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

Case Number: 14205/2014

In the matter between:

G C

Plaintiff

And

J C (born P)

First Defendant

The Minister of Safety and Security

Second Defendant

**The National Prosecuting Authority of
South Africa**

Third Defendant

JUDGMENT DELIVERED ON 21 NOVEMBER 2018

BAARTMAN,J

- [1] In this action, the plaintiff claimed damages suffered pursuant to the laying of alleged false rape, housebreaking and assault charges that resulted in his wrongful arrest, detention, malicious prosecution and defamation. In this judgment, I deal only with the merits of the claim.
- [2] On 18 September 2012, the plaintiff's ex-wife (**first defendant**) laid charges of housebreaking, rape and assault against the plaintiff. Members of the South African Police Services (**SAPS**), represented in these proceedings by the second defendant, the 'Minister of Police', arrested the plaintiff. The National Prosecuting Authority (**third defendant**) proffered criminal charges against the plaintiff but withdrew them on 11 September 2013.
- [3] Prior to their divorce, the first defendant and the plaintiff lived on the Driefontein farm in the Ceres district. After their separation, the plaintiff moved into town while the first defendant and their minor son (**L**) remained on the farm. On 18 September 2012, the first defendant presented with serious injuries to her face and body sustained in an attack the previous night. Apparent from the photographs presented in this matter are the first defendant's swollen and bruised face, bruises on her arms, buttocks, hips and thighs as well as some lacerations.
- [4] The photographs further depict the former marital home in disarray – a broken plate, a wall picture hanging skew, a broken door with the window smashed and the safety gate dislodged. In addition, a pair of jeans and a T-shirt were lying on the floor.
- [5] Later that day at 13h40, Doctor Laubscher (**Laubscher**) examined the first defendant and confirmed the injuries referred to above but was unable to confirm whether the first defendant had also been sexually assaulted. At his insistence, a reluctant first defendant laid the criminal charges referred to above.

- [6] Late that evening, warrant officer Boer (**Boer**) accompanied by other SAPS members arrived at the plaintiff's flat where he was with his girlfriend, Ms T (**T**). The police arrested the plaintiff. At the time, T resided in Worcester and was employed as a waitress at the local casino. The casino complex has a hotel. The plaintiff explained that he and T had spent the night of 17 September at the casino's hotel from where they left for Cape Town early on 18 September.
- [7] The police detained him, although Boer telephonically confirmed that the plaintiff had been at the casino and hotel the previous night. The next day, the police viewed video footage from the casino and hotel complex which apparently confirmed the plaintiff's alibi. However, the first defendant and her neighbour, Mr P (**P**), attested to identical affidavits after viewing the same footage and alleged that the plaintiff was definitely not the person depicted in it.
- [8] Although the state opposed bail, the plaintiff secured his release on bail after an opposed bail application. He appeared in court for several postponements until 11 September 2013 when the third defendant withdrew the charges. Unsurprisingly, the incident and subsequent court proceedings were covered in the media.
- [9] It is against that background that the plaintiff alleged that the first defendant had caused him to be (a) maliciously prosecuted and (b) defamed as follows:

(a) '...20. ...wrongfully and maliciously intended to instigate criminal proceedings against [him] and in fact caused such proceedings to be instituted.

21. First Defendant had no reasonable or probable cause for doing so, nor did she have any reasonable belief in the truth of the information given to the police officials.'

(b) In respect of the defamation, he alleged that the first defendant had *'wrongful and defamatory intended to injure Plaintiff in his good name and reputation;*

intended that the false allegations become known to the general public through court proceedings and publication in the press;

and succeeded in having the false allegations become known to the general public through Plaintiff's court appearances and the press coverage...'

Claim against second defendant

[10] The plaintiff alleged that the SAPS members who had arrested him had acted within the cause and scope of their employment with the second defendant. His action arose because those officials:

'28. ...had no reasonable or probable cause for arresting and detaining [him].

29. by arresting and detaining [him] [SAPS] caused the prosecution and further detention of Plaintiff.

30. ...SAPS officials acted wrongfully in arresting and detaining [him].'

Claim against third defendant

[11] The prosecuting team involved in the plaintiff's prosecution acted within the course and scope of its employment with the third defendant. The plaintiff's claim against the third defendant is based on the allegation that:

'32 In opposing Plaintiff's application for bail and persisting with [his] prosecution for almost a year the prosecution acted without an honest belief founded on reasonable grounds that such refusal and prosecution was justified.

33....the prosecution officials acted wrongfully in prosecuting Plaintiff on false charges.'

The plea

[12] The first defendant pleaded that her allegations were true, alternatively that she held, and still does, the honest belief that the plaintiff was the perpetrator of the crimes committed against her.

[13] The second and third defendants pleaded that they had acted reasonably in the execution of their respective constitutional obligations.

Counter claim

[14] On 13 November 2014, the first defendant instituted a counter claim in which she claimed damages arising from the assault and rape allegedly committed by the plaintiff. In April 2017, the first defendant withdrew her counter claim. The withdrawal was motivated by a report from Doctor Panieri-Peter (**Panieri-Peter**), the first defendant's treating psychiatrist at the time, in which she advised that '[the first defendant] will be unable to meaningfully testify in court in a matter which relates to [plaintiff]'. That opinion prompted the first defendant's legal team to advise her to withdraw her counter claim.

[15] The plaintiff did not testify; Panieri-Peter, however, did testify. Below, I deal with the objection to her evidence and the evidential value if any thereof.

The crime scene

[16] I deal with the evidence to the extent necessary for this judgment although I have considered all of it. N F (**F**), the first defendant's friend, received a call from L at approximately 06h00 on 18 September 2012. L told her that something terrible had happened to the first defendant who then came on the phone and asked F to fetch

L. She responded immediately. She found the house in disarray and the first defendant naked in bed. She was shivering and had apparently been assaulted. On a question from F whether it was 'him' (their manner of referring to the plaintiff) who had assaulted her, the first defendant 'acknowledged'. F further said: '[first defendant] could really never say [plaintiff's] name'. The first defendant urged F not to tell anybody about the incident.

[17] F contacted her husband who collected L. She went to P, the first defendant's neighbour referred to above, who contacted Doctor Laubscher when the first defendant refused to go to the police. F accompanied the first defendant to the doctor. Major Luff (**Luff**) was the first police officer on the scene and he confirmed the scene as depicted in the photographs referred to above. He contacted Boer, who was in charge of the Sexual Violence and Children's unit.

[18] F and the first defendant went back to the scene after the visit to the doctor where they met Boer. In addition to the other disturbed items referred to above, there was wire around the lounge table. Boer confirmed the condition of the house as depicted in the photographs, referred to above.

