THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable

Case No: 205/2019

In the matter between

GUISEPPE CANELLI	**APPELLANT**
and	
JEANNIE CANELLI (born PIENAAR)	**FIRST RESPONDENT**
THE MINISTER OF SAFETY AND SECURITY	**SECOND RESPONDENT**
THE NATIONAL PROSECUTING AUTHORITY OF SOUTH AFRICA	**THIRD RESPONDENT**

Neutral citation:	*Canelli v Canelli and Others* (Case no 205/2019) [2021] ZASCA 012 (3 February 2021)
Coram:	CACHALIA, VAN DER MERWE, SCHIPPERS, DLODLO and NICHOLLS JJA
Heard:	20 February 2020

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 3 February 2021.

Summary: Delict – claim for damages for malicious prosecution, defamation and wrongful arrest and detention – whether *animus iniuriandi* and absence of reasonable and probable cause for malicious prosecution proved – whether *animus iniuriandi* for defamation proved – whether defendant's failure to testify reasonable.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Baartman J sitting as court of first instance):

1 The appeal against the dismissal of the claims against the first respondent for malicious prosecution and defamation is upheld with costs, including the costs of two counsel;

2 The appeal against the dismissal of the claim against the second respondent (the Minister) is upheld only to the extent that the appellant's detention from the time of the confirmation of his alibi on the video material on 19 September 2012, until his appearance in court the following day, is declared unlawful. Save as aforesaid, the appeal is dismissed. The Minister is liable for half of the appellant's costs on appeal, including the costs of two counsel;

3 The appeal against the dismissal of the claim against the third respondent (the NPA) is dismissed. Each party is to pay its own costs on appeal.

4 The order of the court a quo is set aside and replaced with the following order:

'(a) The claims against the first defendant are upheld with costs, including the costs of two counsel;

(b) The claim against the second defendant (the Minister) is upheld only to the extent that the plaintiff's detention from the time of the confirmation of his alibi on the video material on 19 September 2012, until his appearance in court the following day, is declared unlawful. Save as aforesaid, the claim is dismissed. The Minister is liable for the plaintiff's costs, including the costs of two counsel;

(c) The claim against the third defendant (the NPA) is dismissed with costs, such costs to be limited to the costs incurred by the NPA as if on exception.'

JUDGMENT

Cachalia JA (Van der Merwe and Dlodlo JJA concurring)

[1] I have read the judgment prepared by my colleagues Schippers JA and Nicholls JA. I regret that I am unable to agree with their assessment of the facts, their treatment of the legal issues, and the conclusions to which they have come.

[2] The appellant was the plaintiff and his erstwhile wife, who is the first respondent, was the first defendant in the court a quo. The Minister of Safety and Security (the Minister) and the National Prosecuting Authority (the NPA), who are the second and third respondents, were the second and third defendants. The plaintiff claimed damages from: the first defendant for malicious prosecution and defamation; the Minister for unlawful arrest and detention; and the NPA, for wrongful prosecution.

[3] The claims arose from a false complaint the first respondent made to the police, wherein she alleged the plaintiff had brutally assaulted and raped her on 18 September 2012. Following her complaint, the police arrested, charged and detained him. He was released on bail, after spending 18 days in custody. The charges were withdrawn a year later, on 11 September 2013.

[4] The plaintiff's action against the defendants proceeded in the Western Cape Division of the High Court (Baartman J), Cape Town, on 20 June 2017. The high court found that the plaintiff had not assaulted and raped the first respondent, as alleged. Nevertheless, it dismissed both the plaintiff's claims against her on the ground that she reasonably believed he had attacked her. The high court also dismissed the claims against the Minister and the NPA. I set out the facts pertaining to the claims against the first defendant, before considering the claims against the Minister and the NPA. I shall henceforth refer to the appellant as the plaintiff and the first respondent as the defendant.

The Facts

[5] The plaintiff and defendant were married in September 2004. They have one son, 'L', who was born in February 2006. They lived on a farm, Driefontein, in the district of Ceres, near Cape Town, until they began living separately, in December 2009. He moved to the town and she remained on the farm, with L. They were divorced on 24 July 2012, after a nine-day divorce trial.

[6] On Monday, 17 September 2012, at 20h00, the plaintiff drove to the Winelands Casino Hotel. He arrived there an hour later, where he spent the night with his friend, Ms Rowena Titus. They left together for Cape Town at 07h00 the following morning, on 18 September 2012. After attending to their business in the City they returned to his home at Ceres, at about 18h00, where they planned to spend the night.

[7] Unbeknown to the plaintiff, or Ms Titus, another train of events was unfolding on the same day. Ms Nicole Faul, a friend of the defendant, received a call from her at about 06h30. She asked Ms Faul to come to the farm to collect L. Ms Faul arrived shortly afterwards. L escorted her upstairs to his mother's bedroom. Ms Faul found the defendant lying naked in bed. She appeared to be shivering and looked scared. Ms Faul, who testified on behalf of her friend, explained that the defendant was reluctant to talk about what had happened to her, but intimated that her ex-husband was responsible. Ms Faul noticed that the house was in disarray and the defendant's clothes were strewn all over. There was a piece of wire tied around the leg of the dining room-table, the chairs had been knocked over and there was broken glass on the floor inside of the back door.

[8] Ms Faul convinced the defendant to accompany her to her home, where the defendant washed and was given a clean set of clothes. According to Ms Faul, the defendant insisted that no one should know what had happened to her. But she agreed to see Dr Laubscher, the district surgeon, later that day, as Ms Faul had suggested.

[9] Dr Laubscher examined the defendant at 13h40. He recorded her injuries, which are set out in the judgment of the court a quo. He testified that she told him that the plaintiff had sexually assaulted her at 22h00, the previous evening. His examination revealed injuries consistent with a severe assault, but he found no conclusive evidence of any sexual assault. He also testified that she was reluctant to report the incident to the police, but that he had persuaded her to do so.

[10] Later that afternoon, the defendant made a statement to the police in which she graphically described that the plaintiff had assaulted her, raped her both vaginally and anally, and tied her up on the kitchen table with a piece of wire, before leaving. According to the statement, the incident occurred between 05h00 and 06h00 on the morning of 18 September 2012, and not at 22h00 the previous evening, as she had told Dr Laubscher. The statement, described as 'A1' in the record, is reproduced in the judgment of the court a quo. Its admission as evidence is one of the issues in this appeal.

[11] Shortly before midnight on the same day, the police arrived at the plaintiff's home. He was with Ms Titus. The police officers informed him that the defendant had laid charges against him as described in the statement. He explained that he was innocent, which was clear from the fact that he had been elsewhere at the time of the alleged incident. This notwithstanding, he was taken into custody and charged. I set out these facts in more detail later, when dealing with the case against the Minister for unlawful arrest and detention. On 8 August 2014, two years after the incident, the plaintiff issued summons against the defendant, the Minister and the NPA.

[12] In response to the claims against the defendant for malicious prosecution and defamation, arising from the false allegations against him, the defendant instructed her attorneys not only to defend the claim and file a plea, but also to counterclaim for damages arising from the alleged assault and rape. The allegations relied upon for this claim were the same she had made in her complaint to the police, two years

earlier. Her plea was filed on 21 October 2014 and her counterclaim on 13 November 2014. Her statement (A1) was annexed to her plea.

[13] With the trial date looming, the defendant's attorneys filed an expert notice in terms of rule 36(9) of the Uniform Rules of Court on 17 February 2017, indicating that Dr Larissa Panieri-Peter, a specialist forensic psychiatrist, would testify for the defendant. They attached an expert report from her dated 16 February 2016. It appears from the report that Dr Panieri-Peter first consulted with the defendant on 21 September 2012, four days after the alleged incident. The defendant has been her patient since then, and was her patient during the trial. Dr Panieri-Peter's brief was to prepare expert comment on the basis that the plaintiff had an alibi that would prove that he could not have attacked the defendant.

[14] Her report was prepared exclusively from the factual information provided by the defendant. It diagnoses the defendant as suffering from post-traumatic stress disorder (PTSD). The condition, according to the report, causes the defendant to develop panic symptoms when traumatic experiences of her marriage are triggered. The impending court proceedings had this effect on her and also caused her to struggle to focus. The report concludes that the defendant would not be able to meaningfully testify in court regarding the incident.

[15] The report states that it does not comment on the facts of the case – particularly, whether the plaintiff was in fact the defendant's attacker – but, it conspicuously proffers a sweeping opinion on both the key factual and legal issues in the case. In this regard Dr Panieri-Peter says:

'I . . . have no doubt that Ms Canelli believes the perpetrator of her rape and attack to have been her husband. If that cannot be so, then it must have always been that the experience she suffered on that night was similar in some ways to other experiences she has suffered, or that there were aspects of the experience that caused her to believe it to be so . . . If her beliefs cannot be true, as deemed by the Court, then it is my psychiatric view that she has a mistaken belief, rather than any other psychiatric phenomenon or malicious intent.'

[16] It thus became apparent to the plaintiff's attorneys that the defendant may abandon her original defence to the claim against her for malicious prosecution, namely, that the plaintiff had in fact attacked her, and that she was preparing an alternative defence based on this report. They, therefore, requested further particulars as to whether the defendant was persisting with her denial that she had laid false charges against the plaintiff in response to his claim against her. They also sought clarity on whether she intended testifying at the trial, in light of Dr Panieri-Peter's opinion that she would not be able to.

[17] On 19 April 2017, the defendant's attorneys replied to the request for further particulars, equivocally, stating that she 'genuinely believed her version (as described in the A1 statement) to be correct'. They added that in view of Dr Panieri-Peter's opinion regarding her 'current emotional condition' (five years after the alleged attack), it was not advisable for her to testify. They also withdrew her counterclaim, which contained the same allegations of the sexual assault as the plea. This, almost three years after she had instructed her lawyers to pursue the action against the plaintiff. However, the defendant's plea that the plaintiff had sexually assaulted her remained, and was not amended during the trial. Dr Panieri-Peter filed a supplementary report on 12 June 2017.

[18] The defendant also delivered an expert notice and a report prepared by a clinical psychologist, Ms Tanya van der Spuy, who was the defendant's psychotherapist at the time of the alleged incident. The report was prepared on 4 October 2012, five years before the trial commenced and shortly after the alleged attack on the defendant. As with Dr Panieri-Peter's report the only factual information at Ms Van der Spuy's disposal was provided by the defendant, who reported that she had 'experienced prolonged and severe sexual and emotional abuse' by the plaintiff throughout the marriage. Ms Van der Spuy also diagnosed the defendant as suffering from PTSD, which, the report read, 'was consistent with exposure to severe and ongoing threats to her physical and emotional safety and integrity'. The report also offered an opinion that the defendant's 'fears for her safety and that of her child [were not] fabricated or irrational'.

[19] The high court's treatment of the evidence of both Dr Panieri-Peter and Ms Van der Spuy is also strenuously disputed in this appeal. The trial commenced on 20 June 2017.

[20] The plaintiff testified, and, in light of the defendant's plea that he had attacked her, was compelled to adduce evidence to prove his alibi. After closing his case and the defendant's witnesses, including the experts, had testified, the defendant's counsel informed the court, on 5 December 2017, following seven days of evidence, that they would attempt to call her to testify. She arrived at court but, having spent less than two minutes on the witness stand, informed the judge, on Dr Panieri-Peter's advice, that she was unable to continue. The matter then stood down.

[21] When the trial resumed on 20 March 2018, counsel informed the court that the defendant remained unable to testify. No attempt was made to provide her testimony on another date or in another manner, through an intermediary or from another venue, to obviate the need to testify in the plaintiff's presence. In the result, the defendant did not testify and the plaintiff was denied the right to cross-examine her on the central issues in the case: the false allegations giving rise to his prosecution and her state of mind at the time of the alleged incident.

The evidence

[22] There is no dispute that the parties had a destructive marriage, which ultimately led to their separation and divorce. The plaintiff's evidence was that he had never physically or sexually abused the defendant, and that the charges against him regarding the violent sexual assault were false.

[23] The plaintiff referred to the proceedings in the Magistrate's Court in 2010, when the defendant had applied for an interim protection order against him under the Domestic Violence Act 116 of 1998 ('the domestic violence proceedings'). In her testimony then, on 24 April 2010, she said that he had verbally abused her, sometimes

in the presence of friends and relatives, which affected her and L. But she was emphatic that he had never assaulted her. In subsequent proceedings, on 12 May 2011, when the plaintiff sought to set aside the interim order unsuccessfully, the court accepted that there had been no physical abuse. The defendant's evidence then was contrary to what she had told both Dr Panieri-Peter and Ms Van der Spuy about his alleged physical and sexual abuse of her.

[24] By the end of the trial, there was no dispute that the plaintiff had not entered the defendant's home or attacked her as alleged in her statement to the police, her pleadings and throughout the trial. His alibi, that he was at the hotel in Worcester with Ms Titus, was proved beyond any doubt. The defendant's pleaded defence was, therefore, undeniably false.

[25] Faced with this difficulty, which the defendant's lawyers had apparently anticipated, they sought to make the case that she honestly believed the plaintiff had attacked her on 18 September 2012, while steadfastly not admitting that he had in fact not done so. The apparent building block for this defence was that she was suffering from PTSD at the time of the alleged attack. To support this defence they called in aid primarily the evidence of Ms Van der Spuy and Dr Panieri-Peter.

[26] Ms Van der Spuy testified that she began seeing the defendant on 25 July 2012, a day after her divorce. She saw the defendant eleven times, between then and 3 October 2012. Her report was prepared the following day. Surprisingly, it does not refer to the alleged events of 18 September, which one would have expected it to. Ms Van der Spuy confirmed the findings of PTSD. Among the symptoms the defendant exhibited was anxiety, which sometimes bordered on panic. The defendant was unable to give a coherent account of the difficulties and traumatic incidents during her marriage. One of the reasons she gave Ms Van der Spuy for this difficulty was that she feared the plaintiff would retaliate.

[27] Ms Van der Spuy continued to see the defendant until June 2013, after the alleged incident. She confirmed that the defendant had not mentioned that the plaintiff had attacked her on 18 September 2012, and that she had no independent evidence or proof pertaining to any alleged sexual and physical abuse during the marriage.

[28] Dr Panieri-Peter testified on 5 December 2017. The defendant consulted her for the first time on 21 September 2012, a few days after the alleged incident. She observed the defendant as overtly injured, struggling to walk, and obviously distressed.

[29] Dr Panieri-Peter increasingly became worried about the defendant's safety. There were times, she testified, when the defendant was stable, especially when there were no 'legal issues' and she was very happy. But, she continued: 'whenever there's a legal matter of any nature she is triggered into post-traumatic stress'. She also diagnosed the defendant with PTSD, which she described as an anxiety disorder, not a psychotic disorder.

