corrupt relationships with Commissioner Venter and Minister Jordan. Mandela asked Fivaz to appoint the plaintiff as head of the unit, and to ensure that it was provided with the necessary equipment.

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[103] See also Record Vol 16 p1212 where AB referred to the charges on which Kahn refused to prosecute.

[104] Record Vol 17 p1260.

[168] With reference to the line of reporting, Fivaz testified that:[105]

> *'Then the President…said that he would like me to report back occasionally to him about the progress of the unit, because he is expecting that the unit report operationally and otherwise direct to me as the Commissioner, and I must do the necessary to get that operationalised.'*

[169] Fivaz identified the handwritten note as the same document about which the plaintiff had testified.[106]

[170] Fivaz had not personally met the plaintiff at that stage but arranged an appointment with him for this purpose. He told the plaintiff that he would make arrangements with the Chief Financial Officer of the police service, Craemer, to take responsibility for the financing and setting up of the unit out of the police service's open budget but on a *'need to know'* basis, given the serious allegations about Venter who was the head of Organised Crime and had direct access to the *'secret account'*. Fivaz realised that the list of requirements contained in Mandela's handwritten note would be insufficient for the proper operation of the unit. He thus instructed Craemer to make sure that the unit had whatever they reasonably required. Craemer was to deal with this personally or with the assistance of only one other person from his division (it was Bosman who was later tasked to assist Craemer).

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[105] Record Vol 18 p1329.
[106] Exhibit B pp1-2.

[171] Fivaz was referred to the letter dated 18 June 1996 signed by Grové which recorded that the unit would report directly to Mandela and Fivaz. His evidence was as follows:[107]

> *'Now the document was obviously completed at the time after I've spoken to the person that signed the document, that was a General Grové, he was the National Head of the Detective Service at that time…all the people mentioned in the letter of the late President Mandela, that should be transferred to the new unit, except for Lincoln, were members of the detective branch reporting to Grové. Now my discussion with Grové was, make sure these people are released from where they are and transferred to this unit. And that was where this letter emanated from. But the fact is, M'Lady, there was no arrangement between President Mandela and myself, that President Mandela and myself will be the command structure of this unit, it was never the arrangement. It was clearly said by the late President Mandela: the people must report to you. And I think he was well aware of the fact at that time, that is why I want to emphasise it, M'Lady, I think he was well aware of the fact that he cannot be, in terms of law, the operational commander of a police unit…because the Constitution is very clear, who is the operational commander of the police service, and the Police Act is very clear on that.'*

[172] He was referred to the "new mandate" letter he wrote on 29 August 1997, just over a year after the unit's establishment. He was asked to explain how this letter came about:[108]

> *'M'Lady, the period preceding this letter, I experienced numerous hiccups relating to reporting of the unit. I think in the files of the police service, there will be numerous correspondence where there is a tussle, that Director Lincoln, you know, attempted to create the impression that he is not reporting to police structures, he is reporting to the President. Then there will be indications where I am saying but it can't be, it can't work like that in practice.*

[107] Record Vol 18 pp1335-1336.
[108] Record Vol 18 pp1337-1338.

> *So there were continuous talks between myself and Director Lincoln relating to the reporting line. It later on seemed to me that he was deliberately trying to create a situation where he was not reporting to the Commissioner of Police, as arranged with the late President Mandela, that he would like to have his own reporting line. And during that period, exactly what I was afraid for, happened. I received – I started to receive continuous complaints from outside my office, even from the Attorney-General at that time, Mr Frank Kahn here in Cape Town, saying, you know, this unit is a rogue unit, they are doing what they want, they are booking out sentenced prisoners on false statements, and from the Provincial Commissioner here, saying, you know, the unit is doing all sorts of funny things, they are hiring houses, they are renting motorcars and they just do what they want…so that continuous complaints coming to my office, eventually advise* [sic] *me as the accounting officer of the police service, you have to do something, now that all these issues are reported to you. And I'm coming out of a structure in the police service at that time, called Efficiency Services. That's a service that is basically being utilised to conduct efficiency services in the police service. So if you are sceptical about something in the police service, you'll send the unit, they do a typical organisation and work study investigation and they report back on the efficiency of the unit. So I requested that specific unit to do a service level evaluation on this unit. This is now before this letter…'*

[173] Fivaz explained that an efficiency assessment included an investigation into whether state resources were being efficiently applied and whether the unit had sufficient resources to carry out its responsibilities properly. In his words: *'so it was not really a typical crime investigation, it's more of an effectiveness investigation or evaluation'.*[109]

[174] Fivaz was referred to the Bouwer and Senekal Information Note of 19 August 1997 which in turn referred to an earlier Note dated 25 July 1997. He could not recall whether he had sight of the previous information note. However he

[109] Record Vol 18 p1339.

could remember that the investigators gave oral feedback which was extremely negative about the activities at the unit. Either Senekal or another investigator were very concerned about the fact that his accounting responsibility as National Commissioner was at stake:[110]

> *'…because the unit is doing exactly what they want, they are not following rules, they are hiring motorcars, they are living themselves, with their families, in safe houses, which is supposed to be for informers. They are giving police motorcars to informers to roam the streets with and that type of thing that is totally, totally out of line. That was reported to me.'*

[175] Fivaz summonsed the plaintiff to meet him and this resulted in the Mbeki meeting at which the plaintiff, Fivaz and Viljoen were also present. At that meeting the plaintiff expressed concern that he was being investigated and complained of attempts by other SAPS members to sabotage the unit. Fivaz in turn reported that he had received very serious allegations against the plaintiff and members of his unit which would have to be investigated.

