



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

Case no: 4697/2016

In the matter between:

KHANDIKHAYA AMOS DLAZA

Plaintiff

and

MINISTER OF POLICE

First defendant

DIRECTOR OF PUBLIC PROSECUTIONS

Second defendant

Date of hearing: 4 -6 September 2018; 13-15 November 2018

Date of judgment: 30 November 2018

JUDGMENT

SAVAGE J:

Introduction

[1] The plaintiff, Mr Khandikhaya Amos Dlaza, instituted a claim in delict for damages against the Minister of Police, as first defendant, and the

Director of Public Prosecutions, as second defendant, arising from his alleged unlawful arrest, detention and malicious prosecution. The trial proceeded on the merits only, merits and quantum having been separated for adjudication in terms of Rule 33(4) of the Uniform Rules of Court.

[2] The undisputed facts are that the plaintiff was arrested on 19 October 2013 by Constable Dumisani Ndzabela, a member of the South African Police Service (SAPS), without a warrant, for the alleged rape and assault of a minor male child, with whom he lived together with a number of other members of his family, in Site B, Khayelitsha. The arrest followed a complaint of rape and assault having been made against the plaintiff and his mother, Ms Anna Dlaza, to the Khayelitsha police by a neighbour. After the child had been removed from the home, Constable Ndzabela was told by the investigating officer to meet the complainant at the house where she would point the plaintiff out for him to be arrested. After the plaintiff was pointed out by the complainant and identified by her as the person against whom she had laid a charge of the rape and assault of a child with the police, the plaintiff was arrested by Constable Ndzabela and thereafter detained at the Khayelitsha police cells until his first court appearance on 21 October 2013. He was refused bail and remained in custody until his release on 12 June 2015.

[3] On 19 September 2015 the charges against the plaintiff were withdrawn after the prosecutor determined that, despite counselling received, the

child remained unable to testify in the matter and that he would be exposed to secondary trauma if he was required to do so.

Pleadings

[4] The plaintiff's pleaded case was that after his first court appearance, his matter was remanded for seven days when he brought a bail application which was denied "*at the special instance and request of the first defendant*". The particulars of claim continued:

- '9. Once bail was denied, Plaintiff was then taken to Pollsmoor Prison where he remained in further detention until his release on 12 June 2015.
10. The members of the Second Defendant whilst fully presented with facts and allegations leading to Plaintiff's arrest and detention and exercising their discretion and on recommendations of the members of the First Defendant, decided to prosecute the Plaintiff.
11. After a period of more than 1 year 9 months in Pollsmoor Prison, Plaintiff was released on 12 June 2015 and the charges against Plaintiff were withdrawn due to lack of evidence.
12. Plaintiff was wrongfully and unlawfully detained in custody at Pollsmoor Prison and deprived of his liberty for a period of 1 year 9 months at the instance of the said members of the First Defendant and the Second Defendant whose full and further particulars are to the Plaintiff unknown.
13. There was no reasonable and/or probable cause in law justifying Plaintiff's arrest, detention and malicious prosecution, accordingly his arrest and detention was wrongful and unlawful.
14. When the members of the Second Defendant decided to prosecute Plaintiff, there was no reasonable or probable cause for prosecution, accordingly his prosecution was malicious for the following reasons:

- 14.1 The proceedings were instigated;
 - 14.2 Without reasonable and probable cause;
 - 14.3 By member of the Second Defendant who acted with animus injuriandi; and
 - 14.4 The prosecution failed.
15. At all relevant times hereto the members of the First and Second Defendants were acting within the course and scope of their employment and/or furthering the interest of their employees thereby rendering the First and Second Defendants vicariously liable for their members' wrongful and unlawful conduct.
16. As a direct result of the First and Second Defendants and/or their members' actions Plaintiff suffered damages in the amount of R2 000 000,00 (two million rand) being damages for unlawful and wrongful arrest and detention, deprivation of liberty, discomfort, shock, malicious prosecution, loss of dignity and *contumelia*.
17. In the premises, the First and Second Defendants are jointly and severally liable to compensate the Plaintiff for damages suffered, the one paying the other to be absolved.'

