Editorial note: Certain information has been redacted from this judgment in compliance with the law.

THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 26135/2017

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED:

DATE: 14/02/2024

In the matters between:

J[…] S[…] V[…] V[…] N.O **FIRST PLAINTIFF**

J[…] S[…] V[…] V[…] **SECOND PLAINTIFF**

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS **FIRST DEFENDANT**

THE MINISTER OF POLICE **SECOND DEFENDANT**

JUDGMENT

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to Parties / their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date of the judgment is deemed to be 14 February 2024

BOKAKO AJ

INTRODUCTION

1. This is a claim for damages arising from the arrest and detention of the Plaintiffs by the Second Defendant's police officers and their subsequent prosecution by the First Defendant. The Plaintiffs instituted an action for damages against the Defendants for four million rand (R4 000 000-00) for unlawful arrest against the second Defendant and malicious prosecution against the first Defendant.
2. The Plaintiffs pleaded that their arrest and detention were unlawful and the subsequent prosecution was malicious.
3. I pause to mention that the First Plaintiff passed away on 10 July 2021 and was substituted by the Second Plaintiff in her capacity as the Executrix of the estate of the First Plaintiff.
4. The matter was allocated a particular trial date by the Office of the Deputy Judge President at the instance of both the Plaintiffs and the Defendants. It was set down for 10 (Ten) days as a special trial date from 24 July 2023 to 4 August 2023. The matter then became partly heard and was further set down for another 3 (three) days from 13 to 15 September 2023. When the matter was postponed, the Defendant indicated they intended to call another witness. The witness did testify on 13 and 14 September 2023, after which the matter was postponed for heads of arguments. Arguments were heard on 06 December 2023.

FACTUAL BACKGROUND

5. The Plaintiffs were arrested and detained on 2 December 2010 by members of the South African Police Service for Child Pornography. In particular, the Plaintiffs and the other accused faced charges of indecent assault, assault, sexual assault, incest, rape, and manufacturing of child pornography.

6. After the arrest, they did not have any contact with H[…]. The Plaintiffs first appearance in court was 6 December 2010. They unsuccessfully applied for bail, and their release on bail was subsequently granted on appeal on 17 November 2011 by the Gauteng Division of the High Court, Pretoria.

7. The trial commenced in December 2013 and concluded on 21 October 2015, when they were found not guilty and discharged.

The Plaintiffs' pleaded case

8. In their particulars of claim, the Plaintiffs pleaded that members of the South African Police acting within the scope of their employment with the Second Defendant effected an unlawful and wrongful arrest and detention on 2 December 2010 on false allegations and false claims of creation, possession, and distribution of child pornography,

9. In respect of the claim for malicious prosecution against the first Defendant, the Plaintiffs pleaded that their prosecution was malicious in that it was conducted by members of the First Defendant knowingly that such prosecution was without probable cause and without there being any reasonable belief in such prosecution, that the members of the Defendants interfered with witnesses and influenced them, that they sensationalized the trial to such an extent that the prosecution received nationwide and worldwide media coverage, that child witnesses were intentionally, alternatively grossly negligently contaminated and influenced and that the members of the First Defendants failed to assess and analyse the available evidence properly.

10. The Defendants deny that the arrest and detention of the Plaintiffs was unlawful and wrongful and deny malice in the prosecution of the Plaintiffs. The Second Defendant pleaded that its members were not at all motivated by any malice when they arrested and detained the Plaintiffs but acted reasonably based on the information at their disposal. The First Defendant considered the

evidentiary material contained in the police dockets and the forensic reports compiled by the experts when deciding to prosecute the Plaintiffs.

COMMON CAUSE ISSUES.

11. The parties' identity and the Court's jurisdiction are not in dispute. The duration of arrest and detention of the Plaintiffs is not in dispute. Second Defendant admitted the arrest and detention of the Plaintiffs. 11 Months, 13 days in respect of the Second Plaintiff, and 12 months and four days in respect of the First Plaintiff that the Plaintiff's first appearance in the Pretoria North Magistrate Court was on 6 December 2010. That the members of the Defendants opposed the Plaintiff's bail. The Plaintiffs were granted bail by the High Court and released on bail on 18 November 2011 and 6 December 2011, respectively. On the 21st of October 2015, the Plaintiffs were found not guilty and discharged.

ISSUES FOR DETERMINATION.

12. The Court is called upon to determine the following issues

    12.1 Whether the Defendants are vicariously liable for the actions of the police officers involved and the relevant prosecutors.

    12.2 Whether the arrest of the Plaintiffs was based on a reasonable suspicion and justified in terms of Section 40(1)(b) of the Criminal Procedure Act.

    12.3 Whether there was evidence available to the Second Defendant that indicated that the Plaintiffs were involved in child pornography and if the search was lawful and by a valid search warrant.

    12.4 Whether the further detention of the Plaintiffs was lawful and justified on the charges they were arrested for.

    12.5 Whether the opposition to the Plaintiffs' bail was justified.

    12.6 Whether the prosecution of the Plaintiffs was malicious and whether there was probable cause for the First Defendant to prosecute the Plaintiffs.

12.7 Whether there was interference and influencing of witnesses by the Defendants if the allegations attracted worldwide media coverage and the quantum of the Plaintiffs' claims is in dispute, and whether or not the arrest and detention of the Plaintiffs were actuated by malice and whether the prosecution was equally malicious.

SUMMARY OF THE EVIDENCE

13. The Plaintiff's witnesses were as follows: Mrs J[...] S[...] M[...] V[...] V[...], Ms S[...] P[...], H[...] V[...] V[...], Mr C[...] R[...] T[...], and Mr. J[...] V[...] Z[...]. The first Defendant's witnesses were Ms. T[...] C[...]and C[...] H[...]. The second Defendant did not call any witnesses.

Evidence for the Plaintiff's

J[...] S[...] M[...] V[...] V[...]:

14. This is the second Plaintiff married to the first, who has since passed on. She is representing the first Plaintiff as the Executrix of the estate. She is 55 years old and a housewife. She narrated to the Court the circumstances relating to their arrest, meaning herself, the first Plaintiff, and her stepson G[...]. On 2 December 2010, they were arrested by Captain De Jager, who informed them that they were being charged with the offense of child pornography and that their rights were explained to them. Police searched their house after they were shown a search warrant, but nothing was found. The police officers and the social worker took her 13-year-old daughter, H[...], into their custody. The social worker requested that she sign a specific document but refused because she believed she would be signing off on her daughter. They were then taken to Pretoria North police station cells. They were arrested for child pornography, and a notice of rights was issued on 2 December 2010 to both her and the First Plaintiff. On 6 December 2010, warning statements were obtained from her and the first Plaintiff. She told the Court that nothing in the statement was explained to her; she was requested to sign the document, which depicted allegations of e sexual assault, child pornography, indecent assault, and incest. Further, they were charges of sexual exploitation concerning A[...] J[...]and rape and sexual exploitation of C[...] Aucamp. They

were arrested with many other Accused, with an estimated 9 to 11 different persons. After the arrest, they did not have any contact with H[...]. Their first contact was on the day when they were found not guilty, on 21 October 2015.

