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**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 89902/2015

**REPORTABLE: NO.
OF INTEREST TO OTHER JUDGES: NO
REVISED.
DATE: 12 MAY 2022**

In the matter between:

DAVID VHUYATSHA

Plaintiff

and

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Defendant

Summary: Malicious proceedings – despite setting the law in motion- lack of malice and *animus iniurandi*.

Malicious proceedings – reasonable and probable cause – doubt whether a young female learner, although over age of majority, with mental retardation could or did consent to sexual intercourse.

Malicious proceedings – no claim established despite acquittal of plaintiff in criminal trial.

COURT ORDER

The Plaintiff's claims is dismissed with costs.

J U D G M E N T

This matter has been heard in open court and is otherwise disposed of in terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

DAVIS, J

[1] Introduction

On the night of 17 October 2009 the plaintiff snuck into the homestead of a family in a village nearby to his own. There the plaintiff had sexual intercourse with an 18 year old girl. She was later described as a “mildly retarded” female learner attending a special needs school. The plaintiff was subsequently charged with rape and eventually found not guilty, primarily due to the unsatisfactory nature of the learner’s evidence. The plaintiff thereafter claimed that he was maliciously prosecuted and instituted this action for damages against the National Director of Public Prosecutions (NDPP). By agreement, the issues of liability and quantum were separated in terms of Rule 33(4) of the Rules of Court.

[2] Malicious prosecution

2.1 In order to succeed with a claim for malicious prosecution, a plaintiff must allege and prove:

- (a) that the defendant has set the law in motion by instigating or instituting the proceedings;
- (b) that the defendant had acted without reasonable and probable cause in setting the law in motion;
- (c) that the defendant had acted with malice or *animus iniuriandi*; and
- (d) that the prosecution had failed.

2.2 Of the above elements, (a) and (d) were not in dispute.

2.3 In respect of (c), “reasonable and probable cause” means “*an honest belief founded on reasonable grounds that the institution of the proceedings is justified*” see Harms, *Amler’s Precedents of Pleadings* Seventh Edition under the heading *Malicious Proceedings* and the cases quoted there.

[3] The plaintiff’s particulars of claim

After having pleaded that the plaintiff had been arrested on 26 October 2009 on a charge of rape, without a warrant, the plaintiff pleaded as follows in respect of the liability of the NDPP:

“6.

The prosecutor(s) prosecuting the matter, whose full and further particulars are unknown to the plaintiff, acting in the course and scope of his/their employment with the defendant, failed to comply with the requirements as set out in the national prosecution policy and wrongfully and maliciously set the law in motion by prosecuting the matter in circumstances where:

6.1 *The A1 statement was not made under oath;*

6.2 *The J88 made no reference to any signs of rape;*

6.3 *The complainant withdrew the case against the plaintiff on 25 July 2012, however the prosecutor persisted with prosecuting the plaintiff up to and including the 17 September 2013;*

6.4 *The plaintiff’s allegations of a relationship with the victim were never investigated;*

6.5 *No proper statement was obtained from the victim.*

7.

7.1 The aforesaid officials in the employ of the defendant prosecuted the matter against the plaintiff without reasonable or probable cause for doing so or having any reasonable belief that the plaintiff had committed rape and/or any other offence.

7.2 The aforesaid officials in the employ of the defendant failed the prosecute the matter against the plaintiff without fear, favour or prejudice”.

[4] The plaintiff's witnesses:

The plaintiff testified himself but before doing so (and for reasons better known to himself), led the evidence of the learner's younger brother (I shall refer to the learner as such and not as “the complainant” or “the victim” as was done in the particulars of claim and elsewhere in the papers. When regard is had to the learner's reduced mental capacity and how the incident had been reported, I find it inappropriate to refer to her as “the complainant”, but equally inappropriate to refer to her as “the victim” at this early stage of the judgment. To do so, would already imply that an offence had taken place, hence the more neutral appellation of “learner”).

[5] T[....] R[....]

5.1 Mr R[....] was 16 years old at the time of the incident. The learner is his elder sister. He testified that the learner had not been “coping” since primary school. At the time of the incident she was in a special school for disabled persons and she herself was a “slow learner”. When asked about her mental status, I recorded his answer as “she is not ok”. Later he said she could do handiwork and is “ok, just slow”. He knew the plaintiff from sight.

