REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE, PORT ELIZABETH) **CASE NO:1476/09**

In the matter between:

THERESA JOUBERT **PLAINTIFF**

And

NEDBANK LIMITED **DEFENDANT**

JUDGMENT

ANDREWS, AJ

[1] In this matter the plaintiff brought an action against the defendant claiming damages as a result of the delict of malicious prosecution. On 7 June 2006 an amount of R100 000 went missing from a money bag emanating from the defendant's Walmer Park Branch in Port Elizabeth. At the time the plaintiff was employed there as a teller. Disciplinary proceedings were initiated against her, she was suspended from work and she was named as a suspect to the police, by the defendant's in house investigator Jacques Simon ("Simon") who laid a charge, although not against any specific person. In due course internal proceedings were conducted and she was found not guilty. The state did not criminally prosecute her. As a result the plaintiff instituted action claiming damages. By agreement between the parties, the trial was confined to the merits of the claim, with the question of quantum standing over for later determination if necessary.

[2] The following facts are common cause.[1] The plaintiff was a teller who had worked for nineteen years at the time for the defendant. She and a Ms. C Steynberg ("Steynberg") as treasury custodians of the Walmer Branch were together responsible for preparing a deposit of R202,000 for collection from the defendant's premises at the Walmer Branch by the firm SBV. This required them to jointly count and bundle notes into "bricks", place tags on the bricks of notes and loose bundles, place such bricks and bundles in a sealable money bag together with a slip recording the contents of the bag signed by them both. Finally they were required to seal the bag and place it back in the main safe ready for collection by SBV.

[3] The preparation of the deposit was undertaken by them in a small secure treasury room measuring 1.5 m x 2.7 m. On one side of the room was the main safe where banknotes were kept. Opposite it was a safe where coins were kept ("the coin safe") on top of which there was a melamine counter providing a work surface. Mounted above this, near the ceiling, was a video surveillance camera which recorded activities in the room, but did not on the day in question record all the activities of Plaintiff and what took place immediately below it. It was not contested that the plaintiff had never before that date been privy to recorded video footage of activities within this treasury room to enable her to know what the camera recorded.

[4] The main safe could only be opened by the plaintiff and Steynberg together, which was done, whereafter they counted the funds and placed them in a large money bag which was then sealed by threading material through loopholes at the top of the bag. They were required to exercise dual control while preparing the deposit, meaning that both persons were required to complete a task together, and pay attention to each other while doing so. While placing the money in the bag it was positioned on the floor immediately in front of the coin safe and working table. Steynberg held it open and the plaintiff placed the bundles of notes into it. Thereafter while the plaintiff was sealing it, Steynberg became inattentive and then turned away from her to face the main safe for about five seconds. The bag was then placed back in the safe by the plaintiff. At the appointed time it was collected

[1] Paragraphs 2 – 7 herein.

by officers of SBV. Video footage of the aforesaid events in the defendant's treasury room revealed that as a result of the placement and setting of the video surveillance camera not all the activities of the plaintiff and Steynberg were recorded on that day. A video recording was made at SBV of the opening of the sealed money bearing bag no 2114 with seal number 42882, and the counting of its contents under dual control although the tape recordings of this event have since disappeared. The said numbers were on the bag and seal when they left the defendant's Walmer Park premises.

[5] When it was opened and the seal was broken the video footage apparently revealed that the bag contained a shortfall of R100 000. Subsequent to this event various polygraph tests were carried out on employees of SBV, the plaintiff and Steynberg. As a result of the purported results of the tests the plaintiff was suspended. Cross examination of the plaintiff regarding the tests and the results of the tests was disallowed after the plaintiff's counsel raised an objection to the fact that the results of the tests and the fact that they were undertaken were neither pleaded nor discovered by the defendant.

[6] After the disappearance of the money, the defendant's forensic investigator, Simon undertook an investigation including the viewing of video footage of the preparation of the funds by the plaintiff and Steynberg as well as the footage of the treasury room the next day at SBV when the money bag was opened. He compiled a report containing *inter alia* the following findings.

a) The plaintiff did not seal the bag in full view of the surveillance camera.
b) The video recording shows that Steynberg did not observe the entire sealing process of the money bag by the plaintiff.
c) The plaintiff had in her possession a bag which had previously been in her possession, alternatively under her control, which had been empty, but when she left the Walmer Park Branch it was no longer empty.
d) She was not searched on leaving the bank by security personnel as they were on a strike.