15. She also testified about the detention conditions at Pretoria North, saying that they slept under an open roof and had a skinny mattress and blanket. There was also no water they could wash or bathe, and they could not wash themselves, use the toilet, or brush their teeth. The cells were filthy and awful, and they were overcrowded. Though the detention conditions at Kameeldrift were not bad, they were treated well and ate good food. Three women and four men were detained separately at Kameeldrift police station.
16. She knew that the social workers took children. She knew A[...] J[...]and C[...]K[...] , their foster parents, used to come and visit them, and they would stay for an hour or two and then leave. A[...] was approximately four years old, C[...]was about seven, and the children never slept at her place. She also knew other children as well. i.e., W[...] , D[...] , and C[...] . She denied allegations against her and the first Plaintiff in that the defendants had no grounds for arresting, detaining, and prosecuting them. The Plaintiffs and the other accused faced charges of indecent, incest, assault, rape, sexual assault, and manufacturing of child pornography. The Plaintiffs were brought before the Court on 6 December 2010. During consultation with her legal representative, Mr Johan van Zyl, she did have insight into the docket. She confirmed that there were charges of indecent assault, sexual assault, and rape of H[...] and that there were no further charges of child pornography brought against them. There was no evidence in the docket of child neglect or sexual abuse, and there was no evidence in the docket that she is aware of that, they allowed H[...] to be abused. They were prosecuted between approximately December 2013 and 21 October 2015 and discharged on 21 October 2015.
17. She further told the Court that the Defendants influenced witnesses as she believed that the children could not say anything as alleged by the Defendants because evidence tendered by children is not what a child could have said. She needed to find out who the complainant was.

J[...] S[...] M[...] V[...] V[...]

18. She is 26 years old and employed at Q Auto Electrical as an administration clerk and receptionist. Her highest educational qualification is Grade 10 lower grade. She attended Kwaggasrand School, which is different from a regular school where they use their hands to work.

19. The Plaintiffs are her parents, and she recalls the criminal charges against them. She testified in the matter. She was taken out of the care of her parents. During the arrest, the Police spoke to her parents and told her mother to go and pack her luggage, and she then went away with the social worker, Ms Van der Merwe. Captain De Jager was talking to her parents and told her that both her parents were under arrest for child pornography, and her brother G[...] was arrested for child pornography and rape. She was 13 years old at that stage.

20. She was taken to a farm by the social worker and stayed there, and she cannot remember the person's name. She confirmed that she stayed there with the uncle, the aunt, and their son, and it was herself, K[...], A[...], I[...], C[...] , D[...] , her cousins, and her niece, and all were younger than her. Subsequently removed and taken to a safe place, she was told that the children were discussing what had happened. She denied that she discussed the case with any of the children.

21. She met T[...] L[...]after she was taken to a place of safety. L[...]came to her to make a statement, and she identified herself as a Police officer. She saw L[...]three times. The first occasion was when L[...]visited her and asked her who she was, where she came from, and her family members. The first statement she gave was on 15 December 2010. The people at the place of safety were not allowed to be present during the taking down of the statement. She was then asked to sign the statement. She knew the statement's contents and that L[...]read it back to her before she signed it. She could not read the statement because L[...] handwriting could be better. L[...]returned and asked her some questions while writing what she was saying. She had not read the statement before, and L[...]told her she would type it and print it. She was informed that she had to sign it so she could go

and type it. She identified the second statement and confirmed that the statement was obtained on 29 March 2011.

22. Laurence came back for the third time to ask her questions. She answered the questions that L[...]put, and on this occasion, L[...]told her that she would type the statement, print it, and then sign it. She confirmed that, according to her knowledge, the statements were never typed. The witness then identified the third statement and said she signed it on 19 April 2011. She made an additional statement after she testified

23. She told the Court that the allegations against G[...] were not the truth and further denied that the claims made in her third Statement against G[...] were valid; G[...] was her brother. She saw the statements again at Sinoville police station, where she went for court preparation. At Sinoville police station, she met a woman named T[...]. T[...] was preparing her for the court procedures, and she looked at the statements and read them out to her; she then informed T[...] that the statements were not factual. L[...]was not present at Sinoville police station during the court preparation. She went several times to Sinoville, two times a week, before the Court. She denied that she told Tanya anything about the statements or that she discussed the contents of the statements with Tanya.

24. Cornelia and Marie gave her an A.4 book with questions and answers that she had to study for the court case. These questions and answers relate to her parents' case and when she goes to Court on the day. She repeated the answers in Court because Cornelia told her she could see her parents if she testified according to the questions and answers. She must have been 15 years old at the time.

25. She made another statement but for the three statements referred to. She created the statement because she discovered that her brother was locked up innocently. She asked her parents if she could see a lawyer. They then took her to a lawyer. The attorney could not assist her, and he then referred her to another lawyer. The attorney she referred to was Johan van Zyl, and the second attorney was Carel Taute, but Taute gave her another person; she thinks he is also a lawyer. This person asked her what it was about, and then

she narrated her story to him, and he asked her to make a statement. The witness confirmed that the typed statement is the one she made on 13 April 2016, and the contents deal with what happened at the arrest and the conversations between herself and T[...] Lourens, as well as what happened at Sinoville police station and what transpired at Court. At the time, she did not know that Taute was acting on behalf of her parents. She also denied that she was aware of any case reported by her parents that Taute dealt with.

S[..] P[...]:

26. She testified on behalf of the Plaintiffs, and in the main, her testimony was to the effect that, in her opinion, there was no evidence against them and that the prosecution was malicious. She is an attorney in private practice in Pretoria, and she has personal knowledge of the matter as she represented the First Plaintiff in the criminal matter in the Regional Court in Pretoria North. She only came on record after the bail proceedings. According to her recollection, the trial in the matter commenced in 2014, and she confirmed that she had access to the dockets. Initially, the Plaintiffs were charged with more than 50 charges on allegations of rape and manufacturing of child pornography. She read the docket and concluded that there would be a misjoinder in the matter. The State separated the accused persons, the Plaintiffs, and G[...]. The State preferred three charges initially, and on the day that the trial commenced, another three charges were brought by the State, which was charges in respect of H[...] in which it was alleged that the Plaintiffs knew the actions of G[...]. In her evaluation of the statements, she found nothing that implicated the Plaintiffs. Also, the first charge was related to A[...] Joubert, and the second charge was associated with Carel Aucamp; according to her, when she perused the docket, there was no evidence implicating the Plaintiffs. It was her testimony that the Court denied the Plaintiff's application for a discharge in terms of Section 174, and the parties proceeded with the trial; subsequently, they were acquitted, and G[...] was found guilty.

