IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: D7472/2013

In the matter between:

PATRICK BUTHELEZI	Plaintiff
and	
MINISTER OF POLICE	First Defendant
MINISTER OF JUSTICE	Second Defendant
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Third Defendant
DIRECTOR OF PUBLIC PROSECUTIONS, KWAZULU-NATAL	Fourth Defendant

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ORDER

(a) The plaintiff's detention from 22 November 2011 until 14 December 2012 is found to be unlawful.

(b) The first and third defendants are jointly and severally liable to compensate the plaintiff for such damages as may be agreed or proved in respect of his unlawful detention from 22 November 2011 until 14 December 2012, the one paying the other to be absolved.

(c) The first and third defendants are jointly and severally liable, the one paying the other to be absolved, for the plaintiff's costs of suit.

JUDGMENT

Chetty J:

[1] The plaintiff, Patrick Buthelezi, an educator and currently occupying the position of Acting Deputy Principal at a public school, instituted action against the defendants, being the Minister of Police, Minister of Justice, the National Director of Public Prosecutions and the Director of Public Prosecutions for KwaZulu-Natal, arising from his arrest and detention on a charge of rape of a nine year old learner at the school where he was teaching in 2011. The plaintiff was arrested on 21 November 2011 after presenting himself at the Bhekithemba Police Station, having been informed that the police had visited his school, looking for him. He brought a formal bail application on 29 November 2011. On 12 December 2011 a judgment was handed down by the presiding magistrate in which bail was refused on the grounds that the plaintiff failed to meet the threshold of exceptional circumstances in as much as he was charged with a Schedule 6 offence in terms of the Criminal Procedure Act 51 of 1977 (the CPA). The learner is referred to in this judgment by her first name, Mbali, to protect her identity.

[2] Following the refusal of bail, the plaintiff remained incarcerated until the conclusion of his criminal trial on 14 December 2012 when he was eventually acquitted of the charges against him.

[3] In his action for damages, the plaintiff contends that the investigating officer assigned to the case, Warrant Officer Mathengela, failed to bring to the attention of the court certain "unsatisfactory features" in the evidence of the complainant amongst others that her statement to the police, including the first report made by the complainant, was preceded by a beating from her guardians. Only thereafter, and at the prompting from her aunt, did the complainant implicate the plaintiff as the

person who had raped her. It was further contended that the arresting officer and the investigating officer, in collusion with the prosecutor assigned to oppose the bail application, all knew of the existence of these facts, yet withheld them from the court hearing the bail application. Crucially, the plaintiff alleges that the police and the prosecutor, Ms Peramal, were privy to all of the statements forming part of the police docket at the bail application. They were aware that a fellow teacher at the school, Ms Mkhize, whom the learner alleges witnessed the incident (or part thereof) in the classroom, had deposed to a statement indicating that she saw no such thing. Despite the exculpatory nature of the statement, its contents were not placed before the court at the bail application. As a result, the plaintiff alleges that the police failed to investigate the matter properly and that the prosecutor (and the police) failed in their public law duty to disclose evidence in their possession at the bail hearing, with the effect that the court was misled, resulting in the plaintiff being refused bail.

[4] In their plea the defendants deny that the police failed in their duty to the plaintiff, contending that the investigation officer had a reasonable belief that the plaintiff had committed a serious crime and that his legal representative had the opportunity, through cross-examination at the bail application to inform the presiding magistrate of any unsatisfactory features in the evidence of the complainant. .

[5] I should say at the outset that the drafters of the defendants plea appeared to misinterpret the plaintiff's case which is that the defendants employees had a duty to disclose information in their possession to the court, which information was restricted to them alone as neither the plaintiff nor his attorney had access to the police docket at the stage of the bail application. The latter could not have been able to bring out such facts out in cross-examination of the State witnesses. The defendants' further contend that in light of the serious allegation against the plaintiff, the investigating officer was obliged to arrest him and that he had no duty to decide on the innocence or guilt of the plaintiff. It is also denied that Ms Perumal breached her duty in any way.

[6] The plaintiff takes no issue with his arrest per se, in light of the serious allegations levelled by the complainant, in the context of a medical report which

confirmed that she sustained injuries consistent with sexual penetration and that she was a minor.

[7] It was agreed between the parties in terms of Uniform rule 33(4) that the matter would precede on the basis of a separation of the merits from quantum. The sole issue for determination, and on which the parties agreed, is whether or not the detention of the plaintiff from 22 November 2011 until 14 December 2012 was lawful. In essence, the plaintiff contends that the investigating officer Warrant Officer Mathengela and/or the prosecutor Ms Perumal failed to bring to the attention of the presiding magistrate certain vital information which caused the court to refuse the plaintiff bail, resulting in his continued detention for almost 11 months.

[8] At the commencement of the trial, counsel for the parties handed in a signed statement of admissions directed at shortening the duration of the trial. The following admissions are recorded:

(a) That the complainant in the rape case against the plaintiff was nine years old at the time of the incident and a learner at the school in Umlazi, Durban at which the plaintiff was employed as an educator.

(b) That the complainant reported the matter in the company of her guardian to the police on the evening of 17 November 2011.

(c) As a result of the complaint, the plaintiff handed himself over to the police on 21 November 2011.

(d) The plaintiff applied for bail which was opposed by the State. The application for bail was refused.

(e) It is admitted by the defendants that the investigating officer, the police and the prosecutor together with the Prosecution Authority, owed a duty of care to the plaintiff.

