IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 1862/2012

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

19/10/2019
DATE

SIGNATURE

In the matter between:

JOHANNES COENRAAD WESSELS PLAINTIFF

and

THE MINISTER OF POLICE FIRST DEFENDANT

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTION SECOND DEFENDANT

JUDGMENT

NEUKIRCHER J:

1. The plaintiff has sued the defendants on two main claims:

1.1. unlawful arrest and detention; and

1.2. malicious prosecution.

2. At the commencement of the trial Mr Bester[1] and Mr Preis[2] informed me that the parties had agreed to separate the "*merits*" and the "*quantum*". There appeared to be an issue with the formulation of the rule 33(4) separation and the circumscribing with better precision of the issues to be tried before me to obviate any confusion.[3]

3. As a result, the matter stood down for the parties to properly reflect and the result was the following agreement:

3.1. there would be a separation of merits (liability) and *quantum*;

3.2. more specifically, as regards *quantum*, the parties agreed

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1 Who acts for plaintiff
2 Who appears for both defendants together with Mr Van Rensburg
3 **Denel (Edms) Bpk v Voster**, 2004 (4) SA 481 (SCA); **Odifin (Pt) Ltd v Reynecke**, 2018 (1) SA 153 (SCA) at par. 11

that any issues relating to the quantification of the plaintiff's claim for damages shall form part of the quantum enquiries;

3.3. what the cause of the damages claim was will also form part of the quantum enquiry, for example what caused loss of income to the plaintiff's business.

4. Given the judgment of **Tolstrup NO v Kurupa NO,**[4] the parties agreed:

4.1. paragraph 5 on page 13 of the pleadings bundle;

4.2. paragraph 9 on page 16 of the pleading bundle; and

4.3. paragraph 13 on page 22 of the pleadings bundle would form part of the *quantum* enquiry. The rest would be determined at the present hearing.

5. On the basis of the agreement set out in paragraphs 3 and 4 supra,

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[4] 2002 (56) SA 73 (W) at 77: "*when separating issues, the parties ought to be precise as to what issues are to be determined first and what to be stayed for later hearing. This would normally be done by reference to specific paragraphs of the pleading.*"

I was satisfied that it was convenient to order a separation and granted the separation as sought in terms of rule 33(4) on the terms agreed.

6. During the course of the trial, a further agreement was reached between the parties, which resulted in a substantial curtailment of proceedings and obviated the necessity of Mr Preis calling some ten witnesses. That agreement is marked Exhibit "X" and reads as follows:

"Die ondersoek-dagboeke en verklarings deur getuies en lede van die eerste verweerder word toegelaat as deel van die rekord voor die Hof en dien as bewys van die inligting tot die beskikking van die eerste verweerder en lede te Kathu. Die feitelike waarnemings van die eerste verweerder se lede, asook die van Me GGS Solomon van die Krisissentrum te Kathu, soos dit in hul ondersoek-dagboeke en verklarings vervat is, word erken. Die forensiese eedsverklaring van

Sers MA Manyama gedateer 12 April 2010 word erken."

7. Given the agreement *supra* the questions be determined are:

7.1. the unlawful arrest and detention; and

7.2 the malicious prosecution,[5]

the plaintiff bore the onus of the latter[6] and therefore elected to begin.[7]

8. The plaintiff's case rested on the evidence of two witnesses:

8.1 himself; and

8.2 Ian van Zyl Wessels, his son.

9. The defendants called three witnesses:

9.1 Capt. Sandra Boshoff (Boshoff);

9.2 Mr Mocumi (Mocumi), the control prosecutor; and

9.3 Mr Mohengwa (Mohengwa), the prosecutor who conducted the bail hearings.

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5 Or the alternate claims as they appear on the pleadings being a breach of duty of care and/or negligence

6 **Rudolph v Minister of Safety and Security**, [2007] 3 All SA 271 (T)

7 The first defendant bore the onus of proving that the plaintiff's arrest and detention were lawful: **Minister of Law and Order v Hurley, 1986 (3) SA 568 (A)**

10 After all was said and done, the following appeared to be common cause that emanated from the evidence presented:

10.1 the plaintiff was 64 years old and the owner of a bar known as "*Boks Tavern*" (the tavern) in a town called Kathu, Northern Cape;

10.2 he appeared to be reasonably well-known in the area;

10.3 on the night of Friday 27 February 2009 and in a remote area, he and the complainant,[8] had intercourse. He used a condom which he kept in the cubbyhole of his white Toyota Hilux Double cab (the bakkie). The condoms were distinctive in their packaging and have the name "*Casanova*" printed on the one side;

10.4 when he and the complainant were done, he used a piece of kitchen towel[9] to wipe them both off;

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8 A young women in her twenties known as "*Thembisele Posele*" (Posele). This issue of whether the intercourse was consensual was not common cause

9 Which he also kept in the cubbyhole of his vehicle. The kitchen towel was white with

10.5 the used condom, condom wrapper and used piece of kitchen towel were then discarded at the scene;

10.6 on Saturday 28 February 2009, Captains Booysen and Fourie arrived at the plaintiff's home at approximately 07h00 to 07h30;

10.7 with his consent, his bakkie was searched where a box of unused Casanova condoms was found in the cubbyhole and the roll of kitchen towel – white with little red flowers – was also found;