[30] Dr Panieri-Peter testified that before coming to court on that day (5 December 2012), she met with the defendant at counsel's chambers. The defendant was afraid of seeing or hearing that the plaintiff was present. As they entered the court, Dr Panieri-Peter continued, the defendant wanted to run away. She was actually sick. This is typical of people with PTSD: they have a 'fight-and-flight' response, which, Dr Panieri-Peter explained: 'no-one can malinger'.

[31] In response to a question from the court as to why the defendant had resisted the State withdrawing charges against the plaintiff, Dr Panieri-Peter provided an incoherent response, without specifically answering the question. She testified further that even though she had not seen the video, which proved that the plaintiff was elsewhere on the night of the alleged attack, she had raised the matter with the defendant. The defendant's response was that she did not care what was on the video;

she knew that the plaintiff did this to her. As her psychiatrist, Dr Panieri-Peter simply assured the defendant that she understood her; it was not her role to question her. The evaluation of her belief, which, according to Dr Panieri-Peter was what this case was about, was that her husband perpetrated the attack on her. It bears emphasis that despite the plaintiff's objection to the admissibility of this evidence the court allowed it without ruling on the objection.

[32] Although Dr Panieri-Peter had not read the evidence in the domestic violence proceedings she admitted, under cross-examination, that she became aware of the fact that the defendant had previously denied any physical and sexual abuse before preparing her report. Despite being aware of this she did not include this information in her report. The reason for omitting it, she testified, implausibly, was that the report would have become 'long-winded'.

[33] Dr Panieri-Peter was also unaware that the defendant had participated fully in the divorce proceedings in May 2012, and was cross-examined by the plaintiff over several days, without demur. In fact, the plaintiff's undisputed testimony was that she was confident – even playful and sarcastic – when answering his questions. Neither was Dr Panieri-Peter aware that after the divorce proceedings the defendant went to the plaintiff's apartment, twice, to attend to administrative matters. Nonetheless, she insisted that the defendant did not want to be part of 'these legal proceedings . . . she just wants to be free of her ex-husband and the fear she has, the terror. . . [t]hat fear can't be malingered'.

[34] Perhaps, the most extraordinary part of her Dr Panieri-Peter's evidence was her admission that she had not read the statement (A1) that the defendant had made to the police, the veracity of which was one of the central issues in this case.

[35] Under cross-examination by the plaintiff's counsel, Dr Panieri-Peter grudgingly accepted that as the defendant's treating psychiatrist, she was not an independent

expert. She was, therefore, unable to offer an opinion on the factual disputes in the case, nor what had happened on 18 September 2012 at the defendant's home. Dr Panieri-Peter further admitted that, in preparing her report, particularly in relation to the alleged physical or sexual assault abuse during the marriage, she had not read the defendant's evidence in the domestic violence proceedings. She also conceded, after being pressed under cross-examination, that she was unable to say, as a fact, that at the time the defendant made her statement to the police on 18 September 2012, she held a 'subjective belief' that her husband had attacked her. And, further conceded, as she had to, that this fact finding exercise was the function of the court, not hers, as her patient's psychiatrist. She was, therefore, unable to offer an opinion as to the defendant's state of mind at the time of this incident.

[36] The other witnesses, who testified on behalf of the defendant, described other incidents where the plaintiff was verbally abusive towards the defendant. Their evidence, referred to in the judgment of the high court, bear little relevance to the disputed issues in this appeal. I shall nonetheless deal with this evidence briefly when considering the high court's reasoning.

The findings of the court below

[37] The high court found that the plaintiff proved that he was not responsible for the alleged attack on the defendant. It nevertheless concluded that: the defendant reasonably believed the plaintiff was her attacker; that the plaintiff had not proved that the defendant had acted without reasonable or probable cause when she laid charges against him or that she acted *animo iniuriandi*. It followed that the claim for defamation also had to fail. The court was also persuaded that the defendant was 'too anxious to testify on the day'. Before examining how these conclusions were reached it is necessary to set out the law pertaining to malicious prosecution and defamation.

Malicious prosecution and defamation

[38] The cause of action in a claim for malicious prosecution is the *actio iniuriarum.* To establish this claim a plaintiff must establish that (i) the defendant (a) set the law in motion (instituted or instigated the proceedings) (b) acted without reasonable and probable cause and (c) acted with malice (*animo iniuriandi*) ie with intent to injure the defendant in his good name; and (ii) that the prosecution failed.[1]

[39] Reasonable and probable cause means an honest belief founded on reasonable grounds that the prosecution was justified. This imports both an objective element (reasonable grounds) and a subjective element (honest belief).[2] *Animo iniuriandi* in this sense means that the defendant, aware that no reasonable grounds for the prosecution exist, nonetheless initiates the proceedings. If reasonable grounds are absent but the defendant honestly believes that the plaintiff is guilty or that there are reasonable grounds, wrongfulness is lacking. This would also occur in the event of a mistake on the part of the defendant.[3]

[40] The onus to prove these requirements rests on the plaintiff. Where a defendant is proved to have initiated a prosecution without reasonable grounds, it does not follow that she acted dishonestly, nor does it necessarily imply that she did so *animo iniuriandi.*[4] However, in the absence of any other evidence the natural inference is that the plaintiff has established both. The defendant thus bears an evidential burden to rebut this inference regarding her state of mind, including any mistake that would exclude her liability.

[41] In an action for defamation the plaintiff must prove that the defendant intentionally published the defamatory material. Having done so, the plaintiff is assisted by a presumption of wrongfulness and that the defamation was done

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[1] *Minister of Safety and Security v Lincoln* (Case no 682/19) [2020] ZASCA 59 (5 June 2020) para 20.
[2] *Prinsloo and Another v Newman* 1975 (1) SA 481 (A) 495G-H.
[3] Neethling, Potgieter Visser *Law of Delict* 5 ed at 318.
[4] Compare *Moaki v Reckitt & Colman (Africa) Ltd and Another* 1968 (3) SA 98 (A) at 105B-C.

intentionally.[5] The defendant is thus saddled with a full onus to establish either some lawful justification or excuse, or the absence of *animus iniuriandi.* If the defendant is unaware of the wrongfulness of her defamatory publication because she honestly believes that her conduct was lawful, consciousness of wrongfulness, an essential element of intent, is missing. The honest belief would therefore rebut the presumption of *animus iniuriandi* and thereby exclude intent.[6]

[42] In the present matter, however, the defendant's defence to the claim for defamation is that she honestly believed that her attacker was her husband when she published the defamatory material of and about him, not that the publication was lawful on some other basis, for example truth and for the public benefit, in respect of which she would bear the onus. Thus, once the plaintiff establishes a prima facie case, ie that the defendant published the defamatory statement about him to a third party, this casts an evidential burden on the defendant to adduce evidence as to her state of mind, as with the case of malicious prosecution.[7]

The high court's reasoning

[43] I have, with respect, found it almost impossible to glean any clear reasoning to support the trial judge's findings and conclusions.

[44] In regard to the evidence of Ms Van der Spuy and Dr Panieri-Peter, the court acknowledged that their evidence 'lacks the independence required of an expert'. However, it continued, their 'observations regarding her anxiety and inability to articulate traumatic events' involving the plaintiff are relevant, and were supported by both Dr Laubscher and Ms Faul. There was further evidence, the court said, arising from the domestic violence proceedings in 2011, of the plaintiff's abusive behaviour

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[5] 14(2) *Lawsa* 3 ed para 122.
[6] Neethling, Potgieter Visser *Law of Delict* (op.cit fn.3) at 316; *Borgin v De Velliers and Another* 1980 (3) SA 556 (A) at 571F-G; *Le Roux and Others v Dey (Freedom of Expression Institute and Restorative Justice Centre intervening as Amicus Curiae)* [2011] ZACC 4; 2011 (3) SA 374 (CC) para 85.
[7] Compare *Moaki* (above fn 4) at 105G-106A.

towards the defendant and ‘objective findings of symptoms generally associated with anxiety’. The court concluded that it was, therefore, ‘persuaded that the . . . defendant was too anxious to testify on that day [and] that her reaction in the witness box was not a “charade”: instead it was a reaction to the traumatic experience between her and the plaintiff’.

[45] In regard to the court’s finding that the defendant reasonably believed that the plaintiff was responsible for the alleged attack, the court seems to have found support for its conclusion from three sources: First, from the evidence of the defendant’s sister, Ms Lizette Pienaar, who, the court observed, ‘had no hesitation in admitting that she still believed’ that he was responsible. She also believed, the court continued, as did other members of the defendant’s family, that the plaintiff was associated ‘with all or most of the [defendant’s] calamities’. Second, the testimony of Mr Prins, who knew the parties well, but had fallen out with the plaintiff in 2006. He was convinced that the person depicted on the video at the hotel together with Ms Titus, who it is common cause was in fact the plaintiff, was not the plaintiff, but someone else. His belief that the plaintiff was responsible for the attack, therefore, lent credence to her belief. Third, the court perplexingly ‘assume[d], without finding, that the lighting was poor at the time of the attack’. Implicit in this assumption was that the defendant was unaware of who attacked her, and, therefore, reasonably believed it was the plaintiff.

[46] In regard to the finding that the plaintiff had not shown that the she acted *animo iniuriandi*, the court said that the evidence did not establish that she ‘subjectively foresaw the possibility that the plaintiff was not the perpetrator of the assault’. The court found support for this conclusion in Ms Faul’s and Dr Laubscher’s testimony that she was reluctant to lay a charge, and from Dr Laubsher’s observation that she was somewhat taciturn when he examined her after the incident. The high court thus concluded that the ‘objective independent evidence [therefore] belies the presence of malice’.

No admissible evidence of sexual assault

[47] As I have said, the court a quo correctly held that the plaintiff had not attacked the defendant on 18 September. To overcome the difficulty that there was no evidence of any attack, the defendant sought to lead other evidence to establish this. To this end she applied to the court to have her the A1 statement admitted as evidence in terms of s 3 of the Law of Evidence Amendment Act 45 of 1988. The section provides:

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

…

(c) the court, having regard to –

(i) the nature of the proceedings;

(ii) the nature of the evidence;

(iii) the purpose for which the evidence is tendered;

(iv) the probative value of the evidence;

(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;

(vi) any prejudice to a party which the admission of such evidence might entail; and

(v) any other factor which should in the opinion of the court be taken into account,

is of the opinion that such evidence should be admitted in the interests of justice.'

[48] Having found that the defendant was unable to testify on 5 December 2018 because of her 'mental state' the high court admitted the contents of the A1 statement as evidence at the conclusion of the defendant's case. It justified this on the ground that:

'[M]uch of the content of the [statement] has been corroborated by police officers in the course of their duty. It is also not the plaintiff's case that the assault on the [defendant] was fabricated . . . It is in the interests of justice to allow the evidence in terms of section 3(1)*(c)* of the [Law of Evidence Act]. It is important to bear in mind that the plaintiff dealt with the evidence sought

to be admitted. In the circumstances of this matter, the interests of justice trumps any perceived prejudice [to the plaintiff].'

[49] This was the sum total of the high court's reasoning for admitting the statement as evidence. It dismissed the plaintiff's objections to the admissibility and weight of the evidence. It is apparent from the prominence given to the A1 statement in the judgment of the court a quo that its admission was pivotal to the court's findings.

The admission of hearsay evidence in terms of s 3(1)*(c)*

[50] Generally, a decision on the admissibility of hearsay evidence is one of law. An appeal court may, therefore, overrule a decision of a lower court if it considers it wrong.[8] In deciding whether to admit evidence in terms of s 3(1)*(c)* a court must have regard to the six interrelated factors set out therein. For present purposes, the nature, purpose and probative value of the evidence, its possible prejudice to the other party, and, also the reason for the absent witness not testifying assume particular significance.

[51] In *The South African Law of Evidence*[9] the authors say the following concerning the nature of the hearsay evidence sought to be admitted:

'Since the person upon whose credibility the probative value of the evidence depends is, in the case of hearsay evidence, not subjected to the curial devices designed to identify, assess and eliminate those aspects of the evidence that render it potentially unreliable, it is important for a court to (a) understand what the potential dangers are; (b) consider the extent to which those dangers actually arise in the case before it; and (c) identify factors that tend to reduce or even eliminate those dangers. Only then will a court be in a position to determine the extent of the prejudice caused to an adversary by the denial to that party of the benefit of those devices . . .'

[8] See generally C W H Schmidt & H Rademeyer *Law of Evidence* [Issue 17 Lexis Nexus] 18.4.3 and the cases cited therein.
[9] D T Zeffert & A P Paizes *The South African Law of Evidence* 2 ed at 401.

[52] In *Law of Evidence*,[10] in a similar vein, the authors state the following:

'The crucial consideration is to what extent the value of the evidence depends on the credibility of the absent witness and also to what extent the dangers of relying on the evidence are outweighed by indications of reliability.'

The authors add that the factors a court may have regard to in this analysis are (a) the relationship between the absent witness and the other party; (b) a possible motive for making a false allegation; (c) the circumstances under which the absent witness made the hearsay statement, and (d) the extent to which the hearsay evidence is corroborated by other evidence.

[53] In regard to the purpose of the hearsay evidence sought to be adduced, the evidence is more likely to be admitted if it is for a 'compelling reason' rather than for a doubtful or illegitimate purpose.[11] The fact that its purpose is 'direct, not oblique and its attainment depends not on speculative inference . . . but squarely on the reliability of the hearsay' will weigh in favour of its reception.[12]

[54] The factors that weigh crucially in this analysis, and which are usually considered together, are the probative value or cogency of the evidence weighed against the prejudicial effect that its reception may have on the other party. In this regard both the strength and the weakness of the evidence must be considered and also the extent or degree of prejudice the other party may suffer by being denied the right to cross-examine the absent witness upon whose credibility the probative value of the evidence depends.[13]

[55] Finally, the reason the absentee witness does not testify must also be examined closely. The fact that the witness is incapacitated or fears reprisal if she testifies may, in conjunction with the other factors, weigh in favour of admitting the evidence.[14]

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[10] C W H Schmidt & H Rademeyer (op cit fn 8) at 18.4.3.2.
[11] D T Zeffert and A P Paizes (op cit fn 9) at 407.
[12] *S V Ndhlovu and Others* 2002 (2) SACR 325 (SCA) para 44.
[13]C W H Schmidt & H Rademeyer (op cit fn 8) at 18.4.3.4 and 18.4.3.6.
[14] Ibid at 18.4.3.5.

[56] It is evident from the high court's judgment that it failed to appreciate and consider the requirements for the admission of evidence in terms of s 3(1)*(c)*. The statement, admitted as evidence, was made by the defendant, whose marriage with the plaintiff had ended in an acrimonious divorce. She had a strong motive to falsely implicate him in an unspeakable crime. Yet, the trial court showed no awareness of the danger of admitting the statement. The defendant's allegations against her husband in the statement were indisputably false, as the high court was compelled to accept. The hearsay evidence had no probative value at all. Its admission to the plaintiff's prejudice was, and is, obvious.