The plaintiff's case

[19] The plaintiff attributed the breakdown of their marriage to interference from his in-laws and neighbours. He denied that he spent his days either watching television or dressing up for town or the casino while the first defendant ran the farm. Importantly in this matter, the plaintiff denied that the marriage had been characterised by his abusive and controlling behaviour.

[20] On 24 July 2012, Cloete J delivered judgment in the divorce action. The plaintiff was disgruntled about the divorce proceedings, therefore he arranged to meet the judge president on 18 September 2012 at 10h00. T was to accompany him to Cape Town. She, however, had

to work on 17 September on a shift ending at 21h00. Therefore, they arranged to stay at the casino's hotel on 17 September and travel to Cape Town the next morning. The plaintiff said he left Ceres at approximately 17h30 and arrived in Worcester shortly before 21h00. He had a light supper and gambled until T completed her shift.

[21] They then went to reception and booked a room for the evening. Thereafter, they went to T's home and collected her clothes. Back at the hotel, T rested in the room while the plaintiff went back to the casino until late evening. The next morning, the couple left for Cape Town where the plaintiff met the judge president. Thereafter they spent time in Cape Town and returned to Ceres where the police found them. When confronted with the first defendant's allegations, the plaintiff produced the hotel receipt as proof that he had slept in Worcester the previous night. Nevertheless, he was arrested and only released on bail 18 days later.

[22] T confirmed that version. Nevertheless, the police detained and formally charged him as indicated above. The plaintiff said that after Boer viewed the video footage, he accepted the plaintiff's alibi.

[23] The plaintiff said he met Luff, the first policeman to arrive at the crime scene, in the local Spar after his release. Luff then told him that he had lost respect for the first defendant and P as follows:

'I was the first one there, Johnny told me that you placed her on the table, tied her up...I have 25 years in the police...I looked at the surface of the table, it was full of dust,...the glass was outside the house, not inside,...if you break the window from outside the glass has to be inside the house, not outside...I have no more respect for these two...'

[24] The plaintiff was recalled and testified that after he had testified, he met the first defendant as she was driving into the mall in Ceres. The plaintiff was driving out. He said that she had looked at him in a

challenging manner, mocking him. He obtained a video from the Pick n Pay depicting the first defendant doing some shopping. He said that she appeared calm after encountering him.

[25] T confirmed the plaintiff's version in material respects. She started her shift at 18h00 and ended at 21h00. They collected her clothes, booked into the hotel and the plaintiff left her in the room to go back to gambling. At approximately midnight, she called the plaintiff. He was at reception and arrived soon after she called. When the police confronted him, she tried to assist him as best she could.

[26] Prior to the incident, she recalled that after the divorce, the first defendant had come to the plaintiff's flat to discuss the transfer of a motor vehicle to him. The first defendant returned with some documents while the plaintiff was running an errand and left the documents with her. T said that their conversation was cordial and that the first defendant had wished her a pleasant day as she left.

[27] John Saul (**Sauls**), the plaintiff's attorney at the time of his arrest, had represented the plaintiff in domestic violence related matters prior to the incident. On 18 September 2012, the plaintiff contacted Sauls after the police had apprehended him. When Sauls arrived at the police station, Boer explained the allegations against the plaintiff were that between 20h00 and 22h00 the previous night, he had attacked and raped the first defendant.

[28] The plaintiff informed the police that he had spent the night at the casino hotel in Worcester. He further produced the hotel receipt from which it was apparent he had paid with a card. Boer called the hotel to follow up the plaintiff's alibi. It was confirmed. Therefore, Sauls told Boer that an arrest under the circumstances would be unlawful. Boer was not convinced.

[29] Instead, he indicated that he wanted to search the plaintiff's flat. The plaintiff agreed. Once at the flat, the police in the company of Sauls,

the plaintiff and T searched the flat and the plaintiff's car. After the search, the police detained the plaintiff until his release on bail.

- [30] Sauls spoke to Boer after he had viewed the video footage. Although Boer did not discuss the footage, Sauls was adamant that Boer told him that he had nothing to worry about. Sauls said although the police had all the evidence at an early stage, which confirmed the plaintiff's alibi, the state still vigorously opposed bail.
- [31] Isaia Goshupelwang (**Goshupelwang**) had been in the security industry since 1993. At the time of the incident, he had been with the casino's security company for 15 years and security manager at the casino for 5 years. He described the hotel and casino as two separate buildings. At the time, he was responsible for the outside security cameras. They were monitored around the clock from a central control room.
- [32] Although he was not responsible for the installation of the cameras, he was sure that the date and time reflected on the footage were accurate. He worked from 08h00 to 17h00 and regularly entered the control room to check the time and date reflected on the monitors against his own. He has never found the cameras out of sync. In addition, there was a register, an 'occurrence book', in the control room in which the staff monitoring the cameras record when they check the system. Any malfunction would have been reported to him.
- [33] The plaintiff was a regular at the casino and known to him. The room the plaintiff booked had no burglar bars and the camera facing that window was not working at times relevant to these proceedings. However, a second camera facing the road would have detected the plaintiff leaving the premises. He viewed video footage relevant to these proceedings and was convinced that the plaintiff was depicted on it inside the hotel and casino area as alleged.

Defence case

The first defendant's case

[34] Laubscher was the part-time district surgeon of Ceres at the time of the incident. The first defendant was known to him as a patient from his private practice. On 18 September 2012, he examined her. She alleged that the plaintiff had raped and assaulted her on 17 September 2012 at approximately 22h00. The first defendant had bathed and changed her clothes prior to the examination. The doctor completed the required medical report, J88. The first respondent was naked during the examination. He recorded the following injuries:

'5. 1x1cm Bruise R nasal bridge, Ecchymosis, L upper eye lid and swelling and medial L lower lid, 6x8 cm Bruising L upper arm posteriorly

1x1 cm bruise L elbow, 8x Scratches over L&R back

Bruise 1x2 cm R para-lumbar, 2x Bruises R scapula [1x2cm & 2x2cm]

2x Bruises R upper arm posteriorly [6x3cm x2], 2x Bruises both [ASIC Anterior Superior Iliac Crests] 2x3cm each, Both wrists swollen and bruised with neuropraxias to both hands, 15x6cm bruise L upper thigh, 8x5cm bruise L medial side of the knee, 6x3cm bruise R knee medially

Both buttocks bruised, [Was anxious and did not speak much],

8. Assaulted.'

[35] Laubscher said that the first defendant's bruising was 'quite severe'. He was unable to determine whether the first defendant had been sexually assaulted. He said she might have suffered a 'hard blow' to her genital area. However, her anal area was more 'red than normal'.