[5] The defendants denied the claims of unlawful arrest, detention and malicious prosecution. It was pleaded that the plaintiff had been lawfully arrested and detained by Constable Ndzabela, a police officer acting in the course and scope of his duties as a member of the first defendant on charges of rape and assault in accordance with the provisions of s 40(1)(b) read with s 40(1)(q) of the Criminal Procedure Act 51 of 1977 ('CPA') and that reasonable grounds existed for the arrest of the plaintiff.

[6] Section 40(1)(b) and (q) state that:

(1) A peace officer may without warrant arrest any person-

- ...(b) whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody; ...
- (q) who is reasonably suspected of having committed an act of domestic violence as contemplated in section 1 of the Domestic Violence Act, 1998, which constitutes an offence in respect of which violence is an element.

[7] Section 1 of the Domestic Violence Act 116 of 1998 defines “domestic violence” to mean –

- (a) physical abuse;
 - (b) sexual abuse; ...
- where such conduct harms, or may cause imminent harm to, the safety, health or wellbeing of the complainant.

[8] The defendants pleaded that the plaintiff was, following his arrest, lawfully detained until his first court appearance on 21 October 2013, in terms of s 50(1) of the CPA, with his bail application seven days later refused by the Magistrate’s Court.

[9] The plea continued that members of the second defendant decided to prosecute the plaintiff based on the available facts at the time, with it denied that the first defendant had recommended that the second defendant prosecute the plaintiff. The allegations of rape and assault were investigated, with it revealed that the minor child lived with his grandmother and the plaintiff in Site B, Khayelitsha. The minor child was assessed and medically examined and found to be traumatised, with injuries consistent with the allegations and complaint. It was denied that the charges against the plaintiff were withdrawn on 18 September 2015 due to a lack of evidence. Rather, it was pleaded that the minor child was

found, after assessment, to be in need of further psychological counselling and was not able to testify in court against the plaintiff. It was therefore denied that there was no reasonable or probable cause for prosecution or that the prosecution was malicious.

[10] Admitting that the members of the defendants acted at all relevant times in the course and scope of their employment, it was denied that they had acted unlawfully, wrongfully or maliciously against the plaintiff or that they were liable to compensate the plaintiff for damages suffered, all of which were denied. Since the plaintiff was legally represented at all relevant times it was pleaded that he “could and should have mitigated his damages” by *inter alia* appealing the judgment of the Magistrate’s Court to refuse bail; bringing a further bail application for his release pending the finalisation of criminal charges against him; and/or applying for the matter to be struck from the roll in terms of s 343A(3)(c) of the CPA.

[11] In the pre-trial minute signed by the parties prior to the commencement of the trial it was agreed that having admitted the plaintiff’s arrest and detention, the defendants bear the onus to establish that such arrest and detention was lawful. The plaintiff, it was agreed, was to bear the onus of proof in relation to the malicious prosecution claim.

[12] An attempt was made by the parties to both clarify and narrow the areas of dispute between them in a joint minute signed during the course of the

trial. This document recorded that the matter would proceed on the basis that it was agreed that:

- ‘1. The Plaintiff’s allegation that he wrongfully and unlawfully arrested and detained in based solely on the contention that the Plaintiff was arrested without a warrant.
2. The Plaintiff’s claim for damages arising out of his alleged wrongful and unlawful arrest on 19 October 2013 and detention until his first appearance in court on 21 October 2013 is confined to the first defendant.
3. The Plaintiff’s allegations that he was unlawfully detained from the date of his first appearance in court on 21 October 2013 to the date of his release and malicious prosecution are based solely on the contentions that:
 - 3.1 The Second Defendant upon studying the docket upon the initial receipt thereof from the investigating officer should have realised that the State had a weak case against the Plaintiff;
 - 3.2 The First Defendant should consequently not have opposed the granting of bail;
 - 3.3 The Second Defendant should consequently have withdrawn all the charges against the Plaintiff and facilitated his release from custody;
 - 3.4 The Second Defendant failed to properly apply its mind to the contents of the police docket relevant to the Plaintiff’s criminal case and in so doing failed to properly exercise its discretion.
4. The Plaintiff bears the onus as well as the evidentiary burden of proving that the prosecution against him was malicious....’.