[9] The evidence presented by the parties spanned several weeks over almost two years and included several witnesses. The plaintiff introduced into evidence the transcript of proceedings at the bail application and the rape trial at which the plaintiff was acquitted on all counts. None of this is placed in dispute by the defendants.

Both parties made reference to the transcript in their examination of their respective witnesses and the transcripts were accepted as a record of the respective proceedings. I do not intend the repeat the detail of the evidence presented by each witness. This is a matter of record. The issue, informed by the facts, largely pertains to whether the duty of care which the defendants employees owed the plaintiff, was breached, giving rise to liability.

[10] The defendant called five witnesses, the first of which was Constable Ndlovu who stated that she had been informed that a case of rape of a minor had been opened at the police station and that the suspect was an educator at Isidingo School in Umlazi. After reading the docket she proceeded to conduct an interview with the complainant and the principal of the school. Ndlovu also confirmed taking a statement from the complainant.

[11] The suspect, being the plaintiff, could not be immediately located. However, presumably after news spread that he was being sought; a person purporting to be the brother of the plaintiff called Constable Ndlovu and made arrangements for the plaintiff to hand himself over at the Umlazi police station. The plaintiff arrived at the police station where his rights were explained to him, as well as the charges, after which he was arrested and detained.

[12] Under cross-examination, Constable Ndlovu admitted that she had taken a statement from Ms N Mkhize, a teacher at the school which the complainant attended, and where the plaintiff taught. Ndlovu confirmed that the complainant informed her that Ms Mkhize had witnessed the alleged rape. However, when Ndlovu consulted with Ms Mkhize, the latter denied that she had witnessed any such incident. Ndlovu conceded that she had no reason to disbelieve Ms Mkhize. She went on to state that Ms Mkhize had probably changed her version because she may have been fearful for her life as she taught in the same school as the plaintiff. It was pointed out to the witness that this conclusion was based entirely on speculation and without any factual basis. It was further put to the witness that it was her duty as a police officer to bring to the attention of the court the contents of the statement made by Ms Mkhize. Ndlovu accepted the correctness of the proposition but attempted to avoid the issue by stating that she was not the officer who dealt with the bail

application. In addition, she conceded that in the course of the investigation, the conduct of a complainant, particularly that of a child in a case of sexual assault, after the alleged incident, is a relevant factor to take into account. She further stated that she was aware that Mbali had been crying when she got home on the day of the incident, and that Mbali's aunt informed her that Mbali had given differing explanations for her crying. Eventually, only after questions were put to her did she inform her aunts that she had been raped.

[13] Constable Ndlovu further testified that she had taken a statement from Ms Thembeka Ngubane, to whom the first report of the rape had been made by the complainant. It is particularly important because in her statement, Ngubane stated that she noticed the complainant acting strangely on the night of 16 November 2011, and that she was crying in bed. On enquiring why she was crying, the child first said that her head was paining which later changed to a pain in her stomach. Mbali then changed her version saying that he was sick at school and had a headache.

[14] Ngubane's statement further states that she continued to interrogate the complainant until the latter informed her that her class teacher had touched her while she was asleep in the class. As the complainant was not forthcoming with further information as to what precisely took place, even suggesting that she was crying because other children had hit her at school, according to Miya, her sister Ngubane threatened to hit the complainant with a stick. In her statement, Ngubane confirms that because she could not get a clear answer from the complainant as to what was the reason for her crying, she hit her twice with a belt, after which she put her onto the bed and inspected her vagina, noticing that it was swollen.

[15] After further questioning of the complainant, the latter revealed that while the other children were playing outside her classroom, she fell asleep inside and was awoken by her teacher (the plaintiff) touching her, after which he put her onto the desk, took her panties off and had sexual intercourse with her. According to Ngubane's statement, the complainant informed her that another teacher at the school saw the incident and informed her that she was going to remove her from the plaintiff's classroom.

[16] The version set out in Ngubane's statement accords largely with the statement which Constable Ndlovu took from Miya, who was present when Ngubane hit the complainant with a belt, forcing the complainant to divulge what had taken place at her school.

[17] Constable Ndlovu was referred in her cross-examination to the evidence of Miya at the criminal trial, where the latter confirmed in her testimony that upon the complainant being asked what was wrong with her, the complainant initially stated that the plaintiff had touched her on her shoulder, to which Miya responded that there was nothing inappropriate with such action. In her testimony at the criminal trial, Miya stated that the complainant refused to divulge what had happened to her until she (Miya) asked the question "Did your teacher rape you?" to which the complainant responded in the affirmative. She went on to explain that he made her lay on top of the desk while he undressed himself and lay on top of her. Crucially, in her testimony, Miya also stated that the complainant informed her that Ms Mkhize, had seen the incident, and removed the complainant to her class.

[18] Constable Ndlovu testified that the evidence which Miya had given in the criminal trial was similar, although not exactly the same, as set out in her statement. Ndlovu accepted however that she had been informed that before Mbali could make the allegation of having been raped, that Mbali's aunt had given her a hiding with a belt.

[19] Under cross-examination the witness confirmed that the plaintiff surrendered himself to the police, being an indication that he would not evade trial. There was no evidence to suggest that he would be likely to commit a serious offence while on bail and the witness confirmed that there were no reasons why the interests of justice would not permit the release from detention of the plaintiff based on any of the reasons set out in ss 60(4) and (5) of the CPA.