- [36] Despite her injuries, the first defendant did not want to lay criminal charges. The first defendant was sure that the plaintiff would not have left any evidence as he was very meticulous. However, Laubscher explained that he was ethically bound to report the matter.
- [37] Tanya Van der Spuy (**Van der Spuy**), a clinical psychologist, treated the first defendant from 25 July 2012 to 1 October 2012, after her divorce. Van der Spuy said that the first defendant had complained of abuse during the marriage and displayed 'intense symptoms of anxiety (which at times bordered on panic) when attempting to recall and recount her experience of her relationship with [plaintiff].'
- [38] Van der Spuy, confirmed her report in which she said the following:
- '...Prior to the alleged rape on 17 September 2012 I diagnosed [first defendant] with Post-traumatic Stress Disorder (PTSD). At that time the most prominent features were severe anxiety symptoms and an almost complete absence of appropriate effective response to the experiences she was recounting (emotional bluntedness), as well as avoidance of activities and situations reminiscent of the trauma....*
- In my opinion [first defendant] suffers from Post-traumatic Stress Disorder, the symptoms of which are consistent with exposure to severe and ongoing threats to her physical and emotional safety and integrity.'*
- [39] P, a farmer since 2005, initially had a neighbourly relationship with both the first defendant and the plaintiff. However, in 2006, the plaintiff and he had a fall out and never made up. P said that the first defendant was the farmer, therefore he had a closer relationship with her as they shared farming interests.
- [40] He said that the plaintiff mainly watched television and did some welding – building useless things. He said that the plaintiff usually got up at 11h00 and with some amusement indicated that the plaintiff would then 'dress well' for town. The plaintiff is Italian and P a South

African farmer. I accept that he does not appreciate the plaintiff's dress sense. P recounted incidences in which the plaintiff was abusive to the first defendant and concluded that she was afraid of him.

[41] He confirmed that he had viewed the video footage allegedly depicting the plaintiff in the casino and hotel on the night of the attack. He was adamant that although T was depicted in the footage, the man with her was not the plaintiff. He deposed to an affidavit on 27 September 2012 in which he said: (own translation from the Afrikaans)

'3. The reasons I say that it was not the accused:

- 1. The person has an entirely different gait*
- 2. The style, cut and colour of his hair is entirely different*
- 3. His physique is different*
- 4. His hand movements are different to what I am familiar with*
- 5. His forehead appears larger*
- 6. The facial expressions are different*
- 7. This person was wearing permanent spectacles which are larger than the reading glasses which he usually only uses for reading.'*

[42] L P (P2), the first defendant's sister, described the first defendant as an extrovert and happy person at the time of her marriage to the plaintiff in 2004. Initially the plaintiff was also very friendly – he related tales about his work on the cruise ships as well as about his family in Italy and Colombia.

[43] However, shortly after the marriage, things changed for the worse. The plaintiff became unfriendly and the first defendant made excuses

for his behaviour and became nervous. The plaintiff would be easily angered by insignificant things and become red in his face and scream. P2 often stayed over at the farm and saw the first defendant taking responsibility for the physical farming while the plaintiff was lying in bed, watching television or gambling. There was no love lost between P2 and the plaintiff and she made no attempt to hide her animosity towards him. She received a telephone call from the first defendant's friend informing her about the attack and further:

'...that my sister just wanted us not to sleep at home...because she had been threatened by [plaintiff] that he was going to do something to us. He specifically told her that he can see the people... through the brick holes in our wall by my parent's house...So we slept at other places.'

[44] Mr Braun, primarily the first defendant's friend, confirmed the plaintiff's tendency for idle living while the first defendant took responsibility for everything else.

[45] The first defendant agreed to testify after the plaintiff's counsel gave the assurance that the plaintiff would not be in Cape Town. On the day, she entered court accompanied by Panieri-Peter and Ms Hesse, her junior counsel. She hesitantly approached the witness stand – she was pulling back while Panieri-Peter and counsel encouraged her forward. The usher walked up to assist which seemed to scare her. Once in the witness box, she responded to my enquiring about her language of choice as follows: 'It doesn't matter English or Afrikaans, I can't – when I get upset I can't speak properly.'

[46] When I tried to pacify her, she responded:

'Honestly, I – it's not a choice, I can't talk, words doesn't come out of my mouth properly when I'm upset, it doesn't come out of my mouth properly when I'm upset, it doesn't matter which language, it's just I can't speak.'

[47] Mr Olivier SC, the first defendant's counsel, then asked for the matter to stand down and indicated that according to Panieri-Peter, the first defendant was not fit to testify. He continued: *'Can I ask that she stands down, I am going to call Doctor Panieri-Peter as a witness and perhaps we can attempt at a later stage.'*

[48] Panieri-Peter was reluctant to testify because she was the first defendant's treating psychiatrist but, in the circumstances, felt obliged to try to assist the court to understand the first defendant's reluctance or inability to testify. She said that on 17 September 2012, Mr Brand, the facilitator involved in the contact arrangements between the plaintiff and L, requested her, as forensic psychiatrist, to assist the team involved in the contact arrangements. They arranged to meet the following week.

[49] However, the first defendant was attacked prior to the meeting and Panieri-Peter was requested to see the first defendant on an urgent basis. On 21 September, she did and has continued to treat the first defendant to date. She confirmed her report, dated 16 February 2017, in which she said: *'I am in no position to comment on the facts of the case, other than to say that from a psychiatric perspective I have no doubt whatsoever that [first defendant] was attacked by someone, and that she was utterly terrified for her life and brutalised both physically and mentally.'*

[50] She concluded as follows:

'6. Regarding the evaluation of belief, I record the following:

6.1 At no point is it my intention to attempt to usurp the role or function of the Court in this matter.

6.2 As such, I am in no position whatsoever to pronounce upon the factual correctness or otherwise of any allegations that have been made – in particular, with reference to the attack upon and rape of my patient.

6.3 That notwithstanding, however, the evaluation of belief very much forms part of a psychiatric assessment in clinical situations. Belief is part of thought process, and the evaluation thereof is part of the mental state examination conducted by specialist psychiatrists in their daily work. Understanding the ideas, thoughts and beliefs of a person helps make sense of their mental state. Assessing belief forms part of the assessment of a psychosis or an abnormal state of mind. I record the following comments:

6.3.1 Evaluation of belief is something that involves assessing whether the idea is, firstly, bizarre or non-bizarre.

6.3.2 Evaluation of non-bizarre beliefs is more difficult and specialist psychiatrists are trained to evaluate beliefs in relation to other factors relating to thought, such as: (i) form of thinking; (ii) perceptual abnormalities; and (iii) other signs or abnormalities of thought.

