REPORTABLE

CASE NO.: I 2619/2006

IN THE HIGH COURT OF NAMIBIA

In the matter between:

ENGELHARD AKUAKE **PLAINTIFF**

and

JANSEN VAN RENSBURG **DEFENDANT**

CORAM: **DAMASEB, JP**

Heard on: 4th – 5th February 2009

Delivered on: 9th February 2009

JUDGMENT

DAMASEB, JP: [1] This case raises the issue whether liability should attach to a victim of a crime who asks the police to investigate and establish the identity of the perpetrator(s) of the crime – when the police without diligent investigation- arrest a suspect who is then detained but has the criminal proceedings terminating in his favour.

[2] The plaintiff was arrested on 17 November 2004 and spent 32 days in custody awaiting trial because he was unable to pay bail in the amount of N$5000. He made several appearances in court and the case against him was finally withdrawn on 28 June 2005. He now claims N$277 200.00 from the defendant for *wrongfully and maliciously setting the law in motion by laying a false charge of theft of two zebra skins* against the plaintiff. It is then alleged that because of the defendant's conduct the plaintiff was arrested and detained for 32 days until he was admitted to bail. The defendant denied all these allegations and specifically pleaded that he *reported the matter to the Namibian police for further investigation*.

[3] To sustain a claim based on malicious criminal proceedings the plaintiff must allege and prove:

(i) that the defendant actually instigated or instituted the criminal proceedings;

(ii) without reasonable and probable cause; and that

(iii) it was actuated by an indirect or improper motive (malice) and;

(iv) that the proceedings were terminated in his favour; and that

(v) he suffered loss and damage:

Lederman v Moharal Investments (Pty) Ltd 1969(1) SA190 (A)190-196 G-H.

[4] As regards (i) above, it is trite that the mere placing of information or facts before the police, as a result of which proceedings are instituted, is insufficient to found liability for malicious prosecution. In *Waterhouse v Shields,* 1924 C.P.D. 155 at p. 160 Gardiner J said:

> "The first matter the plaintiff has to prove is that the defendant was actively instrumental in the prosecution of the charge. This is a matter more difficult to prove in South Africa, where prosecutions are nearly always conducted by the Crown, that it is in England, where many cases are left to the private prosecutor. Where a person merely gives a fair statement of the facts to the police and leaves it to the latter to take such steps thereon as they deem fit, and does nothing more to identify himself with the prosecution, he is not responsible, in an action for malicious prosecution, to a person whom the police may charge. But if he goes further, and actively assists and identifies himself with the prosecution, he may be liable. "The test", said BRISTOWE, J, in *Baker v Christiane,* 1920 W.L.R. 14, is whether the defendant did more than tell the detective the facts and leave him to act on his own judgment!" (My underlining)

And Price J, in *Madnitsky v Rosenberg* 1949 91) P.H. J5, said:

> "when an informer makes a statement to the police which is willfully false in a material particular, but for which false information no prosecution would have been undertaken, such an informer "instigates" a prosecution."

(Cited with approval in *Lederman supra* at 197 C-D.)

Synopsis

[5] The defendant is the sole member of a Close Corporation called *Otjiwarongo Taxidermy CC (the* Taxidermy*)* which owns and operates a factory in Otjiwarongo. The plaintiff was employed by the Taxidermy at the material time. The defendant does not personally run the Taxidermy as he lives on a farm outside Otjiwarongo. The business is run and managed for him by Ms Sylvia Janbey who was the supervisor of the plaintiff and the other employees working at the Taxidermy at the material time.

[6] On 10 November 2004, an employee (since deceased) of the defendant's Taxidermy became suspicious that some skins were missing from the Taxidermy at Otjiwarongo. That suspicion was well-founded because on 15 November 2004, the manageress of the Taxidermy (Sylvia Janbey) received a call from one Ms Spangenberg employed at Nakara in Windhoek that two Herero men came there that day wanting to sell 2 zebra skins bearing the Taxidermy's distinctive branding. The two men fled when Spangenberg became suspicious. Janbey subsequently retrieved the two stolen zebra skins from Nakara's Spangenberg on 16 November 2004. The images of the two men who attempted to sell the stolen zebra skins to Nakara were captured on CCTV. This video footage was made available to the police. The plaintiff was in the employ of the defendant for a period of about 2 years before his arrest on 17 November 2004 on suspicion of theft of the 2 zebra skins of his employer.