5.2 On the day in question, he witnessed the plaintiff “slip out” from their house at around 04h00. This was after he had heard footsteps and the sound of someone opening the front door. He looked through the curtains and saw the plaintiff leave the house and the yard. He did not know whether the plaintiff had any relationship with his sister.

5.3 The plaintiff's counsel asked Mr R[...] to comment on the conclusions reached by a Dr Nkuna. As will be seen later, Dr Nkuna had been asked, at the instance of the Deputy Director of Public Prosecution at Thohoyandou, to assess the learner. The relevant portion of Dr Nkuna's report reads as follows: "*Clinical observations/Mental Status Evaluation: [The learner] appeared confused with an expressionless face. She appeared oriented to all spheres. Her speech sounded relevant with illogical thoughts and shallow effect. The [learner's] memory seems intact. She lacked insight with immature judgment ... [she] failed grade 7 three times, grades 5 and 6 twice ... her thinking process and judgment were identified to be immature. Her intellectual functioning was rated below average range. Construction and motor functioning was perceived to be impaired. She might be experiencing dyslexia with mild mental retardation. [Her] emotional state appeared to be incongruent. She appeared indifferent. She could not differentiate between good and bad at some stage but being relevant sometimes. She could identify right and wrong aspects and sometimes became confused with the same aspect. The sexual assault seemed to be meaningless to her. She cannot take constructive decisions*".

5.4 Mr R[...] disagreed with the expert's views and contended that his sister can differentiate between good and bad although she "... *could be confused, anyone can be confused*". He maintained that his sister was "ok", just a slow learner.

5.5 In cross-examination Mr R[...] explained that although the homestead belonged to his father, his uncle also played a significant role in the family set-up and because the uncle did not like the plaintiff, he was not welcome there.

5.6 In cross-examination further, Mr R[...] was asked to comment on a statement from their school principal about the learner. Therein the principal identified Mr R[...]’s sister as having an impaired intellect. Mr R[...]’s comment was curious, to say the least. He opined that the school needs money and that the school might make such a statement because it is after money.

5.7 Mr R[...] was also presented with the statement of Mr Albert Maletete made to the police. It reads: "*On 2009/10/24 at about 14h00 I was at the victim's kraal. [The learner] together with my elder brother and her mother as a family was trying to*

resolve the issue of [the learner] as she is sexually abused by the suspect. Yes, I know her as a slow learner and half mental disturbed and she is attending school at [a] special school. My wife Kelibane was also present to allow the victim to explain freely. My wife asked her problem with [the plaintiff] who used to come during the night while the victim is asleep and have sexual intercourse with her without her consent". Mr R[...] noted that he was not present during these discussions.

5.8 Mr R[...] was also referred to statements made to the police by their mother, which accorded with that of their uncle. He declined to comment as he was not present when his sister reported the incident to their mother and either was he present at the police station.

5.9 Mr R[...] also made a statement to the police about his observations on the morning in question and his identifying of the plaintiff. He also identified his sister's signature appended to her A1, statement in the docket.

[6] The plaintiff

The plaintiff himself was the next witness. He testified through a Sesotho interpreter. His evidence and cross-examination was extensive. I shall start with his evidence in chief, wherein he covered topics such as his marital status, the learner's age, the incident and his prosecution.

6.1 The plaintiff was married at the time. He had two wives, one in Johannesburg and one in the neighboring village. He was 34 old at the time. He was working in Johannesburg and only occasionally visited the area where the learner lived.

6.2 The plaintiff met the learner on his way back from Johannesburg on 15 April 2008. His evidence was that the two of them had discussed love and that they had agreed that the plaintiff would "see" the learner on his next return trip from Johannesburg. The plaintiff volunteered that when they parted ways, in his mind "*this woman gave me love and I am in love with her*". The plaintiff was speaking very fast in this recital and needed no prompting from his counsel.

6.3 What the plaintiff was prompted on, was his knowledge of the learner's age at the time. He said he was told the learner was born in 1989. He was not good in maths but in his mind she was over 18. This was important to him because that was the age of consent in South Africa.