6.3.3 Ideas held, that are echoed by the ideas of others, help to determine whether thoughts are considered delusional or not. Delusions also usually occur in context with other abnormalities of thought.

6.3.4 My psychiatric opinion regarding the beliefs of Ms C, lies, therefore, as part of the evaluation of thought form and content, as part of a psychiatric assessment, that has been done from the time I first met her and has been done repeatedly throughout the five years in which she has been my patient.'

[51] In an addendum, dated 12 June 2017, she concluded:

'18.3 While I am not able to comment on the facts of the case, I equally have no doubt whatsoever that Ms C believes the perpetrator

of her rape and attack to have been her ex-husband. If that cannot be so, then it must have been that the experience she suffered on that night was similar in some ways to other experiences she has suffered, or that there were aspects of the experience that caused her to believe it to be so. Ms C is absolutely terrified of her ex-husband. She was even too terrified to lay charges at first. I am told that she was firmly encouraged to do this by the medical attendant to her physical injuries. Psychiatrically she avoids her ex-husband. She is afraid of him. At no point have I seen signs or symptoms of psychosis, and I am not of the psychiatric opinion that her ideas are delusional in nature. If her beliefs cannot be true, as deemed by the Court, then it is my psychiatric view that she has a mistaken belief, rather than any other psychiatric phenomenon or malicious intent.'

The second and third defendants' evidence

- [52] Boer confirmed that he had visited the scene and spoken to F and the first defendant before he arrested the plaintiff. Boer obtained the plaintiff's address and a photograph from the first defendant. Before he went in search of the plaintiff, Boer received the first defendant's A1 statement as well as the J88 medical report. He detained the plaintiff although he had telephonically confirmed the plaintiff's alibi with the hotel in Worcester. On 19 September, he viewed the footage with constable Maziza (**Maziza**) both thought that the plaintiff was depicted in it.
- [53] On 20 September 2012, the plaintiff made his first appearance in the magistrate's court where the matter was postponed to 27 September for further investigation. On 26 September, the first defendant and P viewed the footage and made identical affidavits in which they claimed that the plaintiff was not depicted in the footage. Boer was adamant that he had reasonable cause to arrest and detain the plaintiff.

- [54] The first defendant appointed a private investigator and an attorney, Mr John Riley (**Riley**), to assist her in this matter. Boer gave them regular feedback pertaining to the investigation.
- [55] The prosecution similarly alleged that it was acting reasonably in pursuing the prosecution. Mr Bruiners (**Bruiners**), the prosecutor in the bail application, cited the seriousness of the offence and the fact that the first defendant feared for her life as reasons for opposing bail. He considered a postponement for 7 days from date of the plaintiff's first appearance for a schedule 6 offence as standard procedure. In his opening address in the bail proceedings, Bruiners told the court that 'the only information about the time [of the offence] that's available to the State at this point was between 20h00 and 06h15'. However, at the time, he was aware that according to the J88 medical report, the first defendant had indicated the time of the offence as 22h00.
- [56] The matter was referred to the regional court for trial. Mr Daniels (**Daniels**), a regional court prosecutor, attempted to arrange a consultation with the first defendant. He was unable to as Riley requested that a female prosecutor attend to the matter. Daniels was concerned about the merits of the matter as he thought the plaintiff's alibi was water-tight. He thought the discrepancy about the time of the offence should be clarified in a consultation with the first defendant. Ms Wagenaar (**Wagenaar**), the regional court control prosecutor, said that her office made 2 unsuccessful attempts to consult with the first defendant.

Evaluation

- [57] The plaintiff testified with great emotion. He was adamant that Luff had told him that the glass had been on the outside of the house and that the indications were that the house breaking had been staged. Curiously, the plaintiff admitted that the first defendant had sustained

serious injuries as she alleged. He denied that the first defendant had to bear the brunt of their farming operation, despite independent evidence to the contrary. He went to great lengths to tarnish the first defendant, her family and the neighbours. He was often dramatic followed by an emotional display. However, his evidence that he was at the casino at approximately 20h30 must be accepted. It is corroborated by the video footage and T's evidence. His tendency to exaggerate, however, impacts on his credibility.

[58] I accept that T was a credible witness. She was honest and there is nothing improbable in her version. I accept that the plaintiff entered the room with her at approximately 22h00. When he left the room, he told her that he was going back to the gambling tables. He returned later after she called him. Similarly, she gave a clear account of her interaction with the first defendant and did not exaggerate.

[59] Sauls and Goshupelwang were both credible witnesses. Similarly, Laubscher was a credible witness who was certain that the first defendant had been assaulted but not sure about the allegations of sexual assault. He described her mental state as indicated above; there is nothing to gainsay it. I accept that the first defendant told him that incident had occurred at 22h00 on 17 September 2012.

[60] F gave her evidence in a straightforward manner; she candidly admitted that the first defendant did not volunteer the identity of her attacker. She also admitted that the first defendant took a bath despite her advice to the contrary.

[61] Both experts, Van der Spuy and Panieri-Pieter, treated the first defendant. Their evidence is seen in that light and lacks the independence required of an expert. However, their observations of anxiety and inability to articulate traumatic events involving the plaintiff are relevant. These observations were made prior to these proceedings and I am persuaded that the observations are reliable.

Laubscher made similar observations. F said that the first defendant could never really say the plaintiff's name.

[62] Both parties relied on the findings of the magistrate, dated 12 May 2011, in a domestic violence matter between them. That court described the application as:

'...[the plaintiff] seeks to set aside the order, he consented [to] on the basis that he is in fact a farmer and the owner of the farms, that [the first defendant] rather leave the farm, move to town to look after their 5-year-old son and let him continue with the farming activities....'

[63] That court concluded:

'...What further transpires, in the testimony of [first defendant] is that [the plaintiff] is obsessively jealous and follows her everywhere she goes. ...

From the evidence it is clear that there is no physical abuse towards [the first defendant]. ...The evidence of [first defendant] is that when the [plaintiff] gets mad and is verbally abusive towards her, she must rather leave his premises for fear of being assaulted by him. She and her child had to leave the house on occasion to seek refuge with friends due to fear of being physically assaulted.

The evidence shows that the [plaintiff] is mentally and psychologically, emotionally and verbally...abusive and expresses his love by sending [first defendant] sms.

The conduct of the [plaintiff] falls squarely into the definition of this Act. His conduct is leading to unwanted stress...harm to such an extent that [the first defendant] testified that her hair is starting to fall out and that she is unable to sleep properly. She lives in constant fear.

... [the first defendant] made out a strong case of family violence towards her as we find in the Act.'