[20] Constable Ndlovu accepted that because of the serious nature of the offence, the onus was on the plaintiff to show exceptional circumstances in order to be released on bail, and that in crossing that threshold; the strength of the State's case

was an important consideration. In this regard it bears noting that s 60(11) of the CPA provides for the following:

'(11) Notwithstanding any provision of this Act, where an accused is charged with an offence referred to-

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

(b) in Schedule 5, but not 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 the interests of justice permit his or her release.' (My emphasis)

[21] The second witness called by the defendants was Zandile Octavia Dladla, the maternal grandmother of Mbali. She confirmed that the child presently lives with her as her mother (the witnesses' daughter) died in 2005. She confirmed that on 17 November 2011 she received a call from either Thembeka or Miya, the aunts of Mbali, who informed her that something had happened to Mbali. On her arrival she was informed by Mbali that she had been raped by her teacher at school, referring to the plaintiff. The child was thereafter taken to the hospital on 17 November 2011 but could only be seen the following day as there were no doctors available. The child was examined by a doctor the following day and a DNA sample was taken. The doctor, according to the witness, confirmed after examining the child that there had been penetration of the child's vagina. The witness confirmed that a letter, signed mainly by members of the child's family, had been submitted to the police in opposition to bail being granted to the plaintiff. It was not clear whether the petitioners were people related to the complainant, or whether this was presented as a petition from the community in general. Mrs Dladla confirmed that after taking the child to hospital she reported the matter to the principal at the child's school as the child was in the middle of completing her examinations. She also explained that the child was afraid of returning to school.

[22] Under cross-examination Mrs Dladla confirmed that she did not attend the bail application of the plaintiff but admitted that she spoke to a newspaper reporter after the plaintiff's appearance in court. She confirmed the contents of the newspaper article in which she informed the reporter that something had been troubling Mbali at school for the past two weeks and that she had been temperamental when other children tried playing with her, and she kept on crying at night. Counsel for the plaintiff submitted in argument that this must have been sufficient to create doubt as to the correctness of the child's version that she had been raped by the plaintiff on 16 November 2011, whereas on the information presented to her grandmother she had been troubled at school for at least two weeks before the incident. It was argued that in light of the medical examination not being able to find any fresh tears of the child's hymen, there was some doubt that the sexual assault could have taken place on the date when the child said it was committed.

[23] Mrs Dladla further confirmed the contents of her version to the reporter that the child informed her that another teacher at the school appeared when the 'disgraceful act' was being committed. This would presumably would be consistent with the report by the child that a teacher, Ms Mkhize, arrived on the scene at the time when she was being raped and removed the child to her class. The report reflects that the teacher who supposedly witnessed the incident was no longer willing to testify (presumably in favour of the State) at the criminal trial and that the school principal and his deputies were apparently shocked at the allegation against the plaintiff, someone whom they trusted as a teacher.

[24] The next witness for the defendants was Warrant Officer Mathengela who testified that he is from the Brighton Beach police station and was assigned as the investigating officer to this case. He was assigned the case by his superior, Captain Khanyile, who briefed him on the matter. He confirmed that he had received instructions to pick the plaintiff up and take him to Prince Mshiyeni hospital to have a blood sample taken the purpose of DNA analysis.

[25] Mathengela stated that he had read the statements of the witnesses which were taken by Constable Ndlovu and that he had visited the child's school where the alleged rape is said to have taken place. The instructions which he had received

from his superior were to oppose the bail application of the plaintiff. This was similar to the advice given to him by Constable Ndlovu, on the basis that the plaintiff was charged with a Schedule 6 offence in terms of the CPA. The charge against the plaintiff was that of rape of a person under the age of 16 and thus being a Schedule 6 offence in terms of s 60(11)(*a*) of the CPA. As such, an accused facing such a charge bears the onus of establishing on a balance of probabilities that exceptional circumstances exists, which in the interests of justice, permits his release. In such a case, proof by an accused that he or she will probably be acquitted can serve as 'exceptional circumstances'. On the other hand, the strength of the State's case is relevant to the existence of 'exceptional circumstances, where the court will have to weigh the competing versions. In this regard the witness confirmed that his opposition to bail was based on the fact that the victim was a nine-year-old child, the interest of the community in being protected from such crimes, the fact that the suspect was a teacher and that if he were released on bail, there was a risk that he himself would be harmed by the community. In addition, he stated that at the plaintiff knew the child victim.

[26] On the above grounds, Mathengela was instructed to oppose the bail application of the plaintiff, although he conceded under cross-examination in this court that the plaintiff was not considered as a flight risk in as much as he reported to the police station once he heard that the police were looking for him. Moreover, it was also put to him in this court that at the time of the bail application, the complainant had relocated to eManzimtoti and had transferred to a new school. As such, there was no threat posed to her or the other State witnesses. The witness was however insistent that he deposed to an affidavit which he handed to the prosecutor in which he opposed bail and in which he stated that he feared for the safety of the complainant and the State witnesses. Although he alluded to the reasons for this fear in his affidavit (to which no reference is made in the transcript of the magistrate's judgment on bail) he was unable to explain in this court what those fears were premised on.

[27] Mathengela appeared to be motivated to oppose bail based on the age of the complainant and the fact that she made a report of the incident on the day on which it occurred. As regards the latter aspect, it was put to him that there is some doubt

as to when the incident occurred in light of the statement by the complainant's grandmother that the child had been upset for two weeks prior to disclosing the incident. He also placed emphasis on the J88, disputing that its findings were 'neutral'. It was not certain at the bail hearing what had become of the DNA analysis following a blood sample taken from the plaintiff. It later emerged that the analysis was inconclusive as no traces of the plaintiff's DNA could be found on the child's clothing.