6.4 The plaintiff next saw the learner on the day in question, which everyone referred to as being 17 October 2009 and it appears that this was the date of the evening when the two met up. The plaintiff conceded that this was 1½ years since he had previously seen the learner and that they have not had contact in the interim.

6.5 According to the plaintiff, both he and the learner would have attended church that evening where they would have seen each other but when he telephonically contacted her, the learner agreed to have sex with him so they ended up at her home and not going to church. He simply knocked at the house's door while the others were at church, whereupon the learner opened and took him to her room. There they sat on the bed, talking because they "*had this romantic thing going*". They touched and kissed and one thing led to another and they had intercourse more than once. On the plaintiff's version, this was at the learner's insistence. She even asked whether the plaintiff had a condom and when he said he didn't, she just cautioned him not to "release" inside her. According to him she was a willing participant and he did not notice anything abnormal about her state of mind.

6.6 The plaintiff spent the night in the learner's room which she said was "ok" and the next morning, the 18th September 2009, before 05h00, the plaintiff left as he had chickens to look after.

6.7 The plaintiff alleges that he only saw the learner a week later but had no intercourse with her. Later the police came to his village and arrested him for the rape of the learner. This was on 25 October 2009 after which his first court appearance was on Monday 26 October 2009.

6.8 In chief examination, the plaintiff was referred to the fact that Albert Maletela had made a statement that the learner was mentally disturbed. The plaintiff disagreed with this.

6.9 The plaintiff was also referred to the fact that the learner had a “problem” with him. He disagreed with this and disagreed that she had any learning problems.

6.10 After his initial court appearance and some postponements, the plaintiff was released on bail in December 2009.

6.11 The plaintiff testified that his trial was only concluded on 17 September 2013 when he was found not guilty. He was referred to the transcript of those proceedings and maintained that there was nothing wrong with the learner, that she had been over the age of consent and that the intercourse was consensual.

6.12 The plaintiff was referred to a state advocate’s “instruction”, dated 23 April 2015, which read as follows: “1. *The accused/plaintiff in this matter was arrested, charged of RAPE and appeared at Tshilwavhusiku Magistrates Court on the 27th October 2009.* 2. *The victim knew the accused very well. Victim reported the Rape to her uncle, Albert Matelela (A6). Mr T[...] R[...] (A7) who is the victim’s brother stated he saw the accused leaving the victim’s house (scene). Victim is mentally retarded. The doctor who conducted examination on the victim concluded that “vaginal penetration may have taken place”.* 3. *Formal bail application was held and the accused submitted a written affidavit in support of his application wherein in paragraph 5.5 he admitted having had sexual intercourse with the victim on the same scene as alleged by the victim and “A7” but according to him sex was consensual. This is the position whereas the accused in his warning statement he remained silent.* 4. *In light of the above, there was a prima facie case for the accused to answer in court particularly when taking into account that the victim was 15 years old and legally incapable to give consent due to her mental status.* 5. *Clinical Psychologist’s report has also been secured in respect of the victim.* 6. *Her docket was received by our office for decision and was handled by Adv Madzhuta. On 22 March 2011 our office decided that the accused/plaintiff be charged in the Regional Court on a charge of Rape.* 7. *According to the Control Prosecutor: Tshilwavhusiku the case was finalised in the Waterfal Regional Court on the 17th September 2013 wherein the accused was found not guilty and discharged on the Rape charge.* 8. *Attached hereto please find the following documents for your perusal: (a) Report form the prosecutor (b) copy of the charge sheet (c) copies of the contents of the*

police docket (d) copy of Forensic Psychological Report". As can be seen, this was not actually an "instruction" but a report. The Plaintiff disagreed with the stated age of the learner or that she was unable to give consent. Although she had to repeat grade 12, she had been able to tell the plaintiff about her boyfriend and had knowledge of where in her menstrual cycle she was. She had also told him that this wasn't the first time she had fallen in love.

6.13 The plaintiff was also shown Dr Nkuna's report referred to earlier and denied that the learner was mentally retained, displayed immature responses or who had intellectual disabilities. According to him, the learner spoke to him as someone "equivalent" to him.

