

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, BHISHO)**

CASE NO: 82/2014

NOT REPORTABLE

In the matter between

BUBELE KOPOLO

First Plaintiff

NTLANGWINI NGCELWANE

Second Plaintiff

and

MINISTER OF POLICE

First Defendant

**NATIONAL DIRECTOR OF
PUBLIC PROSECUTIONS**

Second Defendant

JUDGMENT

HARTLE J

[1] The plaintiffs seek damages against the first defendant arising upon their claimed unlawful arrest and detention; and against both him and the second defendant for the alleged malicious prosecution of them. In the latter respect it was pleaded that the

formal pressing of charges of rape and robbery which followed the alleged unlawful arrest of the plaintiffs on 29 April 2012 was effectuated maliciously and without reasonable and probable cause and that the public prosecutor, acting in concert with the police, also “unlawfully, wrongfully and without justification and/or probable cause” opposed their bail applications in the sequel to their arrests.

[2] The plaintiffs were held in custody, after their failed bail applications, for an inclusive period of nine months from the date of their arrest until 6 February 2013 when the charges which had been preferred against them were withdrawn.

[3] Whilst admitting that the arrest of the plaintiffs was effected without warrants, the first defendant pleaded that in the case of each of them it was justified pursuant to the provisions of section 40 (1)(b) of the Criminal Procedure Act, No. 51 of 1977 (“CPA”) in that the arresting officer, a peace officer as defined in section 1 of the CPA, had entertained a reasonable suspicion, based on information she had gleaned during her investigation of a rape complaint, that the plaintiffs had committed rape, a crime listed in schedule 1 to the CPA.¹

[4] To the allegations of malicious prosecution and the unreasonable resisting of bail, the defendants pleaded a denial. In amplification of their plea they claimed that there was sufficient evidential material to justify the charges and in respect of the bail application pointed out that since the plaintiffs had been charged with a schedule 6 offence, it had been up to them, in terms of section 60 (11)(a) of the CPA, to adduce evidence that satisfied the court hearing their applications for bail pending trial that exceptional circumstances existed which in the interest of justice permitted their release. Unfortunately, both had failed to meet this threshold. In consequence the

¹ The charge of robbery was added when the complainant's phone was found in the possession of one of the arrestees at the charge office, but the principal complaint under investigation, and the predominant introspection into, concerned the offence of the rape of the complainant. Both offences are in any event schedule 1 offences.

defendants denied that the plaintiffs' continued incarceration, after their first appearance in court, was at the behest of any official of either of them under the circumstances contended for by the plaintiffs.

[5] The plaintiffs themselves both testified and commenced first in order to meet the evidentiary burden on them to prove the claim of malicious prosecution. In order to justify the arrest and to refute the allegations of malicious prosecution, the defendants led the evidence of the arresting officer, a district court prosecutor who represented the State in the Mdantsane bail court and the regional court prosecutor who ultimately made a decision to provisionally withdraw the charges against the plaintiffs. Documentary evidence, including an extract from the relevant police docket and a transcript of the bail hearings concerning the plaintiffs, was also entered into evidence by consent²

[6] It is common cause that the charges that the State withdrew against the plaintiffs were never revived by reason of the fact that the DNA analysis obtained long after the docket was opened excluded the plaintiffs as donors of the DNA material taken from the complainant's vulva, vagina, cervix and vestibule by the doctor who examined her shortly after her rape ordeal.

[7] It is plain from the way the plaintiffs presented their case that the only issue in dispute was whether the suspicion that the arresting officer harbored, which led to their arrest, was reasonable in the circumstances. It further appeared to be accepted that such justification, if it existed, would impact on the question whether there was reasonable and probable cause for the prosecution (by the same objective standard of reasoning) and the legal effect there anent on the bail proceedings.

[8] Section 40 (1)(b) of the CPA provides that:

² The parties agreed in the pre-trial processes that the documentation discovered, including the bail transcript and the contents of the police docket, would serve as evidence of what those documents purported to be without admitting the contents thereof. There were however no challenges at the trial as to the authenticity of any of the documents that served before court.

“a peace officer may without warrant arrest any person –

(a) ...

(b) whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody.”

[9] The requisite jurisdictional facts which must be in existence before the jurisdiction whether or not to arrest a suspect without a warrant are: (1) the arrestor must be a peace officer; (2) the peace officer must entertain a suspicion; (3) the suspicion must be that the suspect committed an offence referred to in schedule 1; and (4) the suspicion must rest on reasonable grounds.³

[10] It is not in contention that the arresting officer, Warrant Officer Grace Maholwana, is a peace officer within the meaning and contemplation of section 1 of the CPA and that she had harbored a suspicion that the plaintiffs committed the offence of rape.⁴ It is furthermore not in contention that the offence of rape is an offence listed in schedule 1 to the CPA.

[11] At the time of the plaintiffs’ arrest Warrant Officer Maholwana held the rank of sergeant and was attached to the local Family Violence, Child Protection and Sexual Offences Unit of the South African Police Service. It was in this capacity and whilst on standby duties that she came to be involved in the preliminary investigation of the rape complaint against the plaintiffs. Preceding their arrest, the docket, which it is common cause was one opened at the Inyibiba Police Station after the alleged rape of the

³ Duncan v Minister of Law & Order 1986 (2) SA 805 (A) at 8181 G – H and Minister of Safety and Security v Sekhoto & Another 2011 (1) SACR 315 (SCA) at paras [6] and [28].

⁴ The robbery charge, as I have indicated elsewhere, was added as an afterthought after the plaintiffs’ co-accused, Mr. Maphelo Majamane was found to be in possession of the complainant’s cell phone at the charge office. Its emphasis, as a self-standing reason for the plaintiffs’ arrest, did not feature in the trial at all.

complainant (Aphiwe Nomtoto) during the early hours of Sunday, 29 April 2012, was handed to her already complete with the complainant's account of the incident contained in a written statement deposed to by her at 14h00 on that day. The gist of her statement is that at about 02h00 that morning she had had a fight with her boyfriend, Lubumba. They had argued about calls she had received on her phone. He took her phone and threw it down as a result of which it broke into pieces. She picked it up but someone else grabbed it. At this point she was approached by three male persons who purported to help in "chasing (her) boyfriend". She described what two of them were wearing. The three of them misled her by taking a different direction than her boyfriend and then dragged her off into the bushes where she was attacked and raped by them. She claims to have been raped about eight times but during the ordeal they covered her face with a white cloth so that she could not see her assailants. She observed them at the point when they were walking away and significantly identified them as "Bubele" and "Guz", the latter being a nickname.⁵ In the morning when she went to the police station she saw the two men in the company of each other again in the same clothing she had noticed them wearing at the time of the rape. In addition, their shoes were full of mud. She remembered that it had been muddy at the scene of the rape, so this feature was significant to her and provided confirmation for her of their presence there. They (she does not clarify who) had also mistakenly approached a friend about the rape accusation believing her (the friend) to be Aphiwe. One of the two had said to the other in that friend's presence that "the secret is out now".⁶

[12] After becoming seized of the matter, Ms. Maholwana's first port of call was to personally interview the complainant herself to confirm what was contained in her initial statement. She met her at the hospital where she was being examined. She additionally obtained a supplementary statement from her which although only deposed to at 21h40 once the plaintiffs had already been informed of their rights as suspects,

⁵ It was suggested by implication that these persons are the two plaintiffs respectively.