[57] Having had to endure the false allegation that he had sexually assaulted his erstwhile wife in the most brutal manner, he was denied the opportunity to cross-examine her regarding her state of mind when these events were alleged to have unfolded. Among the questions she would have had to answer concerned: the discrepancy in the time, of about eight hours, when the alleged incident took place as she had reported separately to Dr Laubscher and to the police; how she could have mistaken the identity of the attacker, who she had observed closely during the attack and who, she alleged, knew her intimate family details; why she had told Ms Van der Spuy and Dr Panieri-Peter that her husband had physically and sexually abused her during the marriage, contrary to her evidence in the domestic violence proceedings; and why she had not mentioned the attack to Ms Van der Spuy, during her consultation on 3 October 2012, two weeks after the incident, when she had made similar false allegations regarding physical and sexual abuse previously.

[58] The high court's observation that the plaintiff had 'dealt with the evidence' by responding to the allegations against him is no answer to the prejudice he suffered by not being able to test the defendant's version. Yet, the judge admitted the statement in terms of s 3(1)*(c)* in the interests of justice, because in her view, this outweighed what she dismissed as the 'perceived prejudice' to the plaintiff.

[59] It is also difficult to understand how the judge could have concluded that 'much of the content of the affidavit [had] been corroborated by police officers in the course of their duty'. Apart from the investigating officers, who testified regarding the condition of the defendant's home on the morning after the incident, they did not corroborate any material aspect of her statement. On the contrary, the evidence adduced by the police corroborated the plaintiff's alibi.

[60] Regarding the reason for her failure to testify, the court accepted that the defendant was 'too anxious to testify'. And, that her failure to testify was 'not a charade' but a response to her anxiety in relation to her interactions with the plaintiff. But, even if we accept this conclusion, (which I do not as I deal with later), I consider, having regard to the other requirements for the admission of hearsay evidence of this nature, that there was no compelling reason for its admission. On the contrary, it was obviously used to bolster the speculative inference that the defendant honestly believed that the plaintiff was responsible for the attack on her. In the circumstances, the court erred by admitting the statement as evidence. It ought to have been disregarded for what it was: inadmissible hearsay evidence.

The court's treatment of the expert witnesses

[61] Ms Van der Spuy's evidence concerned her diagnosis, made five years before the trial commenced, that the defendant suffered from PTSD. Dr Panieri-Peter was treating the defendant at the time of the trial and made the same diagnosis. They attributed her condition to the abusive relationship with the plaintiff. Dr Panieri-Peter went further, stating in her report that the defendant 'believes the perpetrator of her rape and attack to have been her ex-husband' even 'if that cannot be so'. But she accepted that this fact finding exercise was a function of the court, not hers. She also claimed that the defendant's PTSD was triggered by 'legal issues' with her husband, which meant that she was not able to 'meaningfully' testify, in her defence.

[62] Despite the plaintiff having objected to the admissibility of their evidence the court made no ruling on the objection, and evidently attached considerable weight it.

However, apart from their testimony that the defendant was diagnosed with PTSD, which was not an issue between the parties, their testimony about what the defendant had told them regarding any physical abuse by her husband, that was uncorroborated, also ought to have been rejected as inadmissible hearsay evidence. Critically, their testimony drew no evidential link between defendant's PTSD on the one hand, and her alleged belief regarding her husband's culpability or her state of mind at the time of the alleged attack, on the other. There was none because it was accepted during the trial that PTSD is an anxiety disorder, not a psychotic disorder. The latter condition, not the former, may cause symptoms of delusional thinking, hallucination and detachment with reality. Despite this, the court appears to have decided the case on the basis that a link was established, even though she made no explicit finding in this regard.

The court a quo's reliance on other evidence

[63] It is difficult to understand how the fact that Ms Faul, Ms Lizette Pienaar and other members of the defendant's family, who all bore considerable *animus* against the plaintiff, and also believed that the plaintiff had attacked the defendant, was at all relevant to the defendant's belief. The high court's reasoning is illogical. It reasons as follows: A believes X is the attacker. B and C also believe X is the attacker. Therefore, A's belief that X is the attacker is reasonable. Similarly, the fact that Mr Prins, who was also ill-disposed to the plaintiff, wrongly believed that the plaintiff was not the person identified on the hotel video footage, provided no basis to support this reasoning either.

[64] But the most extraordinary 'finding' appears from this statement in the judgment of the high court:

'I assume without finding that the lighting was poor at the time of the attack.'

What the court appears to have done here was to make a finding, which it called an assumption, that the lighting was poor. It thus found support for the conclusion that the defendant reasonably – but mistakenly – believed that the plaintiff was her attacker. I find it incomprehensible that the defendant could reasonably have been mistaken that her husband was her attacker because the lighting was poor. There was no evidence

regarding the state of visibility where the alleged incident occurred. It is quite clear from the content of her statement to the police, which I have found was inadmissible, that the plaintiff, not anyone else, attacked her. The statement describes the plaintiff as having 'mad eyes' and that 'he stared into my face'. It continues: 'he said that he would hurt my little sister if I told anyone what had happened. He said my parent's wall had holes in it and that he could see through it . . .' There is no suggestion that she did not see her attacker due to the poor lighting or that anyone else other than her husband would have been aware of her 'little sister' or the holes in her parent's wall. There is thus simply no room for the assumption that the lighting was poor, much less for the assumption to be used as a basis to conclude that the defendant's belief was mistaken, but reasonable. Accordingly, the plaintiff proved on a balance of probabilities that the defendant had had no reasonable or probable cause to institute legal proceedings against him.

Animus iniuriandi

[65] In regard to the finding that the plaintiff had not shown that she acted *animo iniuriandi*, the court said that the evidence did not establish that she 'subjectively foresaw the possibility that the plaintiff was not the perpetrator of the assault'. The court found support for this conclusion in both Ms Faul's and Dr Laubscher's testimony that she was reluctant to lay a charge, and from Dr Laubsher's observation that she was taciturn when he examined her after the incident. The judge thus concluded that the 'objective independent evidence [therefore] belies the presence of malice'.

[66] These findings are unsustainable. As I have pointed out earlier, once it is found that there was no reasonable or probable cause for initiating the prosecution and defaming the plaintiff, the defendant attracted an evidential burden to rebut the natural inference that she acted *animo iniuriandi.* In the absence of any evidence from her as to her state of mind, or any other admissible evidence, she faced an almost insurmountable hurdle to rebut this inference. The fact that she may have been reluctant to lay charges initially does not alter the fact that when she did, she knew the charges were false. And, having laid the charges, she and her attorneys were in constant contact with the investigating officers to assess their progress with the

investigation. There is no suggestion that she sought to withdraw the charges at any time.

[67] Furthermore, she persisted with the false claim and also counterclaimed in the civil action against the plaintiff based on the same false allegation, only to withdraw the counterclaim during the trial, five years after having laid charges. Her plea that her husband had attacked her was never withdrawn. The court a quo's finding in regard to the absence of *animo iniuriandi* was, therefore, also incorrect.

The defendant's failure to testify

[68] Dr Panieri-Peters' opinion regarding the defendant's failure to testify clearly weighed with the high court, but was also of little value. She testified on behalf of her patient and not as an independent witness who was able assist the court with this issue, which required a close examination of the facts. Dr Panieri-Peter was simply not familiar with the facts. Her central thesis was that whenever 'legal issues', as she described it, arose with the plaintiff it triggered a 'fight-or-flight' reaction, which was consistent with PTSD. But, she was unable to explain why, if this was so, the plaintiff was able to, and did, testify in both the domestic violence proceedings and the subsequent divorce proceedings, despite suffering from PTSD. The high court's judgment does not deal with this at all.

[69] The plaintiff also testified, after being recalled at the end of the defendant's case, that two months after her aborted testimony, she passed him at a shopping mall, without showing any signs of being terrified. He produced a video recording from the shopping mall to support his testimony. The court dismissed this evidence on the flimsy basis that the plaintiff posed no threat to her at the time. But what the court again disregarded was the obvious point that there was no threat to her at all in the court building where court officials were present, and where she was supported by her lawyers and her psychiatrist.

[70] The high court also ignored the plaintiff's evidence that the defendant twice visited his home, after the divorce, to attend to administrative matters, which also makes the reason for her failure to testify – being terrified of the plaintiff – implausible.

[71] In addition, having accepted the plaintiff's submission that the defendant could have testified on another day, and at a venue other than the court building, the court's reasoning for finding that she was too anxious to testify holds no water.

[72] The most plausible and obvious explanation for the defendant having been too anxious to testify, if she was, was that she must have realised, and in the absence of any other acceptable evidence, did realise, that she would not be able to explain the false charge against her husband. Her failure to testify, therefore, ought to have attracted an adverse inference against her,[15] instead of allowing her the opportunity to escape liability for falsely accusing the plaintiff of a most heinous crime.

[73] I conclude, therefore, that the high court erred in dismissing the plaintiff's claims for malicious prosecution and defamation against the defendant.

The claims against the Minister of Police and the NPA

[74] The plaintiff's case against the Minister was that the police officers had arrested and detained him unlawfully, and in so doing caused his further prosecution and detention. His complaint against the NPA was for having opposed his release on bail and persisting with the prosecution despite there being no reasonable grounds for doing so. The high court dismissed these claims. The relevant facts are set out hereunder.

[15] *S v De Oliveira* 1993 (2) SACR 59 (A) at 65A-C, with reference to the cautionary words of Schreiner JA in *R v Mohr* 1944 TPD 105 at 108.

[75] Following the defendant having laid charges against the plaintiff on 18 September 2012, Captain Boer, Detective Masiza and two other police officers arrived at the plaintiff's home late that evening. Ms Titus was with him at the time. They took him into custody. Captain Boer had the defendant's statement to the police and Dr Laubscher's report in his possession. He had also visited the alleged crime scene earlier and seen it in a state of disarray.

[76] At the Ceres police station Captain Boer informed him that he was under arrest on several counts, including rape, assault and housebreaking. Captain Boer and Detective Masiza questioned him regarding his whereabouts the previous evening and early that morning. He told them that he was at a casino, at a hotel in Worcester in the company of Ms Titus. He produced a hotel receipt to confirm this. He also explained that they had slept over at the hotel.

[77] The plaintiff was allowed to phone his lawyer, Mr Sauls, at about midnight. He arrived at the police station soon afterwards. Upon his arrival Captain Boer phoned the hotel and received confirmation that the plaintiff had been there. Captain Boer reported the call to Mr Sauls, who responded by telling him that in these circumstances the arrest was unlawful. Captain Boer did not answer.

[78] Captain Boer then returned to the plaintiff's home, accompanied by him and Mr Sauls. He conducted a search and returned to the police station where the plaintiff was detained. Mr Sauls then left.

[79] Later that morning, on 19 September, Captain Boer and Detective Masiza drove to the hotel, where they viewed the video footage, which confirmed the plaintiff's alibi. As Captain Boer put it: 'I looked at the footage M'Lady and what I saw . . . was Mr Canelli on the video'. They then returned to the police station and charged the plaintiff.

[80] When asked, under cross-examination, whether he had considered releasing the plaintiff in light of the video material, Captain Boer answered that he had not because ‘there was still an investigation to be done’. ‘Look’, he continued, ‘he was charged, he had to appear in court’. The implication was that the court, not he, would determine whether to release him.

[81] The plaintiff remained in custody and appeared in the Magistrates’ Court on 20 September, during the afternoon. Mr Sauls was present. The State requested the court to postpone the case for seven days, until 27 September, for a bail application, which Mr Saul did not oppose. He applied only for his client to be held at the police cells, and not to be transferred to prison. The application was granted.

[82] The plaintiff appeared in court on 27 September. He was represented by counsel. The evidence in the bail application was heard over two days, but was not completed. It was then postponed for a further a week, to 5 October, when the evidence was finalised. The state opposed the plaintiff’s release on bail on the grounds that: the offences were serious; the defendant feared for her life; and that the plaintiff was a flight risk.

[83] It is, however, common cause that Captain Boer testified at the bail hearing that both he and Detective Masiza confirmed that the plaintiff was depicted on the hotel video footage. The plaintiff and Ms Titus also testified to support his alibi. There is no suggestion that the State presented any false evidence against the plaintiff or improperly sought to resist his release. The bail application, therefore, succeeded and he was released on bail. The plaintiff appeared in court several times thereafter, when the matter was postponed, on each occasion, without demur. The State withdrew the charges against him a year later, on 11 September 2013.

The case against the Minister

[84] The high court held that the plaintiff's arrest and detention was justified, though its reasoning is unclear. It seems to have found that it was reasonable for the police to arrest and detain him because of the seriousness of the allegations, despite his denial, because the alibi still had to be investigated. And further, that once he was charged with an offence in terms of schedule 6 of the Criminal Procedure Act 51 of 1977 (the CPA), only a court could order his release on bail in terms of s 60(11)*(a)*, if he adduced evidence which satisfied the court that there were exceptional circumstances justifying this.

[85] The high court, however, conflated the grounds for the arrest and the detention. These are separate processes, involving two distinct decisions: the decision to arrest and the decision to detain. The purpose of an arrest is to bring a suspect to trial. It is not the arresting officer's function to determine whether the arrested suspect ought to be detained pending the trial. That is the role of the court. However, where a senior officer, such as Captain Boer, arrests a suspect on a serious charge listed in Schedules 1 or 6, he must decide whether to release the suspect immediately or detain him until a court determines the issue. Whether or not the decision to detain the suspect pending his appearance in court is rational and thus lawful must be determined on the facts of the case, including the seriousness of the crime alleged to have been committed.[16]

[86] But the seriousness of the crime is not conclusive. To take an obvious example: an arresting officer has information that X committed a serious crime and he resides at a particular address. The police arrive at the address and ask him to confirm his name, which he does. He is then arrested and taken to the police station. When questioned further it transpires that the arrested person is not X, but another person bearing the same name. In other words the arrest was as a result of a mistaken identity. It is hardly lawful or rational to detain him further only because he was arrested

[16] *Minister of Safety and Security v Sekhoto and Another* 2011 (1) SACR 315 (SCA); [2010] ZASCA 141; 2011 (5) SA 367 (SCA) para 44.

for a serious crime. It follows that while an arrest may be lawful a detention following an arrest may not be.[17]

[87] An arrest and detention is prima facie wrongful. It follows that the defendant must prove the lawfulness of the arrest and detention. The power to arrest without a warrant is conferred by s 40(1)*(b)* of the CPA.[18] An arresting officer must show that in effecting an arrest he entertained a suspicion based on reasonable grounds. Whether or not there are reasonable grounds must be determined objectively.