[7] On 17 November 2004, the defendant came to the Taxidermy. The plaintiff's case is that the defendant upon arrival demanded to know who had stolen the two zebra skins. The plaintiff protested his innocence whereafter the defendant, in the plaintiff's presence, told the other employees that only those who told the truth would receive their annual bonuses. The defendant at some stage had a conversation with the other employees about the theft of the zebra skins. That same day, the plaintiff testified, police arrived, questioned the other employees and the defendant and invited him to the police station where he was arrested for theft. Being unable to pay bail of N$5 000 he was detained for

32 days until his release on 17 December 2004, when through the intervention of a legal practitioner, his bail was reduced to N$2000 which he paid and thus secured his release.

The plaintiff's case

[8] The plaintiff testified that when the defendant came to the Taxidermy on 17 November 2004 he jumped out of the car and approached him (plaintiff) in an aggressive manner and demanded to know who had taken the skins. The plaintiff testified that his response was that he did not know who took the skins, but that it was not he. Thereafter the defendant went to speak to the other employees at the back of the building, returned to the plaintiff and asked if he had taken the skins. Upon his denial that he knew anything about the skins, he testified, the defendant told him that if he did not tell the truth he was going to 'sleep in prison' – a threat the defendant allegedly made twice. At a later stage and also in the presence of the other workers, the defendant allegedly said that he had reported the matter to the police and that only employees who gave statements to the police would to get their bonuses. The police then arrived at the Taxidermy sometime in the afternoon while the defendant was present.

[9] The plaintiff further testified that when the police came to the Taxidermy they took witness statements from some of his other colleagues. It was, on the strength of these, he says, the police told him that they had sufficient evidence implicating him of theft of the two zebra skins. The plaintiff also testified that while incarcerated and awaiting trial, he asked one police officer to accompany him to see the defendant. He then in the presence of this police officer asked the defendant to withdraw the case against him as he was

innocent. He added that the defendant refused to do so unless the plaintiff told the truth and that the defendant said he was prepared to pay the bail money on behalf of the plaintiff if the latter confessed.

[11] The fact of the matter is that the plaintiff was arrested on the strength of statements made by 5 of his former colleagues implicating him in the theft of the defendant's skins. He says as much himself when he says that the police told him that they had evidence implicating him.

It is common cause that the police took five statements from the employees (co-workers of the plaintiff) on 17 November 2004 and another statement from the defendant. One of the statements is that of Elvis Kairii who died in November 2007. An objection was raised by Dr Akweenda to the admissibility of the statement on the basis it was hearsay as the one person was dead and the others were not to be called as witnesses. I overruled the objection because the statement was relevant and admissible, not for the truth of what is stated therein, but to prove the fact it was made.

[12] Under the common law rule against hearsay, an out-of-court statement by a person not called as a witness is inadmissible as evidence of any fact or opinion contained in it. But if the statement is tendered for any relevant purpose other than that of proving the truth of its contents, it is original rather than hearsay evidence and accordingly admissible. Examples of original evidence may be classified according to whether the making of the statement in question is either (a) itself a fact in issue in the proceedings, or (b) relevant to a fact in issue in the proceedings. (*T v Miller 1939* AD 106 at119; *S v*

Brampton 1976 (3) SA 236 (T); *S v De Conceicao* 1978 (4) SA 186 (T); *S v Holshausen* 1984 (4) SA 852 (A) at 624.) In the matter at hand it is an issue whether it was the defendant or other persons who implicated the plaintiff in the theft that led to his arrest and detention. That other people made statements to the police on the basis of which the latter acted is, therefore, a fact in issue in these proceedings. The statements received as C-1 to C-5 are therefore not hearsay as they are not being received to prove the truth of what is therein alleged, but because they are relevant to a fact in issue in the proceedings- who implicated the plaintiff?