⁶ See paragraph [27] below. This friend appears to be one "Sisanda". The plaintiffs by their own testimony confirm that the two of them interacted with the complainant's friend on this basis.

she confirmed was information gleaned from the complainant during the evening preceding their arrest. In it Ms. Nomtoto declares:

“I wish to state further that one of them took my phone. I wish to state further that three of them raped me and one run away as he say they must leave me. I was also dizzy as they were kicking me. I saw Luphelo prior the 3 came to me. I told him that I was looking for my phone which my boyfriend threw on the street. I do not know where he ended. I chased my boyfriend with the three who pretended to be assisting me. I did find my phone. One of them grab my phone from me.

It is a LG phone red in colour. When I came from hospital for examination on 2012-04-29 at 21h20 I saw the three of them at the Inyibiba C.S.C. I pointed them out to Sergeant Maholwana as the ones who rape me, Ntlangwini, Bubele and Maphelo.

They were taking turn in raping me without coming. I know all three of them it was not the first time I saw them. I was drunk but not that drunk that I could not see or identify them. The phone which was at Inyibiba LG found from them is mine red in colour.” (Sic)

[13] Before Warrant Officer Maholwana arrested the plaintiffs she also interviewed certain witnesses, the first of these being the so-called “first report” witness, Ms. Nopumzile Nomtoto, the complainant’s mother, from whom she took a statement at 18h44. The latter states in her written account that her daughter had come home at 04h00 (on the same day of deposing to her statement) and reported to her that she had been raped after an argument with her boyfriend. The perpetrators, three in number, had approached her under the false pretence of wanting to be of assistance to her. Instead of chasing after her boyfriend as they had offered to do, however, they dragged her into the bushes and raped her. Her daughter was sure that she had been raped by the two assailants named by her but was uncertain if the third person had also participated because her face had been covered during her ordeal. According to her

Aphiwe had mentioned to her the names of the two but she could not recall them at the time of making her statement.

[14] At 20h00 Warrant Officer Maholwana took a statement from one Luphelo Sinyono ("Luphelo"). She clarified during her testimony that she had interviewed him because she had heard that the complainant had been in his company earlier that evening. The critical aspects of his account of the incident are as follows:

"On Saturday 2012-04-28 at to 22h00 I was with Aphiwe to the party at NU 16. I dropped her there NU 16 and I proceeded to the party. On Sunday 2012-04-29 at past 24h00 I was from Ledz Tavern and I saw Aphiwe and (her) boyfriend Lubumba fighting and Aphiwe screamed for help and I proceeded to try to rescue Aphiwe and Lubumba run away before I reach them. Aphiwe asked me to look for her phone. I look for it but could not find it. This phone was lost at or near no. 1466 NU 16. When I was looking for the phone Ayanda come out and ask what was happening and I told him Aphiwe run after Lubumba. I then proceeded home." (Sic)

[15] Based on the information obtained from him she also took a statement from Ayanda Bulube ("Ayanda") who it is common cause lives at 1466 NU 16, Mdantsane, the address at which Mr. Sinyono said the complainant's phone was lost. Since his account and purported involvement in the events leading up to the plaintiffs' arrest was central to their case, it is necessary to set out what he stated in full:

"On Sunday 2012-04-29 in the morning session but it was still dark outside I was asleep when I heard my mother screaming saying there is someone screaming outside and she thought it was my sister Siyasanga as she not at home. I stood up and I open the kitchen door. I could see in the street as the lights were on. I saw Luphelo in the gate of my house and I asked him what is happening. He told me that he is looking for Aphiwe's phone and he further told me that Aphiwe was fighting with his boyfriend but I did not see Aphiwe's

boyfriend. I saw Aphiwe coming out from the bush near my home. I did not notice anything wrong with her as I was coming from sleep.

I saw Maphelo the one who say he picked up the phone he was also there in that early morning session he was coming from my next door house. I also saw Fonxo he was also with Maphelo. Aphiwe left. I do not know what happened after that. Lophelo told me he is assisting Aphiwe as she requested her to look for her phone. If there is any problem I must contact him with regard to the phone. I do not know whether Lophelo, Maphelo and Fonxo were together as that two were in my next door neighbor and the one was in his yard.” (Sic)

[16] Mr. Bulube was not called upon to testify at the trial, but according to Warrant Officer Maholwana she obtained his statement at his home just before returning to the police station where she arrested the plaintiffs. The time indicated thereon is 20h30.

[17] She denied under cross examination that “Ayanda” (who it only later occurred to her under cross examination was the same Mr. Bulube from whom she took the last statement) was among the persons at the charge office at the time of the plaintiffs’ arrest or that he had purported as a so-called eye witness to interpose on their behalf to seek their exoneration. (Although, initially claiming to not even know “Ayanda”, it was quite apparent that until she reviewed the contents of the docket, she did not make the connection that he was one of the witnesses she had interviewed before arresting the plaintiffs. This, and the time and place indicated on the statement however, gives credence to her denial that he could have been present at the charge office before she arrested the plaintiffs, or that he had sought, as contended for by the plaintiffs, to seek to persuade her at the charge office before their arrest that the plaintiffs were not the persons involved in the commission of the crime.)

[18] Before the plaintiffs were arrested, the complainant had also been examined by a doctor. The medical report in her view had confirmed the rape or in her opinion at least gave credence to the fact of a rape having been perpetrated against the complainant

and was one of the significant features of the investigation that inexorably compelled her to accept that there was a justifiable basis for the arrest.

[19] Further, there were two critical events that occurred which amply confirmed for her that there was indeed good reason for the arrest of the plaintiffs as opposed to anyone else. Firstly, upon returning to Inyibiba police station with the complainant after the latter's medical examination, the plaintiffs were among a group of five men present at the charge office. She clarified that she had encountered them there before going to the hospital to meet the complainant and knew that they were awaiting her return. When the complainant saw this group of men, she spontaneously pointed out three of them as her assailants, two of them being the plaintiffs. It is common cause that the third one was Mr. Maphelo Majamane ("Maphelo"). Secondly, the cell phone that the complainant identified as her property and which she claimed had been taken from her before the rape, was retrieved from Mr. Majamane's possession. This recovery of the phone had happened in her absence whilst she was away at the hospital with the complainant and carrying out her investigations.

[20] The plaintiffs and Mr. Majamane were formally arrested as appears from their separate constitutional warning statements and SAP 14 notices filed in the police docket, between nine and ten pm that night. The first plaintiff stated that he had an alibi in the person of "Siyasanga" who he claimed to have been with at Ledz and Twin taverns respectively after midnight. He denied being in the company of the second plaintiff after 20h30 that night. Mr. Majamane similarly denied the allegations but conceded picking up the cellphone near 1466 NU 16 (at Mr. Bulube's home) on the grass. The second plaintiff said that at the time he was at home sleeping and innocent of the charges.

