IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

[*REPORTABLE*]

Case No: 824/2014

In the matter between:

MNINIZO NOGWEBELE	Plaintiff
and	
MINISTER OF POLICE	First Defendant
DIRECTOR OF PUBLIC PROSECUTIONS	Second Defendant

JUDGMENT: 12 MAY 2016

HENNEY J

Introduction

[1] On 27 June 2013, the Plaintiff was arrested at his home near Gugulethu in the Western Cape on a charge of rape, whereafter he was detained at the Gugulethu Police Station for 4 days before appearing in court on 1 July 2013. After bail was refused on 17 July 2013, he was detained for a period of four (4) months and two (2) weeks at

Pollsmoor prison up until his release on 11 November 2013, when the charges were withdrawn against him.

[2] As a result of this, the Plaintiff instituted this action against the Defendants. Adv Godla appeared for the Plaintiff and Adv Mayosi appeared for the First and Second Defendants.

[3] The Plaintiff's case is that on 27 June 2013 he was wrongfully and unlawfully arrested by the South African Police Services (SAPS) on allegations of rape. He was further unlawfully deprived of his liberty for 4 days before he appeared in court.

[4] The Plaintiff further alleges that after he was formally charged at his first court appearance on 1 July 2013, members of the Second Defendant whilst fully presented with the facts and allegations leading to his arrest and detention decided to prosecute him without any just cause. That on the Second Defendant's insistence and exercising their discretion to oppose bail, and on the recommendation of the First Defendant, his application to be released on bail was refused by the court.

[5] He further alleges that on 11 November 2013 after having been incarcerated at Pollsmoor prison for a period of four months and two weeks the charges were withdrawn against him due to insufficient evidence.

[6] The Plaintiff's main submissions are these. There was no reasonable and or probable cause in law, justifying his arrest and detention, and accordingly, such arrest and detention is unlawful. Further there was no reasonable and probable cause for his prosecution and accordingly his prosecution is malicious because the proceedings were instigated, without such reasonable and probable cause. The members of the Second Defendant acted with *animo injuriandi* and the prosecution failed.

[7] The members of the First and Second Defendant at all material times acting within the course and scope of their employment thus rendering the First and Second Defendant vicariously liable for their member's wrongful and unlawful conduct.

[8] As a direct result of their unlawful actions, the Plaintiff alleges that he suffered damages in the amount of R800 000,00. He therefore holds them liable to compensate him for damages.

First and Second Defendants' Plea

[9] The First Defendant denies that the arrest and detention of the Plaintiff were wrongful and unlawful. The First Defendant further avers that the detention of the Plaintiff was justified and in accordance with the provisions of the Criminal Procedure Act 51 of 1977 ("the CPA").

[10] The Second Defendant insofar as the allegations made by the Plaintiff is applicable to it avers that the prosecution of the Plaintiff for rape was justified and there was reasonable and probable cause for doing so. It further avers that it was justified to oppose the Plaintiff's release on bail, as the Plaintiff was charged with a Schedule 6 offence. The Second Defendant further states that the application for bail was refused after the Plaintiff failed to satisfy the court that exceptional circumstances justified his release on bail.

[11] The Second Defendant further alleges that on 11 November 2013, the charges against the Plaintiff were withdrawn because the alleged victim, a five year old girl was not ready to participate in the matter.

Separation of Issues

[12] The parties at the outset of the trial agreed that the merits and quantum be separately adjudicated in terms of Rule 33(4) of the Uniform Rules of Court.

The Evidence

[13] In addition to testifying himself, the Plaintiff also called [M…..] [N….] to testify on his behalf. The following witnesses testified for the First and Second Defendants, which I will mention in chronological order although the evidence was not pleaded in such an order: Constable Vetman ("Vetman"), Dr Roy Chunga, Mr Deon Ruiters ("Ruiters") and Mrs Thandi Peter-Varoyi ("Peter-Varoyi").

[14] The Plaintiff's testimony, in summary, is as follows. In the early hours of 27 June 2013, at approximately 05:00am, he was arrested on a charge of rape by members of the First Defendant at his place of residence in Barcelona, Gugulethu. The two policemen were accompanied by a child who alleged that he raped her. The mother of the child was also present.

[15] During the time of the alleged incident, he operated a spaza shop from his house. At first, the policemen told him that the child was there to collect her change because she bought bread at the shop the previous day. He then replied that on the previous day he was not on duty in the shop but his son was. He called his son, but the policeman said he was joking and said that he was there about a rape. When he enquired about the rape, the policeman pointing to the child and said: "*You raped that small child*". When this allegation was made, his son informed the policemen that he (the son) was with his father (the Plaintiff) the whole day - the day they alleged he raped the child. Thereafter, he was arrested and taken to the Gugulethu Police Station.

[16] According to the Plaintiff, the child did not say anything in his presence. At the police station, the police asked him what he knew about the rape and he told them that he did not have anything to do with these allegations. He was arrested on the Thursday and only appeared in court on the Monday. He applied for bail but it was refused. He further testified that he told the police that he sent his son, [S…..] to the shop to buy some beans and that his son's friend [(M….] [N….], his witness) remained with him in the shop and they played pool. The son was not even away for 3 minutes.

[17] The Plaintiff stated that he remained at his house the whole day until about 17h00 when he attended a community meeting and this he conveyed to the investigating officer at the time of his arrest. In cross-examination the plaintiff confirmed that he knows the victim and her mother. He also confirmed that the child referred to him as "*Mkhaya*", because he comes from the same area in the Eastern Cape as the child's father. He denied that on the morning of his arrest, when the child came with the police, that he spoke to the child and said to her "*Is it again you my child?*" He further denied that the child pointed him out, but rather stated that it was the police officer who said that he raped the child.