[13] The gist of Kairi's sworn statement is that on 10 November he saw the plaintiff standing next to Bank Windhoek, Otjiwarongo carrying a black bag. He asked the plaintiff what he was doing there whereupon the plaintiff said he was on the way to have his clothes washed. When Kairi returned to the Taxidermy he noticed that the plaintiff's clothes were in a box at the Taxidermy. He became suspicious and called four of his colleagues to show them the plaintiff's clothes. The suspicion was aroused by the fact that the plaintiff's clothes were in the Taxidermy while he said he was going to have them washed. Kairi suspected that the plaintiff took something from the factory. He took stock of the zebra skins and established that two zebra skins were missing. He repeated his suspicion that skins are missing to his colleagues the next day. He was vindicated when Janbey received a call that two zebra skins of the Taxidermy were brought to Nakara by two men wanting to sell them.

[14] Another employee, Charlie Nashivela, in her sworn statement confirmed that Kairi expressed his suspicion about the plaintiff to her. She added that she also came to suspect the plaintiff because he came with a bag full of clothes to work, but at the end of the day the bag was not there while his clothes were left in the factory. In her statement she says that she wants a police investigation of the matter. One Erwin Nawaseb also confirmed Kairi voicing his suspicion about the plaintiff. He confirmed that after taking stock with Kairi they found two zebra skins missing. One Uiras Rosalia also confirmed what Kairi said about the plaintiff. She added that when the plaintiff brought the bag to the Taxidermy one Lea established that there were uniforms in it. These uniforms were later found in a box. She said that when they asked the plaintiff what was in the bag he brought along to work and later went with, he said that he had brought food in it. When she expressed surprise at him hiding his own food in that way he said that he had clothes in it which he was taking to be washed. She mentioned that she suspected the plaintiff of stealing the zebra skins because he told her he had clothes and food in the bag while the clothes were in a box in the factory; and that he left the premises through the back door. Lea Nawases confirmed seeing the plaintiff come to work with a bag. The next day the plaintiff left the place of work without informing anyone and came back late in the afternoon. She said that when the plaintiff returned he did not have the bag with him. She also confirmed a discussion with Kairi in terms similar to the other employees. She also asked for a police investigation.

[15] According to the plaintiff, at about 15h00 in the afternoon of 17 November 2004, the defendant assembled all the workers and 6-7 policemen arrived. He says the police

isolated him from his co-workers. At some stage he was called by a police officer and asked about the skins. He testified that he told the police that he knew nothing about the disappearance of the skins. He testified that he was repeatedly asked by the police 'who took the skins' whereupon he said that if the officer thought it was him (the plaintiff), the officer must "give me proof I took the skins." It was then that he was asked to accompany the police to the police station where he was told that he would be arrested because the co-workers in their statements mentioned that they suspected him to have taken the skins.

[16] The plaintiff testified that he visited the defendant from the prison cells and asked him to withdrew the charge and that the defendant said he would do that (including paying the plaintiff's bail) if the plaintiff told the truth. The plaintiff still persisted in his innocence but the defendant did not assist in having the matter withdrawn.

[17] In cross-examination the plaintiff admitted that Kairi (as stated in the latter's sworn statement) had seen him standing outside Bank Windhoek carrying a black bag, but he denied saying the things attributed to him by Kairi in the latter's statement under oath.

The defendant's case

[18] The defendant testified that when he came to the Taxidermy on 17 November 2004 he called all the workers together to ascertain if they knew anything about the zebra skins that had been missing. He stated that he told them that if they did not tell the truth, he would deduct the loss from their bonuses as the trophies belonged to foreign trophy

hunters. He testified that he then called the police to inform them that zebra skins had been stolen. The defendant testified that the police then came, interviewed the employees and then him (they all giving statements) and took the plaintiff to the police station. In his statement he confirmed a report made to him by Janbey on 11 November 2004 about the stolen zebra skins. He testified that he then came to the Taxidermy on 12 November to help in the search of the skins but to no avail. He confirmed the Nakara incident. He says that it is a standing instruction that all workers must use the front door for entry and exit at the Taxidermy. He also stated that on the 17th November he called all the workers to ask who took the skins but found out nothing. He stated that he then told them that they would not receive their bonuses unless the truth comes out. He concludes that he did not give anyone permission to remove the skins and that he wants a police investigation into the matter. Significantly, nowhere in the statement of the defendant is any reference made to the plaintiff as a suspect.