[28] The witness then testified that the persons present in the gallery during the bail hearing were interrupting the proceedings and were ordered by the court to remain silent or face removal. This version was later disputed under cross-examination with reference to the transcript of the bail proceedings, which appeared to reflect that the proceedings were held in camera in light of the age of the complainant. While there is a discrepancy over this aspect of his evidence, I do not consider it material to the outcome which I reach.

[29] Mathengela confirmed that when he gave evidence opposing bail, the prima facie evidence against the plaintiff was that the medical report (J88) indicated that *"something had happened to the child*", in other words that the findings were consistent with penetration. He stated that he had informed the court of his reasons for opposing bail (as set out above), in addition to there being some uncertainty as to whether the plaintiff had been previously arrested for an offence, and whether he had any children of his own, for which he was responsible. Under cross-examination the investigating officer conceded that the plaintiff informed him that he had previously been arrested on a charge relating to a boycott, but this was later withdrawn. Despite knowledge of this, when he testified, Mathengela gave the impression at the bail application that the plaintiff had a prior record of criminal conduct. Mathengela also informed the court that members of the public, who were teachers and had presumably come to court to support the plaintiff, had intimidated him outside court. Despite the objection from the plaintiff's attorney as to the relevance of the incident, the state prosecutor joined issue with the investigating officer, stating the following:

"One of the grounds which the State is going to oppose it, that there is going to be interference from either the people supporting the applicant or his family with the investigation itself…..".

The Court overruled the objection and allowed evidence from Mathengela on how he had been intimidated and felt threatened by members of the plaintiff's family, and that he regarded the plaintiff's brother as being un-cooperative in his investigations. Despite his vigorous opposition to bail, he attempted to adopt a neutral stance informing the court that the decision whether or not to grant bail rested with the Court.

[30] The witness further informed the magistrate at the bail application that he had obtained a statement from a teacher at the child's school which he described as a "*defensive statement*". In this court, the witnesses described the statement as being *"very short"*. Under cross-examination on this aspect of his evidence, Mathengela stated that he viewed the statement as 'defensive' because Ms Mkhize had made reference to the plaintiff having assaulted a witness. No such reference could be found anywhere in her written statement. In essence, Mathengela considered that Mkhize would be an "*unco-operative*" witness despite the fact that in the bail application he gave the impression that she was a material witness to the alleged rape.

[31] The investigating officer was subjected to a lengthy and arduous cross-examination by the plaintiff's counsel who based his questions on the reasoning of the Supreme Court of Appeal in *Woji v Minister of Police* 2015 (1) SACR 409 (SCA) and as the plaintiff was not challenging the lawfulness of his arrest, the focus of the cross-examination was directed entirely on the evidence presented (or not presented) by the State to the magistrate presiding over the bail application. Mr *Singh* who appeared for the plaintiff read to the witness the following excerpt from *Woji* which states the following:

'[19] The basis for Mr Woji's claim was that the magistrate, in refusing to grant bail, acted upon the information supplied by Insp Kuhn. It was alleged that Insp Kuhn owed a duty to Mr Woji to properly investigate the crime and bring to the attention of the prosecutor and the magistrate at the bail hearing, information which was relevant to the exercise by the

magistrate of his discretion. It was alleged that Insp Kuhn had failed to discharge this duty, which resulted in the magistrate ordering the continued detention of Mr Woji. His detention was accordingly unlawful. The minister, whilst conceding that this duty rested upon Insp Kuhn, denied its breach. The minister alleged that Insp Kuhn had made it clear to the magistrate what the nature and strength of the prosecution's case against Mr Woji were and that he could identify Mr Woji in the video footage.'

[32] The essence of the cross-examination was directed at the manner in which the magistrate's discretion was exercised in arriving at her decision to refuse bail. As I understood the plaintiff's case, the magistrate's discretion would have been based on the information presented to her by the State through the prosecutor and the witnesses called. The contention by the plaintiff is that by withholding certain vital information from the court, the defendants employees or agents breached their constitutional duty owed to the plaintiff, and had this information been disclosed, the likelihood was that the plaintiff would have been released on bail.

[33] Having canvassed the above statement in *Woji* it was put to the witness that as a police officer he had a legal duty to properly investigate crime and bring to the attention of the court information which would be relevant for the magistrate to exercise his/her discretion. The witness was somewhat evasive in answering the question, stating that his duty was to hand over statements to the prosecutor, who in turn would then hand over information to the defence counsel. The investigating officer stopped short of stating that his obligation as a police officer was to bring all the information at his disposal to the attention of the magistrate, with whom the decision rested whether to grant bail. It is also apparent from the evidence of this witness that he was not willing to accept any blame that attached to his failure of placing relevant information before the court. Instead he attempted to place blame on the prosecutor. There was also a suggestion by the investigating officer that he had handed in an affidavit to court during the course of the bail proceedings in furtherance of his opposition to bail. There is no record of this document in the transcript. The impression I gained from this witness's evidence is that he was reluctant to accept responsibility for the nature of the evidence which he presented to the court, seeking to confine himself simply to those facts which were incriminating of the plaintiff. He did not fully disclose to the court that the crucial witness whom the

complainant alleges to have witnessed the rape, did not corroborate the version of the complainant, knowing that the defence would not have been entitled to copies of witness statements at the time of the bail hearing. He was simply content with the scenario that he handed the docket to the prosecutor, after which it was her responsibility to pose questions to him as a witness.

[34] The witness was further cross-examined in relation to the first report which he testified was one of the grounds which he relied on to form a prima facie view that bail should be opposed. As set out above, the report made by the complainant to her aunt was only done after the complainant was threatened with a hiding. According to his testimony in this court, the witness stated that the child implicated her teacher (the plaintiff) before being threatened with a hiding. This version is not supported by any of the statements by Ms Ngubane or Ms Miya.