[18] He confirmed that his son told Vetman that they were in each other's company the whole day when it was alleged that he had raped the child. Vetman asked his son whether his son was not sent to the shop to buy samp and beans during that time when the child was there. He further testified in answer to a question by Adv Mayosi that the policeman did not know him and that he cannot say if the police would know who he is without being pointed out.

[19] He admitted that he never told Vetman at the time of his arrest about the friend of his son who was present at the time the child came to the shop on the previous day. He only mentioned this fact in his bail application. He also did not call his son's friend to testify at his bail hearing.

[20] [M...] [N….] [("N….")] testified on behalf of the Plaintiff and said he is a friend of the Plaintiff's son, [S….]. He heard about the allegations of rape made against the Plaintiff. These allegations came to his attention the day after he had spent the day at the

Plaintiff's place - that being the day he said it is alleged that the Plaintiff raped someone. He was in the presence of the Plaintiff for a period of between 10 – 11 hours. He only left the house of the Plaintiff round about 6 – 7pm that evening. Throughout this time, they were playing pool. At one stage [S….] went to the shop to buy beans and he was alone with the Plaintiff at his house. The Plaintiff was thus not alone during this time. He is not aware and it cannot be that someone could have been raped during this time.

The Plaintiff closed his case after the evidence of this witness.

[21] The evidence of the First Defendant is set out as follows. Constable Vetman a police officer attached to the Nyanga Family Violence, Child Protection and Sexual Offences Unit ("Nyanga FCS") of the South African Police Station since 2007, was called to testify. Part of his duties is to investigate rape cases.

[22] On 26 June 2013 he received a complaint about the rape of a 5 year old child. On arriving at the Gugulethu Police Station he found the little girl accompanied by her mother and aunt. The Plaintiff did not object and consented to the hearsay evidence of the mother as presented by Vetman in terms of the provisions of s3(1)(a) of the Law of Evidence Amendment Act 45 of 1988[1]. According to Vetman, the mother told him that earlier in the day when she wanted to wash her child at her private parts; the child told her that she had already washed her private parts. The mother however proceeded to wash the child's private parts, and the child pulled away.

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[1] Section 3(1)(a) of Law of Evidence Amendment Act reads inter alia as follows:

"(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless-

(a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;"

[23] She asked the child what was wrong and the child told her that she cannot tell because she was scared and she thought her mother would hit her. The child eventually told the mother what happened, which is - she went to the shop to buy some chips; the owner of the shop invited her to come into the shack through a side door; after entering the shack, he took off his pants, took off her panties, got on top of her and put his penis into her vagina. The child then told the mother she cried because it was painful. He thereafter told her to put on her clothes, and she took her chips and left.

[24] Vetman said that on the insistence of the child, he had a private conversation with her and she confirmed what the mother told him except that the child also mentioned that when she came into the shack, he (the owner) put her onto the bed and thereafter committed the sexual act with her. At that time his son was not there. When she cried, he left her and told her to put on her clothes. Vetman testified that he took a statement from the mother as well as the child. After which he took the child to the Thuthuzela Care Centre at GF Jooste Hospital. She was examined by Dr Chunga who recorded his findings on a J88 form that was earlier handed in as an exhibit. Dr Chunga also gave Vetman a sexual evidence collection kit which he sent to the police's forensic laboratory. Dr Chunga confirmed that the child had sustained injuries to her vagina.

[25] Vetman and his superior officer decided that as a result of the evidence and information they had at their disposal to execute an arrest the next morning. He had no Warrant of Arrest because at that stage he based his suspicion that a crime had been committed on the statement of the child, the statement of the mother and the medical evidence which he had at his disposal. On 27 June 2013, accompanied by his colleague,

Warrant Officer Kappes, as well as the mother and the child, he went to the house of the Plaintiff to affect an arrest. When they arrived at his house, the Plaintiff opened the door. When the Plaintiff saw the little girl, he said to her “Are you back again?” He told the Plaintiff that he is from the police and asked the child who it was that did the things to her. She then pointed at the Plaintiff, after which she went to hide behind her mother.

[26] Vetman testified that he did not point out the Plaintiff to the child. After the identification, he informed the Plaintiff that he is arresting him on a charge of rape and explained his rights. At that stage the Plaintiff’s son came forward and said that he cannot arrest his father for rape because it did not happen, whereupon Vetman asked him if he was not sent to go and buy samp and beans. This was confirmed by the Plaintiff’s son, but said he was only sent to go buy beans. Vetman then told him that he would come back to take a statement from him at a later stage. He later asked the child to show him where the incident took place.

[27] The Plaintiff did inform him that he did not do anything. He proceeded to take the Plaintiff statement, which he read out to him and he asked the Plaintiff to confirm it as correct, which the Plaintiff then signed. Vetman further testified that he took the Plaintiff to draw blood samples. The Plaintiff also asked him about bail and said that he was worried that his wife will find out that he was arrested for the rape of a child, and he said to him that this will be a problem in his marriage. The Plaintiff never told him that on the day that the alleged rape took place that he was with his son and a friend of his son, playing pool. According to Vetman, if he had been told about this, he would have followed it up by taking a statement from the friend of the son.