[21] Regarding the malicious prosecution claim, Warrant Officer Maholwana explained that since the accused were charged with gang rape *inter alia*, which is a schedule 6 offence as set out in the CPA, bail could only be granted by the court. She

misunderstood what exactly the accused were expected to prove in this forum but was aware that they bore the onus to convince the court in this respect.⁷

[22] She did not personally attend the bail hearing, but conceded that she had gone through the motions of formally opposing the plaintiffs' release on bail because of the magnitude of the offence itself. This accords with the formal document in the docket (the Bail Information Form) dated 29 April 2012 in which she had indicated an election to oppose bail, at least in respect of the second plaintiff.⁸

[23] She added that she thought that the plaintiffs' lives were also in danger, because the community had brought them to the police station and were angry. Also, since the complainant knew them and lives in the same area, she did not think that it was in the interest of justice to release them back there or into the hands of the same community. (These extraneous concerns were contemporaneously highlighted on the plaintiffs' Bail Information Forms as well.)

[24] Despite the pointing out by the complainant and her apparent confidence that the plaintiffs were her assailants, the main criticism against Warrant Officer Maholwana's evidence is that she had failed to recognize that the complainant was drunk on the night in question and that her ability to identify the perpetrators was probably compromised as a result. This, so it was suggested to Warrant Officer Maholwana, would affect the premise of her suspicion held that the plaintiffs were among the persons involved in the commission of the crime. It was also put to her that she ought to have recognized from the information furnished by Mr. Bulube that after someone was heard screaming (which was probably the complainant), "Maphelo" (who was arrested and found in possession of the complainant's cellphone) and "Fonxo", in addition to "Luphelo", were

⁷ She suggested that the onus on the accused was to prove whether the offence "has been done by them" and/or whether this "this thing happened or not", which is clearly not the threshold. Nothing however turns on this misapprehension of hers.

⁸ The election is not indicted on the form applicable to the first plaintiff, but this must have been an oversight on her part. She was quite clear that it was her objective to oppose bail for all three arrestees.

seen in the area. This vignette, according to Mr. Nzuzo who appeared on behalf of the plaintiffs, pointed ineluctably to the conclusion that the two plaintiffs were innocent and that the arresting officer had been imprudent and unreasonable in overlooking the possibility that these were the complainant's assailants, arresting the plaintiffs rather than this trio named in Mr. Bulube's statement who were more likely involved in the commission of the crime. Warrant Officer Maholwana denied that she had not been careful in either respect or that she had not critically analyzed the relevant information at her disposal.

[25] The plaintiffs gave dramatically different accounts of the moments of their arrest and of Mr. Bulube's involvement.

[26] The first plaintiff testified that on the day of his arrest he presented himself at the charge office after being informed that the police were looking for him concerning their investigations into the offence of rape perpetrated against the complainant.⁹

[27] Prior to presenting himself at the charge office he looked for the second plaintiff with whom the alleged crimes were said to have been committed. He informed him about the police visit to his own home and the allegations leveled against them. They became aware of the identity of the complainant after being confronted by one Sisanda who accused them of raping Aphiwe. They then proceeded to the complainant's home to ask her about these allegations, but did not find anyone there.

[28] They asked her whereabouts from her neighbor, Ayanda, the same Mr. Bulube from whom Warrant Officer Maholwana took a statement shortly before their arrest. The first plaintiff states that they learnt the following from him:

⁹ None of the parties focused on this feature during the hearing. It confirms to my mind that even before Warrant Officer Maholwana's involvement in the investigations, her colleagues had gone ahead of her to call on the plaintiffs to report as suspects probably based on the information which had been furnished to them up to that point that they were among the offenders.

“And then we asked, since Ayanda is a neighbor of Aphiwe and then we wanted to find out if he has seen Aphiwe and he said he last saw Aphiwe the previous day, (she) was being pulled around by Fonco and Phelo and that she was screaming, or crying. We asked him where was this thing happening, he said in Aphiwe’s yard at the back, because there is a bushy area, like a forest at the back of the house, that is where this thing was happening. Since we heard what Ayanda is saying is linked to what the Police, to what we think the Police are looking for us for and then we asked him, we begged him to accompany us to the Police Station so that he can say this thing in front of the Police.” (Sic)

[29] The plaintiffs then searched for the three persons mentioned by Mr. Bulube and after finding at least Maphelo and Luphelo, they all went to the charge office together with Mr. Bulube. At the charge office they were asked to wait for warrant officer Maholwana who on her arrival there arrested them, this despite Mr. Bulube professing that they were not involved and him informing them that he had purportedly seen “what happened”. Indeed, while he was trying to come to their assistance by interposing for them, he claims that the investigating officer and the “other lady officer” “pepper sprayed” Mr. Bulube.

[30] The officers dismissed their own explanations and Mr. Bulube’s claims that there was no link between the plaintiffs and the complainant intimating instead that he was “siding” with the plaintiffs who the police officers supposedly knew to be “thugs”. Whilst they were arguing among themselves the investigating officer purportedly got tired of the whole thing and announced that he was going to take all of them to the police cells. It was while they were being searched and stripped of their possessions that the complainant’s phone was found in Mr. Majamane’s pocket. In the end it was said that the plaintiffs and Mr. Majamane were going to the cells and that the rest must be released. As for Mr. Majamane and Luphelo they acted as if there was “no link” between them and Aphiwe after being questioned by the police about Mr Bulube’s purported accusation.

[31] The first plaintiff claims that it was a police officer (referred to as “he”)) who pointed them out and not the complainant.¹⁰ Under cross examination he said that additionally the complainant and her mother also identified him, the complainant referring to him by name, “Bubele”, but that this happened after the police had already identified him. He was not prepared to be drawn on why at the bail hearing, when it had been put to him that the complainant in the presence of Warrant Officer Maholwana pointed out the three of them at the police station as the perpetrators, he had agreed then that “that is how it happened,” but was now contradicting himself.

[32] He claimed further that those waiting at the police cells for the return of Warrant Officer Maholwana were six in number (not five as she testified) and that she had only pointed out the two plaintiffs. He now offered a different observation namely that Mr. Majamane only became involved once the complainant’s cell phone was found in his possession.

[33] He could not explain why Mr. Bulube’s statement which he had made to the police (the contents of which he claimed to have no knowledge of) did not align with his own testimony as to the latter’s supposed claim that Mr. Majamane, Luphelo and Fonxo were implicated in the rape or that he had supposedly personally seen what had happened. He accepted though that he could not dispute what Mr Bulube had in fact said in his police statement.

[34] Despite his concession he yet insisted, when the basis for Warrant Officer Maholwana’s justification for their arrest was put to him by Mr. Ntsaluba acting on behalf of the defendants, that “there was a person who witnessed this incident who was also there at the Police Station (who saw) the people who did this”. Asked who it was he

¹⁰ He appeared to accept later that it was Warrant Officer Maholwana who had arrested them at the charge office, so it is unclear why he was referring to the police officer in the male gender unless he was transposing pre arrest events with what happened later that night when they were formally arrested by Warrant Officer Maholwana. In my view this was but one of the several unsatisfactory features of his demeanour as a witness.

confirmed this to be “Ayanda”. When Mr. Ntsaluba pointed out to him that the latter had not said as much, he claimed that it was because he was assaulted at the police station and also “pepper sprayed”. He went further and claimed that the police “made (Ayanda) a witness” as confirmation of his view that Mr. Bulube was implicated “by what he saw”.