- [64] The plaintiff relied on the judgment in support of his evidence that he did not assault the first defendant. However, no reasons were proffered why the finding that the first defendant had made out 'a strong case of family violence towards her as we find in the Act' should be rejected. Curiously, the plaintiff criticised Panieri-Peter's reference to first defendant's allegations of '...terrible things (that) happened to her before within her marriage' and 'horrificing experiences that are certainly very congruent with one's understanding of domestic violence'. The domestic violence court's findings support the observations.
- [65] The objective findings of symptoms generally associated with anxiety are persuasive. These findings were made before this litigation was launched. Panieri-Peter met the first defendant days after the attack relevant to these proceedings and her observation on that occasion is supported by Laubscher and F. The abusive behaviour which led the magistrate to conclude that the domestic violence interdict should remain in place had a debilitating effect on the first defendant.
- [66] Luff was a credible witness and testified without any hesitation. I have considered that he has experience in testifying; nevertheless, I am persuaded that his version is to be accepted where it differs from the plaintiff who tends to exaggerate and dramatise. Luff's version accords with the probabilities. It follows that I accept that Luff did not tell the plaintiff that he thought that the housebreaking was staged.
- [67] Boer was taken to task for the manner in which he executed the plaintiff's arrest. I accept that Boer went to arrest the plaintiff. Prior to the arrest, he consulted with the first defendant, F and P and saw the crime scene. He admitted that he had confirmed the plaintiff's alibi in respect of his stay at the hotel before detaining him but after his arrest. He also admitted that he was satisfied that the plaintiff was depicted on the video footage. Boer was a credible witness.

[68] The prosecutors, Ms Wagenaar, Mr Bruinders and Mr Daniels, were credible witnesses. I deal with the criticism of their methodology below.

Should the hearsay evidence be allowed?

[69] The first defendant did not testify; however, her complaint to the police, the A1 statement, was annexed to her plea. The request is to have that statement admitted in terms of section 3 of the Law of Evidence Amendment Act, 45 of 1988. The section provides:

‘3. Hearsay evidence – (1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless –

- (a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;*
- (b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or*
- (c) the court, having regard to –*
 - (i) the nature of the proceedings;*
 - (ii) the nature of the evidence;*
 - (iii) the purpose for which the evidence is tendered;*
 - (iv) the probative value of the evidence;*
 - (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;*
 - (vi) any prejudice to a party which the admission of such evidence might entail; and*

(vii) any other factor which should in the opinion of the court be taken into account,

is of the opinion that such evidence should be admitted in the interests of justice.'

[70] These are civil proceedings; the first defendant's counsel described the purpose for the admission of the evidence as follows:

'...to describe the prevailing facts and circumstances during the attack on First Defendant, most of which, in particular the consequences of the attack, are confirmed by other witnesses, with regard to the condition of the house, Plaintiff's injuries and her emotional state.'

[71] Mr Potgieter SC, the plaintiff's counsel who appeared with Mr Maartens, submitted that the affidavit was before court and was referred to in the evidence, therefore there was no reason to admit it as hearsay evidence. In addition, so the submission went, the first defendant's 'charade' in the witness box should not be confused for anything else.

[72] Generally, it would be prejudicial for the plaintiff to be unable to cross-examine the first defendant. I consider that the plaintiff has had the first defendant's affidavit for some time – at least since 21 October 2014 when the first defendant filed her plea. The plaintiff had the opportunity to rebut the allegations and in fact did so. The plaintiff now accepts that the first defendant 'sustained extensive injuries on the night of 17/18 September 2012 on the farm Driefontein, Ceres'.

[73] As indicated above, on 12 May 2011, in a domestic violence matter, the magistrate found: (it bears repeating)

'The evidence shows that the [plaintiff] is mentally and psychologically, emotionally and verbally ...abusive and expresses his love by sending [first defendant] sms'.

The conduct of the [plaintiff] falls squarely into the definition of this Act. His conduct is leading to unwanted stress...harm to such an extent that [the first defendant] testified that her hair is starting to fall out and that she is unable to sleep properly. She lives in constant fear.'

- [74] It is against that background that the first defendant's appearance in the witness box must be viewed. In 2011, she was already so stressed and scared that she was losing sleep and hair. I bear in mind that in November 2012, Van der Spuy diagnosed the first defendant with post-traumatic stress disorder; her observations at the time bears repeating;

'the most prominent features were severe anxiety symptoms and an almost complete absence of appropriate affective response to the experiences she was recounting (emotional bluntedness), as well as avoidance of activities and situations reminiscent of the trauma....'

- [75] On 18 September 2012, hours after the attack, Laubscher noted that the first defendant *'Was anxious and did not speak much.'* Soon thereafter, Panieri-Peter made the following observation:

'So she was brought to my offices and really it was not possible to get a history from her. It was quite clear in the moment that she was both physically and mentally extremely unwell at that time...She was trembling and she couldn't really speak.'

- [76] Laubscher is an expert and gave credible evidence. I gather from his evidence that the first defendant was reluctant to lay criminal charges. Van der Spuy's observations were made prior to the attack but are relevant as they suggest a history of anxiety in relation to her relationship with the plaintiff. The criticism against Panieri-Peter as an expert witness is well founded: as the first defendant's treating psychiatrist for many years, she must lack the independence required of an expert. However, that does not mean that she could

not testify about her observations described above. Laubscher made similar observations days earlier.

[77] I noted that the first defendant appeared as if mentally challenged, like a frightened 16-year-old. After the first defendant left the witness box, I enquired whether she had to drive home – I did not consider that a good idea. I am persuaded that the first defendant was too anxious to testify on the day. Mr Potgieter submitted that if she was unable on the day, which was not admitted, she could have testified later and even from outside the court building. In theory, the submission is irrefutable.

[78] However, one has to consider the first defendant's mental state in May 2011 as indicated in the domestic violence judgment referred to above – hair loss and sleep deprivation due to stress. She has been in therapy since this incident. I have also considered the video of the first defendant ably doing her shopping after she encountered the plaintiff at the entrance to the shopping complex. Mr Potgieter submitted that she appeared normal despite having encountered the plaintiff. The significant aspect is that the plaintiff posed no threat to her as he was leaving the complex and there were people in the mall.

[79] The symptoms of anxiety were observed only in relation to traumatic interactions with the plaintiff. In those instances, she displayed '...an almost complete absence of appropriate response to the experience'. Ordinarily, she was able to function normally as a mother and a farmer. I am persuaded that her reaction in the witness box was not a 'charade'; instead, it was a reaction to the traumatic experiences between her and the plaintiff.