10.8 on the basis of this evidence, and bearing in mind that before going to the plaintiff's residence, Boshoff had already spoken to the complainant and she had taken them to the scene of the alleged rape where they found *inter alia* the items referred to in paragraph 10.5 *supra*,

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small red flowers printed on it and thus also rather distinctive.

the plaintiff was arrested on a charge of rape and detained in the police cells for the weekend;

10.9 on Monday, 2 March 2009 the decision was taken by Mocumi to formally charge the plaintiff with the rape of the complainant;

10.10 plaintiff was taken to court where the matter was postponed to 11 March 2009 for the bail hearing. On 11 March 2009, the bail hearing was postponed to 18 March 2009, and on 18 March 2009, it was postponed to 24 March 2009;

10.11 it is of importance that the State opposed the grant of bail and it did so on the following grounds:

10.11.1 that the State has a "strong case" against the plaintiff, which it could prove at trial;

10.11.2 that the plaintiff had tried to interfere with the

complainant (whether directly or indirectly)[10] and as a result she had to be moved to witness protection; and

10.11.3 that there was a suspected involvement of the police in trying to ensure that the matter did not go to court.

10.12 The plaintiff was refused bail on the grounds that "*because of the evidence that there has been interference with the complainant, directly or indirectly, promises made to give her a substantial amount of money to withdraw the case, of particular concern is the involvement, directly or indirectly, of the police or at least their suspected involvement in this case, which believes me to say that if the accused is released on bail today,*

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10 And here the evidence was that one BK Witbooi (BK) who had worked for the plaintiff had informed the complainant that the plaintiff would give her R40 000.00 to drop the charges

people would not have confidence in the legal system."[11];

10.13 the plaintiff appealed this decision and on 15 June 2009, Majiedt J (as he then was) set aside the court *a quo*'s ruling and granted the plaintiff bail in the amount of R5 000.00, subject to certain conditions. He handed down his reasons for judgment on 10 June 2009. Majiedt J criticised the manner in which the case was handled by SAPS, their lack of proper investigation and the conclusions drawn without proper foundation. He also criticised the court *a quo* in refusing bail, who he said *"clearly misconceived his function"* and was "*wrong in law*" to have refused bail on the facts and argument presented on 24 March 2009.

11. During January 2010, the charges were provisionally withdrawn against the plaintiff only for them to be reinstated on 24 May 2010.

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[11] Per the Magistrate's reasoning in refusing the plaintiff bail at the time

They were finally withdrawn on 8 October 2010, after the complainant withdrew her complaint.

THE PLAINTIFF:

12. The plaintiff was the first to testify. His evidence was that:

12.1 on 27 February 2009, he saw the complainant arrive at his bar with another woman who was a customer of his and known to him. He had never met the complainant before and did not know her name;

12.2 at approximately 22h00 one of his waitresses told him that they needed small change and he was on his way to a garage (where he always went) to get some when the complainant asked him for a lift home. As it was on his way to the garage, he agreed and she got into the passenger seat of his vehicle;

12.3 whilst driving he noticed that the complainant suddenly

started taking off her clothes and by the time he was at the intersection to turn off to the garage, she was naked. She told him that he must take them somewhere "*quiet*", which he did;

12.4 he had a pack of Casanova condoms in the cubbyhole of the bakkie and he used one for protection. After they had had intercourse, he used a piece of roller towel, which he also kept in the bakkie, to wipe them both off;

12.5 the used condom, condom rapper and used piece of roller towel were discarded there and the plaintiff them drove them both to the garage, where he gave the complainant R 200.00 to get cold drink and sweets, picked up a petrol attendant who wanted a lift back to the tavern, got his change and drove all three of them to the tavern where the complainant and he parted ways;

12.6 at approximately 04h00, he gave two of his employees a lift home when they encountered the complainant walking with five men. The plaintiff testified that he still at that stage did not know the plaintiff's name and he asked one of his employees to enquire from the complainant *"in her own language, in Setswana"*, whether she felt safe and whether she was *"okay"*. According to him, the complainant gave him the *"thumbs up"* sign, indicating that she was fine and he then drove off.

12.7 at between 07h00 and 07h30, Captains Boshoff and Fourie arrived at his house and informed him that he needed to accompany them to the police station as a charge of rape had been laid against him. With his permission his bakkie was searched where a box of unused Casanova condoms was found in the cubbyhole

and a role of kitchen towel.[12]

12.8 he was then arrested on a charge of rape and taken to the police station. His first court appearance was on Monday 2 March 2009 when he was charged with the complainant's rape and, as the facts *supra* appear, he remained incarcerated until his successful bail appeal.

13. The plaintiff also testified regarding the various statements and documents that were made part of the dossier during the course of the proceedings:

13.1 on 1 March 2009, Captain Sandra Boshoff made a statement in which she said that on 28 February 2009, the complainant had told her "... *dat sy deur drie mans verkrag is. Eerste deur Bok Wessels en daarna deur twee ander mans*";

13.2 on 1 March 2009, the complainant described how Bok

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12 Of the same distinctive pattern as found on the scene

Wessels raped her on the night of 27 February 2009, specifically stating *"... dit was 'n wit man die eienaar van Bok's Tavern"*, and also stated *"die ander twee mans het nie met my geslaap nie. Die een wat ek gesteek het, hy het probeer maar het dit nie reggekry nie"*.