The report concluded by a process of elimination based on the above and other information gleaned from his investigations that on the balance of probabilities the plaintiff had misappropriated the funds.

[7] Simon then laid a criminal charge though not against any person in particular, but named the plaintiff as the only suspect. Internal disciplinary proceedings were instituted and a disciplinary hearing held on 14th November 2006. The plaintiff was charged with:

"Dishonesty in that you appropriated R100 000 on the 7th June 2006, and gross negligence in that you failed to follow laid down procedure(s) in not sealing a bag under dual control resulting in a loss of R100 000."

She was found not guilty of the charges. The state did not prosecute the plaintiff.

[8] Plaintiff instituted an action for malicious prosecution arising out of the instigation of criminal proceedings as well as arising out of the institution of the disciplinary proceedings. The plaintiff therefore claimed that civil and criminal proceedings of a malicious nature were instituted by the defendant. In order to succeed with a claim for malicious prosecution the Plaintiff must allege and prove that[2]:

1. the defendant instigated or instituted the proceedings;
2. the defendant acted with "malice" (or *animo injuriandi*);
3. the defendant acted without reasonable and probable cause;
4. the prosecution (or civil proceedings) failed.

[9] The instituting of proceedings:

The defendant instituted the disciplinary proceedings against the plaintiff and these were terminated in her favour. As regards the criminal prosecution, Simon requested an investigation by the police and he named the plaintiff as the only suspect. A docket was opened. However plaintiff was never criminally charged and

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[2] *Minister for Justice & Constitutional Development v Moleko* (131/07) [2008] ZASCA 43 (31 March 2008) (*Moleko*), para 8

no decision was in fact taken to prosecute her. The plaintiff admitted as much under cross examination.

There must be a prosecution before the plaintiff can bring an action for malicious prosecution. Where there is no charge there has been no prosecution and therefore no basis on which to found a claim for malicious prosecution.[3]

The plaintiff was named as a suspect but failed to prove that she had been charged or criminally prosecuted, and thus failed to prove that the defendant instituted a malicious criminal prosecution against her. This claim therefore fails.

The remaining requirements for malicious prosecution will therefore be considered only in regard to malicious civil proceedings. The plaintiff in an action for abuse of civil proceedings must allege and prove a similar case *mutatis mutandis* to that of a plaintiff in an action for malicious prosecution, and must therefore prove malice and absence of reasonable and probable cause.[4]

[10] Absence of reasonable and probable cause

Reasonable and probable cause in the context of delict means the (subjectively) honest belief founded on (objectively) reasonable grounds that the institution of proceedings is justified.[5] The test is set out in *Minister for Constitutional Development and Others v Moleko*[6], where Van Heerden JA stated:

"[57] In Relyant Trading (Pty) Ltd v Shongwe [2007] 1 ALLSA 375 (SCA) para 14 this court stated the following:

'The requirement for malicious arrest and prosecution that the arrest and prosecution be instituted in the absence of reasonable and probable cause was explained in the Beckenstrater v Rottcher and Theunissen [1955 (1) SA 129 (A) at 136 A-B] as follows:

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[3] *LAWSA* Vol 15 (2) 2008 ("LAWSA") para 316; Amerasinghe, CF *Aspects of the Action Injuriarum in Roman Dutch Law* Colombo Lake House 1968 ("Amersinghe") 13 14
[4] *LAWSA*481
[5] *LAWSA* para 323
[6] para 57

> *"Where it is alleged that a defendant had no reasonable cause of prosecuting, I understand this to mean that he did not have such information as would lead a reasonable man to conclude that the plaintiff had probably been guilty of the offence charged; if, despite his having such information, the defendant is shown not to have believed in the plaintiff's guilt, a subjective element comes into play and disproves the existence, for the defendant, of reasonable and probable cause."*
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> *It follows that a defendant will not be liable if he or she held a genuine belief founded on reasonable grounds in the plaintiff's guilt. Where reasonable and probable cause for an arrest or prosecution exists the conduct of the defendant instigating it is not wrongful. The requirement of reasonable and probable cause is a sensible one: for it is of importance to the community that persons who have reasonable and probable cause for a prosecution should not be deterred from setting the criminal law in motion against those whom they believe to have committed offences, even if in so doing they are actuated by indirect and improper motives. [see Beckenstrater v Rottcher and Theunissen 135 D-E]"*

[11] The test of reasonable and probable cause has both subjective and objective elements. Not only must the defendant have subjectively had an honest belief in the guilt of the plaintiff, but his or her belief and conduct must have been objectively reasonable, as would have been exercised by a person using ordinary care and prudence.[7]

The plaintiff bears the onus of proving the absence of reasonable and probable cause.