[19] The defendant testified that after the 17th November when the plaintiff was taken away by the police, he never again heard from them about the progress in the case. He denied that he was aggressive towards the plaintiff upon arrival at the Taxidermy or that he singled him out from the other employees. He testified that upon arrival he was apprised by Janbey about the other employee's suspicion of the plaintiff and the circumstances that led to that suspicion. The defendant also denied telling the plaintiff that he would spend the night in prison unless he told the truth.

[20] The defendant was emphatic in his denial that he either accused the plaintiff of being the thief or that he told the police that he suspected the plaintiff. The defendant stated categorically under oath that all he did was to invite the police to his premises, report the theft and to make his employees available for questioning by the police. He testified he did not even see the statements taken by the police from the employees and that he was not kept informed about the progress of the case. In his own witness statement received in evidence he said that he had not given anyone the permission to take the skins and that he wants the police to "investigate" the matter. The defendant denied the allegation that the plaintiff invited him from the police cells and asked him to withdraw the case.

[21] Sylvia Janbey in her testimony stated that the late Kairi came to see her on 10 November 2004 and reported two zebra skins missing. Kairi then also stated to her that he suspected the plaintiff in the disappearance of the skins as he saw him standing outside Bank Windhoek carrying a black bag and said he was taking his clothes to the dry cleaners while those clothes were in a box at the Taxidermy. She stated that the plaintiff was suspected to be the thief because he was seen by Kairi near Bank Windhoek carrying a bag when he should have been at work and said he was carrying clothes in the bag while those clothes were at the work place; and that he had arrived at work the previous day with a bag whose contents were at the place of work and he left with the same bag through the back door when company policy required all employees to use the front door.

[22] Janbey confirmed the call from Nakara and the two men who came there wanting to sell the Taxidermy's skins; and that she went to retrieve the skins from Nakara. Janbey

also testified that it was the plaintiff's co-workers who on 17 November 2004 implicated him in the theft. She also testified that it was after she received the call from Nakara that they realized that the two skins which Kairi suspected missing were in fact stolen. Janbey confirmed that the police came and took statements from the plaintiff's co-workers but that she did not know what was in them until when she came to this trial. She also testified that the employees had informed her that they suspected the plaintiff of the theft even before the defendant or the police arrived on the 17 November 2004. She was categorical that when the defendant arrived he did not suspect the plaintiff of the theft and that the defendant merely asked the police to investigate the case. Janbey also testified that she was present when the police were, on 17 November 2004, handed the CCTV footage of the images of the two men at Nakara.

Discussion

[23] Dr Akweenda has urged me to find that the following establish that the defendant "treated plaintiff as a suspect'' and "must have informed the police about his suspicion'' without reasonable and probable cause for the suspicion:

(i) The first person (out of ten other employees) that the defendant on 17 November 2004 confronted at the Taxidermy about the missing skins was the plaintiff; and that the defendant was aggressive;

(ii) The defendant thereafter spoke to the other employees as a group in the absence of the plaintiff and having spoken to them again came to confront the

plaintiff asking him if he stole the skins with the threat that if he did not tell the truth he would spend the night in prison;

(iii) That the defendant went to the police station to report the incident and that upon his return he informed the employees that those who wanted to receive their annual bonuses had to make statements to the police;

(iv) The police then came and first interviewed the other employees in the plaintiff's absence and that he was the last to be interviewed by the police;

(v) That he paid a visit to the defendant from the police cells while in custody accompanied by a police officer and asked the defendant to withdraw the charge as he was innocent but that the defendant refused and again asked him to confess so he (the defendant) could pay the bail for him (the plaintiff);