13.3 the J88, which is dated 28 February 2009, and completed by Dr Mukwevho, states under "*clinical findings*":

"*Allegedly sexually assaulted by three males, one white, used a condom, and two blacks ...*";

13.4 there is also a statement of Thelma Jonas (a police officer) dated 4 March 2009 in which she states that on 28 February 2009, the complainant told her that –

"*... sy deur drie persone verkrag is, en dat sy deur hierdie persone aan die polisie sal uitwys.*"

13.5 On 3 March 2009, Gomslemo Gloria Solomon[13] made a statement in which is *inter alia* stated that complainant had told her that "Bok" raped her and then she was raped again by two other men. Her statement also indicates that the complainant received two threatening messages: one stated "*I am watching you*" and the other stated "*sooner or later you will be dead*" – there is no indication who sent those messages;

13.6 there is a second statement of Boshoff dated 4 March 2009 in which she says that prior to taking the complainant to a doctor, they first went to the scene of the alleged rape where she took into evidence, *inter alia,* a used condom, a condom wrapper (pink on the one side and coloured on the other with the word "*Casanova*" written on it) and a piece of paper towel – white with small

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13 She works at Kathu SAPS Crisis Centre

red flowers. She also then states that at the plaintiff's house, and with his permission, a search of his bakkie provided the following evidence: *"a handdoekrol, soortgelyk aan die stuk handdoekrol wat ek op die toneel gekry het, wit met fyn rooi blomme asook 'n boksie waarop staan Casanova met een ongebruikte kondoom daarin waarvan die kondoom verpakkingspapier dieselfde was as die een wat ek op die toneel aangetref het.*";

13.7 there is a withdrawal statement dated 2 March 2009 made by the complainant in which she says:

"*Ek wil die sake teen die beskuldigdes ... terugtrek aangesien ek met my jonger broer bly, ek sal ook nie elke keer hof toe kan kom nie aangesien ek sieklik is en epilepsie het ...*"

13.8 there is a second withdrawal statement by the complainant during approximately August 2010 in which she states that she has been trying to withdraw the charges against plaintiff since April 2010, and that –

"*Ek poog om nadat ek mooi oordink het Mnr Wessels my nie aangerand het of verkrag het nie, dit was die persone van Mosambiek af wat dit gedoen het.*"

14. It is important to note that the plaintiff alleges that he only found out subsequent to his first court appearance what the complainant's name was – prior to that he had no idea. He also describes his experience as stated *supra*, as "*verskriklik*".

15. Cross-examination delivered the following relevant information:

15.1 nowhere in the first withdrawal statement nowhere does the complainant state that the plaintiff did not rape her.[14]

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[14] Only in the August 2010 statement does she say this. I assume that this admission was sought to justify what later transpired to be the two prosecutors' interference in

15.2 that at his bail hearing, not only did the plaintiff fail to give the Court his version of what had occurred (i.e. that the intercourse was consensual) but that the plaintiff had also failed to inform the Court that he had two previous "*convictions*" stemming from an admission of guilt fine paid for selling liquor without a licence in 2004 and for attempted murder in 2009[15];

15.3 that BK and the plaintiff's son visited the complainant in hospital and offered her R 2 000.00 to withdraw the charge and when she refused, she was offered R40 000.00 – plaintiff denies he instigated this or that he knew anything about this;

15.4 that the plaintiff's son attempted to influence the complainant to withdraw the charge and that he also

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refusing to allow the complainant to withdraw the charge against the plaintiff on 2 March 2009

[15] No trial/conviction resulted from these

went to see a certain Inspector Nyl, who agreed to see to it that the charge was withdrawn – the plaintiff denied any knowledge of this;

15.5 that, as a result of the two threatening SMS's, the complainant was put into witness protection – the plaintiff denied sending the messages and denied knowing of anyone who would send the messages. What he did say was that if it was sent by someone who wanted to help him he had many friends, including black friends, in the community.

16. As it turns out, on the plaintiff's evidence, there is no proof that he knew the complainant's name after his arrest and first court appearance, that he had her cell phone number, or access to her cell phone number and, as he put it, he had no reason to pay her R40 000.00 as he thought that he was innocent.

IAN VAN ZYL WESSELS:

17. The plaintiff's son then testified. He denied ever going to see the complainant in the hospital, knowing BK or driving her to the hospital. He also denied offering the complainant money to withdraw the complaint or sending the complainant threatening SMS's.

18. The plaintiff then closed his case.

19. The defendant then called their witnesses.

CAPTAIN SANDRA BOSHOFF:

20. Captain Boshoff was called to the SAPS Crisis Centre in Kathu by Inspector Jonas on 28 February 2009 where she first met the complainant.

