

Can employers be held liable for malicious prosecution claims arising from internal disciplinary proceedings?

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In *Mahlangu v Minister of Police*, the employer laid charges of assault with intent to do grievous bodily harm against Mahlangu, which resulted in his suspension for approximately four months pending an investigation. The charges were subsequently withdrawn.



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In *Mahlangu v Minister of Police*, the employer laid charges of assault with intent to do grievous bodily harm against Mahlangu, which resulted in his suspension for approximately four months pending an investigation. The charges were subsequently withdrawn.

Ordinarily, this would be the end of the matter and the employee would return to work with no disciplinary record. However, this was not the case for Mahlangu, who claimed that the dubious charges proffered against him by his employer constituted malicious prosecution and instituted a claim for damages against the employer in the High Court for compensation of R625,000.

There is no automatic right to claim compensation in a malicious prosecution claim in South African law. The claimant is first required to prove the damages suffered before any right to claim compensation accrues. Prior to dealing with the merits of the claim, however, the parties agreed that the Court must first determine whether a claim of malicious prosecution may arise from internal disciplinary proceedings or whether such a claim is limited to civil or criminal proceedings instituted in a court of law.

English case law not accepted

The employer, relying on English case law, argued that internal disciplinary proceedings are excluded from the law of malicious prosecution and such a claim is limited to malicious criminal or civil proceedings. However, the Court indicated that while foreign law may have a persuasive value, courts should “avoid an uncritical adoption of foreign law principles.”

In dismissing the English law relied upon by the employer, the Court focused its analysis on the requirements of the South African law of delict, its flexibility and the South African Constitutional order. In doing so, the Court held that the fact that these proceedings were not instituted in a court of law should not be a decisive factor and that South African law adopts a flexible approach in this regard.

The Court went on to state that the charge against Mahlangu, albeit in the forum of internal disciplinary proceedings, nevertheless impaired the good name and dignity of Mahlangu and, according to the Court, it was difficult to see how this type of harm could only manifest itself in the form of criminal proceedings.

Charged under regulations

The Court, therefore, ruled that the charges proffered against Mahlangu constituted a cause of action for malicious prosecution. However, what is crucial is the Court's comments and seeming differentiation regarding the fact that Mahlangu was charged under regulations promulgated in terms of the South African Police Services Act, No 68 of 1995, which governed the disciplinary procedures of the employer.

The Court held the following: "There can be no doubt that the plaintiff was charged departmentally in terms of a (statutory) law promulgated in the form of subordinate legislation as opposed to, for instance, a domestic code of conduct which came into existence by agreement only."

Caution needed even in civil cases

The Court's focus on this differentiation leaves us with a level of uncertainty regarding the position of non-state, private employers whose disciplinary proceedings are not regulated under statute. The Court essentially stated that it is dependent on the facts of each case.

The Court held: "It is important to bear in mind that not all disciplinary proceedings are of a similar nature. It should, therefore, be pointed out that I have attempted to apply the law as it is found to be, or should be, in the case before me, without suggesting that it should necessarily also apply to all other cases of disciplinary proceedings."

Employers with disciplinary procedures regulated by statute/regulations therefore, may be subjected to malicious prosecution claims, depending on the circumstances of each case.

Where non-state, private employers are concerned, the Court's position is unclear and as such, it seems that it may also be possible for these employers to similarly be exposed to claims for malicious prosecution.

Accordingly, both state and private employers are advised, as should always be the case, to first ensure that any disciplinary proceedings instituted against employees are founded upon reasonable and probable cause, along with the necessary evidence, in order to avoid the risk of malicious prosecution claims.

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