27. The family had instructed her to do an appeal for G[...], but the same was not pursued. Concerning A.1, which was I[...] M[...] Statement, she confirmed that

she did have access to the statement. The witness further confirmed that K[...] had some knowledge of one M[...] who raped H[...], and he also did the same to K[...]. When confronted with the statement marked as A.2 in the docket. She did evaluate the child's statement at that stage, 6 to 7 years old, and that she does not repeat what A.1 said. It only refers to the fact that H[...] had to guard to prevent people from seeing what was happening in the plot. She further testified that the child indicated that M[...] had sex with H[...]. The Court must bear in mind that the child was between 6 and 7 years old at that stage and that many of these things were not mentioned in the first report. Also, H[...] denied that M[...] or any other party had sex with her. During criminal trial

28. She further confirmed that A.1, A.2, and A.39 never formed part of the prosecution of the Plaintiffs and further confirmed that the trial that she was involved in, there were indeed three different statements made by H[...], which were also submitted in the trial as exhibits Reference was made by H[...] in the statement her impression was that false information was created in the mind of this child. People told her that it did happen at Oom D[...]. The witness's impression was that false information was made in this child's mind.

CAROL TAUTE

29. Mr Taute testified about the circumstances under which the fourth statement was made. He is a practicing attorney. It was his testimony that after looking into the matter of the Plaintiffs, he felt he needed to talk to H[...] and arrange a consultation with her. One Advocate typed the fourth statement in his office, and after that, he believes it was signed at the police station before a commissioner of oaths. He then wrote a letter to the NPA to complain about the conduct of Ms. Harmzen, and he was later furnished with a response that the matter was investigated and that there was nothing wrong with the conduct of the members of the NPA about the allegations in the statement. He is the attorney representing the Plaintiffs, and he caused the summons to be issued. Plaintiffs came to see him, and he served a notice regarding the State Liability Act. He believed no evidence linked any of the Plaintiffs to the crime on which they were arrested and charged, and there was no reason for the arrest or to oppose the Plaintiffs' bail. During their consultation, he was

told H[...] was home with the Plaintiffs. He asked the Plaintiffs if he wanted to see her as she may be an imported witness. Also, he had to consult with her regarding the previous statements. Three months after the arrest, she made the statement implicating G[...]. The 1st Statement of H[...] indicated that nothing happened; in January, she revealed that her brother raped her. Also, in the statement made on 30 September 2010 by I[...] Myburgh, nothing was implicating the plaintiffs; the content of the statement only says that H[...] is a possible victim.

30. Further, the A.2 statement of K[...] K[...] noted in this statement that it was allegations against the other people and no allegations against the Plaintiffs. It only indicated that H[...] was looking out for people who might come by, and if somebody came, H[...] would tell them to stop. The following people came past: Jana and the Plaintiffs. The only reference to the Plaintiffs relates to pictures of the Plaintiffs having sex, and that has no bearing on the matter.

31. He asked advocate Heinrich Schols, a former prosecutor in the Sexual Offences Court, to assist him. They consulted, and he believed that there was helpful evidence, and they crafted a statement. He decided that H[...] should be a witness in this matter. The witness also confirmed that in pursuit of the legal fees, there was a leak in the roof at his office, and some of the documents were destroyed due to the water leak. He confirmed that he did obtain accounts for the Second Plaintiff concerning the legal fees incurred, although it is only part of the account.

J[...] V[...] Z[...]

32. It was his testimony that he represented the Second Plaintiff and that the record confirming the payments made for services rendered were destroyed and unavailable.

FIRST DEFENDANT'S WITNESSES

MS CARSTERNS

33. She is employed as a Senior Public Prosecutor. She outlined the procedure they follow when receiving a docket to decide whether to enrol a matter. The

docket is considered, and if there is a prima facie case, a case for the accused to answer to the matter gets enrolled. She was involved in the matter concerning the Plaintiffs when they appeared before the Court. The Plaintiffs and the other accused faced charges of indecent, incest, assault, rape, sexual assault, and manufacturing of child pornography. She considered the content of the docket and decided to enrol the matter for bail application. The Plaintiffs were brought before the Court on 6 December 2010, and she immediately started with their bail application, although the same was not concluded on the same day. When she decided to enrol the matter, she had the docket and relied on the statements of I[...] Myburg, C[...]K[...] , and the Teddy Bear Clinic Report. After considering these documents, she decided that the matter should be enrolled for bail application in conjunction with the warning statements they had made.

34. According to her, there was nothing malicious about the decision she took to enrol the matter for bail application since, at the time when she enrolled the matter, she reasonably believed that they were involved in the offenses for which they were charged. She denied influencing any of the children into making false statements, and in particular, she denied having influenced H[...] in any way or form. Her involvement was only until it was taken to the Regional Court.

35. She received the docket from the deceased Senior Prosecutor, Mr Slabbert. She was involved from the first appearance of the case. She attended the first appearance, and when she received the case docket, she read the contents of the docket with the exhibits and consulted with the investigating officer in this case. After considering the contents of the docket and the consultation, she placed the matter before the Court. In her assessment and considered view, she was satisfied that there was a prima facie case and that the accused needed to answer.

36. She considered M[...] Statement and affidavit of K[...] K[...] as part of the docket that was presented to her when she decided to institute the prosecution. Further considered a document from Vastfontein, part of the docket, and a letter from the Vastfontein Community Transformation Centre.

The witness then confirmed that she had the assessment report of K[...] K[...] , which she also considered as part of her decision to institute the prosecution. She confirmed that she did read the statement at that stage. She summarized the affidavit, indicating that the report was made to Myburgh by a minor child, K[...], whom they called Cathy. It contained sexual abuse, exploitation, and trauma to several children, including Cathy.

MARLIZE HARMZEN

37. She is a Senior Prosecutor, and this matter was allocated to her when it was transferred to the Regional Court in 2011. When she took over the matter, she had to decide whether or not to proceed with the prosecution of the Plaintiffs. She did consider the content of the docket to make a decision. After consideration, she decided there was a case to prosecute against the Plaintiffs since they were implicated in the Teddy Bear Clinic Report through the Statement by H[...], the Statement by I[...] Aucamp, and C[...] Aucamp. The evidence in the Statement of H[...] indicated to her that she reported to them about the physical abuse by G[...], and they did nothing to report the physical abuse to the Police. She made her decision based on this evidence. She later decided to separate the trial of the Plaintiffs and G[...] because the children could not remember what had happened. During the criminal trial, the plaintiffs applied for a discharge in Section 174, but the Court refused. G[...] was found guilty and sentenced accordingly. The plaintiffs were acquitted.