[35] The investigating officer conceded in his testimony that only admissible evidence is allowed in court, and not evidence which is made under threat or punishment. It was clear from the evidence of the earlier State witnesses, Ms Miya and Ms Ngubane, that the complainant was reluctant to divulge to her aunts' why she was crying. She offered different explanations to them. It was only after she was asked whether her teacher had raped her that she replied in the affirmative. When questioned in this regard, the investigating officer simply stated that he did not tell the court of the contents of the statements by Ms Ngubane and Ms Miya. He simply informed the court that there had been a first report. His explanation as to why he did inform the court of the contents of the statement is that he was never asked the question.

[36] As an experienced police officer, I found this aspect of the witness's evidence unconvincing in as much as he ought to know that where a question is put to a complainant, particularly a child in a rape case, which is suggestive or leading of a particular answer, the response will certainly not be admissible in court.

[37] There was lengthy cross-examination as to whether the complainant informed her aunts that she had been touched on her upper body and whether this was cause for a charge of rape to be laid against the plaintiff. These are matters which were relevant to the criminal trial court which acquitted the plaintiff on all counts. Although

the plaintiff's counsel submitted that it is a factor to be considered in the plaintiff's claim against the defendants, I am of the view that it is not a material consideration. Not every contradiction in either the testimony of witnesses or from their written statements is decisive of a claim. What is important is that the investigating officer was aware or ought to have been aware at the time of the bail application that the child had given a number of different explanations for her crying, until she was threatened with a hiding, and after being asked leading questions, stated that the plaintiff had raped her. He also conceded that he did not interview other children in Mbali's class despite the statement of the grandmother that the child had been crying and was upset for a while before the incident, nor did the investigating officer question the complainant of what had happened after the incident.

[38] The witness was unable to dispute that this evidence was never placed before the magistrate at the bail hearing and was non-committal as to whether this would have influenced her assessment of the State's case against the plaintiff. He steadfastly maintained that he had conducted a proper investigation into the matter despite the cross-examination revealing several shortfalls. Mathengela was also unable to refute the contention that the complainant's grade was writing examinations on 16 November 2011, the date of the alleged rape. If so, the argument followed, that the rape could not have taken place at the date and time when the complainant alleges it to have occurred. This again throws light on possible doubt in the evidence of the aunts and the version of the complainant.

[39] Mathengela stated in his evidence that the statements in the docket where placed before the prosecutor and it was therefore her duty to ask the relevant questions to place the necessary facts before the court. His evidence was typified by evasiveness and a shifting of blame. This is evident from his evidence in the bail hearing when he was asked:

'Sir, what is your view on the applicant being granted bail today? … I don't have a right to not grant the accused the bail, but I'll leave that to the hands of the court. What I'm here for is to present the evidence here in court, the reason why I was opposing bail.

You are opposing bail? …. I don't feel that he should be granted bail.'

[40] The witness went on the add at the bail application that he did not trust the plaintiff referring to his concern about the plaintiff's physical address and as to whether he had children of his own or whether he was a guardian of his brother's children. Neither of these factors, in my view, would have justified the opposing of bail.

[41] It bears noting that when Mathengela gave evidence at the bail hearing he related to the court the version of the complainant as set out in her statement. He made no mention of the allegation of rape surfacing only after the complainant had been threatened with a hiding. Moreover, he had already been aware that the teacher, Ms Mkhize, was not going to corroborate the version of the complainant. Despite this, Mathengela gave the following evidence to the court:

'And then another teacher came, your worship, which was Ms Mkhize who is a teacher from the next-door class, who enquired from the accused as to what he is doing and he stated that he did not do anything and then that Ms Mkhize told the victim that next year she'll be in her class, not to be in Mr Buthelezi's class.

Are you saying that the teacher is an eyewitness to what happened or did she arrived when everything was over or what is her position? ---

Your worship, as far as the victim is concerned, that teacher was able to rescue the victim.

And have you obtained a statement from the teacher yet?

Your worship, as I've said that on the weekend of the 16th and the 18 I wasn't available but Constable Ndlovu there is a statement that she filed, your worship, but when you look at that statement it looks more as defensive'**.**

[42] His testimony at the bail application strongly suggests that while he was aware that Ms Mkhize was more likely to be a defence witness based on her statement, Mathengela gave the impression that she was an eye witness to the alleged rape. When the magistrate made her ruling to refuse the plaintiff bail, she paraphrased Mathengela's evidence in the preceding paragraph concerning Ms Mkhize as having witnessed the incident. In the bail application, when he was questioned whether the complainant had made her statement under duress Mathengela denied that this had been the case, despite having sight of the statement that the child implicated the plaintiff upon threat of a beating. In this regard too, the magistrate accepted the version of Mathengela that the complainant had made a first report to her two aunts on the same evening as when the incident occurred. The same treatment was given

to his evidence regarding the J88 and the conclusion that penetration had taken place. Based on the above factors alluded to, and all of which were testified to by the investigating officer, the magistrate reached the conclusion that the State's case could not be said to be "non-existent or subject to serious doubt". The court accordingly concluded that no exceptional circumstances had been shown to exist justifying the release of the plaintiff on bail.