[28] On Monday, 1 July 2013, the Plaintiff appeared in court for the first time. During the Plaintiff's bail application on 17 July 2013, Vetman testified that he was not present in court as the prosecutor had asked him to wait outside. He testified that he was opposed to bail being granted to the Plaintiff. As one of his main reasons was that the community would not have approved of bail being granted to him and he was afraid that should the Plaintiff be released, his life might be in danger. He was also afraid that the Plaintiff may abscond to the Eastern Cape where his wife stayed.

[29] Even though he did not testify in the bail application, bail was ultimately refused by the court. The prosecutor later requested him to bring the child to her for a consultation. He also had to find out from the laboratory about the DNA test that was undertaken. In November 2015, he received a call from the prosecutor Mrs. Peter-Varoyi who informed him that she sat with the child in consultation and the child told her what happened but she had to withdraw the case for a short while because the child was not ready for court. He was told that the case will be re-enrolled after a period of approximately two years. In this time, according to his understanding, the child is supposed to go for counseling after which the docket will have to go back to court to consider whether the prosecution against the Plaintiff would be reinstituted. This, however did not happen because the docket went missing. He also subsequently found out that after analyzing the forensic material, the forensic laboratory could not find any DNA result.

[30] Vetman said that the arrest of the Plaintiff on the alleged rape of the child was based on a statement he obtained from the mother and the child, as well as the J88 statement from the doctor who examined the child. In cross-examination he further elaborated that the Plaintiff was described by the mother and the child as the person who

was the owner of the shop. He was satisfied in his mind that after the child and the mother pointed out the Plaintiff that he was the owner of the shop who was allegedly to have raped the child. The child explained to him and pointed out the place where the rape took place the previous day prior to the arrest of the Plaintiff. The child could however not explain the exact time it took place.

[31] Further during cross-examination he confirmed that he only asked the son of the Plaintiff if he was not sent out to go buy samp and beans just to verify the version of the child who told him that when the incident took place the son was sent out by the Plaintiff to go buy samp and beans. It is also for this reason that when he saw a pot of samp and beans on the stove in the Plaintiff's house, he called out the photographer to take photographs thereof. He did not ask the son how long he was gone. He only wanted to confirm whether it was consistent with the child's version at that time.

[32] During the arrest of the Plaintiff, the Plaintiff's son never told him that there was a friend with them who played pool with his father and him. He was also never asked by the prosecutor to follow up this allegation made by the accused during the bail application - that at all times when the Plaintiff's son was gone; this friend was with the Plaintiff at the house. If this information was given to him, he would have followed it up. However, even if he had this information, he would still have arrested the Plaintiff. The reason being, as he said earlier, that there was a complaint that the child was raped and it was never alleged that the rape took place where the pool table was.

[33] In his testimony he revealed that the shack has three doors leading to the outside and the pool table was in a different room than the one which the child had shown him

where the rape had allegedly taken place. He denies that he did not act reasonably and that he did not have all the information on which he based his decision to arrest the Plaintiff.

[34] He denied that the child did not point out the Plaintiff and he was the one who said to the Plaintiff that he is arresting him on a charge of rape. He also disagrees that the Plaintiff's son was the one who opened the door at the time when they came to arrest the Plaintiff. He was persistent in his evidence that he could remember the child also referred to the Plaintiff as "*Mkhaya*" and "[*T….]i*" even though it was not contained in the statement he made or in the statement of the child. Vetman was adamant that he did not make a mistake about the identity of the Plaintiff based on the information and the pointing out that was given to him by the child and the mother. He was aware of the fact that the child said that she was given a free packet of chips after the rape, even though it was not mentioned in the child's statement.

[35] Dr Roy Chunga also testified on behalf of the Defendants. He is a medical doctor employed with the Department of Health. At the time of him giving evidence he was employed at the Mitchell's Plain Hospital since 2014, after GF Jooste Hospital closed down. This witness is in possession of a degree of Bachelor of Medicine and Bachelor of Surgery obtained from the University of Zambia in 1999. He also obtained a Diploma in Forensic Medicine from the College of Medicine of South Africa in 2011. During 2013, he was employed at Thuthuzela Care Centre at GF Jooste Hospital where he would examine victims of sexual assault and rape.

[36] He was referred to a bundle of documents which he compiled at the time of his examination of the child. This bundle of documents can be found on page 42 up to and including page 68 of the record. This is a set of documents that they would compile and hold in safekeeping when the child or a victim of sexual abuse reports to Thuthuzela Care Centre. These documents deal with the criminal matter which is the subject of this case where it was alleged that the Plaintiff sexually assaulted the child concerned. Among these documents was a so-called form, a copy of the criminal case docket as well as the statement of the child.

[37] According to the J88, he examined the child on 26 June 2013 at 23h55 and after examining the vagina of the child concluded that there was evidence of a sexual assault on the child. This evidence was not disputed by the Plaintiff and needs no further discussion.

[38] Mr Deon Ruiters was the next witness called. He was called by the Second Defendant. This witness testified that he was appointed as a Prosecutor in the Sexual Offences Court at Wynberg. He is also a Thuthezela Case Manager. He deals with matters that emanates from the Nyanga FCS where the victims have received treatment at GF Jooste Hospital. These cases would usually go through the Wynberg court. He was responsible for the screening of cases during June 2013 up to the end of that year. He cannot remember the specific case due to the tremendous caseload he dealt with, which would be in the order of 80 cases per month. He however had sight of the documents relating to this matter and after having seen it he identified that this was one of the matters he had dealt with.