LEGAL FRAMEWORK

<u>Unlawful arrest and detention</u>

38. Section 12(1) of the Constitution guarantees the right not to be deprived of freedom arbitrarily or without cause. Section 7(2) of the Constitution obliges the State to respect, protect, promote, and fulfil the rights in the Bill of Rights.

39. Botha v Minster of Safety; January v Minister of Safety and Security 2012 (1) SACR 305 (ECP) has held that in a case where the Minister of Safety and Security is being sued for unlawful arrest and detention and does not deny the arrest and the detention, the onus to justify the detention as being lawful rests on the Defendant and the burden shifts to the Defendant based on the

provisions of Section 12(1) of the Constitution…. These provisions, therefore, place an obligation on the police official who is bestowed with duties to arrest and detain persons charged with and suspected of the commission of criminal offenses to establish before detaining the person the justification and lawfulness of such arrest and detention.

40. Section 39(2) of the Criminal Procedure Act prescribes the manner of arrest as follows:

"The person affecting an arrest shall, at the time of effecting the arrest or immediately after effecting the arrest, inform the arrested person of the cause of the arrest or, in the case of an arrest effected by a warrant, upon of the person arrested hand him a copy of the warrant."

41. In the case of J.E. Mahlangu and Another v Minster of Police [202] ZACC10 at para 25, the Court held that the prism through which liability for unlawful arrest and detention should be considered is the constitutional right guaranteed in Section 12(1), not to be arbitrarily deprived of freedom and security of the person. The right not to be deprived of liberty arbitrarily or without just cause applies to all persons in the Republic of South Africa.

42. It is trite that *wrongful arrest* consists of the wrongful deprivation of a person's liberty. Liability for wrongful arrest is strict; neither fault nor awareness of the wrongfulness of the arrestor's conduct is required. An arrest is *malicious* when the Defendant improperly uses the legal process to deprive the Plaintiff of his liberty. In wrongful and malicious arrests, a person's liberty and other aspects of their personality may be involved, particularly dignity.

43. In *Newman v Prinsloo and another4,* the distinction between wrongful arrest and malicious arrest was explained as follows:

'[I]n wrongful arrest . . . the act of restraining the plaintiff's freedom is that of the defendant or his agent for whose action he is vicariously liable, whereas in malicious arrest the interposition of a *judicial act between the act of the defendant and apprehension of the plaintiff, makes the restraint on the plaintiff's freedom no longer the act of the defendant but the act of the law.'*

Malicious prosecution

40. It is trite that to succeed (on the merits) with a claim for malicious prosecution, a claimant must allege and prove the following elements:[1]

(a) that the defendants set the law in motion (instigated or instituted the proceedings);

(b) that the defendants acted without reasonable and probable cause;

(c) that the defendants acted with 'malice' (or animo injuriandi) and

(d) that the prosecution has failed.

41. In *Eis v Minister* of *Law and Order and Others 1993 (1) S.A. 12 (C) at 15 F,* the Court stated that the general acceptance in our law is that an action for malicious prosecution may not be instituted until criminal proceedings have been terminated in favour of the Plaintiff.

42. In Minister for Justice and Constitutional Development and 2 others v Sekele Michael Moleko, Case Number 131107, (SCA), *"Reasonable and probable* cause, *in the context of a claim for malicious prosecution, means an honest belief founded on reasonable grounds that the institution of proceedings is justified. The concept, therefore, involves both a subjective and an objective element- 'Not only must the defendant have subjectively had an honest belief in the guilt of the plaintiff, but his belief and conduct must have been objectively reasonable, as would have been exercised by a person using ordinary care and prudence.'"*

43. In *Thompson and Another v Minister of Police and Another*, it was held that: "In a claim for damages for wrongful arrest, the delict is committed by the illegal arrest of the plaintiff without the due process of law, i.e., the injury lies in the arrest without legal justification, and the cause of action arises as soon as that illegal arrest has been made, and, to comply with the requirements of section 23 of the Police Act, 7 of 1958, the action must be commenced with [in] six months of the cause of action arising. "In an action for damages for malicious arrest and detention where a prosecution ensues on such arrest, however, as in the case of

[1] The Minister for Justice and Constitutional Development and 2 others v Sekele Michael Moleko, Case Number 131/07, (SCA) at par. 8.

an action for damages for malicious prosecution, the proceedings from arrest to acquittal must be regarded as continuous, and no action for personal injury to the accused will arise until the prosecution has been determined by his discharge, whether by an initial acquittal or by his discharge after a successful appeal from a conviction."[2]

44. The prosecutors are required to read and understand the case docket to establish whether there is probable cause for a person to be prosecuted. Further, the prosecutor must direct the investigations to obtain sufficient information that appears to be credible.

THE PARTIES' LEGAL SUBMISSIONS

The Plaintiff

45. In his heads of argument, Mr. Bouwer, counsel for the Plaintiffs, launched specific points of criticism regarding the Defendant's defence of the claim. The Plaintiffs contend that there were no merits in the arrest and prosecution of the Plaintiffs on these charges with specific reference to the stage when the Defendants opposed the bail of the Plaintiffs, and as such, both the arrest and prosecution were malicious. The Plaintiffs further contend that when they were then further prosecuted on 27 February 2014, the charges preferred against the Plaintiffs were alleged transgression of the Sexual Offences Act, Act 23 of 1957 (SORMA) and child neglect. None of the charges and children mentioned in the initial charge sheet, Andre J[...]and C[...] Aucamp, were preferred against the Plaintiffs. There was further no charge against the Plaintiffs that they had participated and of any mentioning that they had forced C[...] Aucamp to lick or suck the vagina of H[...] V[...] V[...].

46. The Plaintiffs contend that there was no evidence that they were involved in any creation, possession, or distribution of child pornography at the time when they were arrested and prosecuted and with specific reference to the time of the bail application. The Plaintiffs further contend that there was also no basis for the prosecution on the alleged transgressions of the Sexual Offences Act (supra) and

[2] 1971 (1) SA 371 (E) at 373F-G.

that the members of the First and Second Defendants influenced and contaminated witnesses to fabricate evidence against the Plaintiffs.

47. The Plaintiff's claim concerning the damages is based on both the malicious arrest and malicious prosecution, which was widely covered in the media, the period of detention, and the infringement of their rights. The Second Plaintiff also claims damages for legal fees in the sum of R260 000.00 reasonably incurred to defend herself against charges. The Plaintiffs discovered no documents to support the claim.

48. They contended that at the stage when the initial arrest and prosecution ensued, no evidence implicated the Plaintiffs in any crime that could justify either the arrest or the trial. No charges of creation, possession, or distribution of child pornography on which the initial arrest and prosecution were based were preferred against the Plaintiffs in the subsequent trial. The Defendants relied on A1, A2, and A39 to institute the prosecution, which also formed the basis of opposing the Plaintiff's bail application by both Defendants.