[35] Confusingly, when it was pointed out to him that his assertion that Mr. Bulube supposedly saw the people who did this thing and could therefore exclude the plaintiffs from being the suspects was factually incorrect, he tried a different tack claiming instead that Mr. Bubele had mentioned this to Mr. Ntanjana¹¹ when he arrived at the police station, but that he did not say that they were raping her. Rather, he had purportedly informed Mr. Ntanjana that they “were pulling her towards the bushy area, because Aphiwe’s place is close to the bushes”, suggesting that this was as good as saying they were the ones who had raped her in the bushes.

[36] He conceded ultimately that Mr. Bulube had not pertinently said to the police that the plaintiffs were innocent of raping and robbing the complainant but purported under re-examination to resuscitate the premise of their innocence being proclaimed by him on their behalf. He reiterated what Mr. Bulube had said to them when they had gone to his home asking about the complainant, which is that he had last seen her the previous night at the time “while she was being pulled by Lumphelo, Fonxo and Maphelo”. Asked if at the police station Mr. Bulube had repeated what he had told them he saw, he now embellished their cause as follows:

“MR NZUZO: Now at the Police Station, did he repeat what he told you to the Police?

MR KOPOLO: Yes, he did mention that to the Police and then he also mentioned his mother and his mother was phoned by the Police who also said that yes that happened and then because the window of his mother’s room is facing towards

¹¹ Mr Ntanjana is also a police officer who it appears from the testimony was on duty at the charge office when the plaintiffs presented themselves there hours before their arrest by Warrant Officer Maholwana.

the side where the incident was happening and then his mother called him to also look at what was happening.

MR NZUZO: Now he mentions at the Police Station what he told you about the incident?

MR KOPOLO: He did not say that they raped her, he mentioned that when they heard the screams, it is only then that they looked and then they saw them pulling her, because the reason why they went to check is because there is another girl child at his place, he was not at home at that time, that girl child was with us at the shebeen.

MR NZUZO: Did he, Ayanda at the Police Station in narrating what actually occurred the previous night, did he mention your name and that of the second plaintiff as people who were involved in pulling the victim to the bushes?

MR KOPOLO: No, he did not mention our names.”

[37] Still not satisfied that he had made clear that the plaintiffs were *not* identified, he introduced an element of doubt to the complainant’s identification of them at the charge office:

“(T)he thing is first Aphiwe said it was us and then she changed her version and said that she did not clearly see us, because it was dark and then she can only identify us with the muddy clothes that we had, but on the next day we were not wearing the clothes that we wore on the previous day.”

[38] He added yet another string to his bow, now suggesting that although both Mr Bulube and the complainant were talking about three people, Mr. Bulube could “easily” identify the three implicated by him because he did not drink on that day, whereas the complainant had said she could not identify them because she could not see them.

[39] The second plaintiff confirmed the circumstances under which he and the first plaintiff had come to present themselves at the police station, but his account of what Mr. Bulube supposedly said to them is very different:

“... while we were going towards the direction of the Police Station, that is when we met Ayanda and then we asked him whether he has seen Aphiwe, he said he last saw Aphiwe the previous evening while she was being raped by Mapelo, Lupelo and Fonxo. Ayanda asked what is the link between us and Aphiwe and then we told him that it is said that we raped Aphiwe and then he said no he saw the people who raped Aphiwe, because he was called by his mother then to have a look and then he saw, he knows the people who did that and then he was willing to accompany us to the Police Station.”

[40] His version of how the pointing out ensued is also dramatically different. Firstly, he claims that they were prewarned at the police station by the “investigating officer” who had left with the complainant that they must wait for her and the complainant to return “so that Aphiwe can point out those people who have raped her”. (This is in contradistinction to Warrant Officer Maholwana’s testimony that the pointing out happened spontaneously upon their return immediately the complainant saw her assailants there.) Secondly, he claims that when the two women arrived, three of them (the plaintiffs and Mr. Majamane) remained behind and then it was said to her that she must point out the people who have committed the crime. This is what he claimed happened next:

“... And then Ms Maholwana said to Aphiwe she must only point to the three of us and then she must leave the other four out¹² and then she said and then she pointed us out and then Maholwana asked again, “Are you sure about those people”, and then she did not answer, she only closed her ears.”

[41] Regarding the role played by Ayanda and his mother the second plaintiff also gave a different account of what was purportedly said by Ayanda in the presence of the police officers:

¹² According to the second plaintiff’s testimony there were seven of them at the charge office waiting for the investigating officer, although he initially asserted that there were eight.

“Ayanda, it was asked from Ayanda to say exactly what he saw, what he has seen the previous evening and then Ayanda said they heard a scream outside and then his mother called him and then they went to look and then they saw Lupelo, Mapelo and Fonco raping the girl. And then it was said that Ayanda is talking shit, he was beaten and then he was also pepper sprayed, because it was said that he was talking rubbish. When he was asked who can say the same thing thing he saw those people, he said the other person who witnessed that thing was his mother. Mr Ntanjane took a phone and then called Ayanda’s mother and then Ayanda’s mother said exactly what Ayanda was saying.”¹³

[42] He claims that it was then that they were searched before being taken to the cells when the phone, identified as the complainant’s, was found in Mr. Majamane’s possession.

[43] Although it later transpired that Mr. Bulube had made his statement in the comfort of his own home that night,¹⁴ the second plaintiff insisted that he could hear Mr. Bulube and see him giving a statement to the police at the charge office and that it was in fact written down and then signed by him right there in their presence. The police thereafter also phoned Mr. Bulube’s mother to verify that what he was saying was true.

[44] Under cross examination the second plaintiff corrected his version of how the pointing out had happened. He now claimed that he and the first plaintiff were first separated from the larger group before the complainant arrived. Mr. Majamane was only told to join them because the phone was found in his possession. When the complainant came in he claims that she was told “only to point from the three of (them), she must leave the other four people out”.

¹³ Under cross examination the second plaintiff suggested that after being “pepper sprayed”, Mr. Bulube was put behind the police counter.

¹⁴ This was as per the testimony of Warrant Officer Maholwana once she had had the benefit of looking at the contents of the docket to verify this detail.

[45] He remained intractable in his stance that Mr. Bulube told the police (in his presence and contemporaneously signed a police statement at the charge office to this effect) that he saw Luphelo, Maphelo and Fonxo raping the complainant despite it being pointed out to him that Mr. Bulube had said no such thing in his statement neither had the first plaintiff maintained such a version in his testimony. To the contrary he insisted that it was not only Mr. Bulube who saw this, but also his mother.

[46] He conceded however that he would not know what exactly had been written down by Mr. Bulube in his statement.

[47] Strangely enough, under re-examination and being asked to recount exactly what Mr. Bulube had told him about the incident, an entirely different scenario now emerged, one which he was adamant had also been told to the police officers in his presence:

“MR NZUZO: Please tell us what Ayanda told you about the incident?