[176] Fivaz testified that the following transpired at the meeting:[111]

> *'I explained to the President, that the first phase of the assessment was not an investigation, it was to determine whether the unit is effective or not. And it came out that the unit is extremely ineffective, and there are serious allegations of misconduct that could also mean criminal conduct. I explained…that I have no option as the accounting officer of the police service, to appoint an investigator to investigate these allegations. At that stage, Lincoln objected, saying he cannot trust anybody in the police service. I responded, it cannot be possible, somebody must be good in the police*

[110] Record Vol 18 p1341.
[111] Record Vol 18 p1342-1344.

service, all 140 000 people can't be corrupted. M'Lady, I must say during that discussion the Deputy President made the report: I agree with the National Commissioner, these issues must be investigated…the discussion started to revolve around who can be trusted in the police service for this investigation. And eventually Mr Lincoln, himself, brought up the name of…Director Leonard Knipe. According to my knowledge the man was still based here in Cape Town at that time, a seasoned detective that is really highly experienced in the investigation of crime and more specifically sophisticated crime. We decided there and then…Knipe will be the investigator. We left the meeting…with my commitment, that I will make sure that there is not a witch-hunt against [the plaintiff] *and his unit.*

Furthermore, that I will send out a circular, reconfirming the mandate of the unit, in which I will specifically once again emphasise the line of command and what should be done and what couldn't be done in terms of the unit's activities…'

[emphasis supplied]

[177] Fivaz was aware of the existence of Smith's affidavit but to the best of his recollection had not seen it. He was aware of Smith's allegations because Knipe conveyed those to him. His evidence was further that after the "new mandate" letter of 29 August 1997, the unit adhered to his instructions.

[178] During cross-examination Fivaz was told of the plaintiff's understanding from Mandela that he, i.e. the plaintiff, would effectively be in total control of the unit. He responded:[112]

'The fact is, I made it very clear to him in our first meeting the line of command, according to the arrangement between myself and President Mandela, is myself. That, in itself, is extraordinary, because the National Commissioner is not taking command of each and every second unit, so this

[112] Record Vol 18 p1362.

> *unit is a special arrangement between the President and myself, you report to me. But as I have testified, M'Lady, it came out during the course of the process, there was a blunt refusal from the side of Mr Lincoln to report to the Police for one or other reason. He was of the opinion he can report to the President, which was impossible, and I made that point to him on numerous occasions. So that could not even have been a misunderstanding…'*

[179] Fivaz pointed out that Mandela's instruction that the plaintiff take over all responsibility for the unit as well as management of its entire operation, had nothing to do with the line of reporting:[113]

> *'The line of reporting remains within the structures of the South African Police Service, because you are utilising the resources from the budget of the South African Police Service. You can never argue a point saying because the President set up or asked the Commissioner to set up a special unit, I am now totally outside the structures of the South African Police Service. They got their pay from the Police Service, they got their resources from the Police Service, they got their directions from the Police Service, they got their authority from the Police Service, from the Police Act, so they remained members of the South African Police Service.'*

[180] It was suggested to Fivaz that one of the purposes of his letter of 29 August 1997 was to clear up any previous misunderstandings about the line of command. He denied this. Its purpose was to re-emphasise what had previously been agreed.

[181] It was also suggested to Fivaz that the plaintiff could not be blamed for, at worst, misunderstanding the line of command, given his previous lack of training and experience. The plaintiff and others had not had the advantage of

[113] Record Vol 18 p1363-1364.

attending management courses before being integrated into the SAPS. He replied:[114]

> *'M'Lady, they were not. They were integrated and later on trained. By that time Director Lincoln already served for a couple of months in the Police Service. The fact is, a number of other people that were integrated with Director Lincoln, like for instance one of the people involved here, Commissioner Tim Williams, they had the same disadvantage, and they made it their specific responsibility to know what is permissible and what's not in the new environment they are working in. So I think it's a lame excuse to say, we were not trained and therefore we were not aware of the fact that there is a reporting line in the Police Service. That can't be. Being old MK people, all those people were very disciplined in their previous structures. They had their own line of command, they had their own commanders, they were well aware of what is going to happen to you if you step out of the command structure. It was not at all tolerated. That's also known. So being an ex-MK doesn't mean that you are totally without any knowledge about what's going on in a paramilitary organisation like the Police Service. I think the basic principles remain the same.'*

[182] It was also his evidence that at the Mbeki meeting, while the plaintiff complained about sabotage and interference, he was not able to provide any detail. This was when Fivaz made the point that, being issues of an operational nature, the plaintiff should have been reporting to him rather than Mbeki. If there was substance to the allegations he could have attended to them immediately. It could not be expected of Mbeki to have to investigate them. All present at the meeting agreed. Fivaz conceded that it was possible that Viljoen suggested Knipe as investigator although his recollection was that the plaintiff had done so. Fivaz himself never suggested Knipe. Whether it

[114] Record Vol 18 p1372-1373.

was the plaintiff, or Viljoen, or both, Fivaz was adamant that the plaintiff was *'absolutely satisfied'* with Knipe being appointed. He too was comfortable with this:[115]

> *'At that time I was well aware of the ability of Knipe. He was a formidable investigator, a very straightforward, very effective, stainless type of police officer, and I thought by myself that this is a good proposal, because we will know at least one thing: this will be properly investigated.'*

[183] Fivaz pointed out that the only unresolved complaint in the plaintiff's letter of 15 October 1996 was a minor logistical issue relating to a cell phone. In his view it could have been dealt with differently by the plaintiff:[116]

> *'…the Department of Finance and Logistics in the police…uncovered a cell phone has to be given back because it's on the inventory of* [the plaintiff's] *previous unit…so this type of thing irritated me to say the least because we are making a mountain out of a molehill, instead of channelling certain things directly to the right environment, we are creating a political cloud over an issue that is supposed to be dealt with administratively…we* [sic] *were creating unnecessary animosity and suspicion that somebody was now in a sinister way trying to prevent the people to do their work. I was not in agreement with that.'*

[184] He was also referred to the plaintiff's letter of complaint dated 15 July 1997 addressed to Mbeki and Mufamadi. He had no recollection of this letter, or of its contents having been reported to him.

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[115] Record Vol 18 p1383.
[116] Record Vol 18 p1396.

[185] Smith testified that he was seconded to PITU from the Aliens Investigation Unit, a subcomponent of the Organised Crime Unit. He was medically discharged from service on 31 July 2000 after having been diagnosed with post-traumatic stress disorder. At the time he held the rank of detective inspector.

[186] It was he who volunteered the information contained in his lengthy statement to Senekal about irregularities within PITU. He had been involved in investigating suspected Italian mafia fugitives in South Africa since June 1995 while still stationed at Organised Crime. This included engagement with members of the Italian State Police. Palazzolo featured from the early stages of the investigation. The plaintiff was identified as a person closely entrusted by Palazzolo. Smith's understanding at the time was that the plaintiff was thus perfectly placed to further the investigation. It was Smith who introduced the plaintiff to the Italian police while they were on a visit to South Africa in about May 1996.