49. The Plaintiffs further contend that there was also no basis for the prosecution on the alleged transgressions of the Sexual Offences Act (supra) and that the members of the First and Second Defendants influenced and contaminated witnesses to fabricate evidence against the Plaintiffs. Further submitted that there was no evidence in the docket sufficient to justify the decision to prosecute the Plaintiffs. It is evident from the evidence of Carstens that the only “evidence” that was available in the docket was the allegation of K[...] that she saw a picture and or video of the Plaintiffs as a married couple having sex.

Defendant's submission

50. Counsel for the defendants Mr Mosoma, argued that for the Plaintiffs to succeed with their malicious arrest claims, they had to place evidence before the Court that the members of the Second Defendant were motivated by ulterior motives when they arrested and detained them. He submitted that the Plaintiffs failed to do so.

51. The evidence of the Second Plaintiff was simply that the Police came to their plot and informed them that they wanted to search the house and that they were being arrested for child pornography. The evidence of Ms P[...] was that there was no

reason they should have been charged. The case law demands more of the Plaintiffs in that they had to show the Court that the arrest had ulterior motives behind it and was not effected to bring the Plaintiffs to Court.

52. Ms De Jager was not known to the Plaintiffs, and from this, it can be inferred that she had nothing against her. There is no evidence that she had anything against the Plaintiffs. It was established that at the time when they were made to appear before the Court, there was evidence in the case docket that implicated the Plaintiffs in the commission of an offense related to child pornography since the investigations had already started sometime before they could be arrested. The Plaintiffs have thus failed to discharge the onus resting on them to prove that the Police acted with ulterior motives when they arrested the Plaintiffs.

53. The defendants had evidence that at least implicated the Plaintiffs in committing the offenses they were charged with; their prosecution cannot be said to have been malicious or without reasonable cause.

54. The second Plaintiff did not place any evidence which can be concluded that her prosecution and that of the First Plaintiff was malicious. The plaintiffs contend that the trial is malicious because the Defendants' members interfered with witnesses, influenced them, contaminated them, and failed to properly analyse the available witnesses and evidence. The Plaintiffs needed to prove this to the Court, and they did not provide any evidence to prove these allegations.

55. According to the defence, the only thing the Plaintiffs came close to as evidence is the evidence of H[...], in which she only states that what was written about her parents and G[...] is not the truth. Regarding the issue of the members of the First Defendant having interfered with witnesses, no evidence was adduced to indicate who those witnesses were and who influenced and contaminated them.

56. The members of the First Defendant disputed that they interfered or influenced H[...]. If indeed they were able to do that, Ms Harmzen would not have decided not to prosecute the Plaintiffs when she realized that the child witnesses could not recall what had happened.

57. Ms Carstens testified that she had access to the docket, which contained mainly A1, A2, and A39. Not only did she consider these documents, but she also

considered the warning statements made by the Plaintiffs after they were given a chance to consult their legal representatives.

58. On issues A1, A2, and A3, it was her testimony that upon consideration of what she found to be contained in the statements and the report, she was able to establish that there were incidents of abuse of children by various people mentioned in the statements and the report.

59. Evidence of Ms. P[...] is that at the time when the Plaintiffs were charged at the Regional Court, they were facing charges relating to H[...]'s abuse by G[...] and their neglect to report the abuse of H[...] to the Police. It is common cause that the Plaintiffs were not charged with the rest of the charges that were levelled against the other accused persons, and Ms. Harmzen had testified on the circumstances under which those charges were not pursued.

60. Ms Harmzen provided evidence that the Plaintiffs were implicated in various sexual offenses, and these were also relayed in the subsequent reports that were made available through the Teddy Bear Clinic. She referred expressly to A72 and A73, wherein the Plaintiffs were explicitly mentioned in the incidents involving the abuse of minor children and also as perpetrators of these offenses.

EVALUATION

Was the arrest of the Plaintiff Lawful?

61. It was submitted on behalf of Defendant that Defendant had discharged the onus of proving, on a balance of probabilities, that the arrest of Plaintiff was lawful; it was submitted by Defendant's Counsel that the arrest of Plaintiff, viewed objectively, was justified and that he had correctly exercised his discretion when deciding to arrest the Plaintiffs. Counsel on behalf of the Plaintiff submitted that Defendant had failed to prove, on a balance of probabilities, that Defendant had satisfied the necessary jurisdictional requirements to bring the arrest of the Plaintiffs. He argued that the investigating officer had failed to investigate the matter and then, without exercising his discretion, had arrested the plaintiffs.

62. During the arrest, De Jager informed the Plaintiffs that they were arrested for the offenses of child pornography and that their rights were explained to them. The

Minister of Safety and Security v Sekhoto (131/10) [2010] ZASCA 141 (19 November 2010) the Court referring to D[...] v Minister of Law and Order 1986 (2) SA 805 (A) at 818G-H, restated the jurisdictional facts for section 40(1)(b) as being that: *"(i) the arrestor must be a peace officer; the arrestor must entertain a suspicion; the suspicion must be that the suspect (the arrestee) committed an offense referred to in Schedule 1; and the suspicion must rest on reasonable grounds."*

63. It is trite that the onus rests on the Police to justify the arrest. Rabie C.J. explained in Minister of Law and Order v Hurley and Another 1986(3) SA 568 (A) T 589 E – F: 'that an arrest constitutes an interference with the liberty of the individual concerned, and it therefore seems fair and just to require that the person who arrested or caused the arrest of another person should bear the onus of proving that his action was justified.

64. Taking into cognizance that the Plaintiffs' first claim relates to their alleged malicious arrest by members of the Second Defendant. Based on the evidence elicited, it is not in dispute that there were statements in the docket during the arrest, such as statements of I[...] Myburg, C[...]K[...] , and the Teddy Bear Clinic Report. A.1, (M[...] Statement). In paragraph 7, it is stated that M[...] put his private parts in H[...] (the Plaintiff's daughter), and when they were finished, M[...] did the same with K[...]. A2 (K[...] K[...]). Paragraphs 2, 5, and 10 indicate that H[...] stood guard at the door to see if anyone was coming. If somebody is coming, H[...] tells them to stop and that the people who went past are, among other things, the Plaintiffs, and then D[...] will pretend he is sleeping. In A39 (Report of K[...] K[...]), K[...] mentioned that she saw pictures on a computer that they played games on where Hanna and Koos were having sex, and Hanna was having sex with M[...].

65. It is trite that an arrest is malicious, where the police officer improperly uses the legal process to deprive the accused of their liberty. In wrongful and malicious arrests, a person's liberty and aspects of their personality may be involved, particularly dignity.