[39] Upon receiving a docket, he would acquaint himself with the facts to determine whether there is a *prima facie* case. In this particular case, he came to such a conclusion after having read all the statements, the J88 as well as the Arresting Officer's Statement. Once this is done he will summarise the facts of the case on a Roneo Form and give this to the Prosecutor who will be dealing with the bail application in order for him or her to inform the Magistrate about the facts during the bail application.

[40] In concluding whether there is a *prima facie* case he would determine whether an offence was committed, and upon coming to such a conclusion in this case, he would have read the victim's statement to ascertain on the facts whether a sexual offence had been committed. For this particular case, he referred to Exhibit "C" on page 62, which is the statement of the child as well as the statement of the mother. He furthermore testified that there must have been some other evidence to identify the assailant because in the statement of the child, the person who allegedly raped her was being referred to as the shop owner. The child identified the person described as the shop owner as the one that put his penis in her vagina.

[41] He also had a look at the J88, and would have determined the identity of the culprit by having regard to the statement of the investigating officer. After that he would make additional entries in the docket wherein he would give further instructions to the investigating officer regarding outstanding aspects such as acquiring DNA reports. He would also instruct the investigating officer to follow up on any issue raised during the bail proceedings for example to investigate the possibility of an alibi witness. In his experience, in most cases the investigating officer would be present in court during the bail proceedings. It would be most unusual for the investigating officer not to be present.

After having been shown a copy of the charge sheet that was handed in as exhibit, he identified the handwriting on the side of the J15 as that of his colleague Ms Kellerman who made the entry “charge withdrawn”.

[42] On a perusal of the charge sheet and the case record as can be seen on page 20 (of the record) it states that the investigation of this case was completed but consultation still needed to take place. As can be seen on page 21 (of the record) a warrant of liberation had been issued on 11 November 2013 once the matter had been withdrawn by Miss Kellerman after having discussed this with Mrs Peter-Varoyi. According to Ruiters the prosecution against the accused did not fail and the reason for the withdrawal was a result of the fact that the victim was not ready to testify during the trial. When this happens the prosecutor will make an entry into the investigating diary of the docket wherein a date usually after a period of 6 to 12 months is given to the investigating officer in which it would indicate that the prosecution against the accused should be re-instituted.

[43] He revealed that there is no policy or procedure in place to regulate this practice. It is based on an ad hoc working relationship between the prosecutor and the police concerned. In cross-examination, he testified that if an issue of an alibi is raised during the bail application the prosecutor would usually instruct the investigating officer to follow up such an allegation. If a witness would refer to an accused by more than one name, the prosecutor would ordinarily follow-up such information. It was not known to him whether there was any DNA evidence in this particular case.

[44] Ruiters stated that for him to have made a decision to proceed with the case he would have had sufficient information to identify the accused. In his opinion he still had a

prima facie case even if he had the information about a possible alibi. He also conceded that had the Plaintiff in this matter not instituted these proceedings, this matter would have fallen through the cracks. He couldn't explain why this matter was not re-enrolled for prosecution. According to him, the National Prosecuting Authority has no policy or procedure in place to regulate and deal with further possible prosecutions in matters like these where the case was withdrawn due to the fact that the child was not ready to testify in court. They do not keep a copy of the docket after they sent the case back to the police.

[45] The next witness for the Second Defendant was Mrs Thandi Peter-Varoyi. She testified that she is a Magistrate at the Wynberg Court and was appointed to this position on 15 April 2015. From 15 June 2013 until the end of 2013 she was employed as a prosecutor at the Wynberg Magistrate's Court. She cannot recall the facts of this particular case but testified however that if she would be given the docket it would assist her to remember the facts of this case. Due to the caseload she would also not have an independent recollection thereof.

[46] She had sight of the documents relating to this matter which are the J88, the statement of the child and the mother, as well as the charge sheet. She cannot dispute the evidence of Vetman and Ruiters that she may have dealt with this matter. She confirmed the evidence of Ruiters that usually in matters like these, the bail application would be dealt with in the bail court and the docket would be perused by the sexual offences prosecutors. Upon receiving such a docket, they will arrange for a consultation with the child usually after the matter has been postponed by the bail court in order to have such consultation concluded before the next date. The matter would be dealt with in

the bail court. Thereafter she would give the date of the consultation to the investigating officer and also give him/her instructions to follow-up.

[47] She testified that the purpose of the consultation with the victim is to prepare the child for trial and when making such an assessment she will look at: the age of the child; determine whether the child can differentiate between a truth and a lie; ascertain whether the child would know the consequences of the truth and the importance thereof. She will do this by asking the child questions such as if he or she knows the different colours. This is in order to establish whether the child knows the difference between a truth and a lie. She was referred to page 20 of the record where it states that the investigation is complete and she explained that this meant that she was satisfied that the investigation in this case was complete and the matter is then ready to be referred to trial.

[48] After being referred to the words “matter W/D victim not ready” on page 17, she explained that this decision was taken because she noticed the child was 5 years old and, according to her, this means that the child did not pass the competency tests which would mean that the child is not ready testify in an open court. At that stage, the matter was in the District Court when she made the recommendation to the Senior Public Prosecutor to withdraw the case. This did not mean that the matter was permanently withdrawn against that particular accused. It is common practice that she would then instruct the investigating officer to bring this case back to court after a year or two. According to her, this does not mean that the prosecution has failed and if it was such a case, she would rather have stated that there was no prospect of a successful prosecution.