[80] I have also considered that much of the content of the affidavit has been corroborated by police officers in the course of their duty. It is also not the plaintiff's case that the assault on the first defendant was fabricated. I am persuaded that, in the circumstances of this matter, it

is in the interest of justice to allow the evidence in terms of section 3 (1) (c) of the Act. It is important to bear in mind that the plaintiff dealt with the evidence sought to be admitted. In the circumstances of this matter, the interest of justice trumps the perceived prejudice as the former represents a legislative prescript, broad public interest and the *boni mores*.

[81] The first defendant said the following in the affidavit: (own translation from the Afrikaans)

'On Monday, 2012-09-17 at 18h30 she was unsettled because her dogs barked continuously. L went to bed at 20h00 and she went to check whether the gate was closed. En route she met David and Poon Malherbe and told them about the dogs and her unease. David undertook to check the gate. I parked the 'bakkie', locked the doors and lit a fire. I had a shower and watch television where I fell asleep. I woke up hearing something break. The television was still on but the fire was out therefore it must have been late. I was not afraid as I thought that the wind had blown something over. I went towards the kitchen because that was where the noise came from.

The next moment, my ex husband, G, pushed me against the kitchen table. He wore a very smooth material jacket and a cap on his head. I screamed because I got a fright. I cannot remember what he said in response.

He pulled me down the passage with my arms behind my back. He trampled on my thighs while I was lying on the floor. He was very aggressive. I did not fight back because he would just have become more aggressive. He ripped my t-shirt off. I also wore a shirt which he was unable to tear and, in his attempt, to tear he choked me. I am unable to recall everything.

When I was on the bench in front of the fire-place he said that I stole his life. That it was my fault that he was unable to see his child. That

people treated him as a criminal. He used to hurt me with sex when he accused me of something. He had sex with me. I said nothing.

He had mad eyes. He looked at me as if he was going out of his mind. I fell off the bench. I saw my cellular telephone and reached for it but it fell. He pushed me against the wood and hit my head against the cement slab. The slab was level with my hips and he pushed my head against the slab. He penetrated my anus with his penis. I tried to get my phone.

It was very chaotic. I fell over the chair onto the ground onto stiff wire. He dragged me to the table in the lounge. I was on my back on the table with my lower limbs hanging off the table. He choked me. He tried again to have sex with me. He wore denim that hurt my legs. I held my legs together. I started to panic. Something fell off the table and broke. I hoped that somebody would hear. I fell off the table and sat on the ground. He tied my right foot to the right table's right leg. There was a bundle of wire on the table. He also tied my right hand with the wire. It was strange inflexible wire. He struggled to tie me with it. He tied both my hands. One hand was tied to the top of the table and the other to the side of the table. He stared into my face. I looked away. He said that he would hurt my little sister if I told anybody what had happened. He said my parent's wall had holes in it and that he could see through it. He threatened that he would hurt us if I told anybody.

He left me tied to the table. He left. He did not come with a motor vehicle. He must have walked to my house. He could drive to the house.

I waited a while so that he could go. Then I called my son. He switched on the light. He gave me my cellular telephone. I pressed the cellular buttons with the hand on the table. I was unable to get my hands together. I gave the phone to L.

I called F F. L got onto the table to lift the wire. He struggled. He managed to untie one hand and I was then able to untie the other. My son covered me with a blanket while he struggled to untie the wire. He took a long time to untie me. When I was freed, L and I laid on the bed. I waited for my friend. At approximately 06h45, my friend F arrived on the farm.

F took me to her house.'

Discussion

[82] Counsel for the plaintiff submitted that the first defendant's 'A1 statement was a fabrication insofar as it identified the Plaintiff as her attacker, and, by logical inference, ...laid false charges ...knowing that they were false, ...would cause...arrest and prosecution...Plaintiff would go to prison'. That, so the submission went, satisfied the requirements for an action based on malicious proceedings and defamation.

The applicable legal principles

[83] The plaintiff bears the onus to prove on a balance of probabilities that¹:

- (a) one or all of the defendants instituted the proceeding;
- (b) in so doing, they acted without reasonable and probable cause;
- (c) acted with malice/ *animo injuriandi*; and that
- (d) the prosecution failed.

[84] The prosecution failed in that it was withdrawn. It is common cause that the first defendant set the proceedings in motion when she laid

¹ Nel v Baloyi 2005 JDR 804 (T) at para 20 ; *Relyant Trading (Pty) Ltd v Shongwe* 2007 (1) All SA 375 (SCA) at para 5.

criminal charges. It is in issue whether she held 'a genuine belief founded on reasonable grounds in the plaintiff's guilt.'² F's evidence is important in that it clearly shows that the first defendant did not intend to lay criminal charges against anyone. Neither was she blaming anyone for the attack. It was F who probed and enquired whether the plaintiff had been the perpetrator.

- [85] It is also apparent from the first defendant's A1 statement and the J88 that she was not sure about the time of the attack. It must have been after 20h00 as that is when L went to bed. The first defendant woke up L after her attacker left and the call to F followed shortly thereafter. There is objective evidence that the first defendant was tied to the table with stiff wire that injured her hands and was immobile until L rescued her. If the attack occurred at 22h00 and lasted for approximately 30 minutes, the first defendant must then have waited several hours before calling L. Although, the condition of her hands suggests that she was tied for some time, it cannot with any degree of accuracy be an indication of the time of the attack. Laubscher said the following about the injury to first defendant's hands:

'...Both wrists were swollen and bruised with neuropraxis to both hands. ...[an] injury that you sustain when blood constriction is stopped or decreased in [an] area, and you find that you get partial damage to the nervous function of the hands. ...

The hands were so badly squashed, that the hands were numb and she couldn't operate them properly there was decreased power and, ...sensation in her hands [at the time of the examination]. ...my opinion is that she must have been tied for quite a while.'

² *Beckenstrater v Rottcher and Theunissen* 1955 (1) SA 129 (A) at 136 A–B.

- [86] The possibility of the plaintiff leaving the hotel room after he came in at approximately midnight was not canvassed with T nor was she confronted with the possibility that the plaintiff was not the person with her in the video footage, although, P testified that T was with a third party in the footage. I accept that the plaintiff was the person with T depicted in the footage. This is a civil matter; it must follow that on a balance of probabilities, the plaintiff has proved that he could not have been the attacker.
- [87] I have considered the first defendant's condition when F and Laubscher saw her after the attack. Both confirm that she did not want to lay criminal charges. Yet, she ensured that F warned her family of the plaintiff's threat against them. So urgent was the message that her family did not sleep at their home that night. The probability of the first defendant deliberately putting her family through that trauma just to get at the plaintiff is not borne out by the evidence. In fact, the evidence indicates that the first defendant was likely to avoid unpleasant encounters involving the plaintiff. This is also borne out by the fact that she did not volunteer the identity of her attacker.
- [88] P2 saw the first defendant a day after her family spent the night with friends due to the presumed threat. She described the first defendant as 'unrecognisable, extremely swollen, pitch black and blue all over'. Despite being rational and intelligent, P2 had no hesitation in admitting that she still believed the plaintiff had been responsible for the attack on the first defendant.
- [89] Mr Potgieter submitted that 'it is simply not possible that [first defendant] could be assaulted, abused and spoken to by another man for half an hour...and be under the honest impression that it was her ex-husband'. That submission is premised on the 5-year marriage that preceded these events. However, the plaintiff's counsel rejected that same reasoning when suggesting that Boer and Maziza

were better placed to identify the plaintiff from the video footage as they had seen him shortly before the identification.