[24] The plaintiff chose not to bring a claim against the police or the co-workers who implicated him in the theft. Had the police been cited the issue would have been whether the arresting officer had reasonable and probable cause for suspecting the commission of an offence to justify an arrest without a warrant. The plaintiff has opted to sue only the complainant. The issue therefore is whether the defendant instigated (instituted) the criminal proceedings without reasonable and probable cause and with an improper motive. My understanding of why the plaintiff holds the defendant responsible for his arrest and detention is that the defendant spoke to him directly, threatened him with imprisonment if he did not confess, and said that the workers would not get their bonuses unless they give statements to the police.

[25] It is arguable that the threat of the withdrawal of the bonuses served as an inducement for the co-workers to implicate the plaintiff in the theft. That would certainly have added weight to the inference that the defendant instigated the criminal prosecution. The effect of the threat is, however, neutralized by the fact that even before the defendant arrived at the Taxidermy on the 17th November 2004, the co-workers had already implicated the plaintiff before Janbey.

[26] That the police indeed arrested the plaintiff on the strength of the witness statements is amply corroborated by the statements of the co-workers which I have summarized above. The high-water mark of these witness statements is that around the time the 2 zebra skins were stolen, the plaintiff conducted himself in a way that aroused the suspicion that he had stolen the 2 zebra skins that were retrieved from Nakara. The fact remains though that it was the defendant's employees that formed a suspicion why the plaintiff was involved. Clearly he had the opportunity to steal the zebra skins. The two men who tried to sell the skins to Nakara were the critical link whether or not the plaintiff had something to do with the theft.

[27] It is common cause that a theft of 2 zebra skins took place from the Taxidermy. In fact the stolen items were returned to the defendant's business and handed over to the trophy hunters. Based on the information which he received from his employees, the defendant laid a criminal complaint with the police over the theft of the two zebra skins. The police conducted an investigation including interviewing employees of the Taxidermy. The witnesses made statements under oath and the cumulative effect of them

was to implicate the plaintiff. None of the witnesses who gave statements under oath to the police had seen the plaintiff with the stolen skins; nor had they seen him physically remove the skins from the Taxidermy. Both Janbey and the defendant conceded that the plaintiff was not, and could not have been, one of the two men who attempted to sell the stolen skins to Nakara's Spangenberg.

[28] Had the police arrested and detained the plaintiff solely on the strength of the witness statements given by his co-workers (as it appears to be the case), they certainly had no reasonable and probable cause for doing so. All the statements did was to raise suspicion that the plaintiff might have been involved in the theft. It also needs to be said that had the police exercised a modicum of common sense and conducted even the most rudimentary investigative work, the plaintiff would either have been implicated or exculpated. All they needed to do was to identify, if they could, the two men who Spangenberg said were Herero speaking and establish if they had any connection at all with the plaintiff. If found, the two men would either have implicated the plaintiff, or exculpated him. That the police appear not to have done before they arrested the plaintiff.

[29] The plaintiff bears the burden of proving that the defendant instigated the criminal proceedings without reasonable and probable cause and for an improper motive. It is not an improper motive to ask the police to investigate a crime. Besides, the defendant says that he never pointed the finger at the plaintiff as the suspect in reporting the matter to the police. I doubt if (on the facts of this case) it would have made any difference even if he did.

[30] Whether or not the co-workers had reasonable and probable cause for the suspicion and whether or not the police had probable cause for the arrest and detention are separate questions from the issue whether the plaintiff was entitled to report the theft and to ask the police to investigate. Different tests would apply in founding liability. As far as the defendant is concerned, he was entitled upon proof that a crime had been committed, to report the same to the police and to expect them to investigate. Significantly, it was only on the 15th November when Nakara called, that it could be established with certainty that the two skins Kairi suspected missing had actually been stolen. Had the defendant on the 10th November (when Kairi formed the initial suspicion) reported the theft and laid a charge implicating the plaintiff, he would have been 'instigating' a criminal prosecution without reasonable and probable cause - because at that stage there was no evidence a theft had occurred and, according to Janbey, they had in the past missed skins in the factory and after search found them. As far as the workers are concerned, they had to have reasonable and probable cause for suspecting the plaintiff to be the thief when they made their statements to the police. On the facts disclosed in the witness statements that I have summarized, one cannot say that those facts reasonably, according to the reasonable person, indicated that the plaintiff probably stole the 2 zebra skins from the Taxidermy. (*Van der Merwe v Strydom* 1967 (3) SA 460 (A) 467.)