21. She testified that: from there:

21.1 from there, the complainant took them i.e. her and Fourie to the scene where she found the physical evidence of

the alleged rape;

21.2 she then took the complainant to the hospital where the J88 was completed;

21.3 after this, she and Fourie went to the plaintiff's house where they inspected his bakkie, found the evidence as described in par 10.5 *supra*, and then placed the plaintiff under arrest on the charge of the rape of the complainant;

21.4 Inspector Mokgoshi was the investigating officer but he has since passed away.

22. Cross-examination of Boshoff delivered the following information:

22.1 that at the same time the complainant was examined by Dr Mkwebo, on Saturday 28 February 2009, he also examined the two Mozambican men alleged to have committed the second rape;

22.2 that he found three lacerations on the complainant's vaginal wall, with bleeding and he also found blood on the scrotum of the one Mozambican man, Erik Tembe;[16]

22.3 that, according to her, Tembe could have got blood on his scrotum when he touched his shoulder (which complainant said she had stabbed) and then went to urinate;[17]

22.4 that, on Saturday 28 February 2009, the complainant talked to two people – Thelma Jonas and Dr Mkwebo. All she says is that she was raped by three men – she does not give their names and does not describe them;

22.5 on Sunday, 1 March 2009, the complainant then made a statement in which she states the identity of the plaintiff and she says that the two Mozambican men did not rape

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16 These statements and the J88 are filed under docket number 212/02/09. Eric Tembe also had a shoulder injury

17 I find this highly improbable and a very artificial explanation

her;

22.6 that whilst the statements on the Saturday and Sunday contradict each other, they point to the plaintiff and all the evidence pointed to him, and therefore the plaintiff's continued detention was warranted;

22.7 that the plaintiff's detention was also warranted because in a previous case in which the plaintiff was implicated, the dossier went missing and she suspected that the plaintiff had had something to do with that but dhr had no proof. She had also received information from Warrant Officer Smit that someone was trying to bribe the complainant to withdraw the charge.[18]

22.8 the dossier was transferred to Mogoshi.

23. In a document titled *"Inligting on Staatsaanklaer ten opsigte van borg van die beskuldigde 18 jaar en ouer"*, Boshoff indicates:

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[18] No dossier was ever opened as *"it was only an allegation"*

23.1 that plaintiff is a danger to the community;

23.2 that he may possibly (*"moontlik"*) interfere with witnesses; and

23.3 that he should remain in jail as he interferes with witnesses (*"inmeng met getuies"*).

24. Boshoff conceded under cross-examination that the allegations of witness tampering were only *"allegations"* – but she insisted that one of the reasons the case was transferred to Mogoshi was that she was concerned that the dossier and evidence would disappear as she previously experienced this with one of the plaintiff's cases.

MR MOCUMI:

25. He was the district court control prosecutor at the time. He made the decision whether or not to prosecute the plaintiff. He testified that on Monday 2 March 2019 he was given the plaintiff's dossier. Based on the statement of Sandra Boshoff, Sergeant Fourie, the

complainant and the J88, he formed the decision to prosecute. He testified that:

25.1 as is required by the NPA policy, he had to see how strong the State's case was and ensure that all the elements of rape[19] were covered by the statements in the dockets;

25.2 he also had to look at other aspects such as whether the evidence would be admissible in a Court;

25.3 whether it is relevant to the issue;

25.4 whether the witnesses were credible; and

25.5 that the evidence was reliable and the strength of the plaintiff's defence (which was not on record).

26. Mocumi consulted with the complainant after the plaintiff's first appearance and he states that his office had received information that the complainant wanted to withdraw the case and he was

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19 i.e. unlawfulness, intent and intercourse without consent

instructed to find out why. He and Mr Mohengwa (who opposed the bail application on behalf of the State) consulted with the plaintiff who was very afraid and traumatised. She told them that she had been threatened, that she had been offered R 40 000.00 by BK to withdraw the charges and that "*BoK*" would pay her.

27. In his view, the complainant was a credible witness.

28. When the plaintiff's version of the alleged rape was put to him, Mocumi conceded that had he known that the plaintiff's defence was that of consensual intercourse, he would not have placed the matter on the roll but would rather have directed that further investigations be conducted.

29. He testified that the inconsistencies in the statements made by Boshoff and the two of the complainant regarding whether she was raped by three men or one man did not affect his decision to charge the plaintiff, as the complainant placed the plaintiff at the scene of

the crime.

30. The final withdrawal of the prosecution came after Mocumi was given a letter written by an attorney one J. Bester. The letter states: "*We refer to the abovementioned and more particularly writer hereofs telephonic conversation with yourself and hereby enclose the necessary sworn affidavit from Posele Thembisele in the Bok Wessels matter confirming that she wishes to withdraw the matter as he was not the person to rape and/or assault her herein.*"

31. The affidavit of the complainant which is attached to the letter states that she has been trying to withdraw the complaint since April 2010 and that the plaintiff did not assault or rape her – the men from Mozambique did.

32. According to Mocumi he sent someone to obtain an authorised statement from the complainant, which was then sent with the docket to the second defendant, who declined to prosecute.

33. Cross-examination revealed that:

33.1 at the time he made the decision to prosecute all he based his decision on was the statement of Captain Boshoff, Fourie and the two statements of the complainant and the J88;

33.2 he only consulted with the complainant after the first appearance but irrespective of the inconsistencies in her two statements, he did not find them to be material;

33.3 that he did not have and did not call for the J88 of Erik Tembe as it was in a separate docket;

33.4 that the fact that the complainant was dropped back at the tavern by the plaintiff and not at the intersection as he was originally informed,[20] would not have made any difference to his decision;

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20 i.e. she got back into the bakkie and drove back with the plaintiff who had just allegedly raped her

33.5 the fact that there was a huge public outcry and that marches were staged to the Court, also played no part in influencing his decision[21] to oppose the bail application (which he allegedly made with Mohengwa, the public prosecutor).

