

NOT REPORTABLE

**IN THE HIGH COURT OF SOUTH AFRICA
(EAST LONDON CIRCUIT LOCAL DIVISION)**

CASE NO: 293/2020

In the matter between

LWANDO KAVE

Plaintiff

and

NATIONAL MINISTER OF POLICE

First Defendant

**NATIONAL DIRECTOR OF
PUBLIC PROSECUTIONS**

Second Defendant

MS N MAKAZI (Prosecutor)

Third Defendant

JUDGMENT

HARTLE J

Introduction:

[1] The arrest and prosecution of the plaintiff on charges of the rape and kidnapping of a 14 year old girl (*“the charges”*) are at the centre of an action for damages which came on trial before me.

[2] The four issues which arise for determination are (1) whether the plaintiff's arrest and detention were justified, (2) whether the defendants' members (alleged to have been acting in concert) caused his unlawful further detention, (3) whether the 2nd and 3rd defendants acted maliciously in prosecuting him and, (4) in the event of

any of these issues being decided in his favour, the quantum of damages to which he is entitled.

The Pleadings:

[3] The claims are framed in an omnibus fashion.

[4] The plaintiff seeks to hold both the defendants' members liable for their relevant roles played in causing him to be arrested in the first place, detained, prosecuted, and remanded in custody pending the trial that was terminated in his favour on 25 January 2019.

[5] In addition to pleading the classic elements of his claim for unlawful arrest and detention, the plaintiff alleges that certain conduct on the part of the members aforesaid conducted to his continued detention after his first court appearance in the Mdantsane Magistrate's Court on 14 March 2018.¹

¹ This appears to go to the element of legal causation arising in respect of the claim for unlawful arrest and detention directed against the first defendant. In *De Klerk v Minister of Police* 2021 (4) SA 585 (CC) the Constitutional Court clarified that the police, when wrongfully detaining a person, may be held liable for the post-hearing detention of that person. Such liability will lie where there is proof on a balance of probabilities that, (a) the culpable and unlawful conduct of the police was (b) the factual and legal cause of the post-hearing detention. This must be read with the four requirements for the delict that that must be proven, the last being that the conduct of the defendant must have caused, both legally and factually, the harm for which compensation is sought. (See paras [13] and [14] of the judgment). The application for leave to appeal before the court in *De Klerk* was about whether the harm associated with the applicant's detention on the order of the magistrate after his first court appearance until his release could be attributed to the unlawful arrest by the police [16]. In that instance the harm contended for was found to be not too remote from the unlawful arrest. Thus it was considered that the investigating officer knew that the appellant would appear in a "reception court" where the matter would be remanded without the consideration of bail. Also relevant to the manner in which the plaintiff has framed his pleadings is the confirmation by the Constitutional Court in *Mahlangu & Another v Minister of Police* 2021 (7) BCLR 698 (CC) that it is immaterial whether the unlawful conduct of the police contended for is exerted directly or through the prosecutor as long as that harm is not too remote from the claimed unlawful arrest. (See para [33]). It was not hard to envisage in that matter though that the egregious conduct of the police (who obtained a false

[6] In this respect it is suggested that the relevant members culpably missed the fact that there was not a merit-worthy case against him arising from the charges that provided a reasonable underpinning for him to have remained in custody. This contention depends for its thrust on the question whether reasonable and probable cause existed to have founded the enrolment of the charges by the prosecution in the first place. In any event the plaintiff alleges that he was unlawfully deprived of his liberty or rather that there was no just cause for the deprivation, this despite the ordinary legal consequences that ensue upon an arrest carried out under the auspices of Chapter 5, as well as the regular constraints put upon the liberty of an accused person arrested and charged with serious offences under Chapter 9, of the Criminal Procedure Act, No 51 of 1977 (“CPA”).

[7] So, for example, it is alleged that the members failed to apply their minds properly to the contents of the docket, and the facts of the case, especially the fact that the sexual intercourse had been consensual. The particulars of claim postulate that if the members had done so (I suppose it is meant to say conscientiously and objectively) this would have brought with it the realization that there was no justifiable cause for the plaintiff to have been kept in custody arising from his arrest until he was released on warning on 26 March 2018.²

[8] Also alleged is that on each instance when the plaintiff appeared in court the defendants’ members “*were of the view that (he) should be remanded in custody*” and that “*in pursuit of this oral agreement, both applied to Court that (he) be remanded in custody.*”

confession from the plaintiff through torture and coercion to justify the arrest in the first place and then “*cunningly engineered*” their continued detention by misrepresenting the true state of affairs to the prosecutor) materially led to the plaintiff’s further detention.

² This may go to the issue of foreseeability relative to the normative boundary using legal causation (See the first judgement in *De Klerk*), but the allegations also purport to suggest a malicious deprivation of liberty for which the purportedly culpable omissions and acts of *both* defendants’ members are under the scope.

[9] The defendants admit that the plaintiff was arrested without a warrant on 14 March 2018 under Vulindlela CAS 83/03/2018, that he was detained at the Mdantsane police station pursuant thereto and pending his first court appearance, and that he was charged with rape and kidnapping.³ The authority to arrest without a warrant envisaged in section 40 (1) (b) of the CPA was relied upon by the first defendant to justify the arrest and attendant detention of the plaintiff until his first appearance in court.

[10] Also, by implication, the defendants admit the plaintiffs continued detention until he was released on warning although they deny that he was *unlawfully remanded in custody* during this period.

[11] In amplification of such denial they plead that there was a *prima facie* case to have sustained the charges and adverted to the fact that the offences are of a serious nature, more especially the rape count which warranted a “*custodial remand*” in terms of section 60 (11)(a) of the CPA.

[12] The prosecution of the charges against the plaintiff was defended by the defendants on the basis that it was pursued in good faith and on the grounds that there was sufficient evidence to sustain the charges pressed against him. Malice is denied.

The common cause features of the matter:

[13] I list below the facts of the matter which are either common cause or uncontroversial:

³ It is evident from the docket that the kidnapping charge was not on the cards as far as the police were concerned, neither any other offences under the Criminal Law (Sexual Offences and Related Matters) Amendment Act, No. 32 of 2007 (“SORMA”). Nothing turns on this because the offences of rape and kidnapping, as well as a contravention of section 15 (1) of the SORMA each in their own right resort under the Schedule 1 list. The kidnapping charge appears to have been added by the prosecutor enrolling the matter in the regional court for the first time.

[14] The plaintiff was arrested without a warrant at his home on the morning of 14 March 2018 on a charge of the rape of the complainant's 14 year old daughter.

[15] The complainant himself was a police officer. He had reported to the Vulindlela police station that the plaintiff raped his daughter during the night of 12 March 2018.

[16] His report was ostensibly made on the morning of 13 March 2018.⁴

[17] In it he states that he was informed by his sister whilst at work on 13 March 2018 that his daughter had been raped. He relates what he was told by the child herself as regards the offences as follows:

"She said she was on the way to (friend) last night at about 23:00 to collect her track top then on the way she met Lwando. Then Lwando said he is going to help her by giving her cell phone to phone or WhatsApp (friend) Then he said they must go at his place to collect data. Then he dragged her to his shack and he locked the door. Then she said this Lwando threatened her. And he said he is not afraid because he came from jail for years. She then said this male forced her to bed and raped her.

She said Lwando hide the key and squeeze her on her arm and never let her go. He then repeatedly raped her until this morning. He then released her this morning at about 06:00. She said from Lwando's place she went to (friend) to collect her track top."

[18] A victim statement in the docket (marked A2 and according to a contemporaneous note in the police diary obtained from the child also on 13 March 2018) confirms the details of the offences as follows:

⁴ The statement does not reflect a date but it was evidently made on 13 March 2018 contemporaneous with the completion of the First Information of Crime form SAPS 3M (b). This is confirmed by an entry made in the police docket on the 13th recording what was done on opening the docket including the taking of the complainant's founding statement.