[12] The plaintiff's particulars of claim pleaded that the defendant set in motion disciplinary proceedings against her, falsely accusing her of misappropriating the

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[7] *Van Noorden v Wiese* (1882) SC 43 54; *Fyne v The African Realty Trust Ltd* 1906 EDC 248 256 ; *Banbury v Watson 1911 CPD 449 460; Madnitsky v Rosenberg 1949 1* PH J5 (W) 13 14; *May v Union Government* 1954 3 SA 120 (N) 129; *LAWSA* para 323

R100 000 with full knowledge that there were no reasonable grounds for this action. The defendant denied these claims pleading *inter alia* that its investigation of footage of surveillance cameras recording the preparation of the funds by the plaintiff and Steynberg indicated that the plaintiff did not seal the money bag in full view of the surveillance cameras, her co worker did not observe the entire sealing process, she had in her possession a bag which had been empty but upon leaving the Walmer Branch was no longer empty, and she was not searched as the security personnel responsible for such searches were engaged in industrial action on the date in question. It was pleaded that having regard inter alia to these facts and circumstances the defendant acted with reasonable and probable cause, *bona fide* and without *animus injuriandi* in instituting the disciplinary proceedings.

[13] The plaintiff's counsel argued that objectively speaking it could never be said that the defendant acting through Simon could have had a reasonable belief that the plaintiff was guilty of the offence in question. In particular it was argued that none of the factors pleaded by the defendant individually or even cumulatively was in any way indicative of the plaintiff's involvement in the disappearance of the funds. Further, that Simon adopted an unreasonable and highly speculative attitude towards facts which were completely innocent, or at best for the defendant, neutral. It was argued that he made up his mind as a result of what he perceived to be the results of the polygraph test, and no evidence was led as to whether proper polygraph tests were conducted, nor any testimony as to the validity thereof. The probative value of such tests was also contested by the plaintiff.

[14] The defendant's counsel argued that as far as the subjective test was concerned, Simon was emphatic in his evidence that he honestly believed in the plaintiff's guilt. As for the objective test it was argued that the objective and common cause facts assembled by Simon were such that would lead a reasonable person to conclude that the plaintiff was guilty of the offence charged.

[15] During the trial herein an inspection *in loco* was held of the defendant's Walmer Park Branch whereafter various dimensions of the defendant's treasury room were agreed and minuted, as well as the spaces between the coin safe and the flanking

walls, and the position of the video camera above it. It was agreed that the space between the coin safe and the main safe in the treasury room was a distance of approximately 1,2m, and the gap between the coin safe and the walls on either sides of it were measured as being just over 21 cm. A R100000 "brick" of notes was agreed to have measured 14 cm by 15 cm. The height of the melamine counter fitted above the coin safe was agreed to be 1,2m.

[16] Extracts of the defendant's video surveillance recording of the activities in the treasury room on the morning of 6th June 2006 were contained in a DVD which was discovered and provided for viewing at the proceedings in this matter. It showed the plaintiff and Steynberg preparing the funds in the 1,2m space between the two safes. After the bricks had been placed in the money bag Steynberg became inattentive, turning her head away from the plaintiff to look at the main safe for two periods of 2 and 4 seconds respectively. She then turned away from the plaintiff completely for a period of about 5 seconds and went to attend to objects in the main safe. This took place while the plaintiff continued working with the bag on the floor, into which bricks of money had just been placed. Then the bag was placed in the safe, whereafter Sterynberg again averted her attention from the plaintiff and appeared to work with the contents of the safe for three further periods of 7, 3 and 3 seconds respectively. Shortly thereafter Steynberg left the treasury room, followed by the plaintiff 15 seconds later. About five minutes later they both returned to the treasury room for about 2 seconds and the plaintiff followed Steynberg out of the room.

The evidence assembled by Simon.