[88] It was contended on behalf of the plaintiff that the arresting officer was obliged to investigate the plaintiff's exculpatory explanation of his alibi before arresting him. It is unclear from the evidence whether the plaintiff was formally arrested at his home or later at the police station. I shall, however, assume in his favour that he was under arrest from the time he left his apartment, in the company of Captain Boer and his colleagues. It is apparent from the evidence that the decision to arrest him was made before the police arrived at the plaintiff's home on the evening of 18 September 2012. I accept, too, that he immediately provided an alibi.

[89] There was, however, no obligation on the police to there and then investigate the alibi in the circumstances of this case. It would have been irresponsible and arguably negligent not to have taken him into custody until they had properly investigated his alibi. Captain Boer was armed with sufficient information to reasonably suspect the plaintiff to have committed serious offences. The jurisdictional fact for a lawful arrest under s 40(1)*(b)* – a suspicion based on reasonable grounds – was clearly present. The arrest was, therefore, unquestionably lawful.

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[17] LTC Harms *Amler's Precedents of Pleadings* 9 ed LexisNexis at 53.

[18] ' 40. A peace officer may without warrant arrest any person –
(a) . . .
(b) whom he reasonably suspects of having committed an offence referred to in Schedule 1 . . .'

[90] This is not the end of the matter. The Minister had to establish the legal justification for the plaintiff's further detention, at least until his first court appearance. The police could not, as is often incorrectly assumed, simply continue to detain him until he was brought to court. For, as this court said in *Minister of Police and Another v Du Plessis*:[19]

'[I]f shortly after an arrest it becomes irrefutably clear to the police that the detainee is innocent, there would be no justification for continued detention.'

[91] It was clear from Captain Boer's evidence that he gave no consideration to releasing the plaintiff, even after it had become clear from the video material that the plaintiff was at the casino. The plaintiff had shown him the hotel receipts; the hotel confirmed this when he had phoned to check the alibi, and there was no doubt in his mind and Detective Masiza's that he was the person in the video. So, when Captain Boer returned from the hotel after viewing the video material, which conclusively proved the plaintiff's alibi, there was simply no longer any justification to continue his detention.

[92] I accept that there were matters that still required investigation, as Captain Boer testified. But the alibi had been confirmed. It is hardly a justification to hold a suspect until every aspect of the case is fully investigated. It is clear from Captain Boer's evidence that, he believed, wrongly, the plaintiff had to be charged and detained until he appeared in court. In the circumstances, the Minister did not discharge the onus to justify the detention following confirmation of the video footage. I thus hold that the court a quo erred in finding that the detention for this further period (until his appearance in court) was lawful.

[93] In regard to his further detention, that is, after his appearance in court on 20 September 2012 until his release on 5 October 2012, the plaintiff also sought to

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[19] *Minister of Police and Another v Du Plessis* [2013] ZASCA 119; 2014 (1) SACR 217 (SCA) para 17. (Footnotes omitted.)

hold the Minister liable. The police were however not responsible for his detention following his first court appearance. He was remanded in custody with the consent of his attorney. It was not pleaded, nor was there any suggestion in the evidence, that the police improperly procured his further detention.[20] The Minister is, therefore, not liable for the plaintiff's continued detention, at the court's instance, for the period 20 September until 5 October.

The case against the NPA

[94] The plaintiff's third and final claim is against the NPA. His particulars of claim alleged that the prosecution acted wrongfully in opposing his bail application and persisting with the prosecution on false charges for almost a year 'without an honest belief founded on reasonable grounds' that the opposition to bail and the prosecution were justified. The pleaded case differs from the cause of action for malicious prosecution, which requires a plaintiff to allege and prove, the intention to injure (*animus iniuriandi*) in addition to the absence of reasonable and probable cause, the other requirements being that the defendant instituted the proceedings and that the prosecution failed.

[95] Counsel for the plaintiff was unable refer to any authority where the existence of a claim as pleaded was recognised in our law, and I have not been able to find any. The best he could do was produce the reference to 'wrongful legal proceedings' in Amlers Precedents and Pleadings.[21] Examples of wrongful legal proceedings cited there include the attachment or execution of property and arrest without a valid warrant. The author points out that these cases have two special features: first, the defendant must prove the lawfulness of the execution or arrest, and secondly, the absence of *animus iniuriandi* is not a defence.

[96] If a South African court is to recognise a claim for wrongful prosecution it would have to be properly pleaded and argued. The NPA pleaded a bare denial. It ought to

[20] *Woji v Minister of Police* [2014] ZASCA 108; 2015 (1) SACR 409 (SCA).
[21] See LTC Harms *Amler's Precedents and Pleadings* (op cit fn 17 at 257 and the cases cited there).

have raised an exception to the particulars of claim on the ground that it did not disclose a cause of action. That would have brought an end to this claim.

[97] The appeal against the high court's order dismissing this claim must thus fail.

Conclusion

[98] In summary, the appeal against the order of the high court dismissing the claims for malicious prosecution and defamation against the defendant succeeds, as does the appeal against the Minister, but only in respect of the unlawful detention of the plaintiff from the time the police confirmed his alibi on the video recording on 19 September, until his appearance in court the following day. The appeal against the dismissal of the plaintiff's claim against the NPA fails. The defendant and the Minister of Safety and Security are declared liable to the plaintiff for such damages as he may prove against them.

[99] In regard to costs, the defendant is liable for the plaintiff's costs in the court a quo and on appeal. The plaintiff's success against the Minister was limited to the unlawful detention for one day. I, therefore, consider that the Minister should be liable for only half of the plaintiff's costs in this court.

[100] In regard to the dismissal of the claim against the NPA, I consider that the plaintiff should be liable only for the costs against it in the court a quo as if it had taken exception to the particulars of claim. The claim did not disclose a cause of action. The NPA should have raised an exception to it. That would have brought an end to this claim. Instead, the NPA led much irrelevant evidence to oppose the claim. And, the court a quo decided the case on the basis of this evidence, even though there was no cognisable legal claim. In the circumstances, the plaintiff should only be liable for the costs of the NPA as if on exception, and not for any other costs. In this court each party is liable for its own costs.

[101] The following order is made:

1 The appeal against the dismissal of the claims against the first respondent for malicious prosecution and defamation is upheld with costs, including the costs of two counsel;

2 The appeal against the dismissal of the claim against the second respondent (the Minister) is upheld only to the extent that the appellant's detention from the time of the confirmation of his alibi on the video material on 19 September 2012, until his appearance in court the following day, is declared unlawful. Save as aforesaid, the appeal is dismissed. The Minister is liable for half of the appellant's costs on appeal, including the costs of two counsel;

3 The appeal against the dismissal of the claim against the third respondent (the NPA) is dismissed. Each party is to pay its own costs on appeal.

4 The order of the court a quo is set aside and replaced with the following order:

> '(a) The claims against the first defendant are upheld with costs, including the costs of two counsel;
>
> (b) The claim against the second defendant (the Minister) is upheld only to the extent that the plaintiff's detention from the time of the confirmation of his alibi on the video material on 19 September 2012, until his appearance in court the following day, is declared unlawful. Save as aforesaid, the claim is dismissed. The Minister is liable for the plaintiff's costs, including the costs of two counsel;
>
> (c) The claim against the third defendant (the NPA) is dismissed with costs, such costs to be limited to the costs incurred by the NPA as if on exception.'

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A CACHALIA

JUDGE OF APPEAL

Schippers and Nicholls JJA (Dessenting)

[102] The appellant, Mr Guiseppe Canelli, an Italian citizen, met the first respondent, Ms Jeannie Canelli, in 2000 when they worked overseas on a cruise liner. She was a waitress and the appellant, a senior waiter. Ms Canelli is his junior by 23 years. They were married in South Africa in 2004 and have a son, born on 20 February 2006. They left life at sea and in 2005 bought the farm, Driefontein, in Ceres in the Western Cape (the farm), where they lived together until 2012. Prior to the marriage, Ms Canelli was an extrovert, joyful, carefree, and happy. She changed drastically after her marriage to the appellant, due to his controlling behaviour and the verbal abuse, trauma and fear to which he subjected her. Her health deteriorated and in July 2012 she was diagnosed as suffering from Post-traumatic Stress Disorder (PTSD). Unsurprisingly, the marriage ended in divorce in July 2012 and Ms Canelli continued to live on the farm with their son. The appellant moved to a house in Ceres.

[103] On 17 September 2012 the farmhouse in which Ms Canelli lives was broken into and she was viciously attacked, tied up with 'brick force' wire and sexually assaulted. After the attack she could no longer live and work on the farm and moved to Ceres. In a statement to the police she identified the appellant as the perpetrator and he was arrested on charges of housebreaking and rape. Subsequently his alibi that he was at a hotel with his girlfriend on the night in question was confirmed, and the charges against him were withdrawn. He sued Ms Canelli for damages in the sum of R500 000 for malicious prosecution and defamation; and the second respondent, the Minister of Safety and Security (the Minister), for damages for unlawful arrest and detention. In his claim for damages against the third respondent, the National Prosecuting Authority (the NPA), he alleged that 'the prosecution officials acted wrongfully' in prosecuting him on false charges. In respect of the latter claims, the appellant sought an order that the respondents (including Ms Canelli) be held liable, jointly and severally, for payment of an amount of R3 565 000.

[104] The Western Cape Division of the High Court, Cape Town (the high court) dismissed the appellant's claims. The court (Baartman J) accepted that when Ms Canelli laid the charges, her belief that the appellant was her attacker was

reasonable; and held that he had failed to prove that she acted without reasonable and probable cause regarding the claim for malicious prosecution. The court concluded that the appellant had also failed to prove the requisite intent (*animus iniuriandi*), in relation to both malicious prosecution and defamation. The appellant's claims for unlawful arrest and detention, and 'wrongful prosecution' were also dismissed, essentially because the criminal case was initially postponed for seven days by agreement, and thereafter as a result of the appellant's bail application. The claim for 'wrongful prosecution' was dismissed, seemingly on the basis that the appellant's detention was at the behest of the court. The appeal is with the leave of the high court.

The facts

[105] Between the evening of 17 September 2012 and the early hours of 18 September 2012, Ms Canelli was savagely attacked and sexually assaulted in her home on the farm. She made a statement to the police at 16h45 on 18 September 2012 in which she described the attack (the A1 statement). The trial court admitted the A1 statement as evidence in terms of s 3(1)*(c)* of the Law of Evidence Amendment Act 45 of 1988 (the Evidence Amendment Act), because Ms Canelli was in no state to testify, despite an attempt to do so.

[106] In the A1 statement Ms Canelli described the break-in at her home, and the brutal attack on her person, as follows:

'On Monday 2012.09.17 at 18:30 my dogs were barking terribly and crying it is not normal. I was restless the whole time. My little son . . . fell asleep at approximately 20:00 in my bed. I had closed the door with the dogs inside.

I then took a drive to see if I can observe anything and whether the gate was closed. I encountered Dawid Malherbe and Poon Malherbe along the road. I told them that the dogs were barking. Dawid then said that he will be on the lookout to see if they observe anything. He said that they would close the gate.

I parked the bakkie and went inside again. I locked my front door. The back door was not locked but the door was stuck as the wood swells in winter. The door has a security gate in front of it and that was locked. The door has a sliding bolt on it.

I lit a fire and sat down on the couch in front of the fire. I took a shower later and then fell asleep in front of the TV. I woke up with the noise of something breaking. The television was still on. The fire was out so it must have been late already. I was not afraid because I thought

it was the wind that blew something down. I got up and went to the kitchen because that was where the noise came from.

I walked down the passage and the next moment my ex-husband, Guiseppe, knocked me against the kitchen table. He wore a jacket made of very smooth material. He had a small cap on his head. I screamed because I got a fright. I can't remember what he said to me.

He dragged me down the passage with my arms behind my back. He stomped on my buttocks on the floor in the passage. He stood on me. He was very aggressive. I did not fight back as he only becomes madder. He tore my T-shirt off my body. I had a sports vest on. The vest would not tear. He choked me when he was trying to get it off.

Parts of it I can't remember.

I was then on the couch in front of the fireplace. He said to me that I stole his life. He told me it was my fault that he could not see his child. People treat him like a criminal. It was his habit of hurting me with sex when he accuses me of things. His pants were half-way down to his knees. I did not have pants or underclothes on. I can't remember when he took it off. He then pushed his erect penis into my vagina. It hurt a lot because I was lying on the small couch. He was standing and lifted my legs and pulled it towards his lower body. He lifted me up so that my lower body rested on the arms of the couch.

I did not talk back at all. He had mad eyes. It appeared to me as if he was going to lose his mind. I fell off the couch. I saw my cell phone lying there. I tried to get hold of it, but my phone fell to the ground. He pushed me down there where the wood is stacked. He knocked my head against the cement slab. I was standing. He then bent me forwards on the cement slab so that my head rested on it. The slab was at the same time level as my hips, my hip bones hit against the slab. He held my head down on the slab. He then pushed his erect penis into my anus from behind. I tried to get hold of my phone but I could not.

It was very confusing. I fell over a chair. I fell on the ground onto wire that looks like netting. He then dragged me to the table in the dining room. I was lying with my back on the table, the lower part of my body was hanging down off the table. He choked me. He tried to have sex with me again. He wore denims and it hurt my legs. I pressed my legs together. I became panicky. Something fell off the table and broke and a chair fell over because the table moved. I was hoping that someone would hear. I fell off the table and sat on the ground. He tied my right foot to the right leg of the table. There was a bundle of wire on top of the table. He also tied my right hand with the wire. It was strange stiff wire which could not be bent. He struggled to tie it. He tied both my hands. My one hand was tied to the top of the table and the other hand tied on the side of the table. He stared into my face. I looked away. He then said that if I told anyone about what happened he would hurt my little sister. He then said my parents' wall has holes in it and he can see through them. He threatened me that he would hurt us if I told anyone.

He left me tied up like that to the table. He then left. He did not use a vehicle. He must have walked to my residence. He can't drive up to the residence. I waited a while until he was gone. I then called my little son. He switched on the light. He gave me the cell phone. I pressed the button with the hand that was on the table. I could not get my hands together. I gave the cell phone to [my son].
I telephoned Nicole Faul. [My son] climbed on the table to lift the wire up for me. He struggled a lot. He managed to free one of my hands and I could then free my other hand. My son covered me with a small blanket while he was struggling to loosen the wire. He took a long time to untie the wire. [My son] and I lay down on the bed once I was freed. I waited for my friend. My friend Nicole arrived at the farm at approximately 06h45.'