[49] In regards to the statement of the child, wherein the child did not name the alleged perpetrator, she said that children of that age would identify people by description rather than by name. The complainant or child would usually identify the person to the mother or in the presence of the police or to the policeman who will be affecting the arrest. It was clear to all from the statements of the mother and child who the person was that allegedly raped the child. The child said it was the shop owner and she would have clarified this during the consultation. She however does not have an independent recollection whether she indeed clarified it with the child.

[50] She stated that even if there was a witness that said they were present with the Plaintiff on the day of the alleged rape, she would still have proceeded with the prosecution because she would not have found any reason for this child to lie. She would also have proceeded with the prosecution even if there was an absence of DNA linking the perpetrator. If there was DNA of another person she would have taken it up with the child in order to ascertain whether this child was raped by another person and if so, she still would have proceeded with the prosecution. If however, the child insisted that it was only one person, she would have withdrawn the matter.

[51] After having been referred to page 62 of the record where the child at paragraph 4 of the statement says that she doesn't know the difference between right and wrong she will then have embarked on an enquiry where she would for example ask the child that if something is white and someone would say it is red, would it be right or wrong. If the child would then give the correct answer then she should be able to ascertain whether the child would be able to distinguish between right and the wrong.

[52] This was all the evidence that was given during the course of the trial. I will now evaluate the evidence and also the legal questions involved.

Evaluation

[53] It is common cause that the Plaintiff was arrested on Thursday morning, 27 June 2013 by members of the South African Police Services, acting within the course and scope of their employment on the suspicion of the rape of a minor child. After affecting the arrest, the Plaintiff was taken to Gugulethu Police Station where he was detained until his first appearance at Wynberg Magistrates Court on Monday, 1 July 2013. At which point he was formally charged with rape under case number 4/655/13.

[54] He applied for bail on 17 April 2013, which was refused. He remained in custody until his release from prison on 11 November 2013, when the charges against him were withdrawn. Regarding the Plaintiff's claim for unlawful arrest, it is trite that once the First Defendant has admitted the arrest, the onus shifts to him to prove the lawfulness thereof. As far as the claim of malicious prosecution is concerned, the onus to prove this claim resides with the Plaintiff.

[55] Before dealing with the applicable legal principles underlying the claims of unlawful arrest and detention as well as malicious prosecution, the court will first proceed with the evaluation of the evidence in order to make proper factual findings against which it will evaluate the legal principles underlying the claims.

[56] Firstly, I will deal with the evidence of the Plaintiff and his witness. The Plaintiff did not impress this court as a witness. He was evasive and vague, particularly when he was questioned about whether he had told the police at the time of his arrest that his son's friend, [N…..], was present at his house during the time the child alleged that she was raped. In his evidence in chief, he emphatically said that he indeed informed them at the time of his arrest that during the time which the child said she was raped this witness was present. However later during cross-examination he changed his version and said that he never told the police about this witness being present at the time the child alleged she was raped.

[57] After a long struggle and persistent evasiveness, he conceded that he only told this to the court during his bail application. The Plaintiff further informed the court that the police accused him of rape and arrested him without him being pointed out by the child. He said Vetman was lying when he told the court that the child had pointed him out. He could however not explain why the police would bring the child with them to arrest him if the child did not point him out. He could also not explain how the police would have arrested him if they did not beforehand know who he was. In answer to this, he speculated that the mother and the child may have told the police before the time it was him.

[58] Regarding the evidence of the witness [N....], it is clear that at the time of his arrest the plaintiff he did not mention to the police that this witness was present on the previous day. This evidence therefore was not available to Vetman to consider at the time of the arrest and does not take the matter any further regarding the lawfulness of the arrest.

[59] I will now deal with the evidence as presented by the First and Second Defendants. Vetman made a favourable impression on the court as a witness. There was also nothing in his evidence which the court would consider improbable. He was severely criticized during cross-examination as to why he did not mention the name of the Plaintiff in the statements of the mother and that of the child. I find this criticism unfounded, especially in the light of the fact that it was clear, not only to him, but also to the Plaintiff that the child and the mother knew who the Plaintiff was.

[60] There could have been no uncertainty in the mind of the child, the mother as well as Vetman as to who the child alleges was the person who raped her. It is also for this reason that I find the version of Vetman to be more probable than that of the Plaintiff - where he said that the child and the mother took him to the house of the Plaintiff and the child pointed out the Plaintiff as the person who she alleged raped her. He was also criticized that he did not follow-up the allegation that [N…..] was present at the time that the child alleged she was raped. In answer to this, he said that the place which the child pointed out as to where she was raped was in a separate room and not where there was a pool table. In addition, he was not aware that the Plaintiff said that this witness was present during the rape, because he was not informed of this by the prosecutor who dealt with the bail application.

[61] Vetman stated that there are 3 doors leading out of this house and the pool table could have been in one of those rooms. The only person that said he was present when the child was allegedly raped was the Plaintiff's son. He was particularly interested in that allegation because the child told him that the rape had taken place when the Plaintiff sent his son to buy samp and beans. This witness further came across as very confident and

sure of himself. He also did not contradict himself or was seen to be misleading the court. There is therefore no reason to disbelieve the evidence of this witness.

[62] The other witnesses who testified for the First Defendant did not take this matter any further. The evidence of the witnesses for the Second Defendant, Ruiters and Mrs Peter-Varoyi was also not heavily disputed by the Plaintiff. Their evidence was that although they did not have an independent recollection of this case, they were merely there to explain the process and procedure which were in place which prosecutors would use when a person is arrested for the rape and sexual assault involving a child victim.