MR NGCELWANA: Ayanda said he was woken up by his mother,” because his mother has just heard a scream outside the house and then when they went to investigate through the window they saw Lupelo, Mapelo and Fonco dragging and beating up Aphiwe.

MR NZUZO: Is that place the place where the alleged offence was committed?

MR NGCELWANA: Yes, that is what happened in that place being done by Lupelo, Mapelo and Fonco.

MR NZUZO: Is that the place where the alleged rape took place?

MR NGCELWANA: Yes, that is where the rape happened, in the yard of Ayanda’s yard.

MR NZUZO: The three people which you have mentioned as mentioned by Ayanda, were those the only people that you mentioned which he saw at the crime scene?

MR NGCELWANA: Yes, it was only three of them.”

[48] As an aside, Warrant Officer Maholwana later pointed out in her testimony that the rape scene was somewhere entirely different. She personally visited the crime scene the following day and had also visited Mr. Bulube at his home so she could correct the fallacy that Mr. Bulube was at or near the crime scene when he saw what he claims to have seen in his police statement. She could also say from personal knowledge that the crime scene was not close to the complainant's home either.

[49] Miss Cwayita Mkhwayimba who is employed as a prosecutor with the National Prosecuting Authority stationed at the Mdantsane Bail Court identified a transcript of the bail proceedings applicable to the plaintiffs concerning their appearances at the Mdantsane Magistrate's Court after their arrest. She confirmed the outcome obviously apparent therefrom which is that the matter first served before the bail court on 10 May 2012; that the offence of "gang" rape brought the plaintiffs within the ambit of schedule 6 to the CPA; and that, because they could not in that judicial enquiry discharge the onus of establishing on a balance of probabilities that there were exceptional circumstances which in the interest of justice permitted them to be released on bail, their applications did not succeed.

[50] She explained the protocol employed by the National Prosecuting Authority in their Guidelines concerning the test to be applied to cases eligible for prosecution. According to her the receiving prosecutor examines the docket to determine if there is a *prima facie* case against the accused person and, if there is, the matter is then enrolled before the court by completing the necessary J15 charge sheet which initiates the prosecution (colloquially referred to as the "enrolment" of the matter). During the bail proceedings the same premise of a *prima facie* case is required to be established. Thereafter the case is postponed for further investigation to check if there are reasonable prospects of a successful prosecution in due course.

[51] In respect of the bail enquiry she noted that in circumstances where the applicant has failed to discharge the onus on him to establish exceptional circumstances, the prosecutor may decide not to even call the investigating officer to come and testify,

simply leaving it to the magistrate to decide. She however acknowledged the State's role, even though the onus is on the accused person in such an instance, to assist the court to arrive at a just verdict.

[52] She summarized that in this instance the plaintiffs had not raised any exceptional circumstances in the enquiry, relying only on their personal circumstances which they put forward.

[53] She clarified under cross examination that she would have "opposed" bail acting in conjunction with the policy directives issued by the National Prosecuting Authority along the expectation that where the accused person is charged with a schedule 6 offence of this nature, the prosecutor is expected to ("must") oppose bail.

[54] She herself was satisfied in the present instance, in the context of having read the docket as a prosecutor in B-Court, that a *prima facie* case had presented itself in this instance.

[55] With the benefit of having read the statements in the docket and asked under cross examination whether she considered to be relevant the information furnished by Mr. Bulube that he had observed the presence of Luphelo (who claimed to be assisting the complaint to look for her phone) and Maphelo (in whose possession the complainant's phone was later found) who was purportedly "together with one Fonxo as well", the witness readily conceded that it was relevant, but clarified why upon an objective conspectus of all the peculiar nuances of the scenario, there was nothing to detract from the reasonable suspicion harbored by the arresting officer that it was the three persons who she had arrested who were properly before court. Her answer below amply demonstrates her professional reasoning and critical analysis of the information in the docket which would have served before her, concluding in her positive affirmation that she was satisfied that they had charged the correct accused:

“MR NZUZO: ... Now on Ayanda Bulube’s statement the information about the presence of Mapelo. Lupelo and Fonxo where they were seen and thereafter the victim coming from the bushes, with that information did you not think that information was relevant to the investigation?

MISS MAKHWAYIMBA: Yes, it was relevant. But as you can see on page 11, the statement of Ayanda says that he saw Mapelo at the gate of his house, and when asking him what was he doing there the answer was that he was looking for the phone of Aphiwe. Which corroborates what is said by Aphiwe in her additional statement. Paragraph 1 where she says: ‘Before the 3 accused came, this Lupelo came assisting her looking for the cell phone.’”

So Lupelo was at some stage in the scene only assisting with the cell phone. And the complainant further states that before these 3 arrived she does not know where this Lupelo went to. And now when you go back to the statement of Lupelo, the last paragraph, the last two paragraphs on page 13. Lupelo himself mentions that he saw the complainant when (she was) fighting with the boyfriend. On approaching in order to intervene the boyfriend ran away. He then assisted looking for the cell phone of the complainant. So the role that was played by Lupelo was assisting to find the cell phone and assisting to try and rescue the complainant from the fight. And even the complainant herself does not implicate Lupelo as one of the 3 guys who raped her. He is just exonerated by the complainant from the very onset and they corroborate each other that Lupelo was not there during the rape.

MR NZUZO: Yes, I accept that, that is the true reflection of what is contained in the statement. But my question is, there is this Fonxo who is said to be with Mapelo from whom now, Mapelo, the phone was recovered. Wouldn’t a reasonable person have that in his mind that Fonxo may have been involved?

MISS MAKHWAYIMBA: Yes. Although we do not know who is Fonxo. Because Fonxo is a nickname. It is possible that Fonxo might be one of the 3 accused but he’s only known to the complainant by the nickname. And when it comes to the identity of the accused all 3 accused were identified by the complainant in that the complainant in her statement she says that:

'During the morning session she saw the 3 accused wearing the same clothes and their shoes were muddy because there was mud in the place of the incident when it took place.'

And further that the complainant says that:

'I pointed in the pointing out statement, I pointed out the 3 suspects mentioning them by name to the investigating officer, Maholwana.'

and she does not mention Lupelo at all.

MISS MAKHWAYIMBA: And she doesn't (mention) Fonxo at all.

MR NZUZO: Okay, please let's not argue. I accept that the victim does not mention Fonxo, but there is this person who now says Fonxo was at that place. Now the question is, would not a reasonable person consider that information just in case one – we've established your evidence that Fonxo is not one of the people that are accused. He's one of the guys who was never charged.

MISS MAKHWAYIMBA: It's my first time to hear that.

MR NUZUO: That's fine, it was confirmed by the investigating officer. So now there is this person who is seen with one of the accused from whom the phone is recovered. Does it not even occur in your mind that there may well be a chance that Fonxo was one of them which then says maybe one of the accused was not involved because the victim said there were only three? Were you satisfied with that information that indeed it is the 1st Plaintiff, 2nd Plaintiff and the third person who were involved?