6.14 Not surprisingly, cross-examination of the plaintiff explored the fact that, when the learner's mother, her uncle, her school principal and a clinical psychologist all concluded that the learner was mentally impaired, how can the plaintiff justify his denial of this fact. He maintained that the learner was "100%".

6.15 He was forced, however, to concede that a prosecutor could not ignore the uncle's affidavit and the allegations contained therein and neither could a prosecutor ignore a mother's statement to police that her daughter had been raped.

6.16 The plaintiff was also criticized for having stated in his affidavit in support of his bail application that he had sexual intercourse with the learner before 17 October 2009 when it was not true. In the statement, the plaintiff had stated: "*I may also mention that it was not the first time for me to have sex with her at her home as I have been having a love affair with her ever since 15/4/2008 until the date on which I was arrested*". The plaintiff's evidence did not accord with this and he could not explain this discrepancy.

6.17 The plaintiff was also confronted with the contents of paragraph 9 of the abovementioned statement and whether his evidence in court that he had no intercourse with the learner prior to the night in question was because he was afraid that, to testify in accordance with his affidavit, might be at the risk that the learner was under 18. The plaintiff vehemently denied this. He stated that the learner had

told him she was over 18. However, the paragraph in the affidavit makes no mention of this and reads as follows: *"I have been informed by my attorneys that the complainant is said to be a 15 year old slow learner doing grade 7 ... I wish to place it on record that I was NOT aware of that, instead the complainant indicated to me on 15/04/2008 when I proposed to her, that she is repeating Grade 12 for the second time and furthermore that she was born in 1989. Her physical appearance was same to that of my wife Mpho who was born in 1990. Through my love relationship with the complainant she never appeared to me to be slow learner or a person with a mental problem. My suspicion is that the complainant was forced by her uncle Albert to lay a false charge against me as I am informed that her parents are NOT witnesses in this case"*.

6.18 A curious fact in this case was that the learner's mother at one stage sought to withdraw the charge against the plaintiff. When this was initially successful, the defendant had the charges reinstated as will be seen from the evidence of Adv Madzutha. The latter had been accused of having maliciously done this, but I will get to that accusation later. In respect of the attempted withdrawal, the contents of which was canvassed with the plaintiff, the learner's mother made a statement to the police /and the prosecutor) which included the following: *"I am the complainant in this case where my daughter ... was a victim. The matter was reported to the SAPS ... and I was attending the court proceedings until it was transferred to the Regional Court. The matter was before the public prosecutor and I have decided to withdraw the matter after I was satisfied with the explanation given by the public prosecutor in regard to this matter. Nobody influenced me to withdraw the matter. The suspect apologized to the family as to what had happened"*. The plaintiff denied the truth of this statement, denied having made any apology and denied any contact with the learner's mother.

6.19 The topic of the learner's age was revisited in re-examination. Adv Mtsweni referred the plaintiff to various documents in this regard, one of which was the learner's own statement which featured as A1 in the police docket. It read: *"I ... am 15 years of age. I am a scholar at ... disabled school. I am in Grade 7. I am residing at ... village ... I am the complainant in this case. On Saturday 2009-10-17 I was at my mother's kraal. I was at my room and my mother was at her room. I went*

to sleep and I didn't lock the door because my little brother Tshilidzi R[...] was not home yet and my door is the main door. At the same day at about 22:00 someone opened the door and I only woke up hearing that there is someone inside my blankets. When I looked I saw that it was [the plaintiff]. He then undress himself and forced to undress me. I was wearing a black trouser and t-shirt and my underwear. He undressed me and he came on top of me. And he forced my leg to open. I was refusing but he forced my leg open. After that he put his ..." (and then she describes intercourse). She described a second intercourse which appears to have happened shortly thereafter. This was on a Friday being on the day of a funeral and a church service. She stated that she was again by force and that it happened without permission. It is after this time that she reported it to her uncle, saying the plaintiff did something "bad" to her. She signed at the bottom of the page and a commissioner's certificate appears on the next page dated and timed at 13h50 on 25 October 2009. The plaintiff merely "noted" this affidavit.

6.20 The plaintiff was also referred to the transcript of the learner's evidence at the trial. It started like this:

"Witness: [the learner stated her name]

Court: How old is [the learner]?