[63] They said it was common practice for them to withdraw cases against perpetrators, if after the consultation, it was clear to them that the child would not be able to testify in court due to their age and lack of maturity. Also taking into account their lack of understanding of what it means to take the oath or be admonished to tell the truth as required by law. According to them, this does not mean that there was no *prima facie* case against a person accused of rape or sexual assault of the child. It just meant that they could not proceed at that stage with the prosecution, which would result in a withdrawal of the charges against an accused.

[64] The procedure they would undertake would be that once the matter was withdrawn, to request the Investigating officer to re-enroll the case after a period of between 6 or 12 months, where after they would re-assess the child's ability to testify. It does not mean that the prosecution has failed or that there is no case against the perpetrator. What it means is that the child is not mature enough to understand what it means to testify in court and would not be able to withstand the rigors of such testimony.

[65] Coming back to the arrest of the Plaintiff, it is clear on the evidence of Vetman which I find probable, credible and convincing, that he formed a reasonable suspicion that the Plaintiff had committed rape, a Schedule 1 offence. In coming to such a conclusion, it is clear that the First Defendant was satisfied that on the objective and undisputed evidence – the statements under oath, J88 medical report confirming injuries to the vagina consistent with blunt trauma and the pointing out of the Plaintiff by the child – to affect the arrest of the Plaintiff.

[66] With regards to the identification of the Plaintiff, it was clear that the child said that she was raped by the shop owner whom she referred to as "*Mkhaya*". The Plaintiff in his evidence confirmed that he is the shop owner and that he is known as "*Mkhaya*" by the child because the father of the child comes from Butterworth, which is the same area from which he comes. Furthermore, Vetman testified that on the morning of 27 June 2013, he took the mother and the child to the Plaintiff's house because he did not know where Plaintiff lived and he did not know the Plaintiff. Only the mother and child knew who the Plaintiff was.

[67] Further, the child indeed pointed out the Plaintiff as the alleged perpetrator and as said earlier, I find Vetman's version regarding the pointing out as credible and plausible. The Plaintiff's version on the other hand regarding the circumstances of his arrest falls to be rejected as improbable. The court is convinced that the First Defendant has shown overwhelmingly that on the available evidence, that the arrest of the Plaintiff was lawful and that he had allegedly committed the offence as accused of. The effect of such arrest

therefore was that the Plaintiff was in lawful custody and lawfully detained until he was lawfully discharged or released from such custody.

Malicious Prosecution

[68] I will now deal with the question whether the prosecution of the Plaintiff was malicious. In order to succeed with his claim against the Second Defendant for malicious prosecution, the Plaintiff must prove that: (a) the Second Defendant set the law in motion which means that they instigated the proceedings; (b) the Second Defendant acted without reasonable and probable cause; (c) the prosecution has failed.

[69] Regarding the first requirement, it is clear that after the arrest of the Plaintiff, the prosecutors in the service of the Second Defendant, based on the available evidence, proceeded to institute the prosecution against the Plaintiff. The Second Defendant called the prosecutors in their service as witnesses to explain the process as to how a decision is made to prosecute an accused charged with a sexual offence involving a child. This evidence was not disputed.

[70] The second requirement which the Plaintiff must prove, is that the Second Defendant acted without reasonable and probable cause. The Plaintiff relied on the dictum of *Relyant*[2] to argue that the Defendant had no reasonable or probable cause for the prosecution because they did not have such information as would lead a reasonable man to conclude that the Plaintiff had probably been guilty of the offence charged. The

2 *Relyant Trading (Pty) Ltd v Shongwe and another* [2007] 1 ALL SA 375 (SCA).

argument is further based on the fact that the Plaintiff in court during the bail proceedings, explained that he had an alibi which could be confirmed by both his son and his son's friend [N…….], which was never followed up by both Defendants. Ordinarily this would have been followed up by the Public Prosecutor by instructing the Investigating officer to do so.

[71] Notwithstanding this fact, the Defendants pursued the prosecution against the Plaintiff. According to the Plaintiff, this fact could have raised the suspicion that someone else could have been responsible for the rape of a child and not him. This fact shows that there was an absence of a reasonable and probable cause. According to *Neethling, Potgieter and Visser*[3]:

> "*There is an absence of reasonable and probable cause for the prosecution either (i) if there are, from an objective viewpoint, no reasonable grounds for the prosecution, or (ii) if, where such grounds are in fact present, the defendant does not, viewed subjectively, believe in the plaintiff's guilt. The defendant will thus be acquitted if, on the one hand, there existed reasonable grounds for the prosecution and, on the other hand, he also believes in the plaintiff's guilt. The question of whether reasonable grounds exist may only be answered by reference to the facts of each particular case. The facts must then reasonably, or according to the reasonable person, indicate that the plaintiff probably committed the crime."*

[72] In this regard, both the Plaintiff and the Defendant relied on the dictum of *Beckenstater v Rottcher and Theunissen*[4] where the court held as follows:

> "*When it is alleged that a Defendant had no reasonable cause for prosecuting I understand this to mean that it 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*

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3 J Neethling & JM Potgieter *Neethling-Potgieter-Visser Law of Delict* (7th ed 2015) at p 366-367.

4 1955 (1) SA 129 (A) at 136.

not to have believed the Plaintiff's guilt, a subjective element comes into play and disproves the existence, for the Defendant, of a reasonable and probable cause".