[90] The circumstances under which the identification was made are important. It was at night, the fire was out, and the first defendant was surprised by her attacker who wore a cap. She suffered a horrendous ordeal. L switched the light on when he came into the room. Therefore, I assume, without finding, that the lighting was poor at the time of the attack. It is apparent from P2's evidence that the first defendant's family associates the plaintiff with all or most of the first defendant's calamities. F did too. It is apparent from the evidence that the first defendant does too. I also consider that when he testified, P was still convinced that the plaintiff was not depicted on the video footage. Clearly, the first defendant is not the only one, despite the evidence to the contrary, who believes that the plaintiff was the perpetrator of the attack on her.

[91] I accept that when she laid the charges, the first defendant believed that the plaintiff was her attacker. In the circumstances of this matter, that belief was reasonable. The plaintiff has to prove that the first defendant acted without 'reasonable and probable cause'³. He did not.

[92] In the circumstances of this matter, I am unable to find that the first defendant acted with malice/*animo injuriandi*, which Swain JA⁴ described as:

³ *Beckenstrater v Rottcher and Theunissen* 1955 (1) Sa 129 (A) at 136A–B: 'When it is alleged that a defendant had no reasonable cause for prosecuting, ...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'. See also: *Relyant Trading (Pty) Ltd v Shongwe and Another* [2006] ZASCA 162; [2007] 1 All SA 375 (SCA) at para 14.

⁴ *Woji v Minister of Police* 2015 (1) SACR 409 (SCA).

'[35] ...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.'

- [93] The evidence simply does not establish that the first defendant subjectively foresaw the possibility that the plaintiff was not the perpetrator of the assault. Quite the opposite. Laubscher's evidence bears repeating:

'Question by counsel for the second and third defendant:

...It seems that she also told you that it's her ex-husband...

Answer: I had to extract it from her, ja...She did not come forth.

...Ja , she clearly did not actually want to open a case. ...because she felt that, you know there would be no evidence.

She said the perpetrator was very meticulous and would not leave any traces....

...She told me in no unclear terms that she did not want to open a case....

And she was scared of the person.'

- [94] Laubscher further explained that it was difficult to get a history from the first defendant because she was 'very, for loss of the English word *bot*'. The Afrikaans word '*bot*' translates⁵ as 'blunt, dull, stupid, obtuse, imperceptive, slow-witted, slow on(in) the uptake, spiritless'. I

⁵ Bilingual Dictionary: Bosman, Van der Merwe, Hiemstra: Eighth, revised and enlarged edition: P.A Joubert and JJ Spies at page 80.

am persuaded that the plaintiff has failed to prove malice/*animus injuriandi*. In reaching that conclusion, I have considered that the first defendant did not testify; however, the objective independent evidence belies the presence of malice. It follows that a claim based on defamation can also not succeed⁶.

The case against second and third defendants

[95] It was submitted that the magistrate would have released the plaintiff on bail at his first appearance if Boer had told the prosecutor that he had confirmed the plaintiff's alibi through the video footage, hotel receipts and 'there [were] no objective or independent evidence linking' the plaintiff to the incident. The submission went further that Boer should have informed the prosecutor that he had the plaintiff's passport and therefore he was not a flight risk; there were no indications that the plaintiff would interfere with the investigation and he should have been released on bail with suitable conditions.

[96] The plaintiff's counsel relied on the Zealand⁷ judgment for the submission that 'Once the fact of the arrest and/or detention is pleaded and proved, the defendant(s) must justify the breach. If they cannot do that, the unjustified breach ...is sufficient to establish unlawfulness for the purposes of (a) delictual action of unlawful or wrongful detention.'

[97] Counsel further submitted, that the plaintiff's claim against the second and third defendants was: '...not for malicious legal

⁶ The Law of South Africa, Second Edition, Volume 7 at 231 para 235: '*Animus iniuriandi* is the description, for the purposes of the law of defamation, of the concept of intent or *dolus*. In the present context, *dolus* means the intention to defame the plaintiff with knowledge that such conduct is unlawful. It includes the state of mind attributed to a person who publishes a defamatory statement recklessly, not heeding whether it may defame another, in other words, *animus iniuriandi* includes *dolus eventualis*.' Footnotes omitted.

⁷ *Zealand v Minister of Justice and Constitutional Development and Another* 2008 (4) SA 458 (CC) paras 24–25.

proceedings but for unlawful arrest, detention and prosecution.’ Mr Salie SC, who appeared with Mr Magardie for the second and the third defendants, conceded that the second defendant ‘bore the burden of justifying the plaintiff’s deprivation of liberty’.

[98] As indicated above, Boer consulted with the first defendant, who said that the plaintiff was her attacker – she was seriously injured. The crime scene depicted a house breaking and a struggle. I have rejected the suggestion that there were indications that the housebreaking was staged. Boer also received the first defendant’s A1 statement in which the detail of the identification, without more, left no doubt as to the identity of the attacker. He also had Laubscher’s medical report confirming the attack and the alleged identity of the attacker. The discrepancy about the time of the attack would ordinarily be part of the investigation. In the circumstances of this matter, it was more urgent once the plaintiff had disclosed his alibi. However, that does not detract from the objective evidence which should be considered when evaluating whether Boer had just cause to arrest the plaintiff.

[99] One must bear in mind that the alleged attacker was the complainant’s ex-husband. The first defendant told Boer that her attacker had told her that it was her fault that he could not see his child. The detail was intimate; the parties were divorced with one minor child. The same detail was contained in the affidavit that another police officer took from the first defendant. In those circumstances, without more, Boer was entitled to accept the first defendant’s identification of her ex-husband as the attacker. The threat against the first defendant’s parents and the detail of their home also suggested familiarity.