“On Monday 2018-03-12 at about 23:00 hours I went to (friend) house to collect my track top. Then on the way I came across with unknown B/male to me who introduced himself as Lwando. He asked me where I am going. I tell him that I’m going to (friend) house to collect my track top.

He then offered me to give me his cell phone to call or WhatsApp (friend). He then said we must go to his place to take data. When we arrived at his place he dragged me to his shack and locked me inside. I then screamed for him to open the door. He said he's not afraid of anything. He came from jail for years. He then pushed me to his bed and forced me to take off my clothes by himself. Then he take off his clothes. He then forced open my legs and force his penis to my vagina and move up and down on top of me without using condom.

After he finished he move away and hold me to his arm and never let me go. He again get on top of me and put inside his penis in my vagina and rape again moving up and down. Then after that he hold me to his arm until 06:00 in the morning. He released at 06:00.”

[19] Also filed of record in the docket opened consequent to the complaint is a J88 medical report that confirms a vaginal examination of the child on 13 March 2018 at 13h23. The recorded history given by the child to the forensic nurse according to her report is that she was sexually assaulted by an unknown male who also threatened her. Also noted is that the child was “*emotionally hurt*” and “*shocked.*” The gynaecological examination reveals that her *labia minora* and *posterior fourchette* were bruised. Her *fossa navicularis* was swollen and clefts were visible on her hymen at the 3, 6 and 9 o’clock positions (albeit she was reported to have had consensual sexual intercourse a few days before the examination.) The report is endorsed with the examining practitioner’s conclusion that “*findings are consistent with fresh vaginal penetration*”.

[20] Constable Manga was the arresting officer. He unfortunately died on 24 April 2023 shortly before the trial commenced.

[21] In carrying out the warrantless arrest he acted in his capacity as a “*peace officer*” within the meaning of the provisions of section 40 (1) of the CPA.

[22] Both charges of rape (and kidnapping) are Schedule 1 offences. A charge of rape is also a Schedule 6 offence for bail purposes.

[23] Constable Manga received the docket for his attention and investigation on 13 March 2018, ostensibly after the two founding statements had been obtained.⁵

[24] The plaintiff was charged after his arrest on 14 March 2018 at the Vulindlela police station ostensibly on a charge of rape based on the complaint by the child’s father.⁶ The SAPS 14 (“*Notice to Rights in terms of the Constitution*”) was administered to him at 10h00. The offence noted on the face of it is one of “*Rape*”.

[25] Constable Manga filed a contemporaneous official statement documenting the fact of his arrest of the plaintiff. His affidavit, deposed to on 14 March 2018 at 10h00, states as follows:

“I BANDILE MANGA state under oath in English

1. I am a Constable with Persal No. currently attached at Mdantsane FCS, 256 Edcott Square, Oxford Street, Southernwood

2. I wish to state that on 2018-03-14 I was officially on duty. I receive a docket from Vulindlela CAS 83/03/2018 Rape.⁷ I went to the victim for interviews and she took me to the suspect’s place. When I get at suspect’s place ... I arrested Lwando Kave. She was pointed out by the victim (child’s

⁵ The first active involvement by Constable Manga in the matter appears to have been the receipt on the afternoon of the 13th of the sexual assault kit from a colleague who had ostensibly accompanied the child to the medical examination.

⁶ See footnote 3 above. The complaint comprised the elements of the offence of kidnapping as well but this charge appears to have come to the fore only later.

⁷ It is not in contention that Constable Manga received the docket on 13 March 2018.

name) and he was free from injuries, I detained him at Mdantsane SAPS as per SAP 14/124/03/2018 ...”

[26] A further statement was obtained from the child on 14 March 2018 in the presence of her father, the complainant. It is not clear whether it was obtained before or after the plaintiff’s arrest but it in any event states, consistently with her initial statement, that:

“On Monday 2018-03-12 at about 22:00 I was on my way to (friend’s) home who is staying at... I came across with an African male who introduced himself as Lwando. He asked me what I want at that area at that time. I told him that I’m going to (friend’s) home to fetch school document and a jersey and he asked me how may he help me. I borrow phone from him to phone (friend). He told me that we must go to his home to fetch a phone with a data.

When we got to his home he grabbed me to his shack that is behind to the main house. He locked the door and force me to take off my clothes. I tried to cry. He stop me by saying he is not scared of anything. He will go to jail for me he came from jail. I must shut up because I will make his family to wake up when I am making a noise. He then take his clothes off and mine. He force my legs to open and inserted his penis into my vagina and rape me. After he finished, he just sleep next to me and didn’t allow me to leave.

I didn’t check the time. He repeatedly raped me again and fell asleep after he finish. At 06:00 I wake him up and tell him that I want to go home. He opened the door for me and let me go and I went to tell (BM) who is our neighbour what had happened to me.”

[27] A warning statement was taken from the plaintiff by Constable Manga on 14 March 2018 at 13h00. In it the plaintiff denies the allegations of rape (the kidnapping is not referenced) but he admitted to sexual intercourse with the child. He maintained that this had occurred with her consent. (Evidently the issue of the child being underage within the meaning contended for in section 15 (1) of the Criminal Law

(Sexual Offences and Related Matters) Amendment Act, No. 32 of 2008) was not a focal feature of the interview.

[28] Also on the 14th amidst all the other aspects reportedly dealt with in the policy diary, a bail information sheet was completed (A 14) in which the election on the form is made not to oppose the plaintiff's release on bail. Other factors noted on the form favourable to the plaintiff are that his address had been verified, that he had children, and that he had co-operated with the police. At most 7 days were said on the form to have been required to move the investigations to a state of completeness.

[29] Pursuant to the plaintiff's arrest he was detained at the Mdtansane police station until his first appearance in the Mdtansane district court on 15 March 2018 under case number A493/18.

[30] At his first court appearance the plaintiff was represented by a legal aid attorney. He indicated his intention to apply for bail and was remanded in custody by a bench warrant until 16 March 2018 for these purposes. Also recorded is that the State was opposed to bail.

[31] On 16 March 2018 the magistrate noted that an alternative address was to be checked. Also recorded was the fact that a Schedule 6 offence was on the table, which category of offence was confirmed by the plaintiff's attorney to be applicable in the circumstances. By agreement the matter was postponed to 22 March 2018 for a formal bail application. The plaintiff was remanded in custody.

[32] On the 22nd the matter was postponed again to 26 March 2019 for a bail application. The reason that was noted was that the "I/O (Investigating Officer) *is not before court*".

[33] On 26 March 2019 the court noted as follows:

“Accused person is before court. PP. Bail not opposed. Affidavit and SPP certificate attached as an exhibit.

Def: I confirm appearance and applicant also filed an affidavit.

Accused warned not to communicate with (child) and to attend case until final...

ROW (remanded on warning) to 23/4/2018.”

[34] The certificate provided to the court dated 26 March 2018 was ostensibly written and signed by “*SPP: H M Ackermann – Senior Public Prosecutor: Mdantsane*”. It states as follows:

“Mdantsane District Court

RE: AUTHORITY TO PROCEED WITH A SCHEDULE 5 / 6 BAIL APPLICATION UNOPPOSED:

VULINDLELA CAS 83/03/2018

I hereby give authority to Ms Campbell, the Prosecutor in Bail court, to proceed with a SCHEDULE 6 bail application unopposed in the matter of **The State versus LWANDO KAVE**, Court case number **A493/18**. The charges against accused, **Rape (Victim under 16 years, multiple times)**

In terms of Part 9 par C2 of the NPA Policy Directives “No prosecutor may agree to the setting of bail where Schedule 5 and 6 offences are involved without prior authorization from the DPP or SPP in certain Divisions”. Also see Sect 60(2)(d) of the Criminal Procedure Act 51 of 1977.

The reasons why the prosecutor may proceed with bail application unopposed are:

State’s case against accused is weak.

Please contact the writer hereof if any further information is required.”

[35] Also evidently provided to the court was an affidavit by Constable Manga which, consistent with what had been recorded in the Bail Information Sheet in the

docket dated 14 March 2018, confirmed that he had no objection to the plaintiff being released on bail. In it he stated as follows:

“1. I am a Constable with Persal No. ... currently attached at Mdantsane FCS, 256 Edcott Square, Oxford Street, East London.