Unlawful arrest claim

[13] It is trite that an arrest is *prima facie* wrongful and unlawful and that it is for the first defendant to prove it lawful. In *Minister of Safety & Security v Sekhoto (Sekhoto)*,¹ with reference to *Duncan v Minister of Law and Order (Duncan)*,² it was stated that:

‘...the jurisdictional facts for a s 40(1)(b) defence are that (i) the arrestor must be a peace officer; (ii) the arrestor must entertain a suspicion; (iii) the suspicion must be that the suspect (the arrestee) committed an offence referred to in Schedule 1; and (iv) the suspicion must rest on reasonable grounds.’

[14] Once the required jurisdictional facts for an arrest are present the discretion then arises whether or not to arrest the suspect. That discretion must be properly exercised within the bounds of rationality, with the grounds on which it can be questioned being narrowly circumscribed.³ As stated in *Sekhoto*:

‘(t)he standard is not breached because an officer exercises the discretion in a manner other than that deemed optimal by the court. A number of choices may be open to him, all of which may fall within the range of rationality. The standard is not perfection or even the optimum, judged from the vantage of hindsight — so long as the discretion is exercised within this range, the standard is not breached.’⁴

[15] The first defendant’s case is that the arrest of the plaintiff was lawful in terms of s 40(1)(b) read with s 40(1)(q) of the CPA in that the arresting officer was a peace officer and that he entertained a reasonable suspicion that the plaintiff had committed rape, which is both a Schedule 1 offence and is an offence which falls within the ambit of s 40(1)(q).

¹ 2011 (5) SA 367 (SCA) (2011 (1) SACR at para 6.

² 1986 (2) SA 805 (A) at 818G-H.

³ *Sekhoto (supra)* at para 30.

⁴ *Sekhoto (supra)* at para 39.

[16] Although the parties had apparently sought to narrow the dispute pertaining to the unlawful arrest claim in the joint minute to that the plaintiff's arrest had been affected without a warrant, from the approach taken in evidence and argument it is apparent that the plaintiff disputed that Constable Ndzabela as the arresting officer held a suspicion on reasonable grounds that a Schedule 1 offence or incident of domestic violence had been committed by the plaintiff, with it disputed that he had exercised his discretion to determine whether he should arrest the plaintiff or not.

[17] The reasonableness of the suspicion of any arresting officer must be approached objectively, with the question being whether a reasonable person, confronted with the same set of facts, would form a suspicion that a person has committed a schedule 1 offence.⁵ In *Mvu v Minister of Safety and Security*⁶ it was stated:

'The fourth requirement, i.e. that the suspicion must rest on reasonable grounds, is objectively justiciable: ' . . . the test is not whether a policeman believes that he has reason to suspect, but whether, on an objective approach, he in fact has reasonable grounds for his suspicion'.⁷

[18] In *Mabona v Minister of Law & Order*⁸ the Court noted that:

'The reasonable man will therefore analyse and assess the quality of the information at his disposal critically, and he will not accept it lightly or without checking it where it can be checked. It is only after an

⁵ *Minister of Safety & Security v Swart* 2012 (2) SACR 226 (SCA) at para 20 with reference to *Mvu v Minister of Safety and Security* 2009 (2) SACR 291 (GSJ); 2009 (6) SA 82.

⁶ 2009 (2) SACR 291 (GSJ) (2009 (6) SA 82 at 298C.

⁷ See *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) at 814D-E. See also *Minister of Law and Order and Others v Hurley and Another* 1986 (3) SA 568 (A) at 579F-G; and *Minister of Law and Order and Others v Pavlicevic* 1989 (3) SA 679 (A) at 684G.