MISS MAKHWAYIMBA: Counsel I'm answering you. Each case is decided on its merits. And now when you were reading the case you don't have to anticipate what might have happened or what should have happened. When I read the docket, I concentrate on the facts that are before me. And yet we must also remember that I was only a Bail Court prosecutor, not a person who was responsible for investigation. If any question was there, there are the 100% chances that the prosecutor in court would have assisted or asked the investigating officer to make a follow-up on Fonxo. Unfortunately I was not the one who was guiding the investigation, I only dealt with the bail application.

MR NZUZO: Are you saying that information relating to Fonxo was not relevant for the consideration of bail?

MISS MAKHWAYIMBA: It wasn't. Before me there were 3 accused who were identified positively by the complainant who came to apply for bail application.

MR NZUZO: And are you saying that it never occurred to you that you may have been opposing bail on someone who was not involved? That's fine we accept they were all pointed by the victim. But did not occur to you that you may have been opposing bail for someone who may not be involved because of this information of Fonxo being seen?

MISS MAKHWAYIMBA: Based on the fact I had in my docket I was 100% sure that I'm opposing bail on the correct accused."

[56] Pressed regarding Mr. Nzuzo's criticism of the State basing its case of identity on the statement of a complainant who she conceded was purportedly drunk, she noted the qualification by the latter in her statement that although she was drunk she was not so drunk that she did not know what was happening about her. She also adverted to the fact that by the time of her examination by the doctor "nil toxification or any use" was observed by him. Further apart from pointing out the trio of persons known to her who had been involved in the rape of her, the witness referred to the complainant's additional claim that she had also met them (seemingly only the plaintiffs) the following morning as providing confirmation of their identity.

[57] She was not inclined to agree that the statement of Mr. Bulube, possibly highlighting a weakness in the State's case according to Mr. Nzuzo, should of necessity have been placed before the bail court, neither did she agree that the State's case was weak because of it.

[58] Ms. Linda Jekwa, also employed by the National Prosecuting Authority as a prosecutor based at the Butterworth Thuthezele Care Centre (in the capacity of case manager of sexual offences), confirmed that she personally withdrew the charges against the three accused (including the two plaintiffs) in the regional court on 6

February 2013. She explains that after reviewing and considering the case in preparation for trial it occurred to her that identity would be an issue because of the circumstances under which the rapes had occurred. In her professional view the State's case would be strengthened by DNA evidence since swabs (with semen ostensibly) had been taken from the complainant's genitals. She clarified that since the regional court is a trial court and investigations still needed to be undertaken in her view, she provisionally withdrew the charges pending such forensic investigation and analysis.

[59] She repeated the National Prosecuting Authority's protocol regarding the standards to be applied at the different stages of enrolling a case, the bail proceedings, and upon trial ultimately emphasizing that the review of a case is according to the Authority's Guidelines a continuing process having regard to changing circumstances and fresh facts which may come to light after an initial decision to prosecute or not to prosecute has been made. In this instance she felt it necessary, since preliminary DNA processes had detected the presence of semen in the complainant's vagina, that those swabs should be compared with control blood specimens taken from the accused persons. This had been flagged in the investigation diary some ten months before, but had unfortunately not been followed up on.

[60] Despite the new development and caution expressed that something was lacking in the State's case, she refuted the suggestion that at the time of the enrolment of the case there was not a *prima facie* case. This was because in her view the complainant in her statement had named the people who had raped her. In addition, there was a medical report that supported the fact of the rape.

[61] Even making allowance for her recognition that the DNA results had come back excluding all three accused as donors of the swabs taken from the complainant's vagina, this in her view did not detract from the *prima facie* view held by the prosecutor at the time of the enrolment of the matter which entirely justified the prosecution of the plaintiffs as far as she was concerned.

[62] Under cross examination she readily revealed the basis for her concern that the identity of the complainant's assailants in an adversarial trial might pose a challenge and result in the complainant being "grilled" in this respect. She reflected that there was a need to strengthen the State's case with DNA evidence because (1) the incident had occurred at night; (2) the complainant had professed to be under the influence of alcohol; (3) she had been dragged into the bushes and (4) at some stage had had a cloth put over her face.

[63] She reflected on the reason why the DNA evidence would assist:

"I've dealt with many cases especially with the attorneys in Regional Court that they would definitely attack the complainant on that issue to ask about visibility, is she sure because there were other people around, it was at night, you know those kind of things. So I wanted to assist her to make it easy for her when she has to testify. So I felt I needed that evidence."

[64] She maintained though that this did not detract from the decision to enroll the case in the first instance:

"That is why the control prosecutor asked for DNA. But it did not mean that there was no evidence. There was evidence, that's why it was enrolled because in her affidavit she named the people that did it. But the control prosecutor might have realized some of the obstacles she might face, that is why she requested DNA."

[65] The decision to oppose bail was equally justified in her view on the basis that the plaintiffs and Mr. Majamane were facing a schedule 6 offence which placed the onus on them to show exceptional circumstances that in the interests of justice would permit their release on bail.

[66] She did not agree that at that stage of the enrolment of the case that the challenges later recognized by her, or the suggestion put forward by Mr. Nzuzo that Mr.

Bulube had mentioned others possibly involved who had not been brought before court, had rendered the earlier decision taken to prosecute the plaintiffs in any way reproachful. Indeed, she reiterated that the complainant's sworn statement unequivocally mentioned who her assailants were and pointed out that the Prosecuting Authority was perfectly entitled to rely on such a statement deposed to under oath.

[67] Mr. Nzuzo submitted that Warrant Officer Maholwana was not a reliable witness at all and that I should prefer the plaintiffs' versions, but I am not inclined to agree. It became readily apparent while the witness was under cross examination that she had been preconized without reading the docket before giving her testimony. Although she had a fair memory of the events, she could not remember exactly who said or did what or when, but was able to give a comprehensive account that made sense and fell into place once she had had an opportunity to review the contents of the docket and stimulate a chronological memory of the events. Two good examples are that she didn't know who "Ayanda" was until she saw from the docket that he is the person she had taken a statement from at his home shortly before the plaintiffs' arrest. She also thought that the cell phone had been found in possession of one of the plaintiffs until it was pointed out to her that it was common cause that it emanated from a body search of Mr. Majamane. She was obviously mistaken in these salient respects, but also clearly challenged in her independent recollection of these matters until she had had an opportunity to refresh her memory from the police docket.

[68] She further made a favourable impression as a witness. She conceded at the outset at numerous junctures that her memory was not serving her well because the events had happened a long time ago. She also readily made concessions. She accepted for example that the plaintiffs had voluntarily gone to the police station after hearing that they were being sought by the police. She conceded that the information conveyed by Mr. Bulube was "relevant" to the investigation and even agreed that his account of seeing the complainant might have coincided time wise with the period after

the rape incident.¹⁵ She agreed that she had omitted to refer in her statement to the fact that an angry mob had gone to the charge office and were present there.¹⁶

[69] I do not agree that she tried to mislead the court in explaining (and reading out aloud as she thought she had written it down) that the complainant had been “drinking” as opposed to “being drunk” as was actually recorded by her in the statement. She logically explained how she thought she had written it down and that she intended to indicate that the complainant was “drinking” instead of that she was drunk, because why else would the qualification of her not being so drunk so that she could not see or identify the perpetrators have been of any relevance for her to assert.