2. I wish to state that I am the investigating officer of this case. I am not opposing bail. The accused doesn't have previous convictions and pending cases, he has got alternative address at Scenery Park and is confirm(ed) by me. I have consulted with the complainant. She is not in fear of the accused and he is not a flight risk.”

[36] The further postponements of the matter until the case was transferred to the regional court in terms of section 75 (1) of the CPA on 4 July 2019 reflect that the plaintiff appeared on his own recognizances at each subsequent interval.

[37] During the course of the investigation of the matter further statements and records were supplemented. The full complement of documents included a first report statement by the child and fathers' neighbour, chain statements by officers who handled the forensic samples after her medical examination, various records documenting how the plaintiff's arrest had been processed and his constitutional rights were administered to him, his warning statement, SAP 69 record (clean), the child's birth certificate, bail information sheet, competency and victim impact report etc.

[38] On 9 July 2019 the plaintiff made his first appearance in the regional court under case number RC1/65/2018.

[39] The charges framed against him in that court were of rape and kidnapping. The State invoked the provisions of section 51 (1) and Schedule 2 of the Criminal Law Amendment Act, 105 of 1997 (“CLAA”) on the basis that the child was under the age of 16 years when the offence was committed, and on the further basis that she had been raped more than once.

[40] After several postponements the trial ensued and was digitally recorded.

[41] The plaintiff pleaded not guilty. The child testified with the assistance of an intermediary which was followed by the testimony of the first report witness (BM). Her father also testified. The J88 medical report and the child's birth certificate were entered into evidence uncontested. Her statement introduced during the course of the proceedings was also handed in as an exhibit. The accused testified in his own defence and at the conclusion of the trial on 25 January 2019 was acquitted on both counts.

[42] It needs to be stated that chief among the reasons of the court for his acquittal, which was dealt with quite sensitively in the judgment, is that the child was not a good witness essentially because she had not been honest about the reason why she had been out late on a school night. The court remarked that her evidence was "*on shaky grounds*" and that it was not necessarily supported by the medical evidence in the sense that the injuries noted could also have been caused by vigorous consensual intercourse. There were also discrepancies between the reports that she had made to her father and to BM, the first report witness. The child's evidence was additionally noted to have been improbable in several respects. In the result the court concluded that her testimony as a single witness did not measure up against the standard required.

[43] The plaintiff was in consequence given the benefit of the doubt. The magistrate concluded his judgment in the trial with the following pronouncement:

"The accused and his witness, even though I already mentioned that I stand critical against their conduct on the night in question they were not bad witnesses. And in the light of what I have said about the evidence of the complainant, no Court would be able to find that the accused's version is not reasonably possibly true under the circumstances.

The state failed to prove beyond a reasonable doubt that this child was raped on the night in question and the accused's assumption that she was over the age of 16 at the time is accepted as reasonably possibly true. Therefore, under the circumstances the accused is found NOT GUILTY AND DISCHARGED ON BOTH COUNTS."

The trial in the present action:

[44] In the present matter the plaintiff testified first to meet the onus on him to prove the claim of malicious prosecution.⁸ It was acknowledged that the defendant bore the onus to justify the plaintiff's arrest and detention in the respects that were evidently placed under the scope of the illegality enquiry suggested by his pleadings.⁹

[45] The contents of the relevant police docket and the separate court records concerning the plaintiff's appearances before the district and regional courts respectively was also entered into evidence by consent in the trial.¹⁰ The court record included a full transcript of the trial itself.

⁸ I believe that there was a bit of a misconception that the plaintiff only bore the duty to prove the claim of malicious prosecution. His pleadings were oddly framed and flirted with extraneous matter. If he had not meant to pursue claims of malicious *detention* against both defendants (which claims would also have attracted a burden to him), he had also in any event to establish the other elements of his claim.

⁹ See *De Klerk Supra* at [14]. See also *See Jacobs v Minister of Safety and Security* CA 327/2012 [2013] ZAECHGHC 95 (23 September 2013) at para [41] which requires a plaintiff to plead and prove any extraneous circumstances on which he/she relies to establish his claim. Something more than just the traditional claims for unlawful arrest and detention on the one hand, and malicious prosecution on the other, were in the offing here.

¹⁰ The parties agreed at the onset of the trial that the documentation discovered would serve as evidence of what those documents purported to be without admitting the contents thereof. No challenges emerged at the trial as to the authenticity of any of the documents that served before court except for the objection to the receipt into evidence of the late Constable Manga's arrest statement standing in the place of the oral testimony that he could unfortunately no longer give on the nuances of the arrest.

[46] I should add that Ms. Cossie who appeared for the defendants applied during the course of the trial under the provisions of section 3 (1)(c) of the Law of Evidence Amendment Act, No. 45 of 1998, for the arrest statement of the late Constable Manga to be admitted into evidence on the basis that it was in the interest of justice to do so. The application was opposed by Mr. Maduma (who appeared for the plaintiff) essentially on the basis that his client stood to be prejudiced given the fact that he would be unable to test the contents of the statement under cross examination. I ultimately declined the application and ruled that the statement should go in on the regular basis that affidavits in a police docket in a claim of this nature do, namely that it was (in the docket) what it purported to be. In ruling as I did, I gave recognition to the potential prejudice complained of on behalf of the plaintiff but was satisfied in any event that there was more than enough common cause evidence that spoke to the issue of how Constable Manga had gone about arresting the plaintiff, and for what ostensible reason.

The plaintiff's testimony:

[47] The plaintiff related the circumstances under which he came to be arrested on 14 March 2018.

[48] I need not repeat his testimony concerning how he came to have sexual intercourse with the child. His version is that it was an entirely consensual encounter. It had been the first time for him and the child to have met although a mutual friend had facilitated his "*love proposal*" to her which had ostensibly gone down favourably. What happened between them on the night in question was consistent with his version given in the warning statement which Sergeant Manga took from him - voluntarily although begrudgingly because he maintains that he had made an election not to disclose his defence except with the assistance of a legal representative. It is also consistent with his testimony given in the trial in the regional court.

[49] It had therefore come as a surprise to him, so he related, that on the morning of the 13th he had had a call from his home to the effect that a police officer in the presence of the child had come by to report to his grandmother that she had been raped by him.

[50] Acting in response to this information he had proceeded to the child's home after work to see her father. He was in the company of the same friend who had facilitated his meeting with the child the previous night and who pointed out their place of abode to him.¹¹ They did not find him at home, but on the road nearby in his motor vehicle. After introducing himself to him, the plaintiff claims that her father did not want to be reasoned with or hear him out in respect of the explanation that he had offered. (He did not disclose what his explanation to him was although under cross examination he clarified that he had informed him that the sexual intercourse with his daughter had been consensual.) Further in parting the complainant said to him that he would make sure that he got arrested because he had raped his child.

[51] The following morning, he heard a knock on his door. He had not gone to work because he had anticipated the encounter with the police and had intimated to the father at their meeting the night before that he would find him at his home if he wanted him. Constable Manga arrived with the complainant in tow. Asked by the arresting officer if he was the suspect the complainant said "*Yes, here is this dog!*" Constable Manga handcuffed him and took him away in a police van to the police station. As they were proceeding towards the gate, they passed the child who was standing with his uncle in the yard.

[52] With reference to what was stated in the prosecutor's certificate that the case against him was "*weak*" he explained that he felt abused because nothing had changed so to speak to explain the about turn in permitting him to be released on warning on 26 March 2018 whereas the State's attitude prior thereto had been that his application for bail should be opposed.

¹¹ This is the same friend who had been in the company of the plaintiff at a tavern the night before when they met up with the child.