[100] Boer conceded that when approached, the plaintiff was at home, calm and denied the allegations against him. Boer arrested him and took him to the police station. The plaintiff called Sauls and once he

was present, Boer read the plaintiff his rights again and detained him. There can be little doubt that Boer had just cause to arrest the plaintiff at the time. It was in that process that the plaintiff provided the receipts evidencing his stay at the hotel. Boer telephonically confirmed that the plaintiff had been at the hotel the previous night. Boer is criticised for detaining the plaintiff despite the confirmation. The evidence indicates that Boer was prepared to follow up the plaintiff's alibi. He did not consider that the case against the plaintiff was doomed to failure⁸. In the circumstances of this matter, that was a reasonable approach.

[101] It must be so, because Boer considered that the plaintiff had been charged with an offence in terms of schedule 6 of the Criminal Procedure Act 51 of 1977 (**the CPA**). Therefore, Boer considered that the plaintiff had to appear in court for it to consider his release or further detention. Section 60(11) (a) of the CPA provides:

'Notwithstanding any provision of this Act, where an accused is charged with an offence referred to –

(a) in Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional circumstances exist which in the interests of justice permit his or her release.' (See also⁹.)

[102] It follows that the plaintiff's arrest was not unlawful/without just cause, as submitted. The matter was postponed for 7 days from the first appearance for further investigation. I have no problem that the plaintiff's counsel took issue with that postponement. There are

⁸ *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) at 821B–C

⁹ *Minister of Police and another v Zweni* (842/2017) [2018] ZASCA 97 (1 June 2018).

indications that the third defendant assumed simply because the section provides for the 7-day postponement that it is entitled to it. This is incorrect. A postponement is not there for the asking. To the extent that there exists a practice to misapply the section, the presiding officers should be astute enough not to mechanically apply the section. Every postponement should be properly motivated; this is especially so when an accused person is kept in custody¹⁰.

[103] Instead of a routine postponement, it appears the parties had very specific reasons for the adjournment. Sauls represented the plaintiff at his first appearance on 20 September 2012. The matter was postponed for further investigation. Sauls did not object or inform the court of the plaintiff's alibi. He was silent although he knew about the hotel receipt and the video footage that Boer and Maziza had seen. On 27 September 2012, at the plaintiff's second appearance Mr Harmse, the plaintiff's new legal representative, told the court:

'...my instructions [are] that one of the reasons for the seven days [postponement] is for the state to provide the accused with sufficient information to reasonably be placed...in position...to bring a bail application.'

[104] In this trial, Boer explained the further investigation as: obtaining statements from F, L and P and allowing the first defendant an opportunity to view the video footage, which she did the day before the bail application. The prosecutor, Mr Hendricks, did not testify.

¹⁰ *De Klerk v Minister of Police* (329/17) [2018] ZASCA 45 (28 March 2018) at 47; '...True, in terms of s60(1) (c) of the [CPA] it was the duty of the magistrate, if the question was not raised by the appellant or the prosecutor, to ascertain from the appellant whether he wished the court to consider his release on bail....'

Unlawful prosecution

[105] After his first court appearance, the plaintiff's detention was at the behest of the court and lawful¹¹. It is common cause that the plaintiff, 'having been given a reasonable opportunity to adduce evidence which satisfied the court that exceptional circumstances existed which in the interest of justice permit [his release]', was released on bail.

[106] Although the bail application was successful, the plaintiff remained in custody from 27 September to 2 October 2012. I accept that in appropriate circumstances, the defendants' actions or inaction might attract liability for that detention. I consider whether they opposed bail in circumstances where they should not have or failed to place 'all available facts before the court hearing the bail application'.

[107] Boer testified at the bail hearing as follows: (own translation from the Afrikaans)

'The matter involves 2 counts of rape and housebreaking as well as a violation of a protection order. He confirmed that the plaintiff was unemployed and had no previous convictions. He was an Italian citizen but the police already had his passport. He still considered the plaintiff a flight risk. The offences were serious and the first defendant feared for her life and that of L. The first defendant "pertinently" said that she was afraid of the plaintiff. According to the first defendant, the plaintiff was on the farm in breach of a domestic violence interdict. There is a history of applying for interdicts against each other between the plaintiff and the first defendant. One such was an application alleging assault that was withdrawn.'

¹¹ Zweni judgment at para 10 and *Minister of Safety and Security & Another v Marius Schuster & Another* (114/2018) [2018] ZASCA 112 (13 September 2018) at para 14.

He then explained the alleged offence, almost verbatim as per the first defendant's A1. He said the first defendant sat bound to the table for a while before calling L to free her. But she does not mention specific times because there was no watch available. L saw her naked and tied to the table.

He related F and P's involvement as indicated above. He described the crime scene as indicated above and confirmed that the wire around the table was a firm type.

He said that rape was a prevalent offence in the area and that his unit had 165 pending matters at that stage. He said the first defendant was extremely traumatised, cried, injured and that he could see that her body was sore.

In cross examination he said that he had seen the video footage and was satisfied that the plaintiff was depicted on it.'

[108] At the first appearance, the plaintiff was legally represented; Sauls did not object to the postponement. One would have expected, with his knowledge of the alibi, that he would have brought that to the court's attention and objected to the request. Instead the matter was postponed by agreement.

[109] In these proceedings, the prosecutor said that he opposed bail because of the seriousness of the offence. There can be no doubt that the offence was serious. The first defendant was in a potentially life-threatening situation during and after the attack. She was left on a farm naked and tied to a table with a sleeping minor child. The submission that there were no indications that the plaintiff would interfere with the investigation or the witnesses is not borne out by the facts available at the time. Boer testified that the plaintiff was in breach of a protection order that prohibited him from entering the farm. At that stage, the first defendant persisted with the allegation that the plaintiff was her attacker and that he was not the person

depicted on the video. It is correct that the identical affidavits from P and the first defendant should have moved the prosecutor to disclose the fact to the magistrate. Instead, he thought it should be dealt with at the trial.

[110] With the benefit of hindsight, the decision to oppose bail is criticised.

The decision must be viewed in light of the constitutional guarantee of the right to freedom, security of person and the right not to be deprived of freedom arbitrarily or without just cause¹². The defendants had an obligation to protect these rights in respect of the plaintiff and the first defendant. In the circumstances of this matter, I am not persuaded that the second or third defendants' representatives, Boer and Bruinders, violated their obligations to protect the plaintiff's rights. There was an attempt to soften the blow; he was therefore detained at a smaller facility instead of the bigger prison. One has to consider that the injury to the first defendant's hands suggested that she had been tied up 'for quite some time' and it was difficult to get a version from her. Laubscher described her as 'bot'. It follows that the time of the attack could only be ascertained through a further consultation. It follows that the unlawful arrest, detention and prosecution claim must fail.

[111] I, for the reasons stated above, make the following order. Costs stand over for later determination.

(a) The plaintiff's claim against the defendants is dismissed.

¹² See De Klerk referred to above.

BAARTMAN J