33.6 he was adamant that there was reasonable and probable cause to prosecute and that there were prospects of success in the prosecution.

34. Mocumi denied that he ever thought or foresaw that the prosecution was going nowhere (i.e. *dolus eventualis*), denied ever acting with malice (i.e. possessing the necessary *animus iniuriandi*) and denied being in breach of a duty of care vis-à-vis the decision to prosecute.

MR MOHENGWA:

35. He was the last witness for the defendant. He is the district court

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21 The evidence was that the courtroom was full and people stood outside who could not get in

prosecutor in Mothibistad who conducted the bail application for the State. His evidence was that a "*collective decision*" was taken by him and the control prosecutor to oppose bail and that, on the information he had, the State had a "*strong case*".

36. When the plaintiff's version of the night's events was put to him, and he was asked whether he would have opposed bail given these facts, he responded by stating that he would not – he would have recommended that further investigation be conducted.

37. Mohengwa insisted that the decision to oppose bail was a joint one and he also insisted that he knew nothing of the public outcry regarding this case[22]. He admitted to consulting with the complainant when she initially wanted to withdraw the matter, as she "*had no valid reasons*". He said that the complainant could not look him or Mocumi in the eye when they consulted with her and

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22 Which, given Mocumi's evidence and the Magistrate's judgment stating this, is highly improbable

that the issue regarding the bribe was not news to him or Mocumi.

38. He was of the view that, given the complainant's statements and the exhibits, the State's case was "*very strong*" – the fact that the complainant contradicted herself regarding whether she was raped by one or three men was "*immaterial*".

39. Insofar as the alleged bribe and threats of the complainant are concerned, Mohengwa's stance was that he was in possession of a statement to this effect and that it was used to charge BK. The fact that he was severely criticised by Majiedt J for failing to even attempt to find BK to verify any of the accusations, he simply shrugged off by saying that *"the judge did not have all the facts"*.[23]

40. As to the two statements made by the complainant that she was raped by three men and then the statement that she was raped by one man – Mohengwa's stance was that these versions were not

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[23] This was in respect of the judgment in the bail application

contradictory as the complainant was *"confused"* and the contradictions are *"immaterial"*.

41. He eventually conceded that the State's *"strong case"* against plaintiff was built on the statements and the evidence found at the scene but he refused to concede that the admitted contradictions in all the witness statements were sufficient to cause him any doubt as to plaintiff's guilt.

42. It was put to Mohengwa that he'd placed false information before the Magistrate during the bail hearing specifically as regards BK, the fact that she was employed by plaintiff, the bribes and the threats. This was all denied but Mohengwa admitted that no proper investigation was conducted regarding BK at the time the bail hearing was conducted.

43. Mohengwa also conceded that he never consulted with the plaintiff regarding the issue of the threats or bribery – he assumed it was true because complaint's statement contained this information.

45. It was traversed at some length that in refusing bail, the Magistrate placed great emphasis on the false information presented to him regarding, inter alia, the fact that BK worked at Bok's Tavern, that there were attempts made by plaintiff via BK to bribe the complainant and especially, on the version that the State had a very strong case, when none of this had either been properly investigated or was true.

46. It is unfortunate that Mr Mohengwa did not make a very good impression: he was unnecessarily argumentative, evasive, defensive and sometimes clearly and deliberately *"misunderstood"* questions being posed in cross-examination in what appeared to be an attempt to avoid the true thrust of the answers.

47. The defendant then closed its case.

THE WITNESSES

48. None of the witnesses called made a particularly good impression, however in my view while this is an important element, it is not the only element that a court must consider when evaluating the evidence. The common cause facts play a vital role, as does the timeline and the witness statements which formed the basis to the charge, prosecution and opposition of the plaintiff's bail application.

THE UNLAWFUL ARREST

49. Mr Bester conceded during closing argument (and correctly so) that on the facts and evidence presented he could not argue that the arrest was unlawful as it is clear that the arresting officer (Boshoff) had had a reasonable belief that the plaintiff had committed a Schedule 1 offence[24].

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[24] Section 40 of the Criminal Procedure Act 57 of 1977; Mhaga v Minister of Safety and Security [2001] 2 All SA 534 (TK); Manqualaza v MEC for Safety and Security, Eastern Cape [2001] 3 All SA 255 (TK)

50. He hinges his case on the issues of unlawful detention and malicious prosecution. The argument is that the plaintiff's continued detention after his initial arrest was unlawful and the police should have realised this after the complainant made her second statement which was contradictory to the first. Secondly, and based on the decisions of Wogi v Minister of Police and Minister of Safety[25] and Security & Others v Van der Walt[26], the detention was unlawful and the prosecution was malicious given that the prosecutor placed incorrect information before court during the bail application.

51. Thus, argued Mr Bester, as from Monday 2 March 2009 the detention of the plaintiff was unlawful.

52. He argues that:

52.1 section 12(a) of the Constitution states:

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25 2015 (1) SACR 409 (SCA) para [28]
26 2015 (2) SACR 1 (SCA) para [9] and [15]

"(1) Everyone has the right to freedom and security of the person which includes the right –

(a) Not to be deprived of freedom arbitrarily or without just cause; ..."