Witness: I do not know.

Court: Was it not one of the reasons that she would testify through the CCTV that the matter was brought to Waterfal, you do not know of that?

Prosecutor: As the court pleases your worship. I was not aware of that fact your worship however I would make that application since everything is ready. Since the intermediary is available your worship I will make such an application, if my colleague had got no objection.

Defence: I will not have an objection your worship but when an application is made we need to know on what reasons is that application supposed to be made.

Court: Yes, and remember that is what I was about to say. This time it is not the prosecution that is making an application and I may be wrong. I thought one of the reasons why the matter was taken this way had to do with that. But I am not insisting. I could have misunderstood the arrangements.

Defence: That was not the arrangement.

Court: In that instance lets do away with it. She said who she is and she does not know her age...". The learner then testified without the aid of an intermediary. The plaintiff confirmed that this is what this is what had happened.

6.21 The learner's identity document was contained in the docket and was produced in the criminal trial. It was also shown to the plaintiff. The learner's date of birth is reflected therein as 8 March 1991.

6.22 The evidence of the plaintiff concluded the plaintiff's case.

[7] Adv Madzutha

Adv Madzutha was the sole witness for the defendant. The reason was that he was the Deputy Director of Public Prosecutions in Thohoyandou at the time and he was the actual decision-maker in respect of the decision to continue with the prosecution of the plaintiff. This is due to the fact that local control prosecutors send their dockets to him from time to time for decisions thereon. He testified as follows:

7.1 In this case, the docket that Adv Madzutha received on 26 October 2009 contained the following:

A1 – The learner's statement;

A2 – A so-called J88 (medical examination) report;

A3 – A request for medical examination;

A4 – A certificate by the examining doctor;

A5 – The plaintiff's warning statement where he declined to furnish a statement;

A6 – The statement by Mr Albert Maletela (the learner's uncle);

A7 – The Statement by Mr R[...] (the learner's younger brother);

A8 – The birth certificate of Mr R[...];

A9 – The birth certificate of the learner.

7.2 By the time that the docket next reached Adv Madzutha for consideration on 20 March 2010, the bail proceedings had been completed in December 2009 and the plaintiff's affidavit supporting his application for bail had been added to the docket. The docket also by then contained:

A13 – The School Principal's statement.

A14 – The learner's mother's statement.

7.3 Adv Madzutha had regard to all these statements and documents and noted that the affidavit in support of the bail application was at variance with all the other statements in that it alleged a love affair and consensual intercourse by a person whom the plaintiff considered, contrary to all other indications, to be normal.

7.4 Adv Madzutha then initiated a process to have the learner examination by a psychologist. This took some time as government resources were so scarce that he was initially told the process could take 2 – 3 years. After Adv Madzutha speeded up the process he obtained a report which was dated 2 November 2010.

7.5 Adv Madzutha noted the contents of the report, in particular those quoted in paragraph 5.3 above. In addition he noted the following contents: *“Personality Structure: [the learner’s] intellectual functioning is rated within the mild mental retardation range. Her personality structure is rated to be that of a mild retarded person who fails to make rational decisions”*.

7.6 Adv Madzutha had the habit of making notes in the docket when receiving a matter. He referred to those in court. They were rather extensive. He noted that he had regard to A1 and the manner in which the learner had described penetration to have taken place and that intercourse had continued to take place despite a lack of consent. He subsequently considered the J88 report and the conclusion reached by the examining doctor that penetration might have taken place. He considered the witness statements and the fact that, in the warning statement, the plaintiff had chosen to say nothing to refute the learner’s statement. He took note of the birth certificate and the fact that the learner was over 18 years old at the time of the incident but took note that multiple persons had indicated that the learner suffered from mental retardation, which was confirmed by medical evidence. Adv Madzutha testified that he was then satisfied that the elements of a rape had been established and that the learner was a person with compromised decision –making abilities and vulnerable to sexual abuses.

7.7 Having reached the above conclusion, Adv Madzutha instructed the relevant control prosecutor in writing on 22 March 2011 that the plaintiff must be prosecuted in the Regional Court on a charge of contravening the provisions of section 3 read with sections 1, 56(1), 57, 58, 59, 60 and 61 of Act 32 of 2007, also read with section 256 and 261 of the Criminal Procedure Act 51 of 1977 (RAPE) (Read with the provisions of sections 51 and Schedule 2 of the Criminal Law Amendment Act 105 of 1997 as amended).