[70] Neither do I agree that she withheld information about Mr. Bulube (by virtue of her having initially claimed not to remember such a person until she had had an opportunity to review the docket) or that she wished to draw attention away from the suggestion in his statement that Luphelo, Maphelo and Fonxo were seen in the area.

[71] She validly dealt with this issue after refreshing her memory from the contents of the docket and was able to explain how she had dealt with the others who were present at the charge office together with the three arrestees. She had asked them why they were present there which elicited the explanation that “they were called by the suspects while they were coming to the police station”. Once the plaintiffs and Mr. Maphelo had however been identified by the complainant, so she rationalized, she did not see any reason to get any other information from them. She acknowledged though that Mr. Bulube had said in his interview that he had seen them next to his place, but she was satisfied that it was unnecessary to question them any further once the three suspects were plainly identified by the complainant as being the responsible perpetrators.

¹⁵ This was perhaps not a very insightful concession to make, given that there was a period of at least 2 - 4 hours after Luphelo and Mr. Bulube saw her that the complainant was raped, quite evidently somewhere further away.

¹⁶ She had however indicated on the Bail Information Form that the angry mob was a concern for her.

[72] In my view the defendants' witnesses furnished cogent reasons why each of them held the views which they did which prompted them to arrest and prosecute the plaintiffs or not to accede to their release on bail and ultimately to provisionally withdraw the case against them. They also seamlessly in my view argued away any criticism against their alleged mishandling of the matter and explained clearly the respective decisions taken by them (the arresting officer and Ms. Mkhwayimba's at least) which had as a necessary consequence the deprivation of the plaintiffs' liberty from the moment of their arrest, without any prospect of bail absent their presentation of substantial and compelling circumstances permitting their release in the interests of justice, until the time that the charges were so withdrawn.

[73] Contrariwise the plaintiffs did not make a good impression on this court and the contradictory accounts of Mr. Bulube's involvement and supposed presence at the police station prior to their arrest in order to specifically exonerate them from any involvement in the rape of the complainant is somewhat tenuous and improbable.

[74] Firstly it is plain from the docket that Mr. Bulube does no such thing in his statement and secondly the statement taken from him at his home at 20h30 belies his presence at the charge office at all. It is further a strained interpretation of what is said in his statement that the three persons Maphelo, Luphelo and Fonxo were operating as a trio or that the arrest of Maphelo later with the cell phone in his possession should ineluctably point to their involvement in the rape rather than the people pointed out by the complainant herself. Although she does not appear to have interviewed Fonxo, the complainant had not implicated Luphelo at all. Moreover, it is common cause that she had been in his company earlier that night. If he had been present one would have expected the complainant to have said so pertinently when his role in the critical events of the night was under discussion. One further has only to read Mr. Bulube's statement in context (and in conjunction with Luphelo's and the other witness statements) to appreciate that the vignette he was relating and his sighting of the complainant at the time must have preceded the rape of her which happened later and somewhere far

removed from where Mr. Bulube noticed the people and the peculiar events related by him.

[75] It was incidentally open to the plaintiffs to call Mr. Bulube to testify to confirm his supposed ill treatment at the hands of the police and his very voluble denouement of the plaintiffs' involvement in the whole debacle at the charge office (most improbable on its own), but this corroboration was not forthcoming. If the plaintiffs wished to controvert the defendants' version in this respect (which flows naturally from Mr. Bulube's statement) the burden was on them to do so and their failure to call him was at their own peril.

[76] The plaintiffs clearly gilded the lily in many other respects as well, for example prolonging the exact moment and period of their detention and the number of days they languished in prison before their bail application could be heard, unjustifiably attributing blame to the investigating officer who supposedly failed to appear in court to testify. Even the withdrawal of the case ultimately was elevated into a "dismissal" of the case, whereas it was routinely dispensed with under the circumstances outlined by Ms. Jekwa whose testimony and professional account I have no reason to reject.

[77] Most notably it was clear from the premise of Mr. Nzuzo's cross examination and questions put to the defendant's witnesses that he set no store by the plaintiffs' conflicting accounts regarding what exactly Mr. Bulube had said at the police station or what had supposedly gone down there before their arrest. Indeed it would in my view have been an outrageous thing to suggest to the defendants' witnesses that despite Mr. Bulube presenting himself to the police to identify himself as an eye witness to the rape that they would then, calculatingly, have arrested three different persons other than the real perpetrators and worse still have assaulted him in full view of everyone present in the charge office. Indeed if that was the information provided to their attorneys at the outset, one would have expected this astonishing premise to have been pleaded in the particulars of claim as constituting extremely malicious behavior on the part of the police and a gross and deliberate aberration of Warrant Officer Maholwana's duties as a

peace officer under all the circumstances warranting extreme censure. Instead I am fortified in my view that the plaintiffs seriously embellished their case along the way.

[78] Inasmuch as I am obliged to resolve the dispute of fact, I do so in favour of the defendants and reject the evidence of the plaintiffs where their versions differ both from each other's and from the defendants' testimony. Their versions are simply improbable, inherently so, contradictory, and do not accord with the objective record keeping maintained in the docket concerning the case from the moment of the opening thereof. The bail transcript also naturally presents an objective account that does not accord with the plaintiffs' testimony.

[79] I return to the question whether Warrant Officer Maholwana's suspicion was reasonable.

[80] The test whether a suspicion is reasonably entertained within the meaning of s 40 (1)(b) of the CPA is objective.¹⁷ In this instance, would a reasonable man in her position and possessed of the same information have considered that there were good and sufficient grounds for suspecting that the plaintiffs had committed rape, a First Schedule Offence.¹⁸

[81] In *Mabona and Another v Minister of Law and Order and Others*¹⁹ the court expounded upon the expectation of such a reasonable man effecting an arrest without a warrant.

“It seems to me that in evaluating his information a reasonable man would bear in mind that the section authorizes drastic police action. It authorizes an arrest on the strength of a suspicion and without the need to swear out a warrant, i.e.

¹⁷ *Minister of Safety and Security & Another v Swart* 2012 (2) SA SACR 226 (SCA) at [20]; *S v Nel & Another* 1980 (4) SA 28 (E) at 33H.

¹⁸ *R v Van Heerden* 1958 (3) SA 150 (T) at 152; *S v Reabow* 2007 (2) SACR 292 (E) at 297 c – e.

¹⁹ 1988 (2) SA 654

something which otherwise would be an invasion of private rights and personal liberty. *The reasonable man will therefore analyze and assess the quality of the information at his disposal critically, and he will not accept it lightly without checking it where it can be checked. It is only after an examination of this kind that he will allow himself to entertain a suspicion which will justify an arrest.*" (Emphasis added)

[82] Jones J in *Mabona* goes on to state what the threshold of such an examination is:

"This is not to say that the information at his disposal must be of a 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."

[83] Indeed, in *Duncan v Minister of Law and Order*²⁰ the court found that the word "suspicion" implied an absence of certainty or adequate proof.