[43] The next witness for the defendants was Ms J Perumal, who testified that she had been in the employ of the National Prosecution Authority since 2004 and had been assigned to deal with the plaintiff's bail application. She perused the docket, including the statements of the complainant and her aunts, and the J88 prepared by the medical doctor who confirmed that there had been sexual penetration of the complainant. In addition, Perumal was satisfied that the child had been assessed by a prosecutor in the Umlazi District Court who confirmed that the child was a competent witness. In short, the prosecutor was satisfied that there were sufficient grounds for her to oppose the bail application of the plaintiff and that there were grounds for a successful prosecution. As the charge against the plaintiff fell under Schedule 6 of the CPA, the onus was on the accused to prove that bail should be granted. She confirmed that the bail application was heard on 29 November 2011 and that the magistrate issued a ruling refusing bail on 12 December 2011. She stated that she was unaware that the complainant had been beaten by her aunt prior to making a statement implicating the plaintiff. As far as she was aware, "everything" had been placed before the magistrate, who subsequently denied bail.

[44] Under cross-examination the witness stated that the investigating officer informed the magistrate hearing the bail application that a statement had been taken from Ms Mkhize, but that this was a "defence statement". She confirmed that the investigating officer did not bring to the attention of the court that Ms Mkhize disputed the child's version that she (Ms Mkhize) had walked in while the plaintiff was in the process of raping the complainant. The prosecutor conceded that it was not the task of the investigating officer to decide whether or not to bring this information to the attention of the court, but rather a decision which properly must be left in the hands of the court.

[45] She conceded that the affidavit of the teacher, Ms Mkhize, was never handed into court nor were its contents placed on record. When asked why she had not brought the contradiction in the statement of the child and that of Ms Mkhize to the attention of the court, the prosecutor offered the explanation that she was of the view that the plaintiff was going to lead evidence on this point. In essence, the prosecutor appeared to be of the view that she was under no obligation to put such evidence before the court as this was for the plaintiff to do so. To compound matters, in the course of the bail application the plaintiff appeared to have formulated the view that the State intended calling a teacher from his school to testify in this matter against him. When questioned on this aspect, it was put to the prosecutor that she did not do anything to dispel this impression which had been created, while at the same time accepting that it was her duty to inform the court of the evidence, the strength and weaknesses of the State's case, in order to ensure that a just decision is reached.

[46] The prosecutor further testified that she had not been aware that the child complainant had been threatened with a beating before she made a statement implicating the plaintiff. She conceded in hindsight, that such information should have been disclosed to the court. She also conceded that the different explanations given by the child as to why she was crying was relevant information which would have impacted on the credibility of the complainant in so far as the allegation of rape is concerned. This information was not brought to the attention of the court.

[47] Despite the shortcomings in the prosecutorial process alluded to above, the prosecutor maintained that she did not associate herself, either inadvertently or advertently with the investigating officer's conduct, in failing to bring the relevant and necessary information to the attention of the magistrate presiding at the bail application.

[48] When questioned as to the reasons why she was determined to oppose bail Ms Perumal said that some of the teachers at the school had threatened the investigating officer and this was one of the reasons which motivated her to oppose bail. She did however concede that there was nothing to suggest on the evidence before her that the plaintiff had in any way associated himself with those persons

who may have been intimidating the investigating officer. A further factor which influenced her decision was that the plaintiff had handed himself over to the police four days after the police had initially sought him out. She was of the view that the plaintiff should have handed himself over immediately. She however could not dispute that by arrangement between the plaintiff and the arresting officer, he was allowed to remain at large until he reported to the police station on 22 November 2011.

[49] The prosecutor further stated that she had no idea at the time of the bail application that the child's grandmother had given an interview to the newspapers in which she had stated that the child had been having an emotional problem two weeks prior to the incident. When this scenario was put to her, in the context of the J88 not specifying that there were any fresh tears to the child's hymen, she still did not concede that this would have created doubt as to the credibility of the child that she had been raped on the same day when she reported the incident to her aunts. Despite all of this, the prosecutor maintained that she believed that the State had a strong case against the plaintiff.

[50] It bears noting that following the charge laid against the plaintiff, a DNA analysis was conducted to ascertain whether any traces of the plaintiff's DNA could be found on the clothing items of the complainant. . The analysis concluded that there was no evidence to link the plaintiff to having sexually assaulted the complainant. The DNA analysis only appears to have come to the plaintiff's attention in August 2012, after which he had already spent close on to nine months in custody.

[51] The prosecutor conceded that she did not bring to the attention of the defence counsel the contradictory statements which she knew or ought to have known of in her docket. Again, despite the evidence in her possession, the prosecutor submitted to the court that the State had an overwhelmingly strong case against the plaintiff.

[52] It was only after a lengthy cross-examination did the prosecutor, in response to questions posed from the bench, concede that with hindsight the statement of the fellow teacher at the plaintiff's school, Ms Mkhize, ought to have been brought to the

attention of the magistrate, together with fact that the child had been threatened with a beating before implicating the plaintiff. Ms Perumal further accepted that had this information being brought to the attention of the magistrate; it could have influenced her decision. I interpreted this response to mean that the magistrate could have come to a different conclusion on bail. Finally, Ms Perumal stated that "*if she had more time*", she could have asked the investigating officer to carry out further investigations". She seemed to suggest, without saying so, that due to the work pressure on her as a prosecutor, if she had the luxury of more time to prepare for the bail application, she may have asked for the matter to be adjourned for further investigations to be done. Finally, and to her credit, on reflection of what had been put to her in cross-examination by the plaintiff's counsel, Ms Perumal accepted that she may inadvertently have misled the court by not placing certain information before it.

[53] The last witness called by the defendants was Magistrate Bothma who presided over the bail application of the plaintiff. Under cross-examination the Magistrate conceded that her judgment in the bail application was based on the evidence before her at the time and she was accordingly restricted to these facts alone.