[53] Regarding the verdict of the regional court, he lamented the fact that the deprivation of his liberty could have been avoided if he had only been given a chance to state his case before being arrested. He clarified in this regard that Constable Manga had not given him such an opportunity to inform to him what had happened. Asked why he thought the officer had behaved this way towards him he explained that it had appeared to him that he chose to listen to the child's father rather than giving him an opportunity to explain. He asserted that if Constable Manga had given him the space he would have conveyed to him what he had said in his defence to the father the previous evening. Prompted by the direct question whether there might be an additional reason for his perception that the arresting officer had purportedly taken sides with the complainant, he replied that that was because they were both police officers and were working together.

[54] He could not comment on the defendant's plea and deferred to those who know the law. He was however concerned, given the senior public prosecutor's certificate and comment in it that the case against him was weak, that this made for a tenuous basis for him to have been held in custody until 26 March 2018.

[55] Under cross examination he acknowledged however that any parent would have intervened upon receiving news that his child had been abused. He further appeared to accept that in avenging his own child, the complainant was not ganging up with the arresting officer so to speak. He accepted that it was not improper for the complainant to have gone to the police station to open a case of the rape of his child.

[56] Concerning Constable Manga's contentious arrest statement, he agreed with everything stated in it except he wished to point out that it was in his opinion not true for the deceased deponent to have said that he had been pointed out *by the child*. As an aside, although according to his own testimony it was the complainant who

had identified him as the suspect, the child was however present in close proximity on the occasion of his arrest.¹²

[57] As for why he was denied bail at the outset of the case's enrolment, he acknowledged that his legal representative or someone along the line had indeed explained to him that a Schedule 6 offence was implicated as well as the onerous import of these provisions.

[58] He relented, regarding his claim for malicious prosecution, that those who decided to prosecute him and to whom it fell to decide whether there was objective merit in the charges knew more than him about the law.

[59] He further acknowledged knowing that it was a criminal offence to have sex with a minor.

[60] As an aside it seems to never have occurred to him that the child's age was the reason for his arrest at the instance of the complainant (who was her legal guardian), and in setting the tone for the gravity of the offence.

The evidence of Ms. Jodwana-Blayi:

¹² The plaintiff's concern about the father identifying him rather than the child seemed to go deeper than just the difference between what he said and what the late arresting officer had said in his statement about this aspect. He seemed to want to suggest that it was not the father's place to have involved himself in an issue between him and the child (where he probably considered there was none because in his view the sexual intercourse had been consensual), but he was missing the obvious fact that the father as legal guardian of a minor was exactly who the police should have regarded as the "*complainant*" and who it was appropriate should have been present and at the forefront of the "pointing out". Identification *per se* was also never the issue so it didn't really matter whether the father, or the child in the presence of the father, had confirmed to the arresting officer, who up until that point had not yet met the plaintiff, that he was indeed the correct suspect. It appears logical that someone needed to confirm that Constable Manga was not arresting the wrong person. Both daughter (and father by now) knew that the plaintiff was the suspect, but evidently not Constable Manga himself.

[61] Ms. Jodwana-Blayi, an experienced prosecutor with the rank of State Advocate (working as a prosecutor at the Mdantsane magistrate's court in 2018) testified that she had been responsible for enrolling the matter at the court on the date of the plaintiff's first court appearance as part of her obligation to screen new dockets for prosecution.

[62] She was satisfied from a reading of the material in the docket that a *prima facie* case existed against the plaintiff based on the A1 report of the complainant, the two statements of the child stating that she had been raped by the plaintiff more than once, the J88 medical report that gave credence to her claims of sexual penetration, the first report statement of the family's neighbour that stated that the child had come to her crying telling her that she was raped, as well as the warning statement of the plaintiff in which he had related that he had sexual intercourse with the child consensually.

[63] Asked what made her sure that there was a *prima facie* case, she alluded to the corroboration of the child's statement with reference to the medical report that there was penetration and that fresh injuries were noted to have been in evidence. There were the reports of both the father and the neighbour, the latter stating that the child came to her crying and saying that she had "*just been raped*". To the father she had said that she had been raped and more than once at that. The plaintiff's own warning statement also corroborated the complainant's report that she had been sexually penetrated. The child's age also weighed as a factor with her because even if the sex had been consensual on the plaintiff's version, she considered that the "*suspect was admitting to having sexual intercourse with a child under the age of 16.*"

[64] She accordingly enrolled the matter and also noted that because of the charges a Schedule 6 offence was implicated which meant that the plaintiff would have to apply for bail whether the application was opposed or not and that he would have to remain in custody until the matter could be dealt with in "*bail court*".

[65] She explained the processes that apply to facilitate the application happening and the expectation that these be dealt with at the latest within a window of seven day's depending on the circumstances applicable to each matter especially regarding the question what further investigation might still be necessary. The state of the bail appeal court roll was also a factor in this respect.

[66] With reference to the certificate provided by the senior public prosecutor she explained that she was the only incumbent permitted to give authority to a prosecutor to proceed with a bail application unopposed in the case of Schedule 5 and 6 offences.

[67] She disagreed with the sentiments expressed in the latter's certificate that the case against the plaintiff was "*weak*". To the contrary she saw a *prima facie* case in the facts that the child had been penetrated and was underage. In any event, so she explained, the categorization of the case as "*weak*" was only for bail purposes and to give authority to proceed with an unopposed bail application.

[68] She was not in agreement that her own decision to enroll the case had purportedly been overridden by the instruction given by the senior public prosecutor in this instance. Instead - so she emphasized, the latter instruction had been provided expressly and only for bail purposes. She reasoned further that if her senior had meant to overrule her decision as the person who had screened the docket, she would have gone further and indicated that the case should be withdrawn then in its entirety.

[69] She confirmed that in accordance with standard procedure that pertained at the court at the time the matter would have been transferred from the channelizing court (Court A) to the bail court (Court B) for the plaintiff to make his bail application which is what the record confirmed in this instance.

[70] Under cross examination she was not inclined to agree that she had rushed her decision or that she had not been given adequate time to read the docket and

determine the fate of the matter as a case to be enrolled. She also disagreed, with reference to an entry made by her in the docket to the investigating officer to conduct certain investigations, that this reflected her uncertainty that the matter was ready at that point to be enrolled.¹³ Indeed, so she insisted, there was a *prima facie* case. She clarified even further that one does not enrol a case “*because it is ready for trial*”, but rather because it is one in which you “*see there is a prima facie case that the accused has to answer.*”

[71] Despite how the certificate might have made it look and her concession that nothing much had happened in between her decision made to enroll the matter and the plaintiff’s release on warning except that his address had been verified, she strongly disagreed that at that moment (or indeed even at the time of her testimony) that the case against the plaintiff was in fact weak.

[72] Her concluding remarks refuting that she had taken a decision in the haste of the moment, or was undecided about the strength of the case against the plaintiff, or that she had acted with malice towards him, is instructive:

“MR MADUMA: So what I am trying to get at is when you know that there are critical information that is missing from the docket which perhaps had they been obtained, would not have led to your senior finding that the State case is weak, would (it) not have been prudent on you and required of you to have made that decision at that point before enrolling the matter?

MS JODWANA-BLAYI: But unfortunately for this one, all the critical or crucial information was in the docket, hence I made that decision to enrol the matter.

¹³ It is necessary to repeat her instruction to the investigating officer to appreciate her explanation given in this regard. She asked him to obtain a photo album; a statement from the plaintiff’s friend to support his version; the complainant (child) was to be referred for an assessment on her ability to testify and to describe the impact of the rape; he was to file a forensic social worker’s report; the child was to be referred for counselling; a buccal sample was to be taken from the plaintiff; and he was asked to arrange a date for consultation.

MR MADUMA: The critical information that made the State's case weak.

MS JODWANA-BLAYI: Well, I have already stated, M'Lady, that to me the case was strong. To me there was a *prima facie* case.

MR MADUMA: Well, Ms Jodwana-Blayi, I put it to you that the plaintiff came to Court and told the Court that he felt abused by the process of the law and in the process of the law, he meant prosecutors in particular. And because you as a prosecutor, you would know the law and you know what was required but due to your failure, his whole life was uprooted. I put it to you that your actions and your decision in the haste of 30 minutes have caused such damage to a young man. And it could only be construed as malicious in nature.