[84] In this instance there is no question that Warrant Officer Maholwana formed her own suspicion. She also did not launch into making an arrest without firstly carefully gathering her wits about her. She began at the beginning making sure that the complainant's statement was one which she was prepared to put her weight behind. She sought confirmation of what the complainant had said and clarity and supplementation where this was needed; waited until she had objective medical substantiation of the fact that she had been gang raped as claimed; sought the customary corroboration of a "first report" witness; and thereupon followed up on the necessary leads which presented themselves to her. Her first meeting with Mr. Sinyono logically led her to Mr. Bulube, confirming a systematic approach and careful appraisal

²⁰ 1984 (3) SA 560 (T)

of all the relevant information beyond the bare A1 statement made by the complainant (which another colleague had taken) so as to remove any personal doubt as to the correctness of the complainant's plea that she had been raped by known perpetrators. Whereas she had merely been apprised of the names of those offenders (she explained that she had not met the plaintiffs before), she witnessed first-hand the complainant's spontaneous pointing out of the plaintiffs and Mr. Majamane. Although Warrant Officer Maholwana had before she left for the hospital met up with a group of men at the charge office who claimed to be there on the basis of messages left by the police that they were being sought for the rape, she resisted any impulse to arrest them, indicating her consistency in adopting a careful and methodical approach.

[85] In addition, she made enquiries as to the business of those persons present at the charge office in the company of the plaintiffs and Mr. Majamane and was assured that they had come at the behest of the plaintiffs. She sensibly excused them once she had reconciled herself with the fact that they had not been identified by the complainant as being among her perpetrators.

[86] Indeed, regardless of what Mr. Bulube had said in his statement concerning his sighting of Maphelo, Luphelo and Fonxo, who may or may not have been in each other's company, during the early hours of the morning near his home after hearing a scream, there would have been no justifiable basis to arrest Luphelo, who had co-incidentally been interviewed by Warrant Office Maholwana, or Fonxo, as neither were implicated by anyone. Maphelo it is clear was implicated by the fact that the cell phone was found in his possession closer to the hour of the plaintiffs' arrest rather than because of the information furnished by Mr. Bulube.²¹

[87] The finding of the phone in Mr. Majamane possession however provided vital confirmation for Warrant Officer Maholwana, not for any reason other than that the

²¹ The question whether the suspicion concerning him of committing rape never came to the fore, but there would indeed have been a reasonable need for him to have accounted for his possession of the complainant's cell phone.

phone was the property of the complainant and because Mr. Majamane had also been identified by her as being among the three who had assailed her.

[88] As for the exculpatory explanation offered by the plaintiffs and Mr Majamane, Warrant Officer Maholwana was correct in my view to reflect that the pointing out by the complainant of her perpetrators trumped these accounts.

[89] It is unnecessary for an arresting officer to strive for absolute certainty regarding the identity of the supposed perpetrators when making an arrest without a warrant for a First Schedule offence. Indeed there is almost always an element of uncertainty inherent in the concept of suspicion. Warrant Officer Maholwana can therefore hardly be criticized, objectively speaking, for not checking out the plaintiffs' supposed alibis rather than accepting the confidence of the complainant regarding who had violated her.

[90] The fact that the complainant had imbibed alcohol on the night of the incident was not an after-the-fact reflection by Warrant Officer Maholwana. She obviously sought to clarify the complainant's state of sobriety at the time of the incident by pertinently dealing with this aspect in her supplementary affidavit. The examining doctor who saw the complainant several hours after the incident (albeit only at 18h55 on 29 April 2012), who was professionally obliged to comment on any clinical evidence of drugs or alcohol evident upon examining the complainant, wrote "nil". The complainant herself had also had her wits about her that morning after the incident, being astute enough to have observed the two plaintiffs together in each other's company again, wearing the same clothes as at the time of the incident and with muddy shoes on which confirmed for her that they had been present at the physical scene of the rape. Her mother's statement concerning the first report also confirms that the complainant rendered a cogent account to her of the events of the night, albeit her daughter was in a state of shock and crying.

[91] As for the information furnished by Mr. Bulube, even upon a sterile *ex post facto* consideration of his statement, there is nothing which detracts from the reasonableness

of Warrant Officer Maholwana's suspicion that the perpetrators pointed out to her by the complainant were most likely the real offenders. It is contrived in my view to attribute to his information the certainty contended for by the plaintiffs that, because Maphelo, Luphelo and Fonxo were observed by him after he heard a scream, that they were the trio responsible for raping the complainant. As indicated elsewhere his home is not in close proximity to the rape scene; he could not vouch for the three of them being a cohesive team; and despite hearing a scream, the vignette of the complainant being dispossessed of her phone clearly preceded the actual rape event by possibly even two hours.²²

[92] The subsequent withdrawal of charges against the accused (for want of DNA proof) is also neither here nor there and does not affect the lawfulness of the plaintiffs' preceding arrest.²³ The question is whether at the time Warrant Officer Maholwana made her arrest the circumstances giving rise to her suspicion and which informed her perception must be such as would move a reasonable man to form the suspicion that the plaintiffs had committed a First Schedule offence.

[93] In my view the answer, based on the prevailing circumstances and upon an objective overview of all the relevant surrounding circumstances, must be in the affirmative. Indeed this is one of those matters where it can be said with confidence that there was nothing flighty or arbitrary about the arresting officer's suspicion.

[94] In the result I conclude that Warrant Officer Maholwana entertained a reasonable suspicion that the plaintiffs had committed the offence of the rape of the complainant, which justified her arrest of them without a warrant under all the circumstances.

²² Luphelo said he came to the scene to help the complainant look for her phone at "past 24h00". The complainant said she was out and about at 02h00 and made the first report to her mother at 04h00 according to the latter. Mr. Bulube merely referred to "the early morning session" at which juncture he made his peculiar observations.

²³ Victor v Minister of Police (unreported GP case no. 39197/2011, dated 22 October 2014 at [49] – [50].

[95] As for the claim of malicious prosecution, I am inclined to agree with Mr. Ntsaluba that the plaintiffs failed to discharge the onus to prove their claim in this respect against either of the defendants. Both Warrant Officer Maholwana and Ms. Mkhwayimba were obliged, on the premise of a *prima facie* case against the plaintiffs of a so-called gang rape (and in Warrant Officer Maholwana's case on the basis of her coincidental considerations of the safety of the complainant and the accused), to follow the prescripts of section 60 (11)(a) of the CPA and let the law take its course. The evidence failed in my view to establish that the defendants acted with malice (*animo iniuriandi*) in leaving it up to the court to determine their fate pending the trial.

[96] In the premises the plaintiffs' claims are dismissed with costs.

B HARTLE
JUDGE OF THE HIGH COURT

DATE OF HEARING : 16 September 2019

DATE OF JUDGMENT : 12 December 2019

Appearances:

For the plaintiffs: Mr. S Nzuzo instructed by Badi Loliwe Attorneys c/o S Z Sigabi & Associates, King William's Town (Ref. Mr. Loliwe).

For the defendants: Mr. T M Ntsaluba instructed by The State Attorney, East London (Ref. Mrs. Dlanjwa).