[73] Coming back to the facts of this case, it is clear that at the time of the arrest and before the Plaintiff's appearance in court on 1 July 2013, the following evidence was presented to the Prosecutor who dealt with this matter:

(a) A statement under oath of the minor child;

(b) A statement under oath of the mother;

(c) The statement of the Plaintiff's son which confirmed that he had been sent away to another shop which confirms the version of the child that the son was sent to the shop by the Plaintiff in the time the alleged rape took place;

(d) The statement of the Plaintiff;

(e) The J88 medical report confirming the vaginal injuries to the child;

(f) The evidence of Vetman stating that the child pointed out the Plaintiff;

(g) Vetman's statement regarding the crime scene, more especially, the bedroom where the incident is alleged to have taken place.

[74] According to Ruiters, he considered the contents of the docket in order to establish whether there was a *prima facie* case to institute criminal proceedings against an accused. At that stage, he was of such a view. In my view, viewed objectively, if regard is to be had to the contents of the docket, reasonable grounds existed for the prosecution.

[75] Returning to the Plaintiff's allegation that a possibility of an alibi was raised at the time of him giving evidence during the bail application and the prosecution proceeded with the case against him notwithstanding the fact that they had such knowledge. It must be remembered that at the time when Ruiters made his decision, no such evidence

existed. This allegation was also not conveyed to Vetman at the time of the arrest of the Plaintiff and was raised for the first time on 17 July 2013, after a decision had already been made to proceed with the prosecution against the Plaintiff. Ruiters as well as Peter-Varoyi who subsequently dealt with the docket could not have been aware of this allegation because they were not the prosecutors who dealt with the bail application. They, in any event held the view that even if they were aware of this allegation, they would have followed it up but enough grounds existed to proceed with the prosecution, notwithstanding this allegation. There was enough evidence to prove a *prima facie* case.

[76] The mere fact that an accused person raises the possibility of an alibi during the bail application and at the early stages of a prosecution, does not mean that the Defendants, more especially the prosecutors on reasonable grounds could not have believed in the Plaintiff's guilt, given the totality of the evidence which they had at their disposal. Objectively speaking, even if there was evidence of an alibi which the Plaintiff at that stage did not reveal at the time of his arrest, such evidence was countered or gainsaid by strong evidence of identification by the minor child and her mother, who the Plaintiff admits was known to him.

[77] There could therefore have been no doubt in the mind of the arresting officer as well as the prosecutors that the person who was identified as the alleged rapist was the Plaintiff and no one else. If this was raised later in the criminal trial, it would have been up to the court dealing with the criminal case to decide which version should be preferred. That is in the nature of a criminal trial where an accused person is free to raise any defense. If the criminal court in the later trial believes it to be reasonably possibly true, such person will be acquitted. On the other hand, if it is rejected and the State has

proven its case beyond reasonable doubt on the evidence as presented and which was initially contained in the docket, such person will be convicted. The mere fact that a person raises a defense or presents evidence thereof, does not mean there is no reasonable or probable cause for a prosecution. If this is to happen, then most prosecutions would be regarded as malicious.

[78] This fact alone, and weighed up in light of all the evidence, would not in my view have been sufficient grounds on which the Defendants could not have believed in the guilt of the Plaintiff and in no way could lead to the conclusion on this knowledge that the Plaintiff was innocent. I therefore find that the Plaintiff has failed to show that his prosecution was without reasonable or probable cause.

[79] This brings me to the next requirement which is the presence of malice or *animus injuriandi*. For the Plaintiff to succeed in proving this requirement, it must show that the Defendant intended to injure (either *dolus directus* or *dolus indirectus*). In *Relyant*[5] the court held that *animus injuriandi*, and not malice, is to be proved before the Defendant can be found to be liable for malicious prosecution as it includes not only the intention injure.

[80] In *Moleko*[6] , the court held that *animus injuriandi* includes not only the intention to injure but also consciousness of wrongfulness:

> "*In this regard animus injuriandi (intention) means that the defendant directed his will to prosecuting the plaintiff (and thus infringing his personality), in the*

5 *Relyant* n 2 above at para 5.
6 *Minister of Justice and Consitutional Development v Moleko* [2008] 3 ALL SA 47 (SCA) at para 63.

awareness that reasonable grounds for prosecution were (possibly) absent, in other words, that his conduct was (possibly) wrongful (consciousness of wrongfulness). It follows from this that the defendant will go free where reasonable grounds for the prosecution was lacking, but the defendant honestly believed that the plaintiff was guilty. In such case the second element of dolus, namely consciousness of wrongfulness, and therefore, animus injuriandi, will be lacking. This mistake therefore excludes the existence of animus injuriandi".

The court went on to set a very high threshold for the Plaintiff to prove this element in that it held further that "negligence on the part of the defendant (or, I would say, even gross negligence) will not suffice."[7]

[81] I agree with the submissions of the Second Defendant that the Plaintiff has failed to prove this element of the delict. There is no evidence before the court that the prosecutors in the service of the Second Defendant were willful – i.e. that the prosecution of the Plaintiff in the awareness that reasonable grounds for his prosecution did not exist.

[82] The last requirement to sustain a claim for malicious prosecution is that the prosecution against the Plaintiff has failed. It is not clear on what evidence the Plaintiff basis its argument that the prosecution against him has failed. The Plaintiff in a rather muddled submission, argued that due to the fact that there is a lack of DNA evidence which links the Plaintiff with the rape, shows that the prosecution has failed. In a different submission he argued that the evidence of Ruiters and Peter-Varoyi as to the reasons why the case was withdrawn against the Plaintiff is not based on any evidence but on assumptions they made. The court therefore has to in favour of the Plaintiff find that there was no justifiable or rational reason for the withdrawal of the case against the Plaintiff.