[187] During their discussions the conclusion was reached that there was a need to expedite further investigation, including the close links alleged to exist between Palazzolo and certain police and government officials. During June 1996 the plaintiff instructed Smith to compile a report on the activities of Palazzolo and his associates identified by the Italian police. According to Smith the plaintiff told him to keep himself available to attend a meeting which he was arranging with Mufamadi for the purpose of setting up a special investigation unit to investigate the activities of Cosa Nostra in South Africa.

[188] Smith recounted the two meetings that he attended thereafter, the second with the plaintiff, Mbeki, Mufamadi, a Captain Nicholson (also of the Aliens Investigation Unit) and the Head of Intelligence, Mr Joe Nlanhla. It was his evidence that it was Mbeki (not Mandela) who gave the go-ahead for PITU to be established. He explained PITU's mandate as follows:[117]

> *'The mandate at the time was to investigate the activities of Mr Palazzolo in association with Cosa Nostra, and the police complicity, and complicity from allegations that were levelled against certain government officials…'*

[189] Smith was tasked to be an intelligence operative, namely gathering of information:[118] *'The objective…is to collate the intelligence to become a court-driven product at the end of the day.'* Smith recalled that information gathered was reduced to writing and submitted to the plaintiff, who in turn submitted written reports directly to Mbeki and Mufamadi. Smith had no personal knowledge of progress reports to Fivaz but unit members were told by the plaintiff that he was keeping Fivaz informed.

[190] Smith was taken through the allegations contained in his statement. He maintained that the allegations against the plaintiff were true, elaborating as he went along.

[191] During June 1997 he was summonsed by the plaintiff and questioned about an article that appeared in the Weekend Argus concerning the nightclub owned by Palazzolo's family members coupled with allegations that its

[117] Record Vol 19 p1420.
[118] Record Vol 19 p1422.

shareholders were under investigation for tax evasion. The plaintiff was most annoyed and complained that it placed him in a bad light with Palazzolo. Smith denied having leaked this information to the media. It was also his evidence that after a botched raid at a house in Johannesburg in February 1997, where PITU members raided the wrong house, the investigation began to unravel. According to Smith:[119]

> *'…I thought at that stage that we've got a massive problem and this is actually where the turn point came in our investigation, it's because from there a lot of things started going wrong. We came back to Cape Town, I spoke to the plaintiff about it, I expressed my unhappiness and I said that we cannot pursue in this manner, it's not professional and certain structures were changed and certain things happened on my return.*
>
> *When you say there was a turning point, for whom was there a turning point…? --- Well there was a turning point I think with the plaintiff's approach towards me on the unit because I felt that even with certain information if it's called then intelligence with the whereabouts of the fugitives that were going to come…from the DRC I felt that I was being cut out and that certain intel was not shared with me any longer, so I felt that, I had this feeling that I am being distrusted or is something wrong and the more I tried to advise the more things were going wrong…'*

[192] Smith went so far as to suggest that Benn, who had obtained the search warrant for that raid, was motivated by malicious intent, insinuating that Benn deliberately botched the raid to protect suspected Italian fugitives. Observing his testimony in chief, it became apparent that there was merit in the plaintiff's complaint that Smith had an over-inflated sense of his own importance. He appeared to believe that he was justified in advising the plaintiff on how to conduct the unit's operations and felt aggrieved when his advice was not

[119] Record Vol 19 p1468.

followed. It became clear that Smith did not understand that the Italian arrest warrant could not, as a matter of law, be executed in South Africa. He maintained that the plaintiff's refusal to permit Palazzolo's arrest in terms of such a warrant was part of the plaintiff's hidden agenda to protect him. He also complained that after the botched raid he was demoted to Investigator whereas Benn was promoted to Intelligence Operative. It also appeared that what rubbed salt in his wounds was that it was Smith who had initially recommended that Benn join the unit.

[193] That having been said, Smith was able to give chapter and verse about the details of his investigations while at PITU, as well as generally cogent explanations why he became increasingly frustrated over time when the fruits of his investigations appeared to come to naught. During April 1997 he lodged a formal grievance and in the following month applied to be transferred from the unit:[120]

> *'Why did you put in for a transfer, Mr Smith? --- …at that stage I was unhappy and I felt that we weren't moving forward as a unit in achieving our objectives. I know that we had only been commissioned for a period of 12 months, if you look at our appointment letter, and I already knew that we're reaching close to that 12 month period, and the actual mandate has not been achieved. And that we're dealing with a whole lot of other matters unrelated, which is also highlighted in the statement, in the later part of the statement, which took our eye off the focus.'*

[194] It was also Smith's evidence that, as his investigations in PITU progressed, it became apparent to him that the plaintiff's relationship with Palazzolo was not

[120] Record Vol 19 p1490.

above board as he had originally been given to understand. He also gained the impression that Fivaz was being bypassed in the reporting line, which he regarded as strange. His evidence also made it clear that, as he was progressively isolated from the inner workings of the unit, he became increasingly suspicious of the plaintiff and his activities.

[195] Smith was referred to the allegation in his statement that he felt misused for his knowledge and expertise as an experienced policeman. He was asked to explain why he felt that way and responded:[121]

> *'M'Lady, no case dockets were formulated. No proper reporting. The constant sidetracking where not only myself, but I think to an extent even Captain Benn, were sent in other directions, except the mandate of the Task Unit. It was very clear from the offset, that the basis of this investigation came from a former organised crime mandate, and it was conveyed to become a presidential mandate. And the amount of monies that were spent, there wasn't focus, there wasn't target orientation to take down subjects individually. The – and maybe now I would like to come in on the Angola visit…at a later stage, I didn't even know until I was called in by the investigators, I didn't even know that Mr Palazzolo paid for the plaintiff's trip to Angola and I didn't know that the plaintiff claimed subsistence from the police. And I was also produced a document with regards to a fitment of a kitchen, which I had no knowledge of. So then the suspicion that I had, and as referred to earlier…my instincts then sort of came to a point where there was substance of concern…'*[122]

[196] Smith left the unit on 10 July 1997. He maintained that the final straw was when the plaintiff informed PITU members that morning that the project was terminated because Palazzolo had applied for amnesty for past political

[121] Record Vol 19 p1518-1519.
[122] The kitchen was supposedly refitted in the plaintiff's residence at Palazzolo's expense.