7.8 When asked, Adv Madzutha confirmed that he specifically had regard to the learner’s age, hence he did not instruct prosecution of a charge of rape of an underage minor. He was more motivated by the learner’s mental retardation and her incapacity to make rational decisions.

7.9 At a later stage the docket was resubmitted to Adv Madzutha. The reason was that it by then contained as A16 a “withdrawal statement” by the learner’s mother (referred to in paragraph 6.18 above).

7.10 Via correspondence with the prosecutor, Adv. Madzutha arranged a consultation with him by the learner, her mother and the investigating officer. This took place on 20 November 2012. Again, Adv Madzutha kept notes. This aided his recollection of events. He first consulted with the mother alone who confirmed the contents of her statement. Then he consulted with the learner and excused the mother. The learner said she was unaware of an “arrangement” between the plaintiff and her mother. Having regard to Dr Nkuna’s report, Adv Madzutha proceeded cautiously so as not to put the learner through any secondary trauma and he assured her that she was “someone special”. He then excused the learner and again spoke to the mother. He told her that an apology can at best be a mitigating factor but does not negate guilt. In the light of the learner’s statement and the seriousness of the offence, the law must take its course. He said that the law caters for the protection of “those types of compromised persons”. He informed the mother that she was not, in fact the complainant, as her statement alleges, but even if the learner, as complainant were to give a withdrawal affidavit, the DDPP’s office represents the responsible interests of justice (as he put it) and had a duty to see that justice is done for victims. Withdrawals have to be considered holistically before acceded to. Finally, he told the mother that he did not see any reasonable grounds where the interests of justice would be served by not continuing with a rape charge merely because the plaintiff had made an apology for his actions. He then informed the mother that he will write a letter to the control prosecutor to reiterate the prosecution and he asked the mother whether she understood or had any questions. The mother said that she understood and was satisfied. Adv Madzutha thereupon informed the investigating officer accordingly and wrote a letter on 13 November 2012 ordering the reinstatement of the prosecution.

7.11 Adv Madzutha was asked about the allegation in the plaintiff’s particulars of claim that the learner’s A1 statement was not made on oath. He replied that she had signed at the bottom of the first page as well as the next page on which a commissioner of oaths, a police officer, had appended a commissioning certificate.

He was satisfied that the statement had been properly commissioned. He further stated that, should there have been any shortcomings to the commissioning, this could be addressed at the trial, as the learner would then still be required to give evidence (or proof of consent).

7.12 Adv Madzutha was then asked about the plaintiff's allegation that the prosecution was malicious as the J88 had not indicated any injuries. Adv Madzutha responded that the case law is replete with examples where accused had been convicted of rape in the absence of injuries. At best this could be a mitigating factor but an absence of injuries is no proof of an absence of penetration.

7.13 Adv Madzutha was asked whether his instruction to reinstate the prosecution after the withdrawal statement was malicious. He absolutely denied this. Even if, as is African custom, a perpetrator apologises for his actions, this, if done with true remorse, might be a mitigating factor, but it does not absolve the perpetrator from prosecution. To do so, would be wrong in law.

7.14 Adv Madzutha was asked about the accusation by the plaintiff that the existence of a relationship between him and the learner had not been investigated. Adv Madzutha countered that the only evidence of such a relationship featured in the plaintiff's affidavit when he sought to be released on bail. It was not even mentioned in his warning statement where he first had the opportunity to mention it and there was no other indication of such relationship in the docket.

7.15 Cross-examination of Adv Madzutha started out mild, confirming that he had 13 years of experience in the National Prosecuting Authority, that he was aware of the relevant provisions of the Constitution and that his office had to "act in the interests of the community".

7.16 Hereafter Adv Mtsweni who acted for the plaintiff, often forgot that to cross-examine, is not to examine crossly. He was antagonistic towards the witness, often and repeatedly attempting to badger him if the answer did not suit the plaintiff's case. Often limited portions or extracts from documents, rather than complete sentences, paragraphs or statements were put to the witness in an unfair manner. This resulted

in numerous interruptions and objections After long and intensive cross-examination, Adv Madzutha's evidence remained undented.