MS JODWANA-BLAYI: May I respond?

MR MADUMA: Do you care to comment?

MS JODWANA-BLAYI: Thank you, M'Lady. M'Lady, I applied the law. I did the best to apply the law to protect the rights of the complainant at that stage. And at that stage, I was of the opinion that there was a *prima facie* case against the accused. And the law required that the accused be kept in custody because of the seriousness of the charge he was facing. And, M'Lady, I am also of the opinion that, M'Lady, I am also saying that that was not malicious. I was not malicious. I did not even know the accused.

MR MADUMA: Ms Jodwana-Blayi, as a prosecutor, are you the officer of the Court or the officer of accused people? No, I am asking you in your role, who do you represent in your role as a prosecutor?

MS JODWANA-BLAYI: As a prosecutor, you have to apply the law. You have to see if there is a case. You are not a persecutor but a prosecutor. You apply the law. I have to apply the law and that is what I did.

MR MADUMA: In your protection of the rights of the victim, did you consider the protection of the rights of the accused?

MS JODWANA-BLAYI: I did. Hence, I also instructed the investigating officer to make a follow up on the accused's version.

MR MADUMA: All the while making a decision that would send him certainly not only to the holding cells, but to prison.

MS JODWANA-BLAYI: It is unfortunate it is because of the charge he was facing and the law required that he be kept in custody."

[73] In re-examination she demonstrated her grasp of what a *prima facie* case means as well as her understanding of what in the statements conducted to establishing the requisite elements for the offence of rape:

"MS COSSIE: When a case, when it is stated that a case is weak would that, does it mean that there is no case in your understanding?

MS JODWANA-BLAYI: In my understanding, when one says that the case is weak, to my understanding it says, yes, there is a case but it is not that strong when you say it is weak, to my understanding. It does not say there is no case. Hence, I said if there was no case, at that stage it was also at the right stage to withdraw the charges, if there was no case, M'Lady.

MS COSSIE: Just the *prima facie* case, what does it consist of if you make your mind that there is a *prima facie* case?

MS JODWANA-BLAYI: When you say that there is a *prima facie* case, it means with simple language that, yes, there is evidence and then the accused has to answer. He must answer because the complainant is saying this and then the accused must answer, no, I did not do it. Then he must bring evidence and the complainant bring evidence. That is the simple

understanding.

MS COSSIE: Now to establish a *prima facie* case, the elements of the rape, what are they of the charge that was?

MS JODWANA-BLAYI: It is an unlawful and intentional penetration of the vaginal penetration of the complainant. So there was unlawfulness, that means there was no consent. There was intention to do what he did. Intention must be there, unlawfulness must be there. There must be no consent. There must be penetration and all those were there, all those elements were there.”

[74] Finally, she explained that the aspects she had asked the investigating officer in the diary to investigate did not amount to the kind of supplementation that in any way detracted from the existence of a *prima facie* case that in her view was already there from the outset. Instead, what she had asked him to follow up on was in the nature of “*add on’s*” or “*cherr(ies) on (the) top*” of the substance that mattered.¹⁴ In her opinion the statements in the docket at the time of her decision to enroll were “*enough*” to have properly made her decision.

The evidence of Ms. Makazi:

[75] Ms. Makazi, a public prosecutor with 18 years of experience at the time of her testimony, explained that she had received the docket in her capacity as regional court prosecutor after the matter had been transferred to that court from the district court. Her obligation was to consult before the trial date had been set, but the child was in Gauteng and could not be present due to financial constraints. She therefore at first consulted only with her father and the first report witness but had the opportunity to confer with the child later when she was brought to court on the morning of the trial. After meeting with her she was satisfied that there was a *prima facie* case to proceed with the trial.

¹⁴ See footnote 13.

[76] Her decision too that reasonable and probable cause existed was based on the material in the docket and she reasoned that whether on the child's version or the plaintiff's, he still had a case to answer because of her being underage. She saw no reason to have made any recommendation at the time to throw in the towel on the prosecution.

[77] As for the senior public prosecutor's comment in the certificate at the time that the State's case was weak (it was accepted that this document would not have been in the docket but attached to the district court record) she was not of the view that this could have been construed to mean that there was "*no case*" against the plaintiff. If that were the case, so she rationalized, then the senior public prosecutor who had had the power at her disposal to do so would have withdrawn the matter, period.

[78] She eloquently explained why the outcome of the trial was not determinative of the question whether there had been reasonable cause to have persisted with the prosecution as in the first place:

"MS COSSIE: Would the outcome of the trial indicate that there was malicious prosecution?

MS MAKAZE: No, it is not an indication that there was malicious prosecution. We should understand that our duties as prosecutors is to have a *prima facie* case and proceed with it. We do not announce the verdict or decide whether a person is guilty or not. That is the duty of the Court after hearing all the evidence, that this one is guilty, that this other one is not guilty, not a prosecutor's job.

MS COSSIE: Looking at the documents and your view about the case and that certificate, the consultations you had, would you have foreseen the possibility that you were acting wrongly or incorrectly?

MS MAKAZE: No, no, I would not. I would – if there was a

possibility – that possibility, I would have seen[?] it[?]. But in this particular case there was a case against the accused.”

[79] Based on what was in the docket, and her own views on the merit of the case (even despite the certificate) she denied that she had acted wrongfully, unlawfully, or maliciously in persisting with the prosecution. As for the question of the reliability of the witnesses, she repeated her view that it had ultimately been up to the court to make findings of credibility.

[80] Under cross examination she explained that even though she had to wait to consult with the child until the day of the trial her statement that she had been raped trumped the plaintiff's lamentation that he had in the meantime had to endure the burden of living with the accusation implicated by the continuing prosecution.

[81] She was alive to delays experienced in prosecutions in the district court and explained that for its part the regional court chased a finalization target of 9 months from the date of the transfer of cases to its jurisdiction until finalization.

[82] She agreed that prosecutors have the power to withdraw cases but pointed out that this power cannot be applied recklessly. So, for example she explained that one cannot withdraw a matter simply because it has been on the roll for a long time. As long as there is an explanation for why the matter is still on the roll, the matter is required to remain there. She agreed though that matters should not be postponed indefinitely or without regard to the objective circumstances that apply in each instance.

Unlawful arrest and detention:

[83] The customary approach to be adopted in determining the issue of the legality of the arrest itself (which by its mere happening constitutes an infringement of the plaintiff's personality rights that is *prima facie* unlawful), and the circumstances under which an arrest without a warrant might in principle be justified, is made provision for

inter alia in section 40 (1)(b) of the CPA which the defendant invoked in this instance to justify the plaintiff's arrest. This subsection provides in terms that:

- “(1) 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.”

[84] The requisite jurisdictional facts which must be in existence to justify an arrest 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.¹⁵

[85] As indicated above, it is not in contention that Sergeant Manga was a peace officer within the meaning and contemplation of section 1 of the CPA. It is furthermore not in contention that both offences of rape and kidnapping are offences listed in Schedule 1 to the CPA.¹⁶

[86] There is of course no evidence other than the plaintiff's and what appears from the police docket that offers any insight into what prompted Constable Manga to have carried out the arrest.

[87] 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 the officer's position and possessed of the same information have considered that there

¹⁵ *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].

¹⁶ A contravention of section 15 (1) of the Criminal Law (Sexual Offences and Related matters) Amendment Act also co-incidentally resorts under Schedule 1.

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.

were good and sufficient grounds for suspecting that the plaintiff had committed the offence of rape.¹⁸

[88] 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:

“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.”²⁰

[89] 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.”²¹

[90] Although Constable Manga could not speak for himself there is in my view common cause evidence on the basis of which it can inferentially be found as a probability that he entertained a suspicion that the plaintiff had committed the offence of rape. Firstly, this is what the complaint in the docket went about, underpinned by the two founding statements and the report of the forensic nurse. Even if the investigation diary note is cryptic about what the late officer did upon becoming seized with the docket for investigation purposes, this gap is filled by other evidence.

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 (SE).

²⁰ At 658 G.

²¹ At 658 H.