[31] It appears to me on the facts of this case that it was the employees who (subjectively believing in the guilt of the plaintiff[1] instigated the criminal prosecution without

[1] *Beckenstrater v Rottcher and Theunissen* 1955 (1) SA 129 at 136A-C; *Ochse v King Williams Town Municipality* 1990 (2) SA 855 at 859D)

reasonable and probable cause; and the police who, acting on the suspicion, pursued a prosecution without reasonable and probable cause.

[32] I can sympathize with the defendant for the situation he found himself: it is common cause that he lives on the farm outside Otjiwarongo. He has appointed a manageress to run the business for him. He received information that a theft had taken place of his property. He then came to Otjiwarongo to apprise himself of the true facts. Upon his arrival he is informed by the employees that based on certain events around the time of the disappearance of the stolen skins, they suspect the plaintiff. What he does then is to call in the help of the police and makes his employees share their suspicions with the police whereafter he asks them to investigate the matter as he or his employees had not given anyone the permission to remove the skins. Should he be held responsible for the incompetent manner in which the police then handled the matter thereafter; or indeed the flimsy basis on which his employees pinned suspicion against the plaintiff in the first place? I think not.

[33] It is important not to send out a message which has the effect of discouraging victims of crime from reporting same to the police, lest they are sued for malicious prosecution. That might lead to more and more people taking the law into their own hands instead of conveying their suspicions to the police and to leave it to them to investigate and either implicate or exculpate a suspect. That is the rationale for the rule that *where a person merely gives a fair statement of the facts to the police and leaves it to the latter to take steps thereon as they deem fit, and does nothing more to identify himself*

with the prosecution, he is not responsible, in an action for malicious prosecution, to a person whom the police may charge – Brand supra.

[34] Even if I am wrong in this view, and that the plaintiff had established on a balance of probability that the defendant in fact threatened to have the plaintiff imprisoned unless he confessed, I still have to be satisfied that there was a causal link between the threat and the arrest and detention. Can it be said that on the proven facts, the defendant was instrumental in making or prosecuting the charge against the plaintiff? The plaintiff must prove on a on a balance of probability that the prosecution resulted from the actions of the defendant. (*Heyns v Venter* 2004 (3) SA 200 (T) 207-208.)

[35] The plaintiff failed to prove that the defendant directly associated himself either with the accusation leveled by the employees against the plaintiff, or with the arrest by the police based on the suspicion expressed by the employees. Had he done so, and considering that the evidence supporting the suspicion is so flimsy, he would have rendered himself liable as having instigated criminal proceedings against the plaintiff without reasonable and probable cause.

[36] I find that the operative cause[2] of the arrest and detention was the suspicion expressed by the plaintiff's co-workers- a suspicion which they had already voiced (as

[2] In International Shipping Co (Pty) Ltd v Bentley 1990 (1) SA 680 (A) at 700E, Corbett CJ said: ''As has previously been pointed out by this Court, in the law of delict causation involves two distinct enquiries. The first is a factual one and relates to the question as to whether the defendant's wrongful act was a cause of the plaintiff's loss. This has been referred to as "factual causation". The enquiry as to factual causation is generally conducted by applying the so-called "but-for" test, which is designed to determine whether a postulated cause can be identified as a *causa sine qua non* of the loss in question. In order to apply this test, one must make a hypothetical enquiry as to what probably would have happened but for the wrongful conduct of the defendant. This enquiry may involve the mental elimination of the wrongful conduct and the substitution of a hypothetical course of lawful conduct and the posing of the question as to whether upon such an hypothesis plaintiff's loss would have ensued or not. If it would in any event have ensued, then the wrongful conduct was not a cause of the plaintiff's loss; aliter, if it would not so have ensued. If the wrongful act is shown in this way not to be a *causa sine qua non* of the loss suffered, then no legal liability can arise. On the other hand, demonstration that the wrongful act was a *causa sine qua non* of the loss does not necessarily result in legal liability.']