crimes, including the death of Anton Lubowski. He initially returned to the Project Administration Office at Organised Crime and was thereafter re-deployed to that unit. According to Smith it was Viljoen who put him in touch with Senekal:[123]

> *'M'Lady, the day I left the Presidential Task Unit I walked past the desk of Colonel Viljoen and I recall that he actually grabbed my arm in me passing by and he told me that if I wished to speak to the right people, Superintendent Piet Senekal is currently in the Western Cape and he would set up a meeting for them to speak to me. And that is how it transpired that I got…in contact with this member of the South African Police…*
>
> *And did you ascertain subsequently when you made contact with him why he was already in the Western Cape? --- They were down in the Western Cape already on complaints that were received and filed against the Special Presidential Task Unit.'*

[197] Smith was asked why he requested a comprehensive criminal investigation into the activities of the plaintiff and those associated with him:[124]

> *'What motivated you to want that? Were you being malicious towards Mr Lincoln or what was your purpose in wanting this investigation? --- No, M'Lady. If one looks at the contents of this affidavit…there was a series of irregularities that transpired over a period of time in that office…and I was well aware at the time that with the closure of that office there would more than likely be an audit with regards to the running expenses of that office and that it would more than likely be discovered that there were certain matters of concern…'*

[198] Contrary to what the plaintiff alleged, Smith maintained that he was in fact cross-examined on the contents of his statement during the regional court

[123] Record Vol 20 pp1533-1534.
[124] Record Vol 20 p1535.

trial.[125] Knipe interviewed Smith for the first time after he deposed to that affidavit. He described his interaction with Knipe:[126]

> *'And would you describe how it was in terms of your relationship with him when he became involved in investigating certain matters? --- …I was put through extensive pressures during interrogation questioning.*
>
> *What sort of pressure? --- From verbal abuse to being sworn at. It also became very evident to me that Director Knipe at the time was very opposed to covert operations, intelligence-driven projects, and he became somewhat outspoken about it to the extent that it became an ongoing pattern during my visitations to his office when summoned. So in overview, I was put through a lot of pressure.'*

[199] Smith denied that Knipe tried to persuade him to lie. Instead he pressurised him to tell the truth. He recorded one of his interviews with Knipe without his knowledge for the purpose of lodging a formal grievance against him. Smith denied that Knipe at any stage threatened to topple the ANC government: *'No, not that I recall. That was definitely not said.'*[127] He denied ever having had interaction with Khoisan. According to Smith the recording was never duplicated; it was only handed to the plaintiff's legal team after conclusion of his evidence in the regional court trial:[128]

> *'So what was the purpose of them wanting the recording? --- For them to verify what I've said. If it came up during their – with the closure of the case, if there was anything irregular on that recording that they could raise it. But I stuck to what was on the recording…I have no recollection of having any interactions or any associations with Mr Zenzile Khoisan regarding this*

[125] The plaintiff's evidence was that the Smith statement was not made available to his legal representatives before the present trial.
[126] Record Vol 20 p1536.
[127] Record Vol 20 p1539.
[128] Record Vol 20 pp1541-1542.

matter…following my handing over of that recording there was, however an article released in the Mail & Guardian newspaper with regards to it. And I recall that, because at the time Director Knipe made telephonic contact with me and he questioned me…with regards to the recording, because it now had put him in a spotlight…'

[200] Smith was referred to the plaintiff's letter of 15 July 1997 where reference was made to him investigating Smith on suspicion that he had been recruited by the anti-Mafia division of the Italian State Police. Smith was not aware of such an investigation and had never seen the letter. As far as his suspected recruitment was concerned he responded:[129]

'…I find that strange, because we had a bilateral agreement…there was no need for…myself to be recruited by the Italian Justice or Police Department. We had an existing structure in place, so I find that untruthful.

You were co-operating with them, as I understand it. --- That's correct…'

[201] The plaintiff's allegations about Smith's nefarious activities, contained in that letter, were never the subject of any formal investigation by the SAPS during the three year period that followed until he was medically discharged. He denied that any of the allegations made against him by the plaintiff in that letter were true.

[202] During cross-examination Smith testified that it was Senekal who made contact with him. According to Smith, Viljoen provided Senekal with his cell phone number. Senekal called and asked to meet with him without

[129] Record Vol 20 pp1546-1547

elaborating why. When told that Senekal gave a different version, Smith responded:[130]

> *'I don't have a recollection of that, M'Lady. I think, from my recollection, it was the opposite way around.'*

[203] Smith also differed from Senekal about the date of their first meeting but agreed that its purpose was to convey Smith's concerns about the unit's operational functioning. He explained how his statement was taken:[131]

> *'…we went through the functioning of the office and certain questions were posed to me, and that is how the affidavit was compiled…*
>
> *…it was an open discussion…it went about like the way that you extract information from a complainant and you record on a – in the format of an affidavit…it's like a question would be posed that how do you – how did you guys engage conducting subsistence? So, out of that the overview statement was recorded in that manner. In certain categories…there were areas of concern, there were certain things highlighted, from my recollection.'*

[204] As his cross-examination progressed, Smith's testimony became riddled with inconsistencies. I will highlight a few examples. He repeatedly contradicted himself on the circumstances in which he departed from the unit on 10 July 1997. On the one hand he claimed that he had not announced his resignation but rather applied for leave through Van der Westhuizen, while on the other maintaining that he informed the plaintiff and unit members that he was leaving for good.

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[130] Record Vol 20 p1566.
[131] Record Vol 20 pp1570-1571.

[205] His evidence about how he came into contact with Senekal was dubious. He conceded that he had become aware of Senekal's presence in Cape Town and the apparent purpose of his visit which, according to Smith, was to investigate complaints made by other units of PITU interference. He claimed that Senekal somehow became aware that he was on leave and instructed him to postpone it indefinitely because he required Smith's immediate assistance. It then emerged that Smith had not in fact taken leave at all, but was placed in the Project Administration Office on a temporary basis, during which period he procured the use of a government vehicle, which ultimately led to him being investigated. It is noted that this corroborates Senekal's recollection, based on his later statement, that Rossouw appeared to be investigating Smith's vehicle.