[17] Simon testified that he was an experienced forensic investigator working for the defendant. He compiled his report on 2 August 2006 after having taken the following steps in his investigation of the disappearance of the funds: He interviewed the plaintiff; he considered the statements of the plaintiff and Ms Steyberg; he viewed camera footage of the preparation of the deposit at the defendant's treasury room and the breaking of seals and opening of the money bag

at SBV Walmer; he caused polygraph tests to be taken of all persons who handled the money, and he investigated the plaintiff's financial position.

[18] More particularly he testified that he established from his interview with her, that the plaintiff went shopping during the day on 6th june 2006 and bought various items including a jacket, chips and cold drink which she took home the same day in a bag that she had brought to work. A pink bag which was neatly folded in the early part of the day was used to carry goods when she left the premises. She was not searched and the security guards were on strike that week. The plaintiff confirmed in her evidence that she brought a handbag and shopping bag to work every day and that she bought these items and kept them under her counter that day, taking them home in the bag at the end of the day. She testified that staff were never searched on leaving the premises.

[19] Simon also investigated the plaintiff's finances. She was indebted to Foschini and legal action had been taken against her as a result of which she had agreed to pay off a debt, and still owed an amount of R1800. Her bank statements in the months of May and June 2006 showed numerous cheques which she had made out that had been returned marked "refer to drawer", as there were insufficient funds in her account to honour them. The amounts involved were R340, R2800, R563, R404 as well as an amount of R129.90 recorded as a magnetic tape shortage. The plaintiff operated an overdraft facility of R5600 and wrote out the cheques when her overdraft limit had been exceeded. He stated that the plaintiff had told him that her husband had paid her shortfall of R 2000 for school fees, after the cheque for these fees in the amount of R2800 had been dishonoured. He investigated her husband's account and found no corresponding withdrawal from his account. There were no further cheques dishonoured after the disappearance of the R100 000. The plaintiff in her evidence admitted to having a previous history of teller shortages on her teller history card, as well as surpluses.

[20] Simon concluded that the plaintiff's finances were precarious and that she might have had a motive to commit the theft. This conclusion was shown in cross examination to have been somewhat of an exaggeration, but it was clear that the

plaintiff had been pursued for a debt, was living in excess of her means and in particular in excess of her overdraft facility. In these circumstances the conclusion that she might have had a motive to commit theft was not necessarily unreasonable.

[21] Simon testified that he had viewed the video footage of the bag being opened on the 7th June at SBV from three angles and saw that the bag bore the same number as when it left the defendant's premises. He inspected the seal and saw that it had been broken once. The video also showed that it was opened under dual control. He inspected the bag to investigate whether it had been tampered with and found that it had not. He stated that there were no gaps in the video. He concluded that the bag had not been opened after it had left the defendant's premises.

[22] Simon described how he went about his investigation and the basis for his conclusions. He determined that it was possible for the plaintiff to have taken the money, while she was sealing the bag and while Steynberg's attention was averted. He then checked whether there was indeed an opportunity to do so. He concluded that it was possible that she could have put the brick of money with the coin tins that had also been taken out of the main safe and were waiting for collection by the tellers, next to the gap between the wall and the coin safe. This was in the area where she was in the process of sealing the bag. Her coin tin was among these tins and he concluded that she could have left with the money later that morning, when she took her tin out. She always packed the bag on the floor, and there was no possibility that she would be searched as the security guards were on strike. There was also no video surveillance in the room that lead from the treasury room into the bank. He determined from his investigations that she could have had a financial motive. He then drew conclusions as to who was the most likely suspect, based on circumstantial evidence and a logical process of elimination. He testified that the inferences he drew were not only drawn from individual facts but from all the evidence cumulatively including the polygraph test results. He concluded that the plaintiff was the only likely suspect. From his investigation he formed the belief that he still holds that she was guilty of the theft. He concluded that the risk of being caught was negligible given the objective video evidence and Steynberg's lack of attention within the treasury room.

[23] Certain of Simon's conduct in the investigation was referred to as questionable by the plaintiff and indicative of an attitude that he had decided she was guilty without evidence and that he was determined to have her prosecuted. This conduct which took place on the 29th and 30th June 2006 included the fact that he took the plaintiff to the police station on two occasions without her permission and without informing her of his intended destination, and the fact that he and another investigator, one van Rooyen questioned her for an extended period in order to secure a confession.