[91] So, for example, the plaintiff conceded in his evidence that, before his actual arrest, a police officer had arrived together with the child at his home to look for him on the premise that he had raped her. This means that the officer - who by a process of deduction was Constable Manga, would have personally interacted with the child about the complaint enough to understand who was implicated, where the rape had happened, and where the suspect could be found. The plaintiff also anticipated, based on his interaction with the complainant the night before, that a police officer would certainly be approaching him to arrest him on allegations of raping his daughter. The plaintiff further clarified in his testimony that Constable Manga's arrest statements, admitted into evidence on the basis of what it purported to be - namely an official account of that arrest, fell to be challenged only on the basis of the officer's say so in it that he had arrested the plaintiff on a pointing out *by the child* (whereas on his version the pointing out had happened at the instance of her father), meaning that he agreed with the rest of the assertions therein.

[92] Further, what happened after the plaintiff's arrest, documented in a variety of ways in the docket, confirms the obvious reason why the plaintiff was arrested which was to answer to a charge of rape in court the following day. It follows almost ineluctably *that* that was what Constable Manga's intention was in going to his home. This is the inescapable background that preceded his warrantless arrest.

[93] Further, since the defendant's plea was drafted before Constable Manga's demise, it can plausibly be inferred in my view that the first defendant's reliance on the provisions of section 40 (1)(b) of the CPA would have been informed on the basis of his instructions to his first defendant's legal representatives at the time that this had been the legal basis, and the background information the motivation, for the arrest.

[94] As for the reasonableness of his suspicion, the two founding statements and the J88 report, even taken on their own, more than adequately support a *prima facie* case of rape against the child and the inference is irresistible that Constable Manga

based his decision on these founding documents in addition to the forensic nurse's conclusion. There can also be no doubt that the child's affidavit (whether true or not) would objectively have created the impression that the plaintiff had used some measure of physical force to achieve his ends and that he had threatened the child. He had further boasted that he was no stranger to crime and had served time in jail before. There was the added emphasis that the child had been held against her will and repeatedly raped through the night, all of which features would automatically have endowed the debacle with severe gravity.

[95] The plaintiff's acceptance that Constable Manga must have consulted with the child as he said he did in his official arrest statement also confirms that he went about the matter sensibly before swooping in to make the arrest. A further indication is that the matter was investigated and dealt with by an officer assigned to the Family Violence, Child Protection and Sexual Offences (FCS) unit, which is a specialized unit within the South African Police Service that focuses on crimes involving children. Specifically, their mandate is to investigate and assist in cases of sexual assault against children. Evidently the steps taken in the investigation of the matter followed a checklist by their members.²²

[96] Leave aside the serious nature of the report the plaintiff would also by necessary implication have had to answer for the fact that he had had sexual intercourse with an underage child, hence Constable Manga's acting on the father's request to initiate a prosecution would have assumed solemn importance.

[97] As an aside, the provisions of section 54 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, place a legal obligation on a person who has knowledge of a sexual offence that has been committed against a child to report such knowledge immediately to a police official on pain of being prosecuted for a failure to report such knowledge. Under the provisions of section 54 (1) (b) of the Act, a person found guilty of such failure under this provision is liable on

²² See B3 in the docket

conviction to a fine or to imprisonment for a period not exceeding five years or to both a fine and such imprisonment.

[98] Given that the child's father, as he probably felt himself obliged to do, had laid a criminal complaint that received serious traction, it is entirely implausible in my view that Constable Manga would not have followed proper standing orders and procedures in carrying out his arrest of the plaintiff without a warrant. Indeed, it is to my mind telling that the plaintiff has not complained of any shortcoming in the procedure adopted by Constable Manga in arresting him, except to suggest that he felt under pressure when it came to making his warning statement and that he would have preferred to have had his attorney present or to have not disclosed his defence during the interview.²³

[99] It is also improbable in my view that Constable Manga would not have been sensitive to the quandary that the plaintiff found himself in. I say so because contemporaneous with his charging of the plaintiff and taking his warning statement he indicated in the bail information form²⁴ that it was not his intention to oppose bail. Evidently, he followed through on that basis after arresting the plaintiff by confirming to the magistrate on affidavit that he had no objection to his release.

[100] In all the circumstances I am satisfied that the first defendant has discharged the onus on him to prove justification for the plaintiff's arrest. A reasonable police officer in Constable Manga's position would have been more than satisfied that there were good and sufficient grounds to arrest, indeed he would have been lawfully obliged (especially as a member of the FCS unit) to act on the report of the child's father that his 14 year old daughter had been raped even if the thought might have occurred to him that the child had been a willing participant in the sexual tryst. This is because sexual intercourse with a child under the age of 16 years is also an offence

²³ The plaintiff was somewhat ambivalent in this respect. It was important to his case that he had made an exculpatory statement so it was unclear why he wanted to distance himself from that statement as much as possible during cross examination.

²⁴ Marked A14 in the police docket.

under section 15 (1) of the Criminal Law (Sexual and Related Matters) Amendment Act and a Schedule 1 offence at that.

The discretion to arrest:

[101] It is so that the matter does not end there because once the required jurisdictional facts to carry out a warrantless arrest are present a discretion whether or not to arrest arises.²⁵ Although section 40 (1) (b) of the CPA gives peace officers extraordinary powers of arrest and such powers necessarily avail in the fight against crime, these must be sensitively counterbalanced against the arrested person's constitutional rights of personal liberty and dignity. A court will therefore carefully scrutinize in each case whether the infringement of these rights was legally in order.²⁶

[102] The purpose of an arrest is to bring a suspect before court. If the arrest is effected for a purpose other than this, or for another purpose which does not fall within the jurisdictional framework of section 40 (1) of the CPA, the arrest will be unlawful for that reason alone.

[103] The plaintiff in his particulars of claim did not allege that there was anything untoward in the manner in which Constable Manga has exercised his discretion.²⁷ It only transpired in his testimony that he believed that Constable Manga was taking sides with the complainant but this was merely a perception on his part not based on any facts to justify this as a concern. It seems further that it never even occurred to the plaintiff to complain that the arresting officer should have considered less invasive means of bringing him to justice. His contention at the end that he should never have been arrested at all seems to have been predicated instead on an after-the-fact awareness of the senior public prosecutor's certificate provided during the

²⁵ *Minister of Safety and Security v Sekhoto and Another* 2011 (5) 367 (SCA) at para [25].

²⁶ *Minister of Law and Order v Dempsey* 1988 (3) SA 19 (A) at 38 C.

²⁷ If there was such a complaint at the outset the first defendant would no doubt have addressed this in the plea.

bail proceedings that the case was purportedly weak and his successful discharge at the end of the trial.

[104] Peace officers are co-incidentally entitled to exercise their discretion as they see fit, provided that they stay within the bounds of good faith and rationality.²⁸

[105] In a rationality review, the critical enquiry, as suggested by Harms JA in *Sekhoto*,²⁹ should not be focused on the manner of the arrest but rather the rationale for the arrest. The opinion formed in the present matter to have arrested the plaintiff concerned a serious offence of the rape of a child more than once. The legislature has deemed it proportional to arrest a person for such an offence without a warrant provided the jurisdictional requirements stipulated in section 40 (1) (b) of the CPA are met.³⁰ (The same applies to the offences of kidnapping and a contravention of section 15 (1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act.)³¹ Therefore, the mere nature of the offence justified the arrest of the plaintiff for purposes of bringing him to justice. Constable Manga further wasted no time in bringing the plaintiff to court the never next day. He further offered that bail should not be opposed. It would not have been within his power to have released the plaintiff from custody from the police station.

[106] Nothing in the evidence suggests an improper exercise by Constable Manga's of his discretion to have arrested the plaintiff in these circumstances.

The claimed unlawful further detention:

²⁸ *Sekhoto Supra* at para [39].

²⁹ *Supra*.

³⁰ As was stated in *Sekhoto* at para [25] it could hardly be suggested that an arrest under the circumstances set out in section 40 (1) (b) could amount to a deprivation of freedom which is arbitrary or without just cause in conflict with the Bill of Rights.