[206] Smith was taken through the plaintiff's version about how PITU came to be established. He denied all knowledge of Le Roux's initial report, the meeting arranged by Nkosi, and the subsequent meeting with Mandela. He denied that the unit's mandate was essentially to investigate Palazzolo, his associates and their possible links to senior police and government officials. According to Smith the mandate encompassed a general investigation into the activities of Cosa Nostra in South Africa in collaboration with the Italian authorities. He eventually accepted that a full bench of this division subsequently held that Mafia activities did not constitute a crime in South Africa under POCA[132] and that the so-called arrest warrants for Palazzolo and his associates could not have been validly executed in this country.

[132] Prevention of Organised Crime Act 121 of 1998.

[207] Smith was taken through his lengthy statement. He had to concede that it had come as no surprise to him that the plaintiff was familiar with a particular nightclub owned by Palazzolo's family, given his prior knowledge that Palazzolo regarded the plaintiff as a trusted confidante. He conceded that he had no specific knowledge of the plaintiff's actual legend for purposes of this project.

[208] He also had to concede that Benn took full responsibility for the botched raid, but nonetheless maintained that he suspected Benn of having acted with malicious intent, without being able to provide any evidence to support this allegation. It was demonstrated that Smith knew far less about the details of that operation, as well as the Angolan trip, than he claimed.

[209] It became clear that Smith had embellished various matters concerning the plaintiff, PITU and its members in his affidavit. The firm impression gained was that Smith regarded himself as far more important and influential than he actually was; that he had developed a deep rooted resentment towards the plaintiff; and that he also resented Benn.

[210] It is no surprise, therefore, that Senekal, Knipe and Bouwer had to go to the lengths they did in order to distil fact from fiction in their dealings with Smith. What cannot be disregarded however is Smith's testimony about the financial and related irregularities within the unit which formed the genesis of some of

the charges the plaintiff faced. He knew that if those irregularities surfaced during an audit of the unit he too risked criminal prosecution:[133]

> *'…on instruction of the plaintiff I committed fraud. So I knew for a fact that what was going on in there with regards to the informant claims was irregular besides the fact that the actual mandate or objective of Project Intrigue wasn't expedited, the fact that I knew that the Audi was a concern in particular because, and my words…to* [Thea] *van der Westhuizen time and time again was as daardie kar betrokke is in 'n botsing gaan ons groot probleme hê…*
>
> *…I am just singling out one example, there were a lot of other things that was not in place and what I saw was, and it is because of my background, my training, when I was at Organised Crime you work on a budget, I can't just take the State's money and just decide to spend how I wish…there is a ratification process and there were certain matters of concern to me at the time and that I knew that I was being dragged into…'*

[211] Smith was referred to a letter written by one of the plaintiff's legal representatives in the regional court trial to the secretary of the Bar Council in response to a complaint filed against him by Knipe in relation to the contents of the tape recording. Although the version differed in certain respects from Smith's, what is clear therefrom is that Smith had not lied about making the tape available to the plaintiff's legal representatives.[134] He was also referred to a letter addressed by the member of the Bar tasked to investigate the complaint, to the legal representative concerned, the relevant portion whereof reads as follows:[135]

> *'There was only one remaining issue which concerned me and that was whether* [the legal representative] *was under a duty not to furnish to his client*

[133] Record Vol 21 pp1691-1692.
[134] Exhibit MM Record Vol 21 pp1725-1728.
[135] Exhibit NN Record Vol 21 p1730.

> [i.e. the plaintiff] *the tape recording which was handed over to him, which duty may have arisen if the tape recording could still have been an exhibit in the trial.*
>
> *Before writing this letter I spoke to* [the legal representative] *to get clarification on this issue and he confirmed that Assistant Commissioner Knipe had completed his evidence at the time when the tape recording was handed over and there was no question of the tape recording itself having any further relevance in relation to the trial.'*

[212] The implication therefore is that at some stage the legal representative concerned may have handed over the tape recording to the plaintiff. However it would be inappropriate to draw any inference therefrom, given that this testimony was only elicited during Smith's cross-examination, long after both the plaintiff and Khoisan testified.

[213] During re-examination Smith was referred to a report addressed to Interpol in Rome and headed *'Anti-Mafia Directorate Investigation'*.[136] This report was dated 18 June 1996, a week after Mandela requested the establishment of the unit. Smith testified that he had written that report. He was referred to the concluding remarks inserted by the plaintiff which read as follows:[137]

> *'It is undoubtedly clear to me that since the clampdown on the Mafia groups in Italy criminals like Mafia members have discovered a new Mecca called Cape Town. Our aim would be to clamp down on these absconding criminals and to extradite them back to Italy to stand their trial.'*

[214] He was also referred to a document dated 17 December 1996 bearing the heading *'Planning Document Italian Organised Crime Joint Operation NIA and*

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[136] Exhibit G.
[137] Record Vol 21 p1738.

the PITU'. It purported to be a top-secret document addressed by the plaintiff and the Director of Conduct of Intelligence at the Ministry for Intelligence Service to Mbeki, Mufamadi and the Deputy Minister of Intelligence. The letter contained the following recommendation:[138]

> *'In order to effectively assist and co-operate in further investigations on the Cosa Nostra and its activities in South Africa, it's recommended that the NIA implement the following operational strategies…'*

[215] The passages quoted in these communications lend credence to Smith's version of his understanding of PITU's initial mandate. Of course, that does not mean that it was in fact the mandate which Mandela envisaged the unit would have and which, on the plaintiff's own version, was limited to investigating the activities of Palazzolo and his associates as well as their links to senior government and police officials. Smith conceded however that, given the nature of the investigation, there would inevitably have been a degree of overlap.

[216] Rossouw was the last witness to testify. He retired from the SAPS as a senior superintendent in August 2000 after almost 33 years' service.

[217] His evidence was that he was stationed at the Cape Town Detective Branch when he was appointed to the investigation into the activities of the plaintiff and PITU members. He was called to a meeting in Knipe's office in which Fivaz and others were present (he could no longer recall who they were). He

[138] Exhibit PP, and HHH in the regional court trial at p4958 of that record.

was provided with a copy of Smith's statement, and he and Knipe were instructed to use it as the basis for their investigation. He divided the information in the statement into categories of allegations and set about investigating them while also looking for the necessary corroboration. In addition he was at some stage instructed to take over the investigation into the charges of drunken driving and leaving the scene of an accident.

[218] The latter charges were extremely difficult to investigate, given that the plaintiff's blood sample had not been taken after the accident and he was never examined by a district surgeon. Rossouw thus set about interviewing a number of eyewitnesses involved. Their accounts persuaded him that the plaintiff had been under the influence at the time of the collision. He had carefully interviewed each of these witnesses as he was aware of the basic elements which needed to be proved.