[107] Ms Nicole Faul, a social worker and Ms Canelli's friend, testified that she went to the farm immediately on receiving the call. She found Ms Canelli lying naked in bed, shocked, scared and shivering. Her left eye and lip were blue and swollen. She asked Ms Canelli if it was 'him', meaning the appellant. Ms Faul said that Ms Canelli could never say his name. Ms Canelli said 'yes'. She told Ms Faul not tell anybody about the attack as then 'it will go away'. As Ms Faul checked on Ms Canelli's son, she noticed that the house was in disarray. She picked up a torn shirt belonging to Ms Canelli, whose clothes were all over the place. Her jeans were on the floor. There was wire tied around the leg of the dining room table, the chairs had been knocked over and there was broken glass on the inside of the back door.

[108] Ms Faul managed to convince Ms Canelli to come home with her, where she had a bath and was given clean clothes. Ms Canelli insisted that no one should know what had happened to her. She refused to report the matter to the police, or see a doctor. At Ms Faul's insistence she reluctantly agreed to be examined by Dr Laubscher, the local district surgeon, after Ms Faul told him what had happened. The appellant accepted Ms Faul's evidence: she was not cross-examined at all.

[109] Dr Laubscher, a part-time district surgeon since 1987, saw Ms Canelli at 13h40 on 18 September 2012. When asked why the examination was not done at a provincial hospital, Dr Laubscher replied: 'The patient did not want to open a case'. As to her emotional state at the time of the examination, Dr Laubscher said:

‘She did not speak much. She was totally withdrawn, and very anxious, and very quiet. Was it easy or was it difficult to get out of her as to what happened to her? --- It was difficult. She did not want to speak.’

[110] Dr Laubscher concluded that Ms Canelli had been severely assaulted and having regard to the extent of her injuries, they were not self-inflicted. She had sustained multiple bruises and abrasions to her face and her whole body. Both her wrists were swollen and bruised. Her hands were badly compressed and numb. Dr Laubscher said that she suffered neuropraxis or partial nerve damage to both hands as a result of being tied up for a considerable period. He could not come to a firm conclusion concerning vaginal or anal penetration; it could not be proved neither disproved. However, Ms Canelli sustained bruising of the clitoris, para-urethral folds, labia minora, labia majora and buttocks, and abnormal redness around the anal ring.

[111] It is clear from Dr Laubscher’s evidence that Ms Canelli was adamant that she did not wish to report the assault to the police or speak about it. She felt that no evidence would be found because the perpetrator was meticulous. Dr Laubscher struggled to get the identity of perpetrator from her, in his words, ‘I had to extract it from her’. Ultimately, Dr Laubscher persuaded Ms Canelli to make a statement to the police, after he informed her that he was ethically bound to report a sexual assault to the police. According to his medical report, Ms Canelli indicated that the time of the attack was 22h00 on 17 September 2012. However, there is no evidence in the record to indicate that this is correct. Further, Dr Laubscher testified that given the severe assault and her emotional state, one could not rely on the time periods stated by Ms Canelli.

[112] It was not disputed that prior to the attack on 17 September 2012, Ms Canelli had been diagnosed as suffering from PTSD by Ms Tanya van der Spuy, a clinical psychologist. Ms Canelli had been referred to her for psychotherapy to assist her in coping with the impact of her divorce and the events that led up to it. She had consulted with Ms Canelli 11 times between 25 July 2012 and 1 October 2012. The diagnosis of PTSD was made in the second consultation in July 2012 and based solely on information gathered prior to the attack. Ms Van der Spuy said that Ms Canelli did not

at any stage inform her that the appellant was her attacker and had she been so informed, she would not have arrived at a different conclusion.

[113] Ms Van der Spuy testified that Ms Canelli presented as a traumatised person, and that she was clearly anxious during the very first session. She said:

'[T]here were visible signs of anxiety. For example, she talked very fast; she didn't complete her sentences; she would stutter and stammer. She was very restless in her sessions, so there was a lot of physical agitation. She was not able to sit still for long. She would often get up in the session or ask if she can go get water. She would sometimes leave, and tell me that she was feeling nauseous and she needed to go to the bathroom, which wasn't in my office. She trembled at times. Sometimes, when topics were difficult for her to talk about, she would go red in her face and she would ask to leave. She would end sessions early and she couldn't continue. That was apparent from early on in our sessions.'

[114] Ms Van der Spuy went on to say that this normally happened when Ms Canelli spoke about sensitive topics, trauma or abuse. She found it very difficult to discuss anything concerning the appellant or even mention his name. This, Ms Van der Spuy said, was part of PTSD: anxiety and emotional distress when speaking about memories, images and thoughts which the patient constantly tries to avoid. She ascribed Ms Canelli's condition to trauma, not wanting to confront fearful memories and the fear of being overwhelmed. Ms Canelli wanted it to appear to others that she was fine, but she was not coping. Ms Van der Spuy attributed Ms Canelli's condition solely to her relationship with the appellant.

[115] A consistent theme in Ms Van der Spuy's evidence, was Ms Canelli's inability to give a coherent or chronological narrative of events, in particular in relation to traumatic incidents. Ms Van der Spuy considered that this was dissociative amnesia, a criterion for PTSD. It is a defence mechanism for the body to cope with trauma. She recalled Ms Canelli resorting to this coping mechanism when referring to the safe (kluis) incident. As explained below, this was an incident during which Ms Canelli, her son and others were forced to seek refuge in a walk-in safe in the home of Mr Lodewyk Prins, a neighbouring farmer, as a result of the appellant's abusive conduct.

[116] The trauma and abuse inflicted upon Ms Canelli by the appellant, referred to by Ms Van der Spuy, was confirmed by Ms Lizette Pienaar, Ms Canelli's younger sister. She spent considerable time with them and said that the appellant's relationship with Ms Canelli had deteriorated drastically and quickly. Ms Pienaar painted a bleak picture of a marriage becoming increasingly emotionally abusive. The appellant's behaviour became erratic, he would be extremely angry one moment, in her words, 'with veins popping and screaming', and the next, behaved as if nothing had happened. Ms Canelli became nervous (which she had never been previously), started making excuses for his behaviour and did everything to try and keep the peace.

[117] Ms Pienaar also confirmed what Ms Canelli had related to Ms Van der Spuy concerning the appellant's emotional abuse regarding their son. As a baby he suffered from colic and cried a lot. The appellant often shouted at Ms Canelli to keep the child quiet and leave the room; as Ms Pienaar put it, 'he couldn't deal with the crying baby'. For this reason, Ms Canelli and the child often stayed for periods of time with Ms Pienaar and her family in Stellenbosch. Ms Pienaar, like other witnesses, flatly rejected the appellant's claim that he had done all the farming. She said:

'I do not agree with this at all, my sister did all the physical labour even with [the child] being born and having to take care of the baby, [who] had to go with her while she drove hours and hours a day to go deliver hay bales. She also did all the physical work on the farm regarding the harvest. [The child] as a toddler had an actual hole in his head where the hair was missing from just sitting in the driver's baby seat the whole day from very early in the morning until very late at night while he had to be with my sister, she taking care of the baby and doing all the work, doing all the deliveries by herself while he was lying in bed watching TV or lying on the couch, watching TV or gambling at Grand West.'

[118] Ms Pienaar said that as an extrovert, it was important for Ms Canelli to interact with neighbours and the farming community in the Ceres area. This upset the appellant and when members of the farming community visited them, he was anti-social and remained in bed watching television. When she turned 30, Ms Canelli wanted to host a party at the farm. The appellant was not in favour of this.

[119] As time went by Ms Pienaar observed that her sister became a shadow of her former self, she became more anxious, scared and worried. On one occasion Ms Pienaar was at the farm with the appellant, who was doing nothing. Ms Canelli was working late that night and the child was with her. She called Ms Pienaar 'very worried' and asked her to put a pizza in the oven for the appellant, before he became angry because there was no dinner. The appellant himself testified that Ms Canelli 'treated him like a king'.

[120] In 2008 Ms Pienaar found Ms Canelli lying alone on a cold bathroom floor on the farm. She had been lying there all night after suffering a miscarriage. The appellant, who had called her family to advise them of her condition, did not take her to hospital. Ms Pienaar said that Ms Canelli was extremely ill, 'very scared and very nervous', and had been working every day in that condition until she started bleeding in the car one day. She was afraid that the appellant 'was going to freak out'.

[121] Ms Pienaar said that Ms Canelli was stressed about her situation, and that she 'was working really hard at trying to keep everything peaceful but it was becoming impossible'. She was disappointed and ashamed of what her life had become and had too much pride to tell her parents that her life was a nightmare. Ms Pienaar herself (then 19 years old) was worried but felt that there was nothing that she could do, except to spend time with her sister and help take care of the child.

[122] Between December 2009 and January 2010, the appellant stalked Ms Canelli at her family's holiday house in Onrus on multiple days by driving past it numerous times, parking outside the house and staring through the windows; and standing in the street and staring at Ms Canelli. This, Ms Pienaar said, was 'very unnerving and very, very scary'. He also telephoned Ms Canelli repeatedly at the farmhouse at night (up to 40 times), which forced Ms Canelli to disconnect her landline. On another occasion, and in breach of a family violence interdict, the appellant walked directly to the table at a restaurant at which Ms. Pienaar, Ms Canelli and their son were having lunch and smilingly told them to stop accusing him of things. Ms Pienaar said that her sister was 'very scared and freaked out', and that the boy was 'very stressed out and scared as well'. They left the restaurant immediately.

[123] Ms Pienaar was informed of the attack on Ms Canelli by the latter's friend, who advised her that she and her parents should not sleep at home that night because the appellant had threatened to harm them. The A1 statement records that the appellant said that if Ms Canelli told anyone about what happened he would hurt her little sister; that her parents' wall 'had holes in it and he can see through them'; and that he would hurt her family if she told anyone. For this reason Ms Pienaar and her mother did not sleep at home that night (her father was out of town on business). The next morning she went to Ms Canelli in Ceres, whom she described as 'unrecognisable, extremely swollen, pitch black and blue all over'.

[124] Evidence of the appellant's abusive behaviour was also given by Mr Prins, a neighbour and farmer who has lived in Ceres all his life. He knew the Canellis since they started farming in Ceres in 2005. He said that Ms Canelli was very afraid of the appellant, who had no respect for her. Ms Canelli ran an oat hay farm. The hay was cut into bales and delivered to horse farms in Somerset West, Strand and Paarl. Mr Prins witnessed Ms Canelli doing all the work, including standing on a truck, loading bales and delivering them. This prompted Mr Prins' father to make his tractor and workers available to Ms Canelli so that she could load the bales on to the truck. Since they acquired the farm, Mr Prins said that he never saw the appellant farming or doing any work related to farming. Instead, he would usually get up at 11h00, dress-up and leave for town.

[125] Mr Prins recalled an incident on a Friday night at 20h30 when the appellant telephoned him, asking for help because Ms Canelli had taken ill. When Mr Prins and his wife went to the farm, the appellant insisted that Ms Canelli first pay the workers and transport them to an informal settlement some 12 km away, before she could go to hospital. Mr Prins effectively ignored him and took Ms Canelli to hospital immediately, whilst her son went with his wife to their farm. Mr Prins and his wife were also present in 2010 when the appellant stalked Ms Canelli at their holiday home in Onrus, some 180 km from Ceres. The appellant took photographs of Ms Canelli and three couples sitting on a deck, and screamed that he wanted to see her and the child. He left after Ms Canelli called the police.

[126] On another occasion, Mrs Prins fetched Ms Canelli who slept at their home that night. She had walked out on the appellant, who telephoned Mr Braun, a family friend, the next day to inform him of this. Mr Braun testified that the appellant was upset because his wife and son had left him which he said was due to the influence of her family and neighbours. The appellant spoke about guns in the house that belonged to his father-in-law and said that he did not know what he was going to do. Mr Braun, worried that somebody could get hurt, immediately called Ms Canelli and informed her that the appellant was 'in distress'. Ms Canelli hurriedly terminated the conversation when she realised that the appellant was driving towards the Prins farm. Out of caution that the appellant might be armed, Mr Prins, Ms Canelli, her son and others, took refuge in the walk-in safe. When he got to the house, the appellant banged on various doors and windows for 20 to 30 minutes, shouted that he knew that Ms Canelli was there, and demanded to see her. Ms Canelli contacted the police who arrested the appellant later that evening. This evidence by both Mr Braun and Mr Prins went unchallenged.

[127] On the morning after the attack Mr Prins accompanied Ms Faul to Ms Canelli's house. He said that her left eye was bruised and her lips were swollen. She was very afraid, her hands were shaking and she did not realise what was being said to her as she was in shock. The place, he said, looked like a crime scene. The door was broken and there were broken plates and glass lying around. The safety gate was broken and lying against a wall. Ms Canelli's trousers and shirt were lying on the floor. Chairs were lying around and there was brick force wire tied to a leg of the table. Captain Boer, the investigating officer, confirmed the observations of Mr Prins.

[128] The appellant however testified that Ms Canelli's version that she had been assaulted whilst lying on her back on a table, or tied up with wire, was 'nonsense'. After he had been released on bail, he encountered Captain Michael Luff, a detective stationed at Ceres, at a supermarket who allegedly told him that he was first at the crime scene where Ms Canelli 'alleged she was raped'. Captain Luff allegedly said that nobody had been on the table, it was full of dust. He even suggested that the housebreaking had been staged and supposedly said:

'I've been doing this job for 25 years . . . nobody can fool me, if you break the window from outside the glass has to be inside the house, not outside . . .'

[129] The appellant went on to say that Captain Luff repeatedly told him, 'do what you have to do . . . I have no more respect for these two', meaning Ms Canelli and Mr Prins. Captain Luff was called to give evidence on behalf of the Minister. He and Captain Kriel were the first police officers at the scene that morning. He denied the appellant's assertions. Captain Luff testified that it was clearly a crime scene and he immediately summoned members of the sexual and child protection unit to the scene. He concluded that the person who broke in must have known the house because the middle window close to a barrel lock (to open the door from the inside) had been broken. That person knew the precise location of the barrel lock and how entry to the house could be gained. The appellant did not persist with this story.

[130] The appellant denied that he banged on the doors and windows of Mr Prins' house demanding to see Ms Canelli. He said that he went there because he had seen Mr Prins and Ms Canelli having wine in the garden earlier that day and wanted to see his son. He had only 'knocked' on the doors and windows. Mr Prins' stepdaughter indicated that the child was sleeping and he left. As to farming, the appellant testified that he usually got up at 11h00 to work on the farm after working all night on machines, and that he delivered bales of oat hay to customers. He denied that he was emotionally and verbally abusive. He said that Ms Canelli shouted at him in front of his friends, threw a plate at him and was 'out of control'. Ms Canelli, he said, 'was the abusive party in the family', started 'bullying' him after they bought a second farm and is a 'violent person'.