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7 *Moleko* n 5 above at para 64.

[83] I do not understand this argument because it is clear and as indicated on the charge sheet that the matter was withdrawn against the Plaintiff because the victim, referring to the child witness, was not ready. I cannot accept that the evidence of Ruiters and Peter- Varoyi to be mere assumptions as to why this case could not proceed. It was never disputed that the matter was withdrawn by the prosecutors due to the fact that the child witness was not ready to testify in court. These submissions were made due to the fact that these witnesses did not have an independent memory or recollection of this particular case, but it failed to take into consideration that these witnesses testified that this is the procedure they would have followed on a daily basis in dealing with a prosecution where a child is a victim of a sexual offence. Furthermore, these witnesses were able to testify as to what would have happened after having had regard to the documents placed before them.

[84] The submission, therefore, is without merit. I agree with the submission of the Second Defendant that the Plaintiff must prove that the criminal proceedings were terminated in his favour. What happened in this matter is that the criminal proceedings against the Plaintiff were temporarily terminated. It was not settled by an acquittal or a withdrawal thereof on the merits. It was always the intention to institute the proceedings against the Plaintiff. The reason for the withdrawal of the matter at that stage against the Plaintiff is eminently reasonable and rational, which is that in this particular case and many other cases like these, where a sexual offence is committed against a minor child, special circumstances has to be taken into consideration to ensure a successful prosecution against perpetrators. This needs a lot of pre-trial preparation of such a child. This pre-trial preparation often involves an arduous and painstaking task that requires a lot of patience, understanding and expertise, not only from the prosecutor dealing with

such a case but also the investigating officer and other professionals. Given the nature of the offence which is the rape and violation of the physical integrity and dignity of a child who usually needs to be protected against the alleged perpetrator, the police are under an obligation to arrest such a person if reasonable grounds exist, as happened in this case.

[85] This however, does not mean that the prosecution would be in a position to place that evidence of such a young child before court by means of *viva voce* evidence which it is required to do in terms of the provisions of the CPA. This in turn, means that the child is to understand the nature and the importance of the oath, or where applicable, the ability to affirm his or her evidence, or it must be determined whether the child is not able to understand the nature and importance of the oath and whether such evidence may be given in criminal proceedings without taking the oath or making the affirmation.

[86] According to the evidence of Peter-Varoyi this is exactly what they were trying to achieve in cases like these. The child witness also needs to be prepared for the harsh adversarial system wherein he or she will be required to testify in a court of law, as well as being subjected to the rigors of cross-examination. According to her, and on this court's understanding of the functioning of these courts, it more than often happens that the child victim of a sexual offence would not have the ability to testify in court due to immaturity and lack of understanding. And it often happens that the child would not be able to understand what it means to take the oath or affirmation or to distinguish between a truth and a lie. Even though in terms of the provisions of the CPA[8] the evidence of a

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[8] Sec 153, 170A, 158(5). See also the directives not yet gazetted in terms of the Criminal Law (Sexual Offences and Related Matters) Amendment Act in relation to the application of s170A as well as 153 and 154.

child witness must be delivered in camera or by means of close circuit television, a one sided screen and with the assistance of an intermediary.

[87] It also often happens that the child witness lacks sufficient mental and psychological development to meet the challenges of testifying in open court which is often a hostile and unwelcoming environment even for the most seasoned and experienced witnesses. These were the reasons proffered by the Second Defendant for the withdrawal, which I find imminently reasonable and justifiable.

[88] Should prosecutors therefore not be given the opportunity to deal with matters involving children in this manner, it will lead to a situation where perpetrators of sexual offences against children would be acquitted and set free, if such children are not properly prepared to give evidence against perpetrators in sexual offences courts. Under such circumstances, when perpetrators are arrested and the prosecutions are not malicious, can the State or the Second Defendant be held liable by the alleged perpetrator when it was always the intention to prosecute such individuals, where they have such evidence, but where the child witnesses lacked the maturity and ability to testify and present it to a court on the basis that the prosecution failed, surely not. The Constitutional Court[9] as per Ngcobo J (as he then was) said the following about the child witness which is equally important in this case:

> "*The constitutional issues at stake here concern children who are complainants of sexual offences. They are some of the most vulnerable members of society. They are not parties to the proceedings, but they have constitutional rights: the right to*

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9 *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development and Others* 2009 (7) BCLR 637 (CC) at para 200.

have their best interests to be considered is of paramount importance in matters concerning them. Their status as non-parties severely limits, if not eliminates, their ability to vindicate their rights in those proceedings where they are called upon to testify. This makes them doubly vulnerable. They have to depend, for the vindication of their rights, on others, including courts before whom they testify. The constitutional issues at stake here are therefore important, and affect the administration of justice."

[89] To deal with cases of children who are victims of an alleged sexual offence in this manner caters for their special needs and would serve their best interest as required by the constitution. Where the circumstances of the child dictates that the matter be withdrawn provisionally, it was for a reasonable, rational and a legitimate purpose. Therefore such a withdrawal cannot be regarded as a failed prosecution for the purposes of proving a malicious prosecution by a Plaintiff. The Plaintiff given these circumstances, failed to prove that the prosecution has failed against him, which resulted in the withdrawal of the case.

[90] In the result therefore, I make the following order:

"*That the claims against the First and Second Defendants are dismissed with costs*".

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R.C.A. HENNEY
Judge of the High Court