[219] During the course of his investigation into the other allegations he would regularly meet with Smith, particularly after obtaining corroboration. The purpose was to be as thorough as possible. Smith provided a number of follow-up statements on specific allegations as a result (it is common cause that Smith made a further nine statements to the investigators and/or Bouwer before the matter went to trial). Once Knipe felt there was sufficient evidence to open a docket then Rossouw would do so. Other dockets were already in existence.

[220] Rossouw corroborated the evidence of both Knipe and Bouwer about the involvement of the Attorney-General's office from a very early stage. Each docket prepared by him was handed to Bouwer. The latter in turn would scrutinise it and issue specific instructions on what was still needed. It was Rossouw's task to carry out those instructions to the best of his ability. It was also Bouwer who instructed him on which witnesses to bring to him for interviews.

[221] Rossouw strongly denied that any improper influence was brought to bear on witnesses to make false statements. He confirmed that during his testimony in the regional court trial there was no suggestion by the plaintiff that he had done so. The only pressure he placed on witnesses was to tell the truth, informing them of the potential consequences of providing false statements.

[222] Rossouw denied having had a hidden agenda which drove his investigation. He explained that he was simply tasked by Fivaz to investigate. He had no interest in PITU's investigations and knew virtually nothing about them. He was aware that PITU had taken over certain dockets from the Cape Town Central Branch in connection with suspected Moroccan gangsters involved in the nightclub industry. He was relieved when they did so because he knew that, although he was not personally involved in these investigations, there were ongoing problems with these individuals which were taking up a lot of his investigators' time. He was aware that some of these investigators were not pleased when PITU took over their dockets. What had annoyed Rossouw

rather was that some of his investigators were seconded to PITU which increased his unit's already heavy workload.

[223] Rossouw had not even known the plaintiff before receiving his instruction from Fivaz and Knipe. He did not detect any animosity towards him from the plaintiff during the investigation or thereafter. The plaintiff's allegations about Club 35 were absurd. Rossouw corroborated Bouwer's evidence in this regard but maintained that he was never the chairperson. The plaintiff's allegations about Club 35 had been investigated at the highest level on the instructions of Fivaz. Rossouw was interviewed for this purpose but to the best of his knowledge the allegations were found to have no substance. Certainly, he heard nothing further about them save for the plaintiff's testimony in this trial.

[224] During cross-examination Rossouw recalled having been visited by Senekal and Bouwer at some stage. He conceded that they might even have been present at the initial Fivaz meeting. However he was never provided with a copy of their Information Note and was unaware of its contents. Rossouw could recall, in general terms, the nature of the charges that the plaintiff ultimately faced. It was not possible for him to recall specific details of the contents of the dockets that were handed to Bouwer, given that the investigation was completed almost 17 years earlier. Rossouw was cross-examined at some length about the substance of the charges and the plaintiff's exculpatory version. To the extent that he was able to provide responses they were reasoned and supported the versions of both Knipe and Bouwer in all material respects.

Discussion

[225] It has been necessary to set out the evidence on the disputed issues in some detail, given the history and fact-bound nature of this matter.

[226] The plaintiff testified over a number of days. He is clearly a highly intelligent, astute individual who one can safely accept would have left no stone unturned in his quest to prove that the police members concerned deliberately conspired to maliciously instigate his prosecution without reasonable and probable cause. From a purely subjective point of view he seemed utterly convinced of this.

[227] He was afforded ample opportunity to adduce evidence in support of his allegations. However there were serious flaws in the manner in which he presented his case.

[228] I will start with the issue of the dockets. It is not in dispute that they were made available to his legal team prior to the commencement of the trial. It might be that a tactical decision was taken not to lead him on these dockets, and it is so that he managed to avoid absolution at the close of his case without reference to virtually all of them, given that his version was largely uncontested at that point.

[229] However it must have become apparent to him, as the second defendant's case progressed, that it was crucial to have taken at least Knipe and Rossouw through those dockets so that the court was placed in a position, given the

onus resting on the plaintiff, to evaluate whether, on the objective facts, there was no reasonable and probable cause to prosecute when those dockets were handed over to AB of the Attorney-General's office and thereafter.

[230] This could not have been an insurmountable task for his legal team. Even if some of the contents of those dockets had been mislaid with the passage of time (the plaintiff's counsel made a vague suggestion to this effect when this issue was pertinently raised with him), there was simply no attempt made to take the court to the remaining contents. The plaintiff had faced 47 charges and it is fair to accept that there must still have been sufficient material in those dockets to assist the court in determining this essential element of his claim.

[231] The court was given insight into only two of the dockets. The first, relating to the count of drunken driving and leaving the scene of an accident, was introduced by the *second defendant* when the plaintiff was cross-examined. In respect of the second, the Williams count, the plaintiff referred to only two of her statements, which merely represented a portion of that docket. This did not assist the plaintiff.

[232] The largely exculpatory explanations given by the plaintiff during this trial in relation to those charges ultimately took the matter no further. This was not a re-hearing of his criminal trial. Its purpose was not to make any findings about his guilt or innocence. A central component to the success of his claim was for him to prove that, based on the information which the SAPS members had

gathered, there was no reasonable and probable cause to instigate a prosecution.

[233] It was common cause that the plaintiff himself was not interviewed by Knipe and Rossouw until the case was virtually trial ready. Accordingly, one can accept that Knipe and Rossouw relied on other evidence gathered in arriving at the conclusion that there was enough incriminating material to hand over to the prosecuting authority for consideration and decision. Scrutiny of that material, weighed up against the testimony in relation thereto, would have been of value, particularly given the materially unchallenged testimony of AB, Knipe and Rossouw that the Attorney-General's office had been involved in the investigation almost from inception.

[234] For a reason that was not disclosed the plaintiff withdrew his claim against the first defendant a few months before the trial commenced. That too may have been a tactical decision. However in so doing the plaintiff chose to pin his colours to a very specific mast, that of the fruits of the investigations of the SAPS members. He must have realised that this made it crucial for him to produce cogent and persuasive evidence of those fruits. The dockets provided the perfect way to do this. This issue was pointedly raised by counsel for the second defendant at absolution stage. It was pertinently raised by this court during Knipe's testimony, which was before any of the other defence witnesses testified. For some inexplicable reason this was nonetheless not pursued by the plaintiff and his legal team. To the extent that

they believed that it was the second defendant who bore the onus to disprove what essentially boiled down to bald allegations, that belief was misplaced.