[24] These facts were not disputed by the defendant but the plaintiff testified that other far more serious conduct was also perpetrated by Simon and his fellow investigator, at the same time. She alleged that she was taken by Simon under false pretences to the police station and was threatened with dire consequences by the investigators on several occasions. However the plaintiff was not a credible or reliable witness. Numerous statements in her evidence during the trial relating to material facts were proved to be unsubstantiated or false during the course of the proceedings. These include the dimensions of the treasury room, the extent of the gap between the coin safe and the wall, and the threat that she would be raped in custody made allegedly while she was being questioned by Simon and van Rooyen. Her evidence in regard to the conduct of the investigators as described above should thus be treated with circumspection. The facts that were proved about these two event show that Simon and van Rooyen were overzealous in the way thay dealt with the investigation, but not in my view that Simon formed a preconceived view that she was guilty.

[25] As to his credibility as a witness, Simon was at times somewhat evasive but not to the extent that would make me conclude that his evidence about the investigation and the conclusions that he drew from them were not credible. His evasive answers also to a large extent related to events which took place two weeks after he had completed his investigation and formed the opinion that she was guilty. It was the plaintiff's case that Simon formed this opinion as a result of the polygraph test results which were made known on 15 June 2006 and these events took place on 29th and 30th June 2006.

[26] I regard Simon's evidence as to how he formed his opinion that plaintiff had probably taken the money as having been consistent and credible and based on of all the information that he investigated, and this included the polygraph tests. The investigation was methodical and done according to the normal prescripts of an investigator in his position. He concluded that the plaintiff was the last person to handle the money before it was sealed in the bag and was the only person whose actions were not accounted for by being recorded by surveillance cameras, and that she had an opportunity and a possible motive to commit the theft. His conclusions were based on circumstantial evidence from which he drew inferences that were consistent with the facts. I conclude that the plaintiff failed to prove its assertion that the defendant's conclusion was based on no evidence save for the polygraph test. Simon testified that as a result of his investigation he formed an honest belief that the plaintiff had appropriated the funds. No evidence was advanced to show that his conclusion was based on anything false or outside of the investigation nor was his report to the police false in any way. It is therefore accepted as credible.

[27] The next question is whether the conclusion drawn by Simon is reasonable. Simon did not investigate all possible facts. The defendant is only expected to have taken reasonable measures to discover the facts upon which it is to base his conclusion that the plaintiff was guilty of the offence. It is not necessary for the defendant to have tested all relevant facts before proceeding with the prosecution.[8] There must be sufficient facts known to the defendant from which a reasonable person could have concluded that the plaintiff had committed the offence in question and a mere honest belief that the facts amount to the offence irrespective of the legal requirements is insufficient.[9] The information on which the instigator of the prosecution acts need not be true but he or she must believe it to be true on reasonable grounds.[10] Having regard to the nature of the facts of this matter I consider that Simon took reasonable measures to ascertain who might probably have committed the offence. Nothing beyond what he evaluated cried out for

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[8] *Madnitsky v Rosenberg* 1949 (1) P H J5 (WLD) 14.
[9] *Waterhouse v Shields* 1924 CPD 155 168; *Ochse v King Williams Town Municipality* supra 858 ; *Heyns v Venter* 2004(3) SA 200(T)
[10] *Madnitsky* 14

investigation. On the other hand nothing exculpatory in favour of the plaintiff was evident from the investigation. Having concluded that the set of facts he investigated was reasonable and sufficient, the enquiry must turn to whether there were reasonable grounds for instituting the disciplinary enquiry on the basis of these facts. Speculation as to whether the money could have been removed after the bag was left in the safe by the plaintiff and Steynberg or after it was removed from the defendant's Walmer Park Branch is thus excluded from the analysis of reasonable and probable cause.

[28] A reasonable person would have concluded, based on the investigation that it was physically possible for the plaintiff to have taken the money, while Steynberg's attention was averted. The plaintiff was the last to leave the room, 15 seconds after Steynberg and could have concealed it further at this point so as to be able to remove it. It was however argued on behalf of the plaintiff that it was not probable that she would have committed the theft because of the risk of detection by the video surveillance camera in the treasury room. Her uncontested evidence was that she did not know its range of detection. Simon conceded under cross examination that he mistakenly assumed that the plaintiff knew the camera's range. Objectively speaking the video evidence showed that the risk of detection was not high, as could be seen from the video footage showing the camera range and the inattentiveness of Steynberg. The argument made on behalf of the plaintiff was that because she did not know how much of her activity was being monitored by the surveillance camera she would have been deterred from committing theft by its mere presence. Simon on the other hand concluded that it was reasonable to infer that she was aware that the risk of detection was not so great.