⁸ 1988 (2) SA 654 (SE) at 658G-H.

examination of this kind that he will allow himself to entertain a suspicion which will justify an arrest. This is not to say that the information at his disposal must be of sufficiently high quality and cogency to engender in him a conviction that the suspect is in fact guilty. The section requires suspicion but not certainty. However, the suspicion must be based upon solid grounds. Otherwise, it will be flighty or arbitrary, and not a reasonable suspicion.’

[19] In argument it was submitted for the plaintiff that the investigating officer could not delegate the statutory obligation created for the arresting officer in terms of s 40(1)(b). While it is the person undertaking the arrest who must harbour the reasonable suspicion,⁹ with reference to *Minister of Justice v Ndala*¹⁰ there has historically been some judicial support for the view that a peace officer who orders a subordinate to effect an arrest is actually the person who takes the arrestee into custody, although the subordinate is the person who physically complies with the requirements of the arrest. In *Bhika v Minister of Justice & Another*¹¹, with reference to *Ndala (supra)* and *Birch v Johannesburg City Council*,¹² where a subordinate undertook an arrest on the instructions of his senior, the act of arrest was found to be that of the senior.

[20] However, in *Ralekwa v Minister of Safety and Security (Ralekwa)*¹³ the power to arrest was considered against the backdrop of the Constitution with it found that s 40 provides no protection to a police officer who did not form his own suspicion but relied on the opinion of somebody else.¹⁴ It appears to me that the approach in *Ralekwa* is not only constitutionally compliant but accords with

⁹ *Moses v Minister of Safety and Security* [2015] ZAGPJHC 35 at para 6.

¹⁰ 1956 (2) SA 777 (T) at 780.

¹¹ 1965 (4) SA 399 (W) 400G.

¹² 1949 (1) SA 231 (T) 238.

¹³ 2004 (1) SACR 131 (T).

¹⁴ *Op cit* at paras 11, 12 and 14.

the wording of section 40(1)(b) that a peace officer may arrest any person “*whom he reasonably suspects of having committed*” a Schedule 1 offence. This is so in that the use of the word “*he*” is clearly, on a plain reading of the provision, a reference to the peace officer who is arresting the suspect. The result is, it seems to me, that the statute requires that for purposes of s 40(1)(b) it is the arresting officer who must hold the reasonable suspicion.

[21] There is a clear distinction in the wording of s 40(1)(b) and s 40(1)(q) in that the latter provision states that a peace officer may arrest any person “*who is reasonably suspected of having committed an act of domestic violence*”. Since the sub-section does not expressly state, in the manner of s 40(1)(b), that it is the arresting officer who is to hold the reasonable suspicion, I accept that s 40(1)(q) may notionally be capable of an interpretation that if someone other than the arresting officer, such as the investigating officer for example, has sufficient information before him or her to allow such reasonable suspicion to be formed, a subordinate may arrest the suspect on his or her behalf. However, leave rational action by state functionaries and leave against the arbitrary application of the law, an interpretation of s 40(1) which is more consonant with the Constitution in my mind is one which requires an arresting officer, whether acting in terms of sub-section (b) or (q), to him or herself hold a reasonable suspicion that an offence of the nature contemplated in either sub-section has been committed to warrant the arrest of the suspect. In such circumstances, the view I take is that, whether in terms of s 40(1)(b) or (q), it is

for the first defendant to prove that the arresting officer held a reasonable suspicion sufficient to justify the lawful arrest of the plaintiff without a warrant.

[22] The test to determine whether the suspicion held by the arresting officer is reasonable is an objective one¹⁵ and a suspicion might be reasonable even if there is insufficient evidence for a *prima facie* case against the arrestee.¹⁶ The facts show that the complainant identified and pointed the plaintiff out to Constable Ndzabela as the suspect against whom she had laid a charge of the rape of a minor child, and assault. She provided the case number for her report of this complaint to the police, which accorded with the case number provided by the investigating officer. She informed Constable Ndzabela of the circumstances surrounding her report of the matter to the police, that she had noticed the child walking strangely and the fact that the minor child had identified the perpetrator to be the plaintiff, with whom he lived. Constable Ndzabela had been informed by the investigating officer that the complaint had been made by the complainant, that he was investigating the matter and had formed the view that the plaintiff should be arrested. The plaintiff did not dispute that he had been identified by the complainant as the suspect in the rape case reported and confirmed that he was aware of the nature of complaint made against him and it was not in dispute that the investigating officer, who had attended at the plaintiff's house previously to remove the minor child, had requested Constable Ndzabela to arrest the plaintiff.