[235] The other serious flaw in the manner in which the plaintiff's case was presented was the selective reliance on portions of the record in the regional court trial. That record was treated as an exhibit only, and it was made clear to both legal teams at the outset that this court would only have regard to extracts specifically referred to during this trial. The parties also agreed that the probative value of the regional court transcript was merely what it purported to be, i.e. a record of the witnesses who testified and an accurate account of what was said. It was not evidence of the truth of what was said. Accordingly, where the parties sought to rely on the truth of the content of what was stated in the transcript, oral evidence needed to be presented in *this court* in order for the witnesses to be cross-examined and the truth of such evidence tested. Without other evidence to substantiate what was contained in the transcript it had little probative value.

[236] None of the regional court witnesses whose testimony was relied upon by the plaintiff testified in this trial, and no indication was given that they were not available or why (save obviously for Palazzolo who is currently serving a sentence in Italy). The only one of these witnesses whom the plaintiff had intended to call, Viljoen, was subpoenaed by the plaintiff's legal team but he did not testify.

[237] Moreover, to the extent that any weight could be placed on that testimony in these proceedings, it was largely unhelpful to the plaintiff. That of witnesses such as Benn, Williams, April, Van der Westhuizen and Palazzolo merely served to support the defence case that they were not pressurised to lie by either Knipe or Rossouw. In any event, this was their *testimony* given long after the police investigation was completed. In addition, to the extent that earlier witness statements were referred to, they generally served to support the existence of reasonable and probable cause to prosecute, and not its absence.

[238] Turning now to the other evidence. The plaintiff's accusations about the involvement of Fivaz in the conspiracy against him, reflected in his correspondence, were not pursued during his testimony. Indeed, Fivaz was not even cited in his pleadings as one of the SAPS members who maliciously conspired against him. This was peculiar, given his earlier documented complaints that SAPS members tried to sabotage the unit and destroy his credibility on the direct instructions of Fivaz. Nor was this suggested to Fivaz, let alone canvassed with him, when he testified.

[239] The plaintiff's allegations about Knipe's involvement in the Gugulethu Seven massacre and Community House bombing were demonstrated to be no more than suspicion. They were not supported by the independent record of the TRC hearings, and the plaintiff himself adduced no evidence to support them either. These allegations were the primary ones proffered by the plaintiff as the reason for Knipe's hidden agenda as part of the old guard. The others

were of a general and entirely unsubstantiated nature and boiled down to Knipe's involvement in the Murder and Robbery Unit before the end of apartheid.

[240] There was no evidence that Knipe himself had interfered in PITU's activities or tried to sabotage the plaintiff in any direct or indirect way. Moreover it was demonstrated that the plaintiff himself either suggested Knipe's appointment as investigator at the Mbeki meeting or readily agreed to his appointment. No complaints were levelled at Knipe by the plaintiff during that investigation. On the contrary, the transcript of Knipe's interview with the plaintiff during January 1998 reflects the plaintiff's satisfaction, both with Knipe and the manner in which he had carried out his investigation. This was not disputed. There was furthermore no evidence that Knipe himself was accused of having had a hidden agenda during the regional court trial.

[241] On the plaintiff's own version, it was the prosecuting authority, not Knipe or Rossouw, who caused Stofberg to change his statement in relation to the counts of drunken driving and leaving the scene of an accident. His reliance on the Standing Order containing the patently discriminatory types of accommodation for police officers, depending upon their race, was not suggested to have been of Knipe's creation. Its high watermark was that this document was referred to when the prosecutor led Knipe in his testimony in the regional court trial.

[242] It was not suggested by the plaintiff that Knipe was driven by malice towards him when investigating the claim for an informer's fee for someone placed in the office of Palazzolo's attorney. The upshot of his evidence was that a number of individuals in law enforcement agencies wanted to establish the informer's identity and that this is why he was charged. The plaintiff's account of his involvement with Knipe on the charge of theft of safe house furniture amounted to no more than a possible discussion, without him being able to recall the content, other than being told that his possession of the furniture was unlawful.

[243] On the plaintiff's own version Knipe had nothing to do with the Mangiagalli dockets. He conceded that the conspiracy played no role in the instigation of the charges against him on the counts of drunken driving and leaving the scene of an accident; the dockets of *crimen injuria* and disturbance of the peace; and the docket on the count of attempted murder.

[244] During his testimony the plaintiff made no reference to Khoisan's article published in the Mail & Guardian. He did not disclose that after completion of Knipe's testimony in the regional court that tape recording was made available to his legal representatives. This he must have known, given that he was their client and they would not have requested it without instructions. The plaintiff gave no evidence that either he or his legal representatives had listened to that recording.

[245] The purpose of calling Khoisan to testify was clearly to portray Knipe as a sinister member of the old guard. Both Knipe and Smith denied that the recording contained a threat to topple the ANC government. Khoisan was not prepared to disclose his source. What was materially uncontested was that Smith handed over the recording to the plaintiff's erstwhile legal team (this much was confirmed by his own legal representative in correspondence with the Bar Council). Thereafter someone (and I do not suggest that the legal representatives were in any way involved) made a recording available to Khoisan which purported to contain a threat, allegedly made by Knipe. Smith was adamant that he had never spoken to Khoisan. Khoisan conceded that he never personally met with Smith to verify that recording. Khoisan displayed spontaneous personal bias against Knipe during his testimony.

[246] Be that as it may, the plaintiff was not a member of the ANC government and only one government official, Minister Jordan, featured in the PITU investigation on the plaintiff's own version. It is thus difficult to understand how Knipe, a senior member of the Serious and Violent Crime Unit, would have managed to orchestrate the ousting of the ANC government by instigating a prosecution against the plaintiff. In any event, Knipe's unchallenged testimony was that the threat allegedly made by him was investigated at the highest level – in a police service whose Minister was most certainly not a member of the old guard – and found to be without substance. It was the same Minister who conferred an award for exceptional service on Knipe a few months later.

[247] The only manner in which the plaintiff sought to implicate Senekal and Bouwer was with reference to their Information Note. The plaintiff's allegations about Rossouw's involvement in the malicious instigation are best described as scant, apart from those relating to his membership of Club 35 and the counts of drunken driving and leaving the scene of an accident, which were shown to have no substance.