[54] The plaintiff then testified, who at the time was employed as a Deputy Principal and Head of Department at a public school. He confirmed that the complainant's family visited his school on Friday, 18 November 2011 to report an incident which had allegedly taken place on Wednesday, 16 November 2011. On Monday 21 November 2011 the plaintiff stated that he handed himself over to the police and made an appearance in court the following day. His bail application was heard on 29 November 2011 and judgment was eventually handed down on 12 December 2011. The plaintiff remained in custody awaiting trial, and was eventually acquitted on14 December 2012.

[55] The plaintiff's evidence was largely consistent with that which he gave at his bail application and at his criminal trial, which resulted in an acquittal. He confirmed the transcripts of both of these proceedings, which were admitted into evidence by consent of the parties. He described the scene where the alleged rape took place in his classroom, which featured a broken door as well as broken windows, with a

pedestrian path alongside. The incident is alleged to have taken place during a lunch break when other learners would have been playing outside the classroom. Given the setting of where the incident is alleged to have taken place, the suggestion from the plaintiff is that someone would have easily seen or heard what was taking place in the classroom, particularly if the complainant cried during the ordeal. There was also some doubt as to the time when the complainant said the incident had allegedly taken place, in as much as the plaintiff says he would have been on lunchbreak at the time, and that would have been from 09h00 to 10h00, and not at midday when the incident is said to have taken place.

[56] In relation to the J88 which indicates that the complainant informed the doctor that she had been penetrated by a male teacher, without a condom, the plaintiff pointed out that a DNA analysis had been conducted, which failed to find any traces of semen on the clothing items of the complainant. In so far as his incarceration after having been refused bail, the plaintiff stated that he attempted to appeal against the decision of the magistrate but this application did not proceed as he had run out of funds. He further stated that his application for legal aid was turned down due to his employment status as a teacher. This is corroborated by a notation by the magistrate in the court file. He also denied that he had any particular friendship with his colleague, Ms Mkhize, who failed to support the version of the complainant as an eyewitness to the alleged rape.

[57] Under cross-examination he stated that it was only during the criminal trial that it had been revealed that the complainant had implicated him as the alleged perpetrator, after she had been threatened or had received a hiding from her aunt. The plaintiff further stated that he had initially been informed that a teacher at the school had witnessed the incident involving himself and complainant. He did not approach Ms Mkhize to testify on his behalf as she had been identified as a State witness. It emerged also that only in July 2012 did it become known that Ms Mkhize would no longer be called by the state, and was made available as a witness to the defence. The plaintiff confirmed that he had done everything possible to try to secure his release on bail, and that he had acted with due speed and diligence in the circumstances.

[58] The plaintiff called Ms Mkhize as a witness. She confirmed that she was employed as an educator at the same school as the plaintiff at the time of the alleged rape of the complainant, whom she had also known as a learner at the school. She categorically denied that she had seen the plaintiff in a compromising position with the complainant or in the act of raping the learner. She stated plainly that she had never seen such an incident and that she had made a statement to the police to this effect, possibly around 18 November 2011. This is important as her statement would have been in the police docket at the time of the bail application. This is no doubt correct, as the investigating officer in his evidence at the bail application referred to it as a '*defensive*' statement without revealing to the court exactly why he formulated that view.

[59] Ms Mkhize further indicated that she had no idea why the child would have falsely implicated the plaintiff in such an incident. It is significant that nothing was put to Ms Mkhize during her cross-examination suggesting that she may have been unduly influenced or threatened by the plaintiff or members of his family to alter her evidence to exonerate the plaintiff.

[60] This concluded the evidence of the parties, after which the matter was adjourned to 29 March 2019 for the purpose of argument and the submission of heads of argument.

[61] It is not in dispute that the defendants bear the onus to prove that the detention of the plaintiff was lawful. Both the investigating officer and the prosecutor at the bail application testified that they were bound by a duty to act fairly and lawfully to the plaintiff and to respect his rights, including that of liberty. It was submitted in argument by the plaintiff's counsel that contrary to such duty, both the investigating officer and the prosecutor failed to disclose to the presiding magistrate hearing the bail application of the contents of Ms Mkhize's statement; that the first report by the complainant to her aunt was inadmissible because of the existence of the knowledge that the implication of the plaintiff only arose after the complainant was threatened with a beating; that the investigating officer failed to carry out certain investigations including the interviewing of the children in the complainant's class and that the complainant gave conflicting explanations to her aunts as to why she was crying.

[62] In light of this, it was submitted by Mr *Singh* that had the magistrate been in possession of all of these facts, she probably would have granted the plaintiff bail. In fact, in response to a question posed by the Court to the prosecutor at the conclusion of her evidence, Ms Perumal conceded that with hindsight and knowledge of all of the facts which emerged at the trial, the affidavit of Ms Mkhize should have been brought to the attention of the magistrate together with the revelation that the child had been beaten or threatened with a beating before implicating the plaintiff. In her words, she perhaps may have "inadvertently" misled the court.

[63] I am in agreement with the submission that if these facts had been placed before the magistrate a different scenario would have presented itself to the court. Taking into account that in terms of s 60(11) of the CPA, where the onus rests on the accused to satisfy the court that it is in the interests of justice that he be released on bail, the omitted facts would have militated against the supposed strength of the State's case against the plaintiff. There would have been 'question marks' over the credibility of the child's version that the plaintiff was the perpetrator of the rape, particularly if the court hearing the bail application was made aware of the circumstances under which the first report was made and that a material witness to corroborate the version of the single child witness had distanced herself from the allegations made by the child.