52.2 that this right includes that a person's physical freedom will not be encroached upon without acceptable reasons[27];

52.3 that a breach of this duty then would give rise to a private law breach of the plaintiff's right not to be unlawfully detained without acceptable reasons[28].

52.4 once it has been established that the detention was not justified by acceptable reasons[29], the detention is then unlawful and gives rise to a delictual claim for damages[30];

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27 Zealand v Minister of Justice and Constitutional & Another 2008 (4) SA 458 (CC) at para [43]

28 Woji v Minister of Police (supra); Minister of Safety and Security & Another v Carmichele 2004 (3) SA 305 (SCA) para [34] – [36]

29 i.e. is without just cause

30 Zealand v Minister of Justice and Constitutional Development (supra); Woji v Minister of Police (supra)

52.5 the SAPS investigating officer and the prosecutor have a duty of care not to violate the right to freedom of an accused by either not opposing bail or, during a bail application, by placing the correct and relevant information before a Magistrate who can then exercise a proper discretion regarding the grant/ refusal of bail. The breach of this duty gives rise to the breach of an accused's right not to be unlawfully detained without acceptable reasons[31].

UNLAWFUL DETENTION

53. The plaintiff thus claims damages under this heading based on breach of duty of care on the part of SAPS in having failed to take place before the Magistrate information which was relevant to the exercise of his discretion whether to grant bail.

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31 Woji v Minister of Police (supra); Minister of Safety and Security & Others v Van der Walt (2015 (2) SACR (1) SCA para [9] and [15]

MALICIOUS PROSECUTION[32]

54. In order to succeed on this leg the plaintiff must prove that:

54.1 the defendant set the law in motion (i.e. instituted the proceedings)[33];

54.2 the defendant acted without reasonable and probable cause;

54.3 the defendant acted with *"malice"* (i.e. with *animo iniuriandi*); and

54.4 the criminal proceedings terminated in favour of the plaintiff[34].

55. In Minister of Justice and Constitutional Development & Others v Moleko (supra)[35] this requirement of reasonable and probable cause has been formulated as follows:

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32 Minister of Justice and Constitutional Development & Others v Moleko 2008 (3) All SA 47 (SCA) at para [8]; Rudolph & Others v Minister of Safety & Security & Another [2009]3 All SA 323 (SCA) at para [16]

33 This is common cause

34 This too is common cause i.e. with the withdrawal of the charges on 8 October 2010

35 At para [20]

"When it is alleged that a defendant had no reasonable cause for prosecuting, I understand this to mean that he did not have such information as would lead a reasonable man to conclude that the plaintiff had probably been guilty of the offence charged; if despite his having such information, the defendant is shown not to have believed in the plaintiff's guilt, a subjective element comes into play and disproves the existence, for the defendant, of reasonable and probable cause.

It follows that a defendant will not be liable if he or she held a genuine belief founded on reasonable grounds in the plaintiff's guilt."

REASONABLE AND PROBABLE CAUSE

56. In order to satisfy the test for *"reasonable and probable cause"* it must be seen that the prosecutor has objectively taken such

reasonable measures as could be expected of him to inform himself fully of the relevant facts and circumstances. Should he fail to do, the plaintiff would have discharged the onus of proving absence of reasonable and probable cause.

MALICE (ANIMUS INIURIANDI)

57. In Moleko (supra)[36] the SCA framed this inquiry 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 have 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)."

BREACH OF DUTY OF CARE[37]

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36 At para [50]

37 Minister of Police & Another v Du Plessis 2014 (1) SACR 217 (SCA)

58. The National Prosecuting Authority Prosecution Policy provides, *inter alia*, as follows:

58.1 *"The decision whether or not to prosecute must be taken with care, because it may have profound consequences for victims, witnesses, accused persons and their families."*

58.2 *"In deciding whether or not to institute criminal proceedings against an accused persons, prosecutors must assess whether there is sufficient and admissible evidence to provide a reasonable prospect of a successful prosecution. There must indeed be a reasonable prospect of a conviction, otherwise the prosecution should not be commenced or continued."*

(Emphasis added)

58.3 *"This test of a reasonable prospect must be applied objectively after careful deliberation to avoid an unjustified prosecution."*

59. Given these requirements, Mr Bester submitted that:

59.1 in taking a decision to charge a person, a prosecutor has a duty not to act arbitrarily – he must act with objectivity in order to protect the public interest[38];

59.2 although a prosecutor's duties are owed primarily to the public as a whole, he also has a duty to suspects and the accused[39] and therefore he plays a vital role in ensuring that due process and the rule of law are upheld in the criminal justice system;

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38 Minister of Police & Another v Du Plessis (supra) at paragraph [28]; Carmichele v Minister of Safety and Security & Another (Centre for Applied Legal Studies intervening) 2002 (1) SACR 79 (CC) at para [72]

39 Minister of Police & Another v Du Plessis (supra) at paragraph [29]; Democratic Alliance v President of the Republic of South Africa & Others [2012] 1 All SA 243 (SCA) at para [82]

59.3 the constitutional protections afforded to dignity and personal freedom in s 10 and s 12 reinforces the principle that there should be reasonable and probable cause to believe that the accused is guilty of the offence before a prosecution is initiated; and lastly

59.4 a prosecutor is required to pay proper attention to the information contained in the police docket when deciding whether there is sufficient evidence to provide a reasonable prospect of a successful prosecution before charging a suspect[40].