[29] The mere presence of a surveillance camera in a room does not in my view necessarily provide a deterrent to theft. Its deterrent value would depend on its position in relation to other objects, including people, in the room. Simon testified that tellers were required to follow procedures when counting money, in particular doing so directly in front of the camera. This in my view would have provided the requisite deterrent. But in this case the camera was mounted on a wall facing obliquely into the room. Directly under it was a work counter which ran along the

full length of the wall under which was situated the coin safe. The height from the ground of the counter was 1,2 m. The work counter was therefore placed in a position which was not directly in front of the camera. Working on the floor at the base of the coin safe was a position even further from being in directly front of the camera, and its deterrent value would have been reduced accordingly, whether the plaintiff knew its precise range or not.

[30] I do not think that Simon's scepticism as to the deterrent value of the camera is unreasonable. His testified that there had been a previous shortage from the preparation of a deposit for collection by SBV attributed to the plaintiff. This statement was not probed in cross examination. Even if this shortage had not been attributable to the plaintiff it demonstrated that the presence of a surveillance camera was not necessarily a deterrent to theft.

[31] A reasonable person considering these facts would have concluded that the security measures and practices of the defendant would not have provided much deterrent to a determined and opportunistic thief. Working on a regular basis with Steynberg would have given her co-worker the opportunity to observe how strictly she enforced dual control and would have enabled her to take advantage of inattentiveness if she chose to do so. Simon's conclusion that the plaintiff had an opportunity to take the funds and probably did so, based on these observations which he made, and the set of facts that he investigated, is not unreasonable. It is the conclusion that a reasonably prudent person would have made and is the most readily apparent and acceptable inference that can be drawn from the circumstantial evidence that he assembled. The plaintiff therefore did not prove that the defendant acted without reasonable and probable cause in instituting the disciplinary enquiry. The fact that at the end of it, the chairperson apologised for her alleged arrest, (a fact that has not been determined to have taken place), does not alter this conclusion. The apology did not relate specifically to the decision by the defendant to institute disciplinary proceedings.

[32] The plaintiff therefore failed to prove that the civil prosecution was without reasonable and probable cause. In the circumstances the cause of action fails regardless of the motive for instituting the prosecution.[11]

[33] In preparing my judgment in this matter it became apparent to me that no argument had been made by the parties regarding the issue of whether the defendant is liable in respect of the infringement and violation of the plaintiff's personality, more particularly her *fama* and dignity arising out of the alleged conduct of Simon in taking the Plaintiff under false pretences on two occasions to the police station. The parties were afforded an opportunity to make further written representations which are considered hereunder. As stated above, it was common cause that the defendant took the plaintiff to the police station on two consecutive days without her permission and without advising her of his intended destination. On the second occasion a search warrant was shown to the plaintiff and thereafter members of the South African Police searched her house. Based on the fact that the plaintiff was not a credible witness I am unable to find that the defendant took the plaintiff under false pretences. The conduct which is common cause will be considered in respect of these further possible delicts.

[34] The defendant argued that plaintiff's case was directed towards a claim based on alleged malicious prosecution, advanced in the opening address, through evidence and in closing argument both in the heads of argument and during argument itself. It was argued that the recognition of any claim other than for damages in consequence of the alleged infringement and violation of the plaintiff's personality, more particularly *fama* and dignity in consequence of being maliciously prosecuted, would not be competent, as it was inconsistent with the evidence as well as the pleaded case. This argument has merit. The plaintiff's pleadings and evidence do not advance a case for any delict other than alleged malicious prosecution. More particularly:

[35] The plaintiff's supplementary heads of argument allege that her rights were infringed as a result of her home being searched by armed members of the South

[11] *Ochse v King Williams Town Municipality* supra 857

African Police services in the presence of her minor children. The defendant correctly argued that this conduct of the SAPS cannot be attributed to the defendant.

[36] It was argued further that plaintiff's dignity was violated as a result of the defendant's conduct in taking her to the police station allegedly under false pretences on two occasions. However no evidence was led by her to prove that she felt insulted in circumstances where a reasonable person would have felt insulted[12]. To be considered an infringement of dignity the subjective feelings of dignity must indeed have been infringed. As stated by Smalberger, JA in *Delange v Costa*[13]

"The plaintiff in order to succeed would have to establish the further requirement that he suffered an impairment of his dignity. This involves a consideration of whether the plaintiff's subjective feelings have been violated, for the very essence of an injuria is that the aggrieved person's dignity must actually have been impaired. It is not sufficient to show that the wrongful act was such that is would have impaired the dignity of persons of ordinary sensitivities.