[131] It is common ground that in 2011 the appellant unsuccessfully attempted to set aside the protection order. The magistrate made the following findings, the gist of which the appellant confirmed in his evidence in the high court:

'What further transpires, in the testimony of Mrs Canelli [is] that the applicant is obsessively jealous and follows her everywhere she goes. He follows her to church and waits for her at the vehicle, until the church services are finished. He then gets verbally abusive . . . He follows her to various . . . restaurants and also gets verbally abusive also in front of friends and relatives and strangers, afterwards he expresses love and affection for her by way of letters and emails and sms's, only to repeat [this conduct] the following . . . week.

. . . [H]e even followed her to her parent's holiday home in Onrus [where] she and her son and some friends try to relax on weekends. He took pictures of the house, the people and the vehicles parked in the driveway.
The applicant admits that he was there. He was parked in the public road. He testified that his presence there was purely coincidental.
I do not think so. From the evidence presented, even though it is single witness evidence, I am of the opinion that Mr Canelli did follow his wife. His presence at the beach house and all the other things plaintiff mentioned, is not purely by accident. It is a pattern that he follows and he stalks her. One does not bump into the same person by accident on so many occasions.
. . .
The conduct of the complainant/applicant falls squarely in the definition of the Act. His conduct is leading to unwanted stress [and] harm to such an extent that Mrs Canelli testified that her hair is starting to fall out and that she is unable to sleep properly. She lives in constant fear.'

[132] The appellant confirmed that in his application to set aside the protection order, Ms Canelli had testified that she could not cope with the way he intimidated her by screaming at her, which was a grave assault on her personality (although he did not physically assault her). He conceded that whilst the protection order was in place he had sent many unwanted sms's and letters to Ms Canelli in which he expressed his love for her, and that she had made it clear that she did not want his affection. The appellant also conceded that she tried to have a civil relationship with him for the sake of their son, which he misunderstood, rendering the protection order necessary; and that the magistrate was correct (in refusing to set aside the protection order). He further conceded that that he had travelled from Ceres to Onrus where he took pictures of Ms Canelli at her family's holiday home; that his actions had scared her; and that for this reason alone, the protection order had to remain in place.

[133] The appellant's defence to the criminal charges was an alibi. In sum, he testified as follows. He had an appointment to see the Judge President at the high court on 18 September 2012 to ask for a re-trial of his divorce. He spent the night at the Golden Valley Casino (the casino) in Worcester with his partner, Ms Rowena Titus, a young employee who worked there. He left his house in Ceres around 19h30 on 17 September 2012 and arrived in Worcester at 20h45. On his return to the casino he went to the bar where he watched a horserace and spoke to people until Ms Titus finished working at 22h00. They then checked-in at the hotel which forms part of the

casino, after which he took Ms Titus home to get clothes for the following day. On their return to the hotel he left Ms Titus in the room, went to gamble and returned alone around midnight. He did not leave the room until the following morning when they left for Cape Town. He met with the Judge President on 18 September 2012, after which they spent the day in Cape Town and returned to the appellant's house in Ceres later that evening.

[134] Ms Titus, who commenced a romantic relationship with the appellant in July 2012, testified that she met him after she had finished work at 21h00 on 17 September 2012. They fetched her clothes in Worcester but she did not know what time they got back to the hotel after doing so. The appellant then left her in the hotel room, said he was going to gamble and returned shortly after midnight. She could not say where he was during that time. They slept at the hotel that night. She fell asleep at 03h00 the next morning and got up at 06h00. They spent the day in Cape Town.

[135] It is common ground that the police went to the appellant's home on the night of 18 September 2012 and took him to Ceres police station. Ms Titus accompanied him. According to Captain Boer, he was arrested at home. The appellant claimed that he was arrested at the police station. Nothing however turns on this. At the station the appellant said that he had slept at the hotel and produced a receipt for his accommodation. He called his attorney, Mr John Sauls, who arrived later and informed the police that the arrest was unlawful given his client's alibi.

[136] On 19 September 2012 and in the presence of Mr Sauls, the appellant was informed of his constitutional rights. He was detained in the police cells and Ms Titus returned to his home. The appellant appeared in court on Thursday 20 September 2012. The case was postponed to 27 September 2012 for further investigation, without objection by Mr Sauls.[22] The appellant remained in custody.

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[22] Section 50(6)*(d)* of the Criminal Procedure Act 51 of 1977 provides:
'The lower court before which a person is brought in terms of this subsection, may postpone any bail proceedings or bail application to any date or court, for a period not exceeding seven days at a time, on the terms which the court may deem proper and which are not inconsistent with any provisions of this Act, if-

(i) The court is of the opinion that it has insufficient information or evidence at its disposal to reach a decision on the bail application;

(ii) . . .

[137] Captain Boer testified that in the afternoon of 18 September 2012, he was informed of the incident at the farmhouse by Captain Kriel, a female officer who had taken Ms Canelli's statement. They met at the scene of the crime with a police photographer and fingerprint expert. He interviewed Ms Canelli who told him what had happened, basically in accordance with the A1 statement. Captain Boer said that she could not state the time of the housebreaking, save to say that it was late when it happened.

[138] Captain Boer was clear that what he had witnessed was a very serious crime scene ('baie ernstige misdaadtoneel'). The security door on the outside of the back door had been ripped from its hinges. A middle window of the back door had been broken using a brick wrapped in a small blanket, found on the scene. There was broken glass well to the inside of the back door, which showed that the window had been smashed from the outside. The inside of the house was in disarray. A kitchen cupboard door was lying on the floor, a picture was hanging skew, a shoe was lying in the passage, a pair of jeans containing a belt was behind a couch and brick force wire was tied around two legs of the table. Captain Boer's observations of the scene were not disputed, save that it was suggested to him that the dogs and the child must have been alerted by the commotion.

[139] Captain Boer said that he arrested the appellant at home on the night of 18 September 2012. This was after he had observed the crime scene, and interviewed Ms Canelli who identified the appellant as her attacker and gave him a photograph of him. When he arrested the appellant, Captain Boer had already obtained the A1 statement and the medical report by Dr Laubscher.

[140] Captain Boer promptly investigated the case, including the appellant's alibi. On 19 September 2012 he obtained Ms Faul's statement as well as a statement from the appellant's son, then six years old, in the presence of a social worker. On the same day later in the afternoon Captain Boer and Constable Masiza viewed video footage

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(iii) . . .
(iv) . . .
(v) It appears to the court that it is necessary in the interests of justice to do so.'

at the casino, relating to the night of 17 September 2012 and the morning of 18 September 2012, between the hours of 22h00 and 7h30. Captain Boer testified that the person in the footage looked to him like the appellant. He also thought that it was Ms Titus in the footage of the morning of 18 September 2012.

[141] Mr Goshupelwang, the security manager of the casino testified on behalf of the appellant. He said that the footage of 17 September 2012 showed a person at 22h00 in a passage at the main entrance of the casino; at 22h23 at the reception desk at the hotel; at 23h17 in the same passage entering the casino; at 23h18 walking across the parking area between the hotel and the casino, towards the casino; and at 23h20 again at the reception desk of the hotel. In the footage of 18 September 2012 at 07h21, Mr Goshupelwang identified the same person and a woman in a passage of the hotel leading to and from the rooms, on the first floor.

[142] The evidence disclosed that the hotel comprises only two floors: a ground and first floor. There were no burglar bars at a certain section on the first floor and somebody occupying the appellant's room could jump through it on to the ground floor. The CCTV camera which would have recorded a person leaving through the window and getting down to the ground level, was not working at the time. The camera on the driveway entrance to the casino was of such quality that it would not pick up the face or facial features of a person entering or leaving the casino. Mr Goshupelwang conceded that the police had looked only at footage where it was possible to see the appellant, and that the footage did not show that the appellant had been on the premises of the hotel or the casino throughout the relevant surveillance times, ie between 22h00 on 17 September and 07h30 on 18 September 2012.

[143] On 26 September 2012 Ms Canelli and Mr Prins (whose statement was obtained on 20 September 2012) separately viewed the video footage. Captain Boer told them that he thought that the appellant appeared in the footage. They made affidavits in which they stated that the person in the footage was not the appellant, inter alia, because the person walked differently, had a different hairstyle, his build and facial features were different and he wore glasses permanently.

[144] On 27 September 2012 the appellant brought an application to be released on bail. He was represented by counsel. He was charged with offences contemplated in Schedule 6 to the Criminal Procedure Act 51 of 1977 (the CPA). He thus had to satisfy the court that there were exceptional circumstances which, in the interests of justice, permitted his release.[23] Captain Boer handed the affidavits of Ms Canelli and Mr Prins concerning the video footage of the casino to the prosecutor. He testified in the bail application that he and Constable Mazisa both thought that the person in the footage looked like the appellant. The bail hearing continued on 28 September and on 5 October 2012 the appellant was released on bail subject to certain conditions. He appeared on four more occasions before the charges against him were withdrawn on 5 June 2013.

The high court's findings

[145] The trial ran for 15 days in the high court. Its findings may be summarised as follows. The appellant testified with great emotion and had a tendency to exaggerate and dramatise, which impacted (adversely) on his credibility. He denied that Ms Canelli had to bear the brunt of the farming operation despite independent evidence to the contrary. He went to great lengths to tarnish her character and those of her family and neighbours. Captain Luff, whose evidence the court accepted, did not inform the appellant that the housebreaking at the farm had been staged.

[146] The observations by Ms Van der Spuy and Dr Panieri-Peter concerning Ms Canelli's anxiety and inability to articulate traumatic events involving the appellant were made prior to this case. These observations were reliable and were underscored by the evidence of Dr Laubscher and Ms Faul.

[147] The appellant relied on the magistrate's finding in his application to set aside the protection order, that he did not physically assault Ms Canelli. There was no reason

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[23] Section 60(11)*(a)* of the Criminal Procedure Act 51 of 1977 provides:
'Notwithstanding any provision of this Act, where an accused is charged with an offence referred to–
(a) in Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional circumstances exist which in the interests of justice permit his or her release.'

why the magistrate's finding that Ms Cannelli had made out a strong case of family violence as defined in the Domestic Violence Act 116 of 1998,[24] had to be rejected. The magistrate found that the appellant had mentally, psychologically, emotionally and verbally abused Ms Canelli that led to unwanted stress and harm to her; and that he expressed his love for her by sending her sms's. This abusive behaviour had a debilitating effect on Ms Canelli.

[148] It is against the background of the facts stated above that Ms Canelli's conduct in the witness box had to be viewed. In 2011 she was already so stressed and scared that she was losing sleep and hair. Prior to the attack on her in 2012, Ms Van der Spuy diagnosed her as suffering from PTSD. Dr Laubscher testified that hours after the attack Ms Canelli was anxious and did not speak much. The trial Judge noted that Ms Canelli appeared as if mentally challenged, like a frightened 16-year-old; that she was too anxious to testify; and that she was in no state to drive home. Her conduct in the witness box was not a 'charade', but a reaction to the traumatic experiences between her and the appellant.

[149] As stated earlier, the high court considered that it was in the interests of justice that the A1 statement be admitted as evidence in terms of s 3(1)*(c)* of the Evidence Amendment Act. The court's reasons were the particular circumstances of the case, more specifically, much of the content of the A1 statement had been corroborated by the police, the appellant had dealt with the statement, and the assault on Ms Canelli was not fabricated.

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[24] Domestic violence is defined as follows:
'**domestic violence'** means-
(a) physical abuse;
(b) sexual abuse;
(c) emotional, verbal and psychological abuse;
(d) economic abuse;
(e) intimidation;
(f) harassment;
(g) stalking;
(h) damage to property;
(i) entry into the complainant's residence without consent, where the parties do not share the same residence; or
(j) any other controlling or abusive behaviour towards a complainant,
where such conduct harms, or may cause imminent harm to, the safety, health or wellbeing of the complainant.'

[150] The court accepted that on a balance of probabilities, the appellant had proved that he was not the attacker. Both Ms Faul and Dr Laubscher confirmed that Ms Canelli did not want to lodge a criminal complaint. She ensured that her family was warned of the appellant's threat to harm them and they slept elsewhere. She was surprised by her attacker who wore a cap, it was night, the fire was out and the lighting apparently was poor. Ms Pienaar and Ms Faul believed that the appellant was the attacker because all her calamities were associated with him. Mr Prins was not convinced that it was the appellant in the video footage of the casino. In the circumstances, the court concluded that Ms Canelli's belief that the appellant was her attacker was reasonable. As already stated, he failed to prove absence of reasonable and probable cause and *animus iniuriandi*, and his claims were accordingly dismissed.

[151] The high court concluded that the appellant's arrest and detention was lawful. The crime scene depicted a housebreaking and a struggle. Captain Boer was in possession of the A1 statement which identified the appellant as the perpetrator of the crimes and there was just cause for his arrest. Captain Boer acted reasonably by investigating the appellant's alibi and after confirming that he had been at the casino on 17 September 2012, did not consider that the case was doomed to failure. Further, the appellant had been charged with offences envisaged in Schedule 6 of the CPA and Captain Boer considered that he had to appear in court to determine whether or not he should be released. On 20 September 2012 the case had been postponed for seven days without objection by the appellant's attorney. Thereafter the case was postponed so that the appellant could bring a bail application.

[152] The issues in this appeal, in our view, are whether the high court was correct in holding that the evidence did not establish: (a) that Ms Canelli had acted *animo iniuriandi* in relation to both the claims for damages for malicious prosecution and defamation; (b) that she acted without reasonable and probable cause when laying the criminal charges; and (c) that the appellant's arrest and detention was wrongful. We turn now to consider these issues.

Malicious prosecution

[153] For present purposes, only the requirements of fault (*animus iniuriandi*) and wrongfulness (the absence of reasonable and probable cause) are relevant in relation to the claim based on malicious prosecution. In *Relyant Trading v Shongwe*,[25] this Court restated these requirements as follows:

'*Malicious prosecution* consists in the wrongful and intentional assault on the dignity of a person comprehending also his or her good name and privacy. The requirements are that the arrest or prosecution be instigated without reasonable and probable cause and with "malice" or *animo iniuriarum*. Although the expression "malice" is used, it means, in the context of the *actio iniuriarum*, *animus iniuriandi.* In *Moaki v Reckitt & Colman (Africa) Ltd and Another* Wessels JA said:

> "Where relief is claimed by this actio the plaintiff must allege and prove that the defendant intended to injure (either *dolus directus* or *indirectus*). Save to the extent that it might afford evidence of the defendant's true intention or might possibly be taken into account in fixing the quantum of damages, the motive of the defendant is not of any legal relevance."

. . .