¹⁵ *Mvu v Minister of Safety and Security & Another* 2009 (2) SACR 291 (GSJ) at para 9

¹⁶ *Duncan v Minister of Law and Order* 1984 (3) SA 460 (T) at 465-6

[23] From his evidence it is apparent that Constable Ndzabela, had regard to the nature and quality of the information at his disposal, including the seriousness of the Schedule 1 crime of rape of a minor child which the plaintiff was alleged to have been committed. His evidence was that he was satisfied that the complainant was a sober-minded person who had, having engaged with the child, reported the matter to the police. She was able to identify and point out the plaintiff as the suspect, who did not dispute that he had been accused of the rape of the child by the complainant.

[24] It was argued for the plaintiff that the fact that the arresting officer had not had sight of the docket had the result that he could not have formed a reasonable suspicion against the plaintiff. Furthermore, had the police sat down and let the plaintiff's mother explain, in the manner she stated in her evidence she had asked of the police, the explanation which would have been given would have "possibly influenced the arresting officer's decision".

[25] I am satisfied on the facts of this matter that the arresting officer obtained the relevant information from the investigating officer, the complainant and the plaintiff, that he was able to assess the quality of the information he had obtained and, with it determined by him that the complainant was of sober mind, he entertained a suspicion that the plaintiff had committed a serious Schedule 1 crime which warranted his arrest. This was not an arbitrary or flighty suspicion arrived at without due regard to the information at his disposal but that viewed objectively the suspicion arrived at was reasonable. From the information before

him the arresting officer was able to consider facts placed before him which provided solid grounds for a suspicion that the plaintiff had committed the offence of which he was accused. There was no obligation on the part of the arresting officer to sit down to be provided with an explanation favourable to the plaintiff when he had before him a complainant who had pointed out the suspect as the person who was alleged to have committed a serious violent crime of a sexual nature against a minor child. From the information before him he was able to determine that reasonable grounds existed to arrest the plaintiff.

[26] It is trite that the purpose of arrest is to bring a suspect to court for trial within the parameters of the Constitution and the applicable criminal law. In exercising his discretion to arrest the plaintiff, the arresting officer had a number of choices may be open to him. His election to arrest the plaintiff, inform him of the reason for his arrest and take him to the police station for the matter to be processed further there cannot be faulted. It was a decision which fell within the range of reasonable decisions available to him having regard to the seriousness of the crime alleged, the interests of society and the identification of the plaintiff by the complainant. In exercising his discretion in the manner he did, I am satisfied that the arresting officer acted rationally and lawfully.

[27] It follows for all of these reasons that the first defendant has successfully proved that the arrest of the plaintiff without a warrant was lawful and the plaintiff's claim of unlawful arrest against the first defendant cannot succeed.

Unlawful detention

[28] The plaintiff's claim in relation to his unlawful detention for the period from 19 October 2013 until his first appearance in court on 21 October 2013 is one against only the first defendant.

[29] As a rule, every interference with physical liberty is wrongful in the absence of a ground of justification. The wrongful deprivation of liberty as a form of *iniuria* consists in a person being deprived of physical freedom without justification. The deprivation of liberty is to be determined objectively with it for the plaintiff to prove that the defendant, or a person acting on his or her behalf, was responsible for it. In *S v Dlamini; S v Dladla & others; S v Joubert; S v Schietekat*¹⁷ it was stated that –

‘Section 35(1)(f) in its context, makes three things plain. The first is that the Constitution expressly acknowledges and sanctions that people may be arrested for allegedly having committed offences and may for that reason be detained in custody. The Constitution itself therefore places a limitation on the liberty interest protected by s 12. The second is that notwithstanding a lawful arrest, the person concerned has a right, but a circumscribed one, to be released from custody subject to reasonable conditions. The third basic proposition flows from the second, and really sets the normative pattern for the law of bail. It is that the criterion for release is whether the interests of justice permit it.’