[37] It was also argued that the defendant's conduct amounted to nothing less than a disguised arrest and therefore that the plaintiff's personality rights were infringed in that there was a wrongful deprivation of liberty. However the impairment of plaintiff's personality by the infringement of her bodily integrity or *corpus* was not pleaded.

[38] It was submitted that as a result of the defendant's conduct, as described above, her *fama* or good name which she enjoys in society was infringed. A defamatory statement is one which tends to diminish the esteem in which the person to whom it refers is held by others.[14] The plaintiff did not plead facts to indicate what statement resulted in the alleged loss of reputation, nor was evidence led that a diminution of her esteem in the eyes of others occurred, as a result of its publication.

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[12] Neethling and Potgieter, *Law of Delict* (5th ed) p 322
[13] 1989 1 SA 857 861
[14] *S A Associated Newspapers Ltd v Schoeman,* 1962(2) SA 613 (AD) at 616-17

[39] Finally the plaintiff's supplementary heads of argument submit that the defendant's conduct infringed her right to privacy. It was submitted that although privacy exists as an independent personality right at common law, our Courts perceive claims under this heading as claims of infringement of dignity. This aspect will be therefore considered as part of the plaintiff's claim for infringement of her dignity.

[40] The right to privacy embraces the right to be free from intrusions and interference by the state and others in one's personal life.[15] Such freedom from interference may require that a citizen be free from unauthorised disclosures of information about his or her personal life.[16] The second connotation of privacy implies that individuals have control not only over who communicates with them but also who has access to the flow of information about them.[17] Privacy can be infringed only by acquaintance with personal facts by outsiders contrary to the determination and will of the persons whose right is infringed, and such acquaintance can take place in two ways only, namely through intrusion (or acquaintance with private facts) and disclosure (or revelation of private facts).[18] Thus a right to privacy encompasses the competence to determine the destiny of private facts. This determination of destiny, in turn, embraces the right to decide who and under what conditions private facts may be made public.[19] Section 14 of the final Constitution establishes the right to privacy as a fundamental right. In order to establish an infringement of the constitutional right to privacy the plaintiff would have to show that she has a subjective expectation of privacy which was objectively reasonable, and which has been violated.[20]

[41] In the present case there is no indication that intrusion into or disclosure of the affairs of the plaintiff took place in any manner which would satisfy the

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[15] D J McQuoid Mason *Privacy* in South African Constitutional law 2nd edition at 38-1 (McQuoid Mason *Privacy)*

[16] *Case v Minister of Safety and Security* 1996(3) SA 617 (CC)

[17] D J McQuoid Mason *The Law of Privacy in South Africa* (1977)p 99

[18] Neethling JM, Potgieter and PJ Visser *Neethlings's Law of Personality* (4th edition 1996) p 243.

[19] McQuoid Mason *Privacy 38-2*

[20] *Bernstein and Others v Bester and Others NNO* 1996(2) SA 751

requirements for invasion of privacy set out above. Nor did the plaintiff lay the basis for her subjective expectation of privacy which was both objectively reasonable and was subsequently infringed, in order to establish an infringement of her constitutional right to privacy. This claim therefore fails.

I make the following order:

[42] The plaintiff's claim is dismissed with costs.

A. Andrews.

A ANDREWS

ACTING JUDGE OF THE HIGH COURT

DATE HEARD	:	11 March 2011
DATE DELIVERED	:	5th 7 JULY 2011

For the Plaintiff	:	ADV BEYLEVELD
Instructed by	:	LAUBSCHER ATTORNEYS
		12 Buckingham Road
		Mill park
		PORT ELIZABETH
		Tel no 041 373 1760
		FAX No 041 373 1774
		REF: MR LAUBSCHER/nj

For the Defendant	:	ADV GIRDWOOD
Instructed by	:	PAGDEND ATTORNEYS
		PAGDENS COURT
		18 CASTLE STREET
		PORT ELIZABETH
		Tel no 041 502 7200
		FAX No 041 373 1774
		REF RH PARKER /djs/CL 119/0001