³¹ The offence of kidnapping was ostensibly not in the forefront of Constable Manga's mind. He was also inclined to accept that the complaint was one of rape as opposed to any other sexual offence against a child.

[107] Even though I hold that the arrest itself was lawful, which would have provided legal justification to have detained the plaintiff for purposes of securing his attendance in court, the plaintiff in his particulars of claim still suggests a basis to challenge the lawfulness of his detention (from 15 – 26 March 2018) which beckons scrutiny by this court.

[108] In every matter where there is a legality enquiry to determine whether the deprivation of liberty is arbitrary or without just cause, the facts are always unique and it is important that their relevance is consciously framed in the particulars of claim as the defendant needs to know what the case is that he/she is required to meet.

[109] Although detention as a distinct separate act from arrest is by itself *prima facie* unlawful, detention on its own (especially post court appearances in the context of criminal proceedings where the accused's right not to be deprived of freedom of liberty is protected by section 35 (1) (d) – (f) of the Constitution)³² does not necessarily attract scrutiny unless there is something about it that is claimed to render it unlawful. There is for example no automatic obligation on the Minister of Police, the National Prosecuting Authority, or the Judiciary,³³ to have to justify detention (on its own or consequent to an arrest as a necessary corollary thereof) in a vacuum or as a general coverall in every claim in which they have been cited

³² These are the provisions that give effect to the protection against arbitrary and unjust deprivation of freedom under section 12 (1) (a) of the Constitution when a suspect has to be brought to court for an appearance.

³³ Subsections 35 (1) (d) - (f) of the Constitution impose constitutional obligations on three different institutions of government. The police carry the responsibility to ensure a criminal suspect is brought before court as required by section 35 (1) (d). This is an administrative function to be exercised within the broader executive authority of government. The decision to charge a suspect under section 35 (1) (e) is one that falls under the authority and competence of the NPA, an independent institution under the Constitution. The decision to release or detain a suspect falls within the independent judicial authority or competence of the Judiciary. (See the third judgement in *De Kerk* at [132] including the authorities cited there.

bearing upon his claimed unlawful detention except where a proper basis is laid in the pleadings that invokes the obligation on one or other of the role players to do so.

[110] Whilst every alleged intentional deprivation of liberty (speaking in the context of an action for damages) puts an onus on the arrestor to show why the arrestee's deprivation of liberty should *not* be regarded as wrongful in law, a plaintiff seeking to rely on extraneous circumstances that his arrest and subsequent detention was unlawful is required to plead a basis therefor.³⁴

[111] The starting point in any enquiry is to consider the provisions of section 35 (1) of the Constitution that spell out the rights of an accused person who has been arrested for allegedly committing an offence. These provisions, read in conjunction with those of section 12 (1) (a) of the Constitution that lay down the underlying right of every individual not to be deprived of freedom arbitrarily or without just cause, provide as follows:

“35. Arrested, detained and accused persons.—(1) Everyone who is arrested for allegedly committing an offence has the right—....

(d) to be brought before a court as soon as reasonably possible, but not later than—

(i) 48 hours after the arrest; or

(ii) the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day;

(e) at the first court appearance after being arrested, to be charged or to be informed of the reason for the detention to continue, or to be released; and

(f) to be released from detention if the interests of justice permit, subject to reasonable conditions.”

[112] It is the latter provision that invokes a discussion concerning the circumstances under which or when the interests of justice so permit.

³⁴ *Jacobs Supra* at para [41].

[113] The CPA has its own unique provisions in Chapter 5 that deal with the manner and effect of arrest that brings an arrestee's right to liberty into tension. In section 39 (3) for example, concerning its legal effect, it is provided that:

“(3) The effect of an arrest shall be that the person arrested shall be in lawful custody and that he shall be detained in custody until he is lawfully discharged or released from custody.”

[114] Section 40 provides for the defined circumstances in which a peace officer may arrest any person without a warrant. As indicated above section 40 (1)(b) of the CPA was invoked for present purposes.

[115] Section 50 deals with the procedure after arrest that must be adhered to so as to ensure that one who has been deprived of his liberty on the basis of an official arrest is not unnecessarily restrained by the detention that is naturally consequent upon such arrest.

[116] Section 50 (1)(a) of the CPA, for example, provides that:

“(1) (a) Any person who is arrested with or without warrant for allegedly committing an offence, or for any other reason, shall as soon as possible be brought to a police station or, in the case of an arrest by warrant, to any other place which is expressly mentioned in the warrant.”

[117] More significantly, section 50 (1)(b) and (c) provides as follows regarding an arrestee's right to apply for bail:

“(b) A person who is in detention as contemplated in paragraph (a) shall, as soon as reasonably possible, be informed of his or her right to institute bail proceedings.

(c) Subject to paragraph (d), if such an arrested person is not released by reason that

- (i) no charge is to be brought against him or her; or
- (ii) bail is not granted to him or her in terms of section 59 or 59A, he or she shall be brought before a lower court as soon as reasonably possible, but not later than 48 hours after the arrest.”³⁵

[118] It is recognized, in terms of section 50 of the CPA, that once an arrestee is brought to court the police’s authority to detain, inherent in the power of arrest, is said to be exhausted.³⁶

[119] Chapter 9 of the CPA deals with the procedures to obtain bail and the rigors facing an accused person who is charged with a Schedule 6 offence.

[120] In this regard it is necessary to state the obvious challenge that the plaintiff faced in this instance, made provision for in section 60 (11)(a) of the CPA which provides, in peremptory terms, as follows:

“60 (11) Notwithstanding any provision of this Act, where an accused is charged with an offence—

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

[121] The issue of liability for unlawful arrest and detention (especially the element of causation necessary to be established) is rendered quite complex by the fact that there are two other essential role players in the mix than just the Minister’s members who by obvious implication are at least factually responsible for the deprivation of liberty that commences with an arrest.

³⁵ Obviously neither sections 59 nor 59A are of application in this instance.

³⁶ *Minister of Safety and Security v Sekhoto & Another* 2011 (1) SACR (1) (SCA) at para [42].

[122] So, for example, in this instance after Constable Manga arrested the plaintiff, he indicated that he would not oppose bail. The police were not authorised to release him themselves. Their obligation was to deliver him to the court to be dealt with by it in accordance with the law. The plaintiff would have been obliged, because of the nature of the charge and the fact that a Schedule 6 offence was implicated, to have applied for bail. The magistrate upon receiving him would have been obliged to detain him in custody until he was dealt with in terms of the law. It was up to the plaintiff then to satisfy the court that exceptional circumstances existed which in the interests of justice permitted his release.

[123] When the matter appeared in the so-called channelizing court it was transferred to the bail court. In both courts the State had indicated that it would oppose the application. It appears that some or other verification of the plaintiff's alternative address was sought. A date for the bail application was arranged and was in the offing but the matter was postponed again. One gets the impression that this was because the affidavit Constable Manga deposed to needed to be obtained. Ultimately it appeared that the court had three things at its disposal that predisposed it toward a decision in the plaintiff's favour to release him on warning. It had the plaintiff's application in the form of an affidavit, it had the affidavit of Constable Manga confirming the factors in his favour that could be taken to constitute exceptional circumstances, and it had the certificate of the senior public prosecutor which permitted the prosecutor to contend, quite misleadingly in my view, that the state's case was weak.

[124] In the latter regard I accept the evidence of both prosecutors to the contrary that there was at all times a *prima face* case for the plaintiff to have met, and, self-evidently, objective merit in the charges of rape (and kidnapping as ultimately framed in the charge sheet in the regional court).

[125] In all that happened (or didn't) I find no unlawful conduct on the part of the first defendant's members (flowing from the arrest at their behest) that either influenced the prosecutor's decision or led to the plaintiff being detained in custody from the

date of his first court appearance until his release on warning on 26 March 2018 other than what was expected *ex lege* to have happened. There is no legal obligation as far as I am aware and none was held up to the court that Constable Manga was obliged to file an affidavit. It seems that one was requested though and that he was happy to oblige.