The requirement for malicious arrest and prosecution that the arrest and prosecution be instituted "in the absence of reasonable and probable cause" was explained in *Beckenstrater v Rottcher and Theunissen* as follows:

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

It follows that a defendant will not be liable if he or she held a genuine belief founded on reasonable grounds in the plaintiff's guilt. Where reasonable and probable cause for an arrest or prosecution exists the conduct of the defendant instigating it is not wrongful. The requirement of reasonable and probable cause is a sensible one: "For it is of importance to the community that persons who have reasonable and probable cause for a prosecution should not be deterred from setting the criminal law in motion against those whom they believe to have committed offences, even if in so doing they are actuated by indirect and improper motives".'

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[25] *Relyant Trading (Pty) Ltd v Shongwe* 2007 (1) All SA 375 (SCA) paras 5 and 14, footnotes omitted.

[154] Counsel for the appellant submitted that Ms Canelli had decided to falsely accuse him of housebreaking and sexual assault and acted thereon; and that she could have testified but elected not to do so, which warranted a negative inference against her since she was required to discharge an evidentiary burden relating to her state of mind at the relevant time. The objective evidence, so it was submitted, shows that 'she could not and did not have an honest and rational belief' that her attacker was the appellant.

[155] Two preliminary points are required to be made at the outset. The first is that the issue as to whether Ms Canelli had wilfully and falsely set the machinery of the law in motion against the appellant, had to be decided on the basis of circumstantial evidence. In *Ocean Accident and Guarantee Corporation Ltd v Koch*[26] Holmes JA approved the following dictum in *Govan v Skidmore*:[27]

'[I]n finding facts or making inferences in a civil case, it seems to me that one may, as Wigmore conveys in his work on *Evidence*, 3rd ed., para. 32, by balancing probabilities, select a conclusion which seems to be the more natural, or plausible, conclusion from amongst several conceivable ones, even though that conclusion be not the only reasonable one.'

Holmes JA went on to say that 'plausible' was used 'in the connotation which is conveyed by words such as acceptable, credible, suitable'.

[156] Recently, in *Kruger v National Director of Public Prosecutions*,[28] a majority of the Constitutional Court affirmed this approach, specifically in relation to malicious prosecution. Froneman J said:

'Lack of reasonable and probable cause and with intent to injure will almost invariably have to be proved by inference from other, secondary, facts. This will be done by assessing whether the facts presented in evidence lead to the probable conclusion that the prosecution took place without reasonable and probable cause and with intent to injure. The factual evidence that, taken together, proves the absence of reasonable and probable cause plus *animus injuriandi* will vary from case to case. It is impossible to state a general legal rule by which factual evidence is necessary as proof of these ultimate legal requirements.'

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[26] *Ocean Accident and Guarantee Corporation Ltd v Koch* 1963 (4) SA 147 (A) at 159D.
[27] *Govan v Skidmore1952* (1) SA 732 (N). See also *AA Onderlinge Assuransie-Assosiasie Bpk v De Beer* 1982 (2) SA 603 (A) at 614G.
[28] *Kruger v National Director of Public Prosecutions* [2019] ZACC 13; 2019 (6) BCLR 703 (CC) para 79.

[157] The second point – which the appellant ignores – is the presumption that a trial court's factual findings are correct in the absence of demonstrable error. To overcome this presumption, an appellant must convince the appellate court on adequate grounds that the trial court's factual findings were plainly wrong. If the appellate court is merely left in doubt as to the correctness of a factual finding, then it will uphold it. It is only in exceptional circumstances that an appellate court will interfere with the trial court's evaluation of oral evidence, in the light of the advantages enjoyed by the trial court of seeing, hearing and appraising the witnesses.[29]

[158] In this regard, the dictum by Lewison LJ in *Fage UK Ltd v Chobani UK*,[30] is instructive, and in our opinion applies with particular force to factual findings made by a judge after a long trial, as in the present case:

'Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them . . . The reasons for this approach are many. They include

i The expertise of the trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.

ii The trial is not a dress rehearsal. It is the first and last night of the show.

iii Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.

iv In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.

v The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).

vi Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done.'

[159] The high court's findings that the appellant had mentally, psychologically, emotionally and verbally abused Ms Canelli, which had a debilitating effect on her and

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[29] *R v Dhlumayo and Another* 1948 (2) SA 677 (A) at 705-706; *Sanlam Bpk v Biddulph* 2004 (5) SA 586 (SCA) para 5; *Roux v Hattingh* [2012] ZASCA 132; 2012 (6) SA 428 (SCA) para 12; *Bee v Road Accident Fund* 2018 (4) SA 366 (SCA) para 46.

[30] *Fage UK Ltd & Anor v Chobani UK Ltd & Anor* [2014] EWCA Civ 5 para 114; approved recently in *Perry v Raleys Solicitors* [2019] UKSC 5 para 52.

caused her to suffer unwanted stress and harm; and that part of this abuse was his sending of unwelcome sms's expressing his love for her, are unassailable in our view. On this score the appellant stands convicted out of his own mouth. He conceded that the protection order had to remain in place, because of his unwanted sms's and love letters and his stalking of Ms Canelli. The magistrate refused to set aside this order on account of his verbal and emotional abuse, stalking and the fact that she lived in constant fear. He also conceded that his stalking had frightened Ms Canelli.

[160] The finding that Ms Van der Spuy's observations were reliable concerning Ms Canelli's anxiety and her inability to articulate traumatic events involving the appellant, is likewise unassailable. In our opinion, nothing turns on the fact that Ms Canelli did not give this evidence, or that Ms Van der Spuy did not obtain 'collateral evidence' as was put to her in cross-examination, for the simple reason that there was ample independent evidence – in most instances unchallenged – of the appellant's cruelty, and the abuse, trauma and fear to which he subjected Ms Canelli. A few examples will suffice. The appellant left Ms Canelli alone on a cold bathroom floor all night after she had suffered a miscarriage. He refused to tolerate his own son's colic as a result of which Ms Canelli and the child often had to stay over at her family's home. He expected to her to work, despite being ill, from early in the morning until sometimes 22h00 at night. The appellant conceded that when he married Ms Canelli she was friendly and an extrovert, and that she had changed. This change was drastic and swift after her marriage, even before the birth of their son, from being happy to becoming very anxious and scared.

[161] Ms Faul said that Ms Canelli could not say the appellant's name, something that Ms Van der Spuy had also observed. Mr Prins said that Ms Canelli was 'very, very afraid' of the appellant. The appellant refused to take her to hospital one night when she clearly needed it and insisted that she first transport their workers to an informal settlement. Mr Prins ended up taking her to hospital, where she was admitted that night. Then there is the unchallenged evidence of Mr Braun concerning the appellant's threat after Ms Canelli had left him, that there were guns in the house on the farm and that he did not know what he was going to do. He went to the home of Mr Prins where, in breach of the protection order, he banged against the windows and doors for at least

20 minutes, demanding to see Ms Canelli. She was forced to take refuge in a walk-in safe.

[162] Ms Van der Spuy's conclusion that Ms Canelli presented as a person who had been exposed to severe trauma, and that there was no trauma that she experienced unconnected to her relationship with the appellant, was entirely justified. Her diagnosis of PTSD cannot be faulted, particularly because it was based solely on evidence gained prior to the attack on Ms Canelli, who had not even told her that the appellant was the attacker. The high court's finding on this aspect is obviously correct. Further, Ms Van der Spuy testified that having regard to the consistency of Ms Canelli's presentation (of the symptoms of PTSD) across time and over context, her psychological and physical symptoms were not feigned. This evidence was neither challenged nor contradicted.

[163] However, counsel for the appellant submitted that it was clear that the purpose of Ms Van der Spuy as a witness 'was not to give [an] expert opinion on any issue relevant to the case, but to manoeuvre hearsay evidence by First Defendant into the trial record, since she was not going to testify in the trial because of her "current emotional condition"'. This submission is both astounding and wrong. First, the so-called purpose of her evidence, or that it was irrelevant, was never put to Ms Van der Spuy in cross-examination. The Constitutional Court has said that the precise nature of an imputation against a witness must be made 'so that it may be met and destroyed', particularly where the imputation depends on inferences drawn from other evidence at the trial.[31] Second, the fact that Ms Canelli at the relevant times suffered from PTSD, solely as a result of her relationship with the appellant, was highly relevant to the issues in dispute. And third, the submission is at odds with the undisputed evidence of Ms Van der Spuy that Ms Canelli's symptoms were not feigned, and it suggests, regrettably, that the attempt to get her to testify (she was in the witness box) was a stratagem designed to deceive the trial court.

[31] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) para 63.

[164] It is beyond question that Ms Canelli suffered severe trauma at the time of the attack. The gross violation of her dignity, privacy, the sanctity of her home and her physical integrity must have been a terrifying experience, given her fragile emotional state. She sustained serious injuries: multiple bruises and abrasions of her face and her whole body; swelling and bruising of her wrists, and partial nerve damage of both hands; and extensive bruising of her private parts. It was a brutal and savage attack and she was left naked, alone and tied to a table with brick force wire for a considerable period of time, evidenced by the nerve damage to her hands. This is consistent with the evidence. Ms Canelli had to wait for her six-year-old son to wake up so that he could untie her. Ms Faul received the telephone call at approximately 06h30 on 18 September 2012, and said that she could hear Ms Canelli telling her son not to hurt her (as he was untying her). And the charge sheet stated that the crimes were committed between 17 and 18 September 2012, in the bail proceedings the State alleged between 20h00 and 06h15.

[165] Ms Van der Spuy's evidence as to the effect of the attack on Ms Canelli, given that she was suffering from PTSD, was similarly not challenged nor contradicted. She said:

'Well . . . it would be compounding the trauma and the damage that was already there. The psychological damage would be – trauma on top of trauma, and it would be worse . . . I would predict a worse picture.'

[166] In these circumstances, and quite apart from her reluctance to lay criminal charges, the appellant contends that Ms Canelli had decided to falsely and deliberately accuse him of housebreaking and sexual assault, and set the law in motion against him. The contention strains credulity. Worse, he testified that according to Captain Luff, Ms Canelli had not been assaulted or tied up with wire; and that the broken glass through which entry to the farmhouse had been gained was outside, not inside the house, suggesting that there had been no housebreaking or assault. All of this, as the appellant put it, was 'nonsense'. And this, when he and his legal representatives would have seen the affidavits of Ms Faul, Mr Prins, Captain Boer and the medical report by Dr Laubscher (filed in the crime docket) from which it was clear that Ms Canelli had been the victim of serious crimes. The alternative of course, is that the housebreaking

had been ‘staged’ and the serious injuries sustained by Ms Canelli, self-inflicted! This proposition needs merely to be stated to be rejected.

[167] The inference is inescapable that the appellant fabricated the Captain Luff story to bolster his theory – it is nothing more and unsustainable on the evidence – that Ms Canelli had falsely and intentionally instituted his prosecution on charges of housebreaking and rape. But this was not the only fabrication by the appellant. His version of the safe incident at the home of Mr Prins may safely be rejected as false. It is no coincidence that when the police arrested him at the farm that night on charges of domestic violence, they asked him whether there were guns in the safe and there and then telephoned Ms Canelli’s father, who confirmed that he owned those guns. The appellant’s evidence that Ms Canelli was ‘abusive’, ‘violent’ and had bullied him, is risible. Ms Canelli was afraid of the appellant and always tried to please him. She bore the brunt of the farming operations. Mr Braun said that whenever he went to the farm, Ms Canelli was the one working, preparing dinner, cleaning and doing everything. Little wonder then, that the high court found that the appellant was prone to exaggerate and dramatise, which negatively impacted his credibility. This finding also is incontestable.

[168] Ms Faul said that Ms Canelli was shocked, scared and shivering. Given her PTSD, this was ‘trauma on top of trauma’. When Ms Faul asked her what had happened, she did not say anything. From the outset, Ms Canelli did not wish to lay criminal charges. It was Ms Faul who asked her if it was ‘him’. She answered affirmatively but told Ms Faul not to ‘tell anybody anything, and it will go away’. She did not want to report the housebreaking and assault to the police. She kept on saying that if they kept quiet, ‘everything would go away’. She did not want to go to a doctor. It was only at Ms Faul’s insistence that she agreed to be examined by Dr Laubscher. Mr Prins said that Ms Canelli was very afraid, shaking and in shock. When she was spoken to, she did not realise what was being said.

[169] Likewise, Dr Laubscher testified that Ms Canelli was very anxious, quiet and totally withdrawn. It was difficult to establish from her what had happened. She did not want to speak. She did not want to make a case. It was only when Dr Laubscher

informed her that he was duty-bound to lay charges if she did not, that she made the A1 statement to the police. All of this evidence was unchallenged. And contrary to the appellant's assertion, there was objective independent evidence of Ms Canelli's state of mind at the material times.

[170] On the appellant's theory, the most plausible, credible or readily apparent inference to be drawn from these facts, is that Ms Canelli well knew that the appellant was not her attacker, but decided to falsely instigate a prosecution against him for the crimes. And it follows logically from this theory, that in her traumatised state after the brutal attack on her, Ms Canelli had the wherewithal to engineer a massive deception on the very people on whom she called for help. Her statements to Ms Faul that the attack should be kept quiet and it would go away, that she did not want to report the attack to the police and her reluctance to go to a doctor, were all part of the deception. So too, the warning to her family of the appellant's threat to harm them, and the so-called charade concerning her inability to give evidence.

[171] What is more, on this theory Ms Canelli had everybody fooled! Ms Faul said that she asked whether it was 'him' because Ms Canelli had often spoken about the appellant and the things he had done. Ms Faul believed her and concluded that the appellant was the attacker. Mr Prins observed that Ms Canelli was in shock and did not realise what was being asked or said. Dr Laubscher was adamant that Ms Canelli did not want to report the matter to the police. Ms Pienaar and her mother acted on the appellant's threat to harm them and went to sleep elsewhere. Ms Canelli certainly could never have predicted the reaction of these witnesses. On the proven facts the appellant's theory is simply unsustainable: it is fanciful and absurd.

[172] The submission that Ms Canelli's inability to give evidence was a 'charade' is yet another example of an attack on the trial court's findings in the absence of demonstrable error. The finding that Ms Canelli's inability to testify had to be viewed in the light of the appellant's mental, psychological, emotional and verbal abuse of her, and her anxiety and inability to articulate traumatic events involving him, cannot be faulted. The trial Judge concluded that Ms Canelli was unable to testify after she had

observed her in the witness box, and after assessing the evidence of Dr Panieri-Peter, including the factual evidence concerning Ms Canelli's inability to testify.

[173] The facts speak for themselves. Ms Canelli could not stay in counsel's office. She left a number of times. She vomited. On her way to court she stopped a number of times and said she was going to be sick. She would not go through the security entrance and felt boxed in. She wanted to flee from the courtroom, was shaking and got sick on the way out. The Judge said to Dr Panieri-Peter: 'I don't quite understand how you would have been able to explain to me what I saw today . . . She looked like a frightened 16-year-old'. The Judge observed that Ms Canelli appeared as somebody who was mentally challenged. She had to be given medication and an attorney had to drive her home. Dr Panieri-Peter said that it was an extremely traumatic experience for her to be in court and that what had been witnessed were the symptoms of PTSD.