66. In this case, I see no malicious intention to injure the Plaintiffs. Police officers had specific documents that speak to alleged offenses. Plaintiffs still must provide evidence regarding the malicious intent of the second Defendant. In my view, no

evidence suggests that the Second Defendant was motivated by ulterior motives when they arrested and detained the plaintiffs. This Court is convinced that the arresting officer formed an objective opinion based on the facts that the Plaintiff has committed the alleged offenses.

67. In Mabona and Another v Minister of Law and Order and Others 1988(2) SA 654 SE at 686 E-H, the Court referring to S v Nel and Another 1980 (4) S.A. 28 E at 33 H reiterated that the rationality test required the arresting officer to enquire whether a reasonable man in the position of the arresting officer and possessed of the same information, would have considered that there were reasonable and sufficient grounds for suspecting that the Plaintiff was guilty of committing the crime. A sensible man will, therefore, analyse and assess the quality of the information at their disposal critically, and they will only accept it with a grain of salt and check it where it can be checked. Only after an examination of this kind will they allow themself to entertain a suspicion that will justify an arrest.

68. Therefore, I believe the arresting officers' suspicion was on solid grounds. The Police have a public law duty to safeguard the constitutional rights of members of society. It must be remembered that the investigating officer relied on the witness's statements and the teddy bear clinic report compiled by an independent social worker. This Court further disagrees with the Plaintiff's submissions that the children's statements were fabricated and cohesed.

69. Most of the children were interviewed in the company of an adult who was responsible for the child's well-being at that time. It was, therefore, significant for the arresting officer to keep records of the said interview. Reliance on the statements of the witnesses, as well as a teddy bear report, was enough to formulate a reasonable suspicion that children were exploited.

70. Section 18(1)(*c*)(ii) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 ("**Criminal Law**") provides that a person who supplies, exposes, or displays to a third person child pornography or pornography; or a publication or film to encourage, enable, instructs or persuade a third person to perform a sexual act with a child is guilty of the offence of promoting the sexual grooming of a child.

71. The focus should be on something other than the quantity of evidence a police officer has at their disposal. In my view, the officer had relevant and qualitative information during the arrest.

72. Therefore, I believe that the plaintiffs did not succeed with their malicious arrest claims; there is no evidence before this Court that suggests the members of the Second Defendant were motivated by ulterior motives when they arrested and detained the Plaintiffs.

73. The following passage quoted from the matter of *Biyela v Minister of Police* **[13]** is relevant in these proceedings: "At para [35], what is required is that the arresting officer must form a reasonable suspicion that a Schedule 1 offense has been committed based on credible and trustworthy information. Whether that information would later be in a court of law found to be inadmissible is neither here nor there for the determination of whether the arresting officer at the time of arrest harboured a reasonable suspicion that the arrestee committed a Schedule 1 offense."

74. Our Constitution empowers police officers to prevent, combat, and investigate crime, maintain public order, protect and secure the Republic's inhabitants, and uphold and enforce the law.[3] The South African Police Act, on the other hand, permits police officers to exercise their authority and to carry out the responsibilities granted to or delegated to them by law, subject to the Constitution and with proper consideration for each person's fundamental rights. Failure to effect arrest and detention in circumstances where it is reasonable and justified may undermine the community's confidence in the criminal justice system.

75. I am, therefore, satisfied that the jurisdictional facts were established before the arrest. The fact that the plaintiffs were acquitted has no bearing on the issues raised. Thus, the Defendant has discharged its onus and has shown that the arrest was lawful; on the other hand, the Plaintiffs have failed to prove that the arrest had ulterior motives.

DETENTION

[3] Section 205 (3).

76. The Plaintiffs argued that the arrest should have been effected by less invasive means. This triggers a question of whether the arresting officer was justified in detaining the Plaintiff. The methods of securing the attendance of an accused in Court are encapsulated in Section 38 of the CPA.[4] In *Louw v Minister of Safety and Security*[5], it was stated that Police are obliged to consider each case when a charge has been laid for which a suspect might be averted, whether there are no less invasive options to bring the suspect before a court other than immediate detention of the person concerned. If there is no reasonable apprehension that the suspect will abscond or fail to appear in Court if the warrant is first obtained for his or her arrest or a notice or summons to appear in Court is received, then it is constitutionally untenable to exercise the power to arrest.

77. In *McDonald v Kumalo*[6]Graham JP reiterated that the object of the arrest of an accused person is to ensure his attendance in Court to answer a charge and not to punish him for an offense for which he has not been convicted.

78. It has been established that effecting an arrest is a harsher method of initiating a prosecution than citation by summons. However, suppose circumstances make it lawful under a statutory provision to arrest a person to bring him to Court. In that case, such an arrest is not unlawful even if made because it will be more harassing than summons.[7] At 17H, Schreiner JA said, “But there is no rule of law that requires the milder method of bringing a person into court to be used whenever it would be equally effective.”

79. In this case, the arresting officer’s role was to arrest the Plaintiffs to bring them before the Court. This was a reasonable step to employ. I also find that in doing so, he followed all the relevant procedures; I say so because the Plaintiffs were aware of the charges that were preferred against them; they were informed of their constitutional rights and were brought to Court within a reasonable time. Further noting that the plaintiffs opted to remain silent when they were warned. This Court

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[4] "38 METHODS OF SECURING THE ATTENDANCE OF ACCUSED IN COURT

(1)*Subject to section 4(2) of the Child Justice Act, 2008 (Act 75 OF 2008), the methods of securing the attendance of an accused in Court who is eighteen years or older in Court for purposes of his or her trial shall be arrest, summons, written notice and indictment by the relevant provisions of this Act."*

[5] 2006 (2) SACR 173(T) at 186a-187(e).

[6] 1927 AD 293 at 301.

[7] Tsose v Minister of Justice and Others 1951 (3) S.A. 10(A) at 17F-H.

is not drawing any adverse inference from the Plaintiff's constitutional right to remain silent.

80. According to my assessment of the *Sekhoto*[8], since the Plaintiffs were charged with an offense falling under schedules 1 and 6 of the CPA, the quality of the information in favour of the arrest and detention was overwhelming. Even if the arresting officer believed that arrest would be more harassing than summons, he could not prevent arrest and subsequent imprisonment to bring the Plaintiff to justice. The statutory framework governing bail would be undermined if the arresting officer were only required to arrest in circumstances where he was satisfied that the suspect would not attend the trial. This was not a trivial offense where the police officer would have been expected to employ other arrest methods. It was for the Court to decide whether the plaintiffs were eligible to be released on bail or warning.

81. Section 60(11) (a) of the CPA justifies detention in offenses involving minor children. This provision reads:

"Notwithstanding any provision of this Act, where an accused is charged with an offense referred to (a) in Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with by 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 interest of justice permit his or her release."