[126] Quite evidently the plaintiff's detention in this short period, although of huge import to him, was caused by the legal effect of the provisions of section 60 (11) (a) of the CPA and the independent decision of the prosecutor to oppose bail until receipt of the senior public prosecutor's certificate that gave the prosecutor authority to relent in the State's opposition to his application.

[127] But even if I am to construe the plaintiff's particulars of claims as also suggesting that the police and or the prosecutors *maliciously* detained him (as a separate delict from the classic unlawful arrest and detention claim for which the Minister of Police might be held liable arising from the continuum of the arrest in the first place), the evidence also does not go so far as to establish that the police caused the plaintiff's post court appearance by acting without reasonable or probable cause and *animo iniuriandi* with intent to injure him.³⁷

[128] To the contrary, and for the same reasons I find above that Constable Manga entertained a reasonable suspicion to have arrested the plaintiff in the first place, this provided an enduring *ex lege* basis, following the arrest and first court appearance, to justify his continued detention.

³⁷ See in this regard the approach adopted in *Minister of Police and Another v Erasmus* (366/2021) [2022] ZASCA 57 (22 April 2022) at para [11] and [12]. Both wrongful and malicious deprivation of liberty are *iniuria* actionable under the *actio iniuriarum*. Each constitute actionable wrongs on their own that attract stringent requirements to be proved for their success against the actor. But wrongful arrest can also attract liability for the post-hearing detention of that person where the culpable and unlawful conduct of the police is the factual and legal cause of his post hearing detention. The more egregious that conduct the easier it is to establish the necessary element of legal causation.

[129] The same applies to the second defendants' members. I accept the evidence of both Ms. Jodwana-Blayi and the third defendant that there was at all times a *prima facie* case against the plaintiff that would have justified his continued detention until he was dealt with by law as provided for in section 60 (11) (a) of the CPA. The sting of the plaintiff's allegations in his particulars of claim is that the police and prosecutors failed to apply their minds to the facts, with the emphasis being placed on his defence that the sexual intercourse had been consensual, and that they had applied to court that he especially be remanded in custody.

[130] By the time of his post-court appearance his defence was both known and recognized but would still not have provided an objective basis to either withdraw the charges against him or to have rendered the case less merit-worthy so to speak. Apart from the serious allegations reported by the child, the fact of her being underage also loomed large and required an answer. The plaintiff was confounded so to speak by the common cause fact that he had had sexual intercourse with her in the first place. As for the remands, these would have followed on the basis provided for in section 60 (11) (a) of the CPA.

[131] The State could well have decided earlier than it did to forego its opposition to the plaintiff's formal bail application, but this was not the complaint outlined in his particulars of claim. His case that was required to be met by the defendants is rather that the police and the State alike had promoted a case without merit against him. For this he had relied on two key events that obviously conduced to his favour as far as he was concerned. The first was the purported acknowledgment by the senior public prosecutor that the State's case was "*weak*". The second was that he was ultimately acquitted.

[132] The plaintiff's ill-conceived reliance on the "*weak case*" theory does not assist his claim. I accept Ms. Jodwana-Blayi's sensible explanation that that decision and opinion of the senior public prosecutor related to the strength of the state's case *vis-à-vis the bail application*, with the certificate being the mechanism to have facilitated the plaintiff's release from custody without contestation. Otherwise, the plaintiff would

ostensibly not have succeeded in proving that exceptional circumstances existed that in the interests of justice permitted his release on bail. His application would certainly have floundered.

[133] Likewise, the fact that the plaintiff was acquitted on the charges is his mere good fortune and does not detract from the opinion properly held in my view by both the prosecutors (who properly acted with the required objectivity and in the public interest) that the criminal case at all times carried with it reasonable and probable cause for its likely success and the reasonable promise of evidence to sustain the charges.

[134] In the result I am satisfied that the defendants have discharged the onus on them (within the narrow confines of the case that they were prevailed upon to meet) to prove that the plaintiff's further detention too was justified.

The malicious prosecution claim:

[135] The plaintiff bore the onus resting on him in respect of this claim to allege and prove that the defendants instigated the proceedings; that in doing so they had no reasonable and probable cause; that they acted *animo injuriandi*, and that the prosecution failed.³⁸

[136] Reasonable and probable cause in the context of this claim means "*an honest belief found on reasonable grounds that the institution of proceedings is justified*". The concept involves a subjective and an objective component.³⁹

[137] Where reasonable and probable grounds for an arrest or prosecution exists the conduct of the defendant instigating it is not wrongful.⁴⁰

³⁸ *Minister of Justice and Constitutional Development v Moleko* 2008 (3) SA 47 (SCA).

³⁹ *Moleko supra* at 53 C.

⁴⁰ *Relyant Trading (Pty) Ltd v Shongwe* [2007] 1 All SA 375 at 382a.

[138] The contemporary approach is that although the expression “*malice*” is used, the remedy in a claim for malicious prosecution lies under the *actio injuriarum* and what has to be proved is *animus injuriandi*.⁴¹

[139] This element may be proven by establishing that despite an appreciation that his actions were wrongful a defendant acted recklessly although not negligently.⁴² The degree of culpability required was expounded upon in *Minister of Justice and Constitutional Development v Moleko* as follows:

“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”.⁴³

[140] There is nothing of the kind in this instance as I have demonstrated above concerning the assumed separate delict of malicious detention. My comments apply with equal force to the present claim under discussion.

[141] The contents of the docket and the court record speak for themselves and I accept the evidence of the prosecutors that they exercised their discretions objectively on the basis of the information that was before them in the docket.

[142] The plaintiff has failed in my view to establish that the defendants’ members acted with malice (*animus iniuriandi*) in leaving it up to the court to determine his fate in the trial which as it turned out vindicated his defence that the sexual intercourse had been consensual after all and excused him for not knowing that the child was only 14 years of age at the time.

⁴¹ *Rudolph v Minister of Safety and Security* 2008 (5) SA 94 SCA at par [18].

⁴² *Rudolph supra* at par [28]

⁴³ Para [64].

[143] Perhaps a different approach would have ensued if the child had been held personally responsible for the claim on the basis that she had knowingly laid a false charge against him and had galvanized the machinery of the Sexual offences Act, vitally necessary to protect underage victims *inter alia* of sexual offences, for her own purposes.

Conclusion:

[144] It is regrettable that the plaintiff's life was upended by the incident, but this is certainly not one of those instances in which civil liability in delict attaches to the defendants arising upon their pursuit of criminal justice.

[145] In the premises the claims (howsoever they were meant to be construed) must all fail.

[146] On the issue of costs, however, it is clear that the plaintiff felt righteously indignant that he had been arrested after making it plain to all concerned that the sexual intercourse with the child had been entirely consensual. He was also misled by the intimation given in the senior public prosecutor's certificate misleadingly stated that the State's case was weak. This remark, coupled with him having been vindicated upon trial, would have given any person in his position a reason to feel abused as he said he did, and to embark on a legality review to question whether his arrest and detention had been justified. I appreciate that his experience was a bitter pill to swallow and is one that has left him feeling particularly bereft even if he acted irresponsibly in the whole debacle for his own part.

[147] In the circumstances and on the basis of the principles established by the court in *Biowatch Trust v Registrar Genetic Resources and Others*⁴⁴ I consider that it would not be appropriate to order him to pay the defendants' costs.

⁴⁴ 2009 (6) SA 232 (CC).

[148] I make the following order:

1. The plaintiff's claims are dismissed.

B HARTLE
JUDGE OF THE HIGH COURT

DATE OF HEARING : **7, 8 & 9 November 2023**
HEADS OF ARGUMENT : **16 & 23 November 2023**
DATE OF JUDGMENT : **6 May 2024**

Appearances:

For the plaintiff: Mr. DA Maduma instructed by Ntamo & Tshika Attorneys, East London (Ref. Ms. Ntamo)

For the defendants: Ms. CTS Cossie instructed by The State Attorney, East London (Ref. Mr. L Isaacs).