60. On the issue of the unlawful detention, Mr Bester submits that:

60.1 section 12(a)(a) of the Constitution guarantees the right not to be deprived of freedom arbitrarily or without just cause;

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40 Patel v National Director of Public Prosecutions & Others 2018 (2) SACR 420 (K2D) at para[27]

60.2 the Constitution imposes a public law duty on the State not to perform any act that infringes on a person's entrenched rights, e.g. the right to freedom. He argues that a breach of this public law duty gives rise to a private law breach of the plaintiff's right not to be unlawfully detained without acceptable reasons;

60.3 once it is established that the detention was not justified by acceptable reasons, or was without cause, this renders the detention unlawful for purposes of a delictual claim for damages[41];

60.4 the prosecutor and SAPS investigating officers have a duty of care not to violate the right to freedom of an accused: they fulfil this duty not opposing a bail application or by placing information before a Magistrate

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41 Zealand v Minister of Justice and Constitutional Development & Another (supra) at para [43]; Woji v Minister of Police (supra) at para [27]

which is relevant to the exercise of his discretion whether or not to grant bail. A breach of this duty of care gives rise to a breach of an accused's right not to be unlawfully detained without acceptable reasons[42].

61. The tenor of Mr Preis's argument is that the period from the plaintiff's arrest until he was brought before court on 2 March 2009 was lawful and that having arrested plaintiff on a charge of rape, the police did not have the statutory authority to release the plaintiff from custody.

62. He argues that the first period of the plaintiff's detention is regulated by s50 of the Criminal Procedure Act 51 of 1977 (CPA) which requires that the accused be brought before a lower court as soon as reasonably possible, but not later than 48 hours after the arrest

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42 Woji at paragraph [28]; Minister of Safety and /security & Others v Van der Walt 2015 92) SACR 1 (SCA) at paragraph [9] and [15]

and, at court, informed of the reasons for his further detention[43] or he is charged and released on bail[44].

63. He submits that the bail application of a person who is charged with an offence referred to in Schedule 6 has to be considered by a Magistrate[45] and the crime of rape falls under Schedule 6.

64. Section 59(1) of the CPA provides that any accused in custody may be released on bail prior to his first appearance in a lower court save in respect of an offence referred to in Part II or Part III of Schedule - rape is an offence referred to in Part II of Schedule 2[46].

65. Thus, the argument is that the plaintiff's detention from the time of his arrest until he was brought to court on 2 March 2009 was not unlawful.

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43 Under section 50 (6) (i)(aa)
44 Under section 50(6)(1)(bb)
45 Section 50 (6)(c)
46 Also section 72 of the CPA

66. In Louw and Another v Minister of Safety and Security & Others[47] the following was stated:

"An arrest, being as drastic an invasion of personal liberty as it is must still be justifiable according to the demands of the Bill of rights. [P]olice are obliged to consider in each case where a charge has been laid for which a suspect might be arrested whether there are no less invasive options to being the suspect before the court than an immediate detention of the person concerned. If there is no reasonable apprehension that the suspect will abscond, or fail to appear in court if a warrant is first obtained for his/her arrest, or a notice or summons to appear in court is obtained, then it is constitutionally untenable to exercise the power to arrest."

67. This has been quoted, with approval, in Minister of Safety and Security v Sekhoto & Another[48] which called this the "5th

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47 2003 (2) SACR 178 (T) at 186 A – C and 187E
48 2011 (5) SA 367 (SCA)

jurisdictional fact which, if justified, would by its very nature be a requirement for a valid arrest under all the paragraphs of section 40(1) ..."[49]

68 In my view, however, it is clear that once arrested and charged with rape, the SAPS had no discretion to release plaintiff and that any bail would have to be granted by a court[50]. Thus plaintiff's detention from 28 February 2009 until 2 March 2009 (being his first appearance in court) was lawful.

THE OPPOSITION TO BAIL

69. The question now is: what of the period from 2 March 2009 until 5 June 2009[51]?

70. Coupled with this is the question of whether plaintiff's bail application should have been opposed by the prosecutors?

71. In my view it should not:

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49 Also Potgieter v Minister of Police 2017 JDR 0834 (GP)
50 See para 61 to 64 supra
51 i.e. the date of plaintiff first court appearance and the date his bail appeal was successfull

71.1 given the complainants' contradictory statements and given similar contradictory and incomplete statements to Boshoff, there was insufficient supportive evidence to oppose bail at that time;

71.2 in my view, there was sufficient evidence to raise red flags regarding the reliability of the complainant's and other witnesses' statements:

71.2.1 i.e. to whether or not complainant had been raped by one or the three men;

71.2.2 the fact that Boshoff was of the view that plaintiff posed a threat to complainant's safety (i.e. the *"attempts"* to bribe her and the sms threats);

71.2.3 Boshoff's view that plaintiff should remain incarcerated for fear of evidence going missing

– based on an entirely unsupported suspicion that he'd done this in a previous matter.