[64] It was submitted by Ms *Khuzwayo* on behalf of the defendants that the denial by Ms Mkhize that she saw the plaintiff either raping or in a compromising position with the child is not "decisive" as "it is known that witnesses are threatened which could have been the reason why she denied having witnessed the incident". This denial of the incident, it was contended, must be weighed against the fact that neither the prosecutor, the investigating officer nor the arresting officer had any doubt that the child had identified the plaintiff as the rapist.

[65] The approach of the prosecutor was based entirely on what had been placed before her by the investigating officer. There is nothing before the court to suggest that Ms Peramal made any attempt to obtain additional information regarding the

offence or attempted to secure corroboration for the State's case. In fact, when questioned at the end of her evidence, the prosecutor conceded that if she had more time she would have asked for the matter to be further investigated.

[66] I find no basis for the submission that Ms Mkhize was threatened. Firstly, it suggests that Ms Mkhize was threatened to change her version. This is entirely based on speculation, only because her version did not suit the ends of the prosecution and the investigating officer. Second, there is no evidence to suggest that Ms Mkhize ever changed her version. She was consistent from the outset that she never witnessed the incident as alleged by the child. The contention that she was threatened to tailor her version and her evidence to suit the plaintiff is unfounded and a serious indictment on the character of the witness. This was also never put to the witness when she gave evidence.

[67] While counsel for the defendants' devoted much attention in her written submissions to the aspect of malicious prosecution, this was not the case of the plaintiff. The plaintiff made it clear from the outset that the allegation against him, concerning a child of nine years old, was serious to justify an arrest and prosecution of the perpetrator. The plaintiff's case is that after the allegations had been levelled against him, the State prosecutor and the investigating officer, not necessarily acting in collusion, had failed in their public law duty to bring material facts to the attention of the court which could have cast a completely different complexion on the strength of the State's case against the plaintiff. In this regard the plaintiff relied on *Woji* where the Investigating Officer testified that he had identified the Woji as a robber after viewing a video recording. That identification proved to be erroneous. The court said the following at para 28:

'The Constitution imposes a duty on the state and all of its organs not to perform any act that infringes the entrenched rights such as the right to life, human dignity and freedom and security of the person. This is termed a public law duty. See *Carmichele v Minister of Safety and Security and another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC) para 44. On the facts of this case Inspector Kuhn, a policeman in the employ of the state, had a public law duty not to violate Mr Woji's right to freedom, either by not opposing his application for bail, or by placing all relevant and readily available facts before the magistrate. A breach of this public law duty gives rise to a private law breach of Mr Woji's

right not to be unlawfully detained which may be compensated by an award of damages. There can be no reason to depart from the general law of accountability that the state is liable for the failure to perform the duties imposed upon it by the Constitution, unless there is a compelling reason to deviate from the norm. Mr Woji was entitled to have his right to freedom protected by the state. In consequence, Insp Kuhn's omission to perform his public duty was wrongful in private law terms. See *Minister of Safety and Security and another v Carmichele* 2004 (3) SA 305 (SCA) paras 34-38 and 43.'

[68] The investigating officer, who was a key witness for the defendants, did not make a good impression on the court. As stated earlier, he tendered to be evasive, non-committal about answers and sought to avoid or deflect responsibility for matters falling within his knowledge and authority. In my view, he withheld evidence which would have been crucial for the court hearing the bail application to assess the strength of the State's case. His explanations for these omissions, in light of his public law duty, are simply unconvincing. I am of the view that he was probably driven to oppose bail because of public sentiment over the serious nature of the allegations. The plaintiff was sacrificed to satisfy the need to make an early arrest and keep the offender behind bars, despite the paucity of evidence against him even at the time of the bail application. The situation confronting the police was not made any easier by the first report made by the complainant. Despite the seriousness of the allegations following the sexual assault on a nine year old child, the police ought to have investigated the matter more thoroughly before making an arrest, and even while the plaintiff was in custody awaiting his bail application. The investigating officer was content to rest on the version of the complainant, which was uncorroborated. The plaintiff was eventually vindicated when he was acquitted, but by this time he had spent more than a year in custody.

[69] The plaintiff had been held in custody from 22 November 2011 until his release on 14 December 2012. It was argued that this period also included detention pursuant to a lawful order of the magistrate, and any detention found to be unlawful should take this factor into account. I am not persuaded by this argument as it had been intention of the investigating officer from the outset to oppose bail and he was instrumental in withholding vital evidence from the court.

[70] There is no basis for a finding of liability against the second and fourth defendants. It is only the first and third defendant's employees who were instrumental and responsible for the plaintiff not being granted bail in circumstances where he should have.

[71] I am satisfied that the plaintiff has established his case on liability, on a balance of probabilities, against the first and third defendants only.

Order

[72] In the result, I issue the following order:

(a) The plaintiff's detention from 22 November 2011 until 14 December 2012 is found to be unlawful.

(b) The first and third defendants are jointly and severally liable to compensate the plaintiff for such damages as may be agreed or proved in respect of his unlawful detention from 22 November 2011 until 14 December 2012, the one paying the other to be absolved.

(c) The first and third defendants are jointly and severally liable, the one paying the other to be absolved, for the plaintiff's costs of suit.

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Chetty J

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Dates of hearing	18 - 20 November 2015; 29 March 2017; 25 October 2017; 13 – 14 March 2019, 29 March 2019
Date reserved:	29 March 2019
Date delivered:	30 July 2019