82. The charges that were formulated against the Plaintiffs placed the matter within the ambit of Schedule 6 and confirmed that the two Plaintiffs at that time were charged with serious sexual assaults of minor children, which are serious offenses that resort under Schedule 6 for bail consideration. The word *'shall'* demonstrates that the detention is peremptory, and the Court can only release the suspect after having heard the evidence and exercising its discretion based on the circumstances of the case. In this scenario, the onus was placed upon the plaintiffs to adduce evidence to prove that exceptional circumstances exist which, in the interest of justice, permitted their release. The Plaintiff's further detention,

[8] Minister of Safety and Security v Sekhoto 2010 1 SACR 388 (FB) par 24; Mvu v Minister of Safety and Security 2009 2 SACR 291 (GSJ); Gellman v Minister of Safety and Security 2008 1 SACR 446 (W)).

which spiralled up to twelve months, depended on the lawfulness of the Magistrate's orders.

83. De Jager's decision to arrest the Plaintiffs cannot be said to have been irrational. Child pornography, sexual abuse, etc., are serious offenses, and he was justified to arrest the Plaintiffs and not just warn them to appear at the police station. In my view, the arrest and subsequent detention of the Plaintiffs was lawful, and the Plaintiff's claim cannot be sustained.

84. I find that the arresting officer carried out his official task in a manner that was rational under the circumstances. Therefore, I conclude that the plaintiffs' arrest and subsequent detention were lawful. It then follows that Plaintiff's claim must fail.

Was the prosecution malicious?

85. This brings me to the requirement of malice. Malice or improper motive on the part of the second Defendant is an independent or standalone requirement of a malicious prosecution action. It is incumbent on Plaintiff to prove that improper malice actuated the second Defendant. If the second Defendant had any motive other than having Plaintiff convicted, it was actuated by malice. Ms. Carstens testified that she had no intentions of malice when prosecuting the Plaintiff; she had no reason to prosecute the Plaintiff maliciously.

86. It is trite that a prosecutor must prosecute a matter if there is a prima facie case and if there is no compelling reason for refusal to prosecute. A prima facie case means the allegations, as supported by statements and, where applicable, combined with actual and documentary evidence available to the prosecution, are of such a nature that if proved in a court by the State based on admissible evidence, the Court should convict.

87. It is trite that animus iniurandi is defined as ‘consciously wrongful intent’ or an intention to injure, that is, a deliberate intent to harm. To succeed in their action, the plaintiffs would, therefore, have to establish a desire on the part of the second Defendant to cause harm to them or a conscious or deliberate intention to injure them by setting in motion the legal proceedings against them.

88. The Plaintiffs were implicated and connected to the offenses through the statements of H[...], Iwanco Aucam, and C[...] Aucamp. What the evidence also entailed was that the prosecution of the Plaintiffs on the offenses or charges of indecent assault, rape, and child abuse were abandoned because the minor children could not remember what they had said in their statements. During the consultation, it dawned on the prosecution that it would be unjust and unfair to the children and particularly to the plaintiffs to insist on calling these children to testify. She applied her mind and considered it unethical to remind the children of the incidents instead of allowing them to testify on their recollection of events. In this case, I agree with the Defendant that her actions to cease prosecution on these aspects are commendable.

89. Ms. Carstens is a senior prosecutor who worked on this docket to decide whether to enrol this matter. She considered it and found that there was a prima facie case and that there was a case for the accused to answer. When she decided to enrol in the matter, she had the docket and relied on the statements of I[...] Myburg, C[...]K[...] , and the Teddy Bear Clinic Report. After considering these documents, she decided that the matter should be enrolled. She denied that she influenced any of the children into making false statements, and in particular, she denied having influenced H[...]. The plaintiffs' submissions that there was insufficient evidence in the docket to justify the decision to prosecute the Plaintiffs are not factual.

90. It is evident in my view that the Defendants were not motivated by any malice at the time when they arrested, detained and subsequently prosecuted the Plaintiffs but acted reasonably based on the information at their disposal that the Plaintiffs were involved in the offenses for which they were charged involving child pornography. Thus far, no evidence suggests that Ms. Marlize Harmzen or Ms. Carstens had malicious intentions. In prosecuting the Plaintiffs.

91. To succeed with a claim for malicious prosecution, the plaintiffs must prove all the requirements mentioned above. Both the witnesses mentioned above denied that they influenced any of the children into making false statements, and in particular, they denied having influenced H[...] in any way or form. The evidence in the Statement of H[...] indicated to her that she reported to Plaintiff about the physical

abuse by G[...], and they did nothing to report the physical abuse to the Police. She decided based on this evidence and then prosecuted the Plaintiffs.

92. Aucamp Teddy Bear report recorded, "*Tannie Johanna put pictures of them at the pig stay while they were doing the things.*" "*Tannie Johanna took pictures with the camera when I[...] pulled his private parts in such a way that it broke off.*" "*They had fun when they did it, and Aunt Johanna took pictures of them.*"

93. K[...] K[...] 's report said, "*Videos were placed in a box and sent to a shop.*" "*Video of the Plaintiffs having sex.*"

94. In C[...] Aucamp's statement, it was recorded that "*Sexual acts also happened at H[...] house*." "*Aunt and Anita told children to lick each other.*" "*Aunt Johanna took pictures and recorded the children on a cell phone at the pig stay where children play the games.*"

95. In D[...] Smith's Teddy Bear report, it was recorded that "*Witness recalls later oom Koos was also there.*" "*He does not want the Plaintiffs and their son as part of his life.*" "*That room Koos also did bad things with the children.*"

96. In I[...] Aucamp's statement, it was recorded that "*H[...] parents will call it games. It also happened at their house, and the Second Plaintiff took photos on her cell phone.*"

97. In H[...] V[...] V[...]'s Statement, it was recorded that "*Plaintiffs knew that G[...] was abusing her.*" "*The First Plaintiff knew about these things, but the former Accused one did not want to listen.*" *That the First Plaintiff told her that G[...] was caught when she was five years old touching her private parts.*" "*That the First Plaintiff knew that G[...] had put his finger in her private parts and chased G[...] away.*" "*That the Plaintiffs allowed G[...] to return home.*"

98. The prosecution correctly formulated the view that the Plaintiffs knew about the sexual abuse by G[...] on H[...] for some time and that the Plaintiffs had a duty to report the sexual abuse of G[...] to the Police. Thus, they were only implicated in the second statement to the extent that they knew about the sexual abuse.

99. It is also evident that the prosecution's decision to prosecute was based on evidence in the docket. The information they had contained detailed information about child

abuse and how children were sexually abused. In one of the children's statements, it is stated that “M[...] placed his private parts in H[...] private parts. K[...] K[...] 's statement, which they based there, recorded *that D[...] performed these actions in the room, and H[...] stood by the door to see if anyone approached. The witness also mentioned that people like Jana, Koos, Hanna, M[...], and A[...]* went past.