72. In my view, the fact that complainant had identified plaintiff in all her statements as the man (or one of the men) who had raped her is simply one of several factors that the prosecutor should have considered when weighing the strength of the State's case on 2 March 2009.

73. The fact remains that bail was opposed without proper investigation. The National Prosecuting Authority and the court kept plaintiff incarcerated until 5 June 2009, i.e four months and two days later when Majiet J upheld his bail appeal and issued rather scathing criticism against the Magistrate.

74. Mr Preis's argues that once the plaintiff was brought before court on 2 March 2009, his subsequent detention had to be determined by the Magistrate concerned and the prosecutors who dealt with his

case. He submits that the issue of defendant's liability is therefore based on the evidence adduced at the bail hearing on 4 March 2009 where:

74.1 Inspector Mokgosi had conceded that he did not know whether or plaintiff's injuries were caused by the first alleged rape by plaintiff or the second alleged by the two Mozambicans;

74.2 evidence was given that Natasha Witbooi (BK) had tried to bribe the complainant to withdraw her complaint;

74.3 the evidence was that complainant had tried to withdraw the complaint and after she was persuaded to proceed with it she was placed in witness protection;

74.4 the complainant received threatening messages on her cell phone;

74.5 the matter was first reported at Mothibistadt as there was a concern that members of the police at Kathu, who were friends with plaintiff, might interfere with the investigation;

74.6 Boshoff explained the factors in favour of granting bail to the plaintiff and expressed the view that bail could not be granted.

75. Mr Preis submits that the Magistrate considered that under Schedule 5 of the CPA, the court was obliged to order plaintiff's continued detention until his hearing unless he adduced evidence which satisfied the court that his release was permitted in the interest of justice – bail was then refused primarily because the possibility existed that plaintiff would interfere with the State witnesses.

76 It is my view that, over and above the fact that it has already been found that the Magistrate was clearly wrong in his view, the

prosecutor should have had enough insight to realise that the State's case was not sufficiently strong (at that stage) to warrant plaintiff's continued detention. The State (i.e. the prosecutor) should have realised that:

76.1 there was no evidence that plaintiff was behind the threatening messages sent to complainant;

76.2 there was no evidence that plaintiff sat behind the alleged bribes to the complainant;

76.3 there was no evidence that plaintiff would intimidate the State's witnesses – who would have included Boshoff, Inspector Mokgosi and Dr Mkwebo;

76.4 there was no evidence (despite the indication by Boshoff in her statement) that plaintiff would cause documents to disappear.

77. All-in-all there was no indication that it was not in the interest of justice to agree to bail being set (or not to oppose bail) on 2 March 2009 pending the proper investigation of the matter by the SAPS.

78 Furthermore, the fact that plaintiff had previous *"convictions"* was not a factor that should have carried enough weight for prosecutors to oppose bail (or the Magistrate to refuse bail) on 4 March 2009: these previous offences were in respect of a) trading without a liquor licence and b) intimidation. They were *"petty"* offences in terms of which plaintiff had paid an admission of guilt fine.

79. Much was made of further information acquired by the prosecutor on late 2 March 2009 and 3 March 2009 – the point is that the decision to oppose bail was taken and executed on 2 March 2009 already <u>without</u> this evidence (my emphasis) and the evidence acquired did not inform the original decision. Had plaintiff been

released on 2 March 2009 already, that information would not have been relevant to the bail proceedings.

80. I agree with Mr Preis that, had the plaintiff chosen to provide a plea explanation on 2 March 2009 the entire matter may have taken a different turn, as was conceded by both Mocumi and Mhengwa[52], but this does not absolve the defendants from their responsibilities.

MALICIOUS PROSECUTION?

81. I cannot, on the facts, of this matter find that Mocumi or Mhengwa acted with *animus iniuriandi*[53]. Having said that I do find that they failed to pay proper attention to the information in the docket in deciding whether or not to prosecute on 2 March 2009. I also find that on 2 March 2009 and with the information at their disposal, it was not possible to form the decision that there was a reasonable

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52 Their evidence was they would not have opposed bail
53 Per Moleko and Rudolph cases and as set out in para [49] supra

prospect of a successful prosecution and that they therefore acted in breach of the duty of care owed to the plaintiff[54].

82. This being so and as discussed *supra*, the plaintiff was unlawfully detained from 2 March to 5 June2009.

CONCLUSION

83. It is thus the inevitable conclusion that, given the facts of this matter as set out supra, the plaintiff's right to freedom and his right to a fair and equal and reasonable prosecution were violated by the National Prosecuting Authority in opposing his bail application and therefore the order is made as follows:

THE ORDER

1. The plaintiff in respect of merits succeeds and the second defendant is to pay damages in the amount to be proven;

2. The plaintiff's claim against first defendant is dismissed;

3. The second defendant is ordered to pay the plaintiff's cost of suit.

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54 Per Du Plessis at paragraph [34] and Patel at para [27]

NEUKIRCHER J

JUDGE OF THE HIGH COURT

Date of hearing: 27 – 31 May 2019

Date of judgment: 8 October 2019

For the plaintiff:

Adv G. Bester SC

For the Defendants:

Adv D. Preis SC

Adv J. Janse van Rensburg