[30] Following his arrest, the plaintiff was detained until his first appearance in Court, which occurred within the period prescribed in s 35(1)(d) of the Constitution. Since his arrest was lawful and the period of his detention until his first appearance in court was constitutionally compliant, the first defendant successfully proved that the plaintiff's detention for such period was lawful. No

¹⁷ 1999 (2) SACR 51 (CC) at para 6

claim against the first defendant can consequently succeed in respect of this period of detention.

[31] The plaintiff claimed that he was unlawfully detained from 21 October 2013 to the date of his release and that his application for bail was denied “at the special instance and request of the first defendant”. In the joint minute filed the plaintiff’s case was recorded to be that the first defendant should not have opposed the granting of bail and the second defendant failed to determine that the State had a weak case against the plaintiff and thereafter release him from custody.

[32] As made clear in *Sekhoto*, it is the court that holds the discretion to order the release or further detention of an arrested person. This requires a judicial evaluation to determine whether it is in the interests of justice to grant bail or not. The arresting officer is not called upon to determine whether the suspect ought to be detained pending a trial since this is the function of the court, although he may provide evidence to the court with regards to whether there are facts which support the granting of bail or not.

[33] No evidence was placed before this Court to support the plaintiff’s contention that the plaintiff was detained from 21 October 2013 at the instance of the first defendant. It was the court which determined on 21 October 2013 until his release in June 2015 that the plaintiff should be held further in custody.

[34] From the judgment of the Magistrate's Court in the plaintiff's bail application dated 10 March 2014 it is also not evident that the members of the first defendant opposed the release of the plaintiff on bail, although concerns about the plaintiff's safety if released given that the attitude of the community was reflected in a petition handed up by the investigating officer in which the release of the plaintiff was strongly opposed.

[35] The court had regard to the interest of justice in the matter having regard to the provisions of s 60(4) of the CPA. It noted that the evidence available regarding the rape charge, included that "there are clear signs of anal sexual penetration of the child" with forensic evidence indicating that male DNA was found on the specimens collected from the child by the doctor. Given "the strength of the State's case", with "nothing to suggest that the State has a weak case", together with factors such as the interests of justice, the absence of exceptional circumstances and the likelihood that his release from custody would disturb the public order and undermine public peace and security, bail was refused.

[36] It follows that the first defendant has discharged the onus to prove that the plaintiff was lawfully detained at the instance of and on the order of the court for the period from 21 October 2013 until his release. The plaintiff's claim that he was unlawfully detained at the instance of the first defendant for such period cannot therefore succeed when it was the court which took the decision to order the further detention of the plaintiff and not the first defendant. The

plaintiff's claim of unlawful detention against the first defendant for this period must therefore fail.

[37] The plaintiff's claim of unlawful detention for the same period against the second defendant is based on the contention that the second defendant failed to apply its mind properly to the contents of the police docket in that it should have realised that the State had a weak case against the plaintiff on studying the docket when it was received initially from the investigating officer; and that the second defendant should have exercised its discretion properly to withdraw all the charges against the plaintiff to facilitate his release from custody. For the same reasons as the claim of unlawful detention against the first defendant for the period from 21 October 2013 fails, the claim against the second defendant also must fail. The court ordered the continued detention of the plaintiff for this period. When bail was refused in 2014, the court found there to be nothing to suggest that the State's case was weak.

[38] The second defendant put up evidence of the docket which served before the prosecutor from which it was apparent that on 19 October 2013 statements were collected from the complainant and the minor child in which the plaintiff was identified as the alleged perpetrator of the rape. In addition, the J88 completed by the medical doctor recorded a finding of anal sensitivity on examination of the child.