[248] I have already dealt with my views on Smith's evidence. As I have said, there is some merit in the plaintiff's complaints about Smith. However what seems clear from a consideration of Smith's testimony as a whole is that he was the whistle blower on this unit. I have certain reservations that Smith was motivated by his professed desire to do the right thing. To my mind, it was more a case of him realising that the chickens would soon come home to roost and that he should take proactive steps to cover himself as far as he possibly could. I do not accept Smith's version that it was Senekal who approached him. It is far more probable that Smith, who obviously had an axe to grind with the plaintiff, seized the opportunity presented by Senekal to spill the beans and at the same time make life as difficult as possible for the plaintiff. Senekal was a very credible witness and his version is in line with the inherent probabilities. Another relevant consideration is the plaintiff's opinion that, in any event, Smith was only used as a pawn by those involved in the so-called conspiracy.

[249] Although various attempts were made to portray Senekal as having his own agenda, the evidence of Fivaz, uncontested, was that it was *he* who instructed

that the unit to which Senekal was attached should investigate the irregularities complained of. Senekal's evidence that he could not simply ignore Smith's allegations makes sense. He had a duty to report back to Fivaz and a number of Smith's allegations directly impacted on Fivaz as the National Accounting Officer of the SAPS. It may be that Senekal was overzealous in certain respects. However, Senekal did not make the final call on whether or not PITU, and the plaintiff, should be investigated. That was a decision made by Fivaz. Senekal's evidence that after producing the Information Note he played no active role in the investigation was uncontested. There was also the evidence of AB, Knipe and Rossouw that a number of complaints made against the plaintiff were not pursued. Moreover, Senekal's evidence that he previously made a recommendation in PITU's favour (i.e. to continue with the Nothnagel investigation) was not challenged.

[250] AB and Knipe were excellent witnesses. The accounts they gave of the lengths to which they went to ensure that the investigation proceeded fairly and thoroughly were not shaken in cross-examination. AB's testimony about the opportunity given to the plaintiff to make representations at the highest level was not contested, nor was his evidence that the decision to prosecute was ultimately made by Ngcuka, also most certainly not a member of the old guard. The testimony of these two witnesses, taken with that of Fivaz and Rossouw (both of whom were also excellent witnesses) neatly fitted with the objective facts and moreover with the inherent probabilities.

[251] Both Knipe and Rossouw testified that they were satisfied that reasonable and probable cause existed. This was supported by AB's testimony. In the absence of any cogent evidence having been adduced by the plaintiff to the contrary, I must accept their version.

[252] Accordingly, having regard to the evidence as a whole, viewed in the light of the applicable legal principles, I am not persuaded that the plaintiff has discharged the onus of proving that the relevant SAPS members acted with malice (even on the basis of *dolus eventualis*) and without reasonable and probable cause. Reverting to what was held in *Woji*,[139] I am instead persuaded that Senekal (and Bouwer) gave a fair and honest statement of what they considered to be the relevant facts to Fivaz. Knipe and Rossouw took reasonable care to inform themselves of the true state of affairs; gave a fair and honest statement of the relevant facts to the prosecutor; and left the final decision in the hands of the prosecuting authority as it thereafter drove the process. The evidence shows that Knipe and Rossouw were vigilant in how they went about verifying Smith's allegations. Furthermore, and insofar as Smith's involvement is concerned, as was held in *National Director of Public Prosecutions v Zuma*:[140]

> *'A prosecution* [or more appropriately in the present matter, the instigation thereof] *is not wrongful merely because it is brought for an improper purpose. It will only be wrongful if, in addition, reasonable and probable grounds for prosecuting are absent…'*

[139] Para [34].
[140] Para [37].

Costs

[253] There are four sets of costs standing over for determination at the conclusion of the trial:

250.1 The costs attendant on the withdrawal of the plaintiff's claim against the first defendant and the second defendant's withdrawal of his special plea;

250.2 Three days of wasted costs (7, 8 and 9 March 2017) incurred as a result of the plaintiff's abortive application for the postponement of the trial *sine die*;

250.3 The wasted costs incurred as a result of Mr Khoisan's failure to appear as scheduled, which caused the matter to stand down on 28, 29 and 30 March 2017; and

250.4 The costs of the second defendant's unsuccessful application for absolution.

[254] I see no reason why the costs of withdrawal of the claim against the first defendant should not be borne by the plaintiff. It is also my view that the costs attendant upon the second defendant's special plea and the subsequent withdrawal thereof, as well as the costs of the absolution application, should be borne by the second defendant.

[255] The plaintiff brought an application for a postponement of the trial *sine die* on the ground that he had not had sufficient time to consult with his legal representatives to prepare for trial. He sought to lay the blame for his inability to consult his legal team on the second defendant while at the same time asking for costs on a punitive scale.

[256] The second defendant filed an answering affidavit, contending that the plaintiff had only himself to blame for his lack of readiness. Details, supported by the relevant correspondence, were provided. The plaintiff failed to file a replying affidavit, and in any event become available for the trial to proceed a few days later. There is no reason why, in these circumstances, the second defendant should have to bear the wasted costs of that postponement.

[257] The same applies to the postponement occasioned by Khoisan's unavailability. He assured the court that he would be able to continue with his testimony when the matter resumed. He failed to appear, and later explained that he had forgotten that he had other commitments. While there is no reason to doubt his explanation, there is similarly no basis upon which the second defendant should have to foot the bill for wasted costs incurred where a witness for the plaintiff caused that postponement.

[258] The second defendant sought costs in respect of these postponements on a punitive scale. In the exercise of my discretion, I am not inclined to make such an order.

Conclusion

[259] **In the result the following order is made:**

1. **The plaintiff's claim against the second defendant is dismissed.**
2. **The second defendant shall pay the costs occasioned by its special plea and the withdrawal thereof, as well as the application for absolution from the instance at the close of the plaintiff's case, including the costs of two counsel where employed.**
3. **Save as aforesaid, the plaintiff shall pay the costs incurred in respect of the withdrawal of his claim against the first defendant, as well as the second defendant's costs in this action, including the costs of two counsel where employed, and the wasted costs of the postponements on 7, 8, 9, 28, 29 and 30 March 2017.**
4. **Costs shall be taxed on the scale as between party and party.**

J I CLOETE