early as 10 November in the case of Kairi)- even before the defendant came to the Taxidermy on 17 November 2004. The inference that the police in effecting the arrest acted on the diktat of the defendant is not supported by the evidence. The clearest evidence that the defendant was not the source of the suspicion directed at the plaintiff is the defendant's own witness statement to the police where he without reference to the plaintiff asked the police to investigate the matter. Besides, the threat of imprisonment was not made in the presence of the police who, in any event, were required to make an independent decision (based on reasonable and probable grounds) whether or not to arrest the plaintiff.

[37] The defendant denied the visit by the plaintiff to the Taxidermy from the cells to ask him (the defendant) to withdraw the charge as he was innocent. The plaintiff, who says he was accompanied by a policeman when this visit and conversation took place, did not call the police officer in question. He also offered no explanation why he did not call the officer:

> "Now where a witness, who is available and able to elucidate the facts, is not called by a party such failure '' leads naturally to the inference that he fears that such evidence will expose facts unfavorable to him…*Ex hypothesi*, such adverse inference only arises if the witness in question is able to elucidate the facts or may, from the circumstances, be presumed to be so able'': Brand v Minister of Justice and Another 1959 (4) SA at 715F-G. (Compare *Raliphaswa v Mungivhi and Others* 2008(4) SA 154 at 157H-I-158A.)

[38] By parity of reasoning, if a party to a dispute alleges that a certain person was present when something was said or something happened (and its occurrence is denied by the opposing party), and the party making the allegation does not call that person (without some satisfactory explanation why that person is not called), such failure "leads naturally to the inference'' that the witness either does not exist, or that what is alleged

to have happened never happened, or that the person, if called as a witness, will expose facts unfavorable to the party who makes the allegation. That, as it is said, "raises the risk of the onus being decisive''.

[39] In any event, it sounds to me to be a contradiction in terms to on the one hand demand that a person confess to a deed and on the other hand threaten them with imprisonment if they do not: the confession would be the basis for the imprisonment without proof by the complainant that the confessor actually committed the crime. I find it improbable, therefore, that the defendant threatened the plaintiff in the manner alleged or refused to withdraw the charge or offered to pay for the plaintiff's bail if he confessed.

[40] Much of the plaintiff's effort was devoted to establishing that there was no reasonable and probable cause for the arrest instead of crossing the first hurdle- did the defendant instigate the criminal prosecution? It appears to have been assumed by the plaintiff that the accusations leveled by the co-workers (without the allegation and proof that the defendant was liable for them) and the arrest and detention by the police of the plaintiff, could be imputed as a matter of course to the defendant simply because he laid a criminal complaint with the police. That was a serious error of judgment.

[41] I find it significant that the defendant's witness statement makes no reference to the plaintiff and that the police's suspicion of the plaintiff was – again on his own admission – only made at the police station in the absence of the defendant. On the facts before me, I am unable to find evidence from which to draw the interference that the defendant

instituted criminal proceedings against the plaintiff. It appears to me that he merely made information available to the police on the basis of which to investigate a crime which, it is common cause, was committed sometime on 10 November at the Taxidermy of which he is the owner.

[42] I am satisfied that the suspicion on the basis of which the police acted to arrest the plaintiff did not disclose a reasonable and probable cause. However, I have come to the conclusion that the plaintiff failed to cross the first hurdle of establishing that it was the defendant who initiated or instigated the criminal proceedings against him.

[43] In the result, the plaintiff's claim is dismissed with costs.

DAMASEB, JP

On behalf of the Plaintiff: Dr S Akweenda

Instructed by: Titus Ipumbu Legal Practitioners

On behalf of the Defendant: Mr C Brandt

Instructed by: Chris Brandt Attorneys