[39] I am satisfied that having regard to the material before me that the second defendant cannot be criticised for having regard to material contained in

the docket, or for its decision not to withdraw the charge against the plaintiff until September 2015. The further detention of the plaintiff as ordered by the court remained an order of the court and the detention for this period was consequently lawful. The plaintiff was at liberty to pursue the steps available to him, which included to appeal any order, pursue a further bail application or make representations that the charges be withdrawn. The failure to do so did not impact on the lawfulness of his detention which was by order of the court. In these circumstances I am satisfied that the defendants have discharged the onus to prove that the detention of the plaintiff was lawful. It follows that the plaintiff's claim against the first and second defendants relating to his detention from 21 October 2013 until his release cannot succeed.

Malicious prosecution

[40] The plaintiff's claim of malicious prosecution against the second defendant is that the second defendant "on recommendations of the members First Defendant, decided to prosecute Plaintiff", that there was no reasonable and/or probable cause for the prosecution, which was malicious as the proceedings were instigated without such reasonable or probable cause by members of the second defendant who acted with *animo injuriandi* and the prosecution failed. In the joint minute signed the plaintiff contended that the malicious prosecution claim was based on the failure of the second defendant to apply its mind to the contents of the police docket and to exercise its discretion properly so as to realise that the State had a weak case against the plaintiff; and that had it done so this would

have led to the withdrawal of the charges against the plaintiff and his release from custody. It was agreed that it was for the plaintiff to prove that his prosecution was malicious.

[41] It was pleaded for the second defendant that the plaintiff was prosecuted “*based on the available facts at the time*” but denied that members of the first defendant recommended to the second defendant that the plaintiff be prosecuted. The allegations were duly investigated, with it revealed that the victim was residing with the plaintiff and the victim’s grandmother at the same residential address at the time. The victim was medically examined and found to be traumatised, with injuries consistent with the complaint; and, after assessment, was found to need psychological counselling. When the minor child was found not to be able to withstand testifying on 18 September 2015, the prosecutor decided to withdraw the charges against the plaintiff. It was therefore denied that there was no reasonable or probable cause for the prosecution of the plaintiff, or that the prosecution was malicious.

[42] In order to succeed leave as is his claim of malicious prosecution, the plaintiff must prove that the second defendant set the law in motion by instigating the prosecution against him; acted with malice (or *animus injuriandi*, for which purpose *dolus eventualis* will suffice); acted without reasonable and probable cause; and the prosecution failed.¹⁸ There is no dispute that the second defendant set the law in motion insofar as it instigated, in the

¹⁸ *Woji v Minister of Police* [2015] 1 All SA 68 (SCA) at para 33; *Rudolph v Minister of Safety and Security* 2009 (5) SA 94 (SCA) at para 16 and *Minister van Polisie v Van der Vyver* [2013] SASCA 39 at para 21.

sense that it instituted, the prosecution of the plaintiff in court. There is also no dispute that the rape charge against the plaintiff was withdrawn and has not to date been re-instituted. To this extent, there is no dispute that the prosecution of the plaintiff did not proceed. In issue is whether the second defendant acted with malice and without reasonable and probable cause in this regard.

[43] The absence of reasonable and probable cause exists where, viewed objectively, there exist no reasonable grounds for the prosecution, or if there do, the defendant does not, viewed subjectively, believe in the plaintiff's guilt. This requires regard to be had to the facts of the case, with the facts reasonably indicating that the plaintiff probably committed the crime.¹⁹

[44] In *Rudolph v Minister of Safety and Security*²⁰ it was stated in relation to the requirement of malice that what has to be proved is *animus injuriandi* in the manner set out in *Minister of Justice and Constitutional Development v Moleko*,²¹ namely that:

'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.'

[45] The evidence for the defendants was that a case manager at the Sexual Offences and Community Affairs Unit of the Thuthuzela Centre at

¹⁹ Neethling, Potgieter and Visser *Law of Delict* 7th Ed. at pp 366-367.

²⁰ At para 18.

²¹ [2008] 3 All SA 47 (SCA) para 8.