100. Concerning the Teddy Bear Clinic report, the child *recalled that one could play games and cards on the computer. She saw pictures of naked men and women on the computer and also of them having sex. There were pictures of them (children) having sex, papa D[...] licking her, her parents having sex, M[...] and Tanya having sex, Hanna and Koos having sex, and M[...] having sex with H[...]*.

101. It was further indicated in the paragraph that D[...] sucked and licked her private parts, and she does not like it, but that D[...] does not listen. D[...] performed these actions in the room, and H[...] stood by the door to see if anyone approached. All this information came from the child who explained about other children who were being abused, and the children were known to her as she mentioned their names.

102. Minister of Police v du Plessis[9] referred to the case of State v Lubaxa and said, "Clearly a person ought not to be prosecuted in the absence of a minimum of evidence upon which he might be convicted, merely in the expectation that at some stage he might incriminate himself. That is recognized by the common law principle that there should be "reasonable and probable" cause to believe that the accused is guilty of an offense before a prosecution is initiated… and the constitutional protection afforded to dignity and personal freedom (s 10 and 12) seems to reinforce it. It should follow that if a prosecution is not to be commenced without that minimum of evidence, so too should it cease when the evidence finally falls below that threshold". The Court further endorsed the principle that it should not interfere with the decision to prosecute where there is reasonable and probable cause to believe that the accused is guilty of an offense.

103. This Court is convinced that the first Defendant had enough information to implicate the plaintiffs in the commission of the offenses for which they were charged. Therefore, the prosecution cannot be said to have been malicious or without reasonable cause.

[9] 66/2012)(2013 ZASCZ 119 (20 September 2013) at paragraph 30

104. The second Defendant cannot be penalized for deciding to cease to prosecute the Plaintiffs on charges based on the statements of the minor children who could not remember what had happened. Also, deciding to proceed to separate the trial of the Plaintiffs from the main trial on the charges relating to H[...] could not be penalized. The fact that G[...] was found guilty as charged and he never appealed the finding confirms that she was justified in deciding to charge the Plaintiffs.

105. There was a duty on the prosecution to prosecute the Plaintiffs, given the information at their disposal involving minor children; I do find that there was a *prima facie case* against them. This information was the basis of reasonable grounds and could lead anyone to believe that the Plaintiffs were guilty of the offense charged with and does not in any way display any malice.

106. The *Constitution* empowers the National Prosecuting Authority (NPA) to institute criminal proceedings on behalf of the State and to carry out any necessary functions incidental to instituting criminal proceedings. The NPA is an institution integral to the rule of law, and it must act in a manner consistent with the constitutional prescripts and within its powers. The decision to prosecute or decline prosecution is a serious step that may affect accused persons and their families, victims, witnesses, and the public. It must be undertaken with the utmost care. For instance, a recent judgment of the Supreme Court of Appeal held that the prosecution's failure to exercise sensible discretion and decline to prosecute had led to a matter without merit to be pursued by that Court.

107. The plaintiffs pursued Section 174, and the Court denied it, and the parties proceeded with the trial. The Criminal Procedure Act, namely section 174, provides: "If at the close of the case for the prosecution at any trial, the court believes that there is no evidence that the accused committed the offense referred to in the charge or any offense of which he may be convicted on the charge, it may return a verdict of not guilty." If the application of the provisions of section 174 favours the accused, they are discharged from prosecution without having to testify; in this case, the presiding officer found the contrary; in simple terms, he was of the view that the plaintiffs had a duty to answer to allegations levelled against them. In essence, there was a prima facie case.

108. The Plaintiff's contention that the first Defendant coaxed H[...] into making statements is far-fetched. They contend that H[...] Statement about her parents and G[...] was not the truth and that the first Defendant interfered with witnesses. The plaintiffs failed to prove the interference. As stated above, the prosecution made a sound and well-calculated decision not to utilize evidence of children who could not recall their statements; this is indicative that they had no vested interest in prosecuting the plaintiffs maliciously and unjustly. The members of the First Defendant disputed that they interfered or influenced H[...]. I agree with the Defendant and associate myself with the principle established in **National Employers General Insurance Co Ltd v Jagers**[10] .

109. Regarding the prosecuting policy of the National Prosecuting Authority, reasons for the exercise of prosecutorial discretions should be furnished at the request of persons with a legitimate interest in the decisions. In general, only the broad reasons should be provided, not the specific particulars of the decision. This approach is based on two crucial policy considerations. The first is that the decisions of the prosecuting authority should be transparent since they are required to uphold the legality principle. The second is that furnishing specific particulars could violate individuals' rights; for example, it could create doubt about a person's innocence without ever being subjected to a criminal trial.[11]

110. There are three contradictory versions of H[...]'s fourth statement. Ms Van Vuuren testified that when she went with H[...] to Taute Attorneys, she did not tell H[...] they had a case against the Defendants. H[...] stated that she made the statement on 13 April 2016 because she found out that her brother was locked up and he was innocent. She asked her parents if she wanted to see a lawyer. They then took her to a lawyer. Mr. Taute testified about the circumstances under which the fourth statement was made. He said that after looking into the matter of the Plaintiffs, he felt he needed to talk to H[...] and arrange a consultation with her. That is how her fourth statement was taken. Why H[...]'s fourth statement was drafted still needs to be clarified; there are several reasons from the Plaintiff's perspective. This is a deliberate and desperate effort from the Plaintiffs in building their case.

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[10] 1984 (4) 437 (E) 440E-G

[11] Reasons for prosecution: P.G. du Toit[I]; GM Ferreira[II]

111. The claim for malicious prosecution brought by Plaintiffs against the second Defendant stands to be dismissed.

112. The first and second Defendant's explanations do not display any malice and are based on reasonable grounds and probable cause. Plaintiff has not established that the Defendants acted without reasonable cause on these claims of malicious arrest, detention, and prosecution. Thus, their claim stands to be dismissed.

Costs

113. The Plaintiffs have not proved their claim on unlawful arrest, detention, or Malicious prosecution. There is no plausible reason why costs should not follow the event.

Order

Consequently, I make the following order:

114. The Plaintiffs' claim on unlawful arrest and detention is dismissed;

115. The Plaintiffs' claim on malicious prosecution is dismissed;

116. The Plaintiffs are ordered to pay the costs of the suit.

_____

T BOKAKO

Acting Judge of the High Court

Gauteng Local Division, Pretoria

APPEARANCES

DATE OF HEARING : 24 JULY-4 AUGUST 2023, 13 SEPTEMBER – 14 SEPTEMEBR 2023 AND 6 DECEMBER 2023

DATE OF JUDGMENT : 14 FEBRUARY 2024

COUNSEL FOR PLAINTIFF : ADV BOUWER

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