[174] These events, which are symptomatic of PTSD, are entirely consistent with Ms Van der Spuy's evidence. When asked by the appellant's counsel whether there was any change in Ms Canelli's condition after the rape incident, she replied that the most significant change was that she was more anxious and her avoidance to deal with trauma or any topic related to the appellant had escalated. Given these facts, yet again unchallenged, the appellant's contention that Ms Canelli's inability to testify was a 'charade', is startling. There is no basis to interfere with the high court's finding on this aspect. It is plainly correct.

[175] What all of this shows, is that the facts on which the appellant relied at the trial, and on which he relies in support of his basic ground of appeal, namely that Ms Canelli falsely and intentionally identified him as the attacker, are matters which the trial Judge took into account in reaching her conclusion. The appellant has failed to demonstrate that the findings of fact by the trial court were plainly wrong. In our view the court's findings and reasoning regarding the appellant's failure to prove absence of *animus iniuriandi* are sound. His claim was rightly dismissed on this ground.

[176] The appellant's failure to prove that Ms Canelli did not have reasonable and probable cause to institute the prosecution may be dealt with briefly. The test for reasonable and probable cause contains both a subjective and objective element: a defendant must subjectively believe that the plaintiff probably committed the crime; and that belief must be objectively reasonable.[32] Whether there were reasonable grounds for the prosecution depends on the facts of the particular case.

[177] There is no evidence showing that when she made the A1 statement, Ms Canelli knew or should have known that the appellant could not have been her attacker. Thus, there is no factual basis for such a finding. Further, she could not, and did not, know of the appellant's alibi defence. So, it cannot be said that when she instigated the prosecution, she did not believe in the appellant's guilt and thus acted without reasonable and probable cause.

[178] There can be no question, in our opinion, that at the relevant time Ms Canelli held an honest belief that the appellant was her attacker. That much is clear from all the persons she spoke to immediately after the attack. Dr Laubscher said that she did not want to lay charges because the appellant was meticulous, would leave no traces of evidence and for these reasons, Ms Canelli thought it unnecessary to go through all the examinations concerning a sexual assault This explains why she had a bath contrary to Ms Faul's advice. As we have found, none of this was a deception on the part of Ms Canelli.

[179] Consistent with her belief that the appellant was the attacker, Ms Canelli made an affidavit that the person who appeared in the video footage was not the appellant. She filed a counterclaim for rape and assault. She hired a private investigator, a former policeman, to ensure that the police investigation was conducted properly. She instructed attorneys to put pressure on the NPA to properly investigate the criminal case as she was concerned that nothing was being done to rebut the appellant's alibi.

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[32] *Minister of Justice and Constitutional Development and Others v Moleko* [2008] ZASCA 43; [2008] 3 All SA 47 (SCA) para 8; J Neethling, J M Potgieter and P J Visser *Law of Personality* 2 ed (2005) at 176.

When no progress was being made, she asked that a female prosecutor be appointed to deal with the case.

[180] In this regard, it must be emphasised that these steps taken by Ms Canelli are consistent with reasonable and probable cause for a prosecution. Where it is shown that a defendant has knowledge of the plaintiff's allegation of a defence, the defendant may still reasonably decide that the plaintiff is probably guilty of the crime because she is convinced that the defence is not good, or even if she is uncertain of the defence.[33]

[181] Ms Canelli's belief that the appellant was the attacker was reasonable in the circumstances. According to the A1 statement, the attacker did not use a vehicle. He must have walked to the house and could not drive up to it. This fact was known to somebody familiar with the house. It is buttressed by the evidence of Captain Luff. The manner in which the house was broken into indicated that the attacker had knowledge of the house and knew exactly where the barrel lock was located on the back door, in order to gain access.

[182] Aside from this, the particular circumstances of this case cannot be over-emphasised. As the high court found, it was a horrendous attack. On the evidence, Ms Canelli was suffering from PTSD and unable to give a coherent or chronological narrative of events, specifically in relation to traumatic incidents. Thus, her utterance, 'Parts of it I can't remember' in the A1 statement, should come as no surprise. On the appellant's theory, this too, was a deception. The attack happened at night (or in the early hours of the morning), the fire was out and Ms Canelli was surprised by her attacker who wore a cap. Mr Prins was convinced that it was not Mr Canelli depicted on the video footage. Like Ms Canelli, both Ms Pienaar and Ms Faul associated the appellant with all or most of Ms Canelli's calamities, and she was not the only one who believed that the appellant was the attacker. Once again, it cannot be said that these findings by the high court are demonstrably wrong.

[33] *Van der Merwe v Strydom* 1967 (3) SA 460 (A) at 468F-G.

[183] In our view, a proper conspectus of the evidence does not lead to the plausible or probable conclusion that the prosecution was instigated without reasonable and probable cause. Having regard to the adverse credibility findings in respect of the appellant, more specifically, his denial of his abuse of Ms Canelli, and the Captain Luff story that the housebreaking had been staged and there was no sexual assault, this is not one of those rare cases where 'a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another'.[34] There is no reason to disturb the high court's finding that the appellant failed to prove wrongfulness.

[184] The appellant failed to prove wrongfulness or *animus iniuriandi* concerning his claim based on malicious prosecution. It follows that the high correct was correct in dismissing his claim for damages for defamation.

Wrongful arrest and detention

[185] The pleaded case against the Minister was that the police officers had no reasonable or probable cause to arrest and detain the appellant and that by doing so, they caused his further prosecution and detention. Before us it was argued that the arrest itself, the appellant's detention until his first court appearance, and thereafter his detention until his release on bail, were all unlawful.

[186] The appellant was arrested without a warrant. The jurisdictional requirements for an arrest without a warrant under s 40(1)*(b)* of the CPA are well settled:

'1) The arrestor must be a peace officer.
2) He must entertain a suspicion.
3) It must be a suspicion that the arrestee committed an offence referred to in Schedule1 to the Act (other than one particular offence).
4) That suspicion must rest on reasonable grounds.' [35]

Once these requirements are established the arresting officer has a discretion to arrest, which must be exercised rationally.[36] As Harms DP said in *Sekhoto*:[37]

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[34] *Stellenbosch Farmers' Winery Group and Another v Martell et Cie and Others* 2003 (1) SA 11 (SCA) para 5.
[35] *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) at 818G-H; *Minister of Safety and Security v Sekhoto* and Another [2010] ZASCA 141; 2011 (5) SA 367 (SCA).
[36] *Minister of Safety and Security v Magagula* [2017] ZASCA 103.
[37] *Sekhoto* fn 14 para 39 and the cases cited therein.

'A number of choices may be open to him, all of which may fall within the range of rationality. The standard is not perfection, or even the optimum, judged from the vantage of hindsight - so long as the discretion is exercised within this range, the standard is not breached.'

[187] In this regard, the appellant has again failed to show that the high court's factual findings were plainly wrong, or as Lord Reed put it in *Henderson v Foxworth Investments Ltd*,[38] 'the decision under appeal is one that no reasonable judge could have reached'. When the appellant was arrested, Captain Boer had reasonable grounds to suspect that he had committed offences referred to in Schedule 6 to the CPA. He had witnessed a crime scene which depicted a housebreaking, a struggle and the use of brick force wire. Ms Canelli identified the appellant as the perpetrator both in the interview with Captain Boer and the A1 statement. Captain Boer was in possession of Dr Laubscher's medical report confirming that Ms Canelli had been severely assaulted. The mere nature of the offences of which the appellant was suspected – which carried potential sentences of life imprisonment – justified his arrest to enable a court to exercise its discretion as to whether he should be detained or released pending his trial and if so, on what conditions.[39]

[188] In these circumstances, it cannot seriously be argued, as counsel for the appellant did, that the police should 'investigate exculpatory explanations offered by the suspect before they can form a reasonable suspicion for the purpose of executing a lawful arrest'. Unsurprisingly, no authority was cited for this submission. Captain Boer was not called upon to decide whether the appellant ought to be detained pending a trial.[40] Neither was he required to conduct a hearing before arresting the appellant.[41]

[189] There is also no merit in the appellant's argument that Captain Boer should not have arrested him, given his alibi and the different times at which the attack was alleged to have occurred. In the medical report it was stated as 22H00 on 17 September 2012, whereas in the A1 statement it was recorded as having taken

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[38] *Henderson v Foxworth Investments Ltd and Another* [2014] UKSC 41 para 62.
[39] *Sekhoto* fn 14 para 44.
[40] *Sekhoto* fn 14 para 44.
[41] *National Commissioner of Police and Another v Coetzee* [2012] ZASCA 161; 2013 (1) SACR 358 (SCA) para 14.

place between 18H00 on 17 September and 06H00 on 18 September 2012. For this argument the appellant relied on this Court's judgment in *De Klerk v Minister of Police*.[42] The reliance on *De Klerk* is misplaced. The latter case is distinguishable on the facts: there the arresting officer failed to establish the seriousness of the injury and wrongly assumed that a Schedule 1 offence had been committed. The arrestee who attacks the exercise of the discretion where the jurisdictional facts are present, bears the onus to prove that the discretion was not properly exercised.[43] The appellant failed to discharge this onus.

[190] As to the appellant's detention before his first appearance in court, it was submitted that he should have been released after Captain Boer and Constable Mazisa had viewed the video footage at the casino on 19 September 2012. According to the appellant, these officers came to see him at the police cells after they had viewed the footage and told him that 'he had nothing to worry about'. They allegedly saw the appellant shaking hands with the manager and playing blackjack, on the footage. The appellant then asked to be released, but Captain Boer allegedly refused because they were 'receiving pressure from the high people of Cape Town'. This was false. Captain Boer denied seeing the appellant in the cell on 20 September 2012 and his allegations are not borne out by the video footage tendered in evidence.

[191] Aside from this, it cannot be said that Captain Boer's actions after viewing the video footage were unreasonable. He testified that he had never seen the appellant prior to arresting him, and was in possession of evidence that pointed to the appellant as the perpetrator of serious offences. In the circumstances, it was not unreasonable for Captain Boer to have required further corroboration. He asked Ms Canelli and Mr Prins to view the footage. They deposed to affidavits on 27 September 2012 in which they stated that the person in the footage was not the appellant. In addition, the police were also awaiting telephone records and the results of forensic tests. Given these facts, Captain Boer could not be expected to decide where the truth lay. And if he was not required to conduct a hearing before arresting the appellant, then in our view, *a fortiori*, was there no duty on him in the particular circumstances to decide

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[42] *De Klerk v Minister of Police* [2018] ZASCA 45; [2018] 2 ALL SA 597 (SCA) para 11.
[43] *Sekhoto* fn 14 para 49.

whether the appellant's alibi was reasonably possibly true. That is the function of a trial court.

[192] For these reasons, the appellant's reliance on this Court's decision in *Minister of Police v Du Plessis*,[44] in support of the argument that after the video footage had been seen, his continued detention was unlawful, is misplaced. The facts in that case are wholly distinguishable.

[193] The high court's finding that the appellant's detention after his arrest was lawful, similarly cannot be faulted. It is clear from the evidence that the purpose of his arrest was to bring him before a court, for it to decide whether he should be detained pending his trial.[45] Section 59 of the CPA precluded his release on bail before his first court appearance. [46] He was lawfully remanded in custody at his first appearance where he was charged with offences contemplated in Schedule 6 to the CPA. He was then required to establish on a balance of probabilities that there were exceptional circumstances which, in the interests of justice, permitted his release on bail.

[194] At his first appearance the appellant was represented by his attorney, Mr Sauls, who was at the police station shortly after the arrest, and was aware of the appellant's alibi. Mr Sauls did not object to the postponement of the case for seven days, for the purpose of further investigation. The case was again postponed to 27 September 2012 at the request of the defence. The appellant was then represented by counsel who informed the magistrate that the purpose of the postponement was for the State to provide the appellant with information to enable him to bring a bail application. That application was brought on 27 September 2012 and continued until the appellant was released on bail on 5 October 2012.

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[44] *Minister of Police and Another v Du Plessis* [2013] ZASCA 119; 2014 (1) SACR 217 (SCA) where it was held that although the arrest was unlawful, the arrestee's continued detention was unlawful as a telephone could have corroborated his alibi.

[45] *Sekhoto* fn 14 para 44.

[46] Section 59(1)*(a)* of the CPA provides:

'An accused who is in custody in respect of any offence, other than an offence referred to in Part II or Part III of Schedule 2 may, before his or her first appearance in a lower court, be released on bail in respect of such offence by any police official of or above the rank of non-commissioned officer, in consultation with the police official charged with the investigation, if the accused deposits at the police station the sum of money determined by such police official.'

[195] On the facts, the question of liability on the part of the police for any court-sanctioned detention does not arise.[47] In any event, no such case was pleaded or established in evidence. It was not the appellant's case that Captain Boer committed a separate delict, or that he gave false evidence that led to a refusal of bail, or resulted in the appellant's court-sanctioned detention. On the contrary, in the bail application Captain Boer testified that he thought that the person in the relevant video footage was the appellant. And in his evidence Mr Sauls said that Captain Boer had testified openly and honestly in the bail proceedings, in which the prosecution had led his evidence objectively. It follows that the claim for unlawful detention prior to the appellant's first appearance in court and until his release on bail, must fail.

[196] What remains is the claim against the NPA. The appellant alleged that the prosecution 'acted wrongfully' in prosecuting him on false charges, by opposing his bail application and persisting with the prosecution without an honest belief founded on reasonable grounds. This claim is misconceived. It is clear from what is stated above that for a defendant to incur delictual liability for instituting a prosecution, the plaintiff must prove that the defendant acted intentionally (*animo iniuriandi*). In his claim against the NPA, the appellant did not plead that the prosecution acted intentionally; neither was this established in evidence. There are persuasive public policy considerations for the requirement of *animus iniuriandi*. To impose delictual liability on the prosecution every time a case is withdrawn for lack of evidence would result in considerable harm to the administration of justice.

Conclusion

[197] For the above reasons we would make the following order:
The appeal is dismissed with costs, including the costs of two counsel.

[47] See in this regard *Zealand v Minister of Justice and Constitutional Development and Another* [2008] ZACC 3, 2008 (4) SA 458 (CC); *De Klerk v Minister of Police* [2019] ZACC 32, 2020 (1) SACR 1 (CC); *Woji v Minister of Police* 2015 (1) SACR 409 (SCA); and *Mahlangu and Another v Minister of Police* [2020] ZASCA 44 (SCA); 2020 (2) SACR 136 (SCA).

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A SCHIPPERS

JUDGE OF APPEAL

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C H NICHOLLS

JUDGE OF APPEAL

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