Khayelitsha Hospital and who is based at the Khayelitsha Magistrate's Court, Ms Audrey Phiri, examined the docket in the matter in which she found the complainant's statement, the victim statement and the J88 medical report. From the contents of the docket it was apparent that a criminal complaint of rape and common assault had been made by the complainant on 18 October 2013 against the plaintiff and his mother. On 19 October 2013 a statement was obtained from the complainant from which it was apparent that she had seen the minor child walking strangely and that he had told her he had been raped by "bhuti". When asked whether by this he meant the plaintiff, the child replied "yes". On investigation by the complainant it was found that the child's anus was "reddish". The child begged her not to tell anyone because he was concerned his grandmother would assault him. A statement was obtained on 19 October 2013 from the minor child in which he indicated that the plaintiff had raped him by inserting his penis into the child's anus. The J88 medico-legal examination report recorded that the child had the imprint of a shoe on his shoulder blade which the doctor recorded to be suggestive of being held down with a boot or a shoe, that he was dirty with stained underpants, that he was crying and withdrawn and that he experienced "extreme tenderness on insertion of rectal swab". The statement of a further witness dated 18 October 2013 confirmed the report of the complainant. The investigating officer deposed to a statement in which he stated that the forensic crime kit obtained from the doctor was booked into the SAP13 register for despatch to the forensic science laboratory.

[46] Ms Phiri signed the relevant docket before it went to court, indicating that once the docket is at court the prosecutor guides police in gathering information, with an investigation diary recording the steps taken. Prosecutor Mr Heinrich Solomon screened the docket and decided to enrol the plaintiff's matter on the court roll having concluded, based on the information contained in the docket, that there was a strong case against the plaintiff and certainly a *prima facie* one for him to answer. His evidence was that he would not have placed the matter on the court roll if there were no prospects of a successful prosecution in the matter. It remained however for the court to determine the matter, including any challenges to issues such as identification or related to the medical evidence. Mr Solomon in evidence denied that there had been a malicious prosecution of the plaintiff and indicated that no representations were made to have the charge withdrawn and no further particulars were requested by the defence.

[47] Prosecutor Ms Elana Bester testified that she interviewed the child in September 2015, who was so emotionally traumatised that he could not speak, even with an interpreter. She stated that it was clear to her that the child was still in need of counselling and unable to testify about the incident and, to avoid his exposure to further secondary trauma, the charge was provisionally withdrawn against the plaintiff.

[48] It was contended for the plaintiff in argument that his claim of malicious prosecution turned on the fact that the second defendant had acted with

malice and did not assess the evidence to determine whether probable cause existed to justify the prosecution of the plaintiff. There was however no substantial challenge by the plaintiff to the evidence tendered regarding the claim of malicious prosecution on behalf of the second defendant. The result is that the evidence of the two prosecutors and Ms Phiri stands to be accepted as both credible and reliable accounts as to the basis for the prosecution.

[49] Having regard to the evidence as a whole and in the light of the applicable legal principles, I am not persuaded that the plaintiff has discharged the onus of proving that the second defendant or its members acted with malice (even on the basis of *dolus eventualis*) and without reasonable and probable cause in its prosecution of the plaintiff. Both prosecutors and Ms Phiri indicated that they had regard to the relevant facts as contained in the docket before the matter was placed on the court roll. There is no evidence that they failed to take reasonable care to inform themselves of the true state of affairs. There is also no basis on which to reject their evidence that the material contained in the docket indicated a *prima facie* case against the plaintiff. It follows that on the evidence before this Court there is no basis to support a finding that the second defendant or members of his office acted with malice (or *animus injuriandi*, for which purpose *dolus eventualis* will suffice) or that they acted without reasonable and probable cause in prosecuting the plaintiff. For these reasons the plaintiff's claim of malicious prosecution cannot succeed.

[50] Since the plaintiff has not succeeded in his action, there is no reason why costs should not follow the result.

Order

[51] In the result, an order is made as follows:

1. The plaintiff's claims against the first and second defendant are dismissed with costs.

K M SAVAGE

Judge of the High Court

Appearances:

For plaintiff: Mr Z Bobotyana

Instructed by Godla & Partners

For defendants: Mr JJ Moses and thereafter Mr J van der Schyff

Instructed by the State Attorney