7.17 In particular, Adv Madzutha was accused of having made the case his "personal mission". Adv Madzutha denied this. He also explained the practice in the office of the NDPP that once a person had made a decision, he remained responsible to handle the docket and to follow up on decisions and instructions. It is a standard procedure and facilitates reporting on a matter. He treated this matter as he did all others that come across his desk.

7.18 Adv Madzutha was accused of having been "unhappy" with the withdrawal statement. His answer was that he was neither happy or unhappy. Before he formulated a decision, he called for and had regard to the remainder of the docket. The withdrawal statement was inconsistent with the rest of the docket and that is why he called for consultations to find out what had happened.

7.19 It was put to him that it was the prerogative of a complainant to withdraw a case. Adv Madzutha answered that this depends on the nature of a case. Not all withdrawals are accepted "as it is". The ultimate question is what would be in the interests of justice. He stressed that these interests are those dictated by justice, not the prosecution. He gave examples of cases of domestic violence, rapes and related matters where the input and reasoning of those withdrawing the charges needed to be obtained. In some such instances, even if there is a withdrawal statement, justice would dictate that the prosecution proceeds. It was also in this case relevant that the person seeking to have the case withdrawn, was not the learner herself.

7.20 Adv Madzutha was repeatedly accused of having been biased, which accusation he calmly but firmly denied. He answered that he never served any personal interests or preference. He did not take any decision to prejudice any person and treated the case purely on what he found in the docket. Thereafter it would have been up to court to make the necessary findings.

7.21 This concluded the evidence for the defendant.

[8] The criminal trial

Before dealing with the conclusions and findings of this court, it is necessary to say something about the criminal trial. The transcribed record of proceedings in the criminal trial formed part of the documents placed before the court by both parties. It indicates, as already indicated in paragraph 6.20 above, that the learner testified herself, without the benefit of an intermediary. This took place after Dr Nkuna had testified and when another prosecutor took over. The magistrate in a very truncated and ham-handed manner tried to ascertain whether the learner understood the oath and thereafter proceeded to hear her evidence under the guise of protecting her. The plaintiff was legally represented and in cross-examination the learner stated that the only problem she had with the plaintiff was because her family did not like him coming to their homestead but she actually had a relationship with him. This is after she had earlier testified that he had raped her. Hereafter the debate in court was whether a “retarded” person was the same as a “mentally disabled” person as contemplated in the definition in section 1(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, and whether a competent verdict could be made as contemplated in section 57(2) (as referred to in paragraph 7.7 above). The debate went as follows in respect of the plaintiff’s application for discharge at the end of the prosecution case as contemplated in section 174 of the Criminal Procedure Act 51 of 1977:

PROSECUTOR: Your worship I do concede with the submissions by the defence that indeed there isn’t any rape that was proved. Your worship the only issue which is at hand your worship, the Sexual Offences Act talks about mentally disabled person and in this instance we have got a mentally retarded person and your worship at this stage I am not in a position not can say whether there is a difference between the two or not ... I will leave it in the hands of the capable court to decide, your worships.

COURT: To do what ...?

PROSECUTOR: I do not have the powers to decide on that application itself.

COURT: You cannot raise issues like [that] ... with regards whether the words disabled mentally and/or mentally retarded are different in the context and leave it in the hands of the court to do what? You get my point?

PROSECUTOR: Hmmm

COURT: Yes?

PROSECUTOR: I do your worship.

COURT: Argue it yourself let me hear how you are going to?

PROSECUTOR: Your worship, I feel the Act is quite clear to say mentally disable.

COURT: So you concede in short?

PROSECUTOR: I do your worship.

COURT: I appreciate that.

JUDGMENT: Seeing that the prosecution on the one hand and the defence on the other agreed with regards the ruling and that I still have got other cases to attend to in the other court, the so-called Hlangani Court, I will not be long, I will simply ACQUIT THE ACCUSED PERSON on the strength of such agreement".

[9] Evaluation

9.1 I need not make a finding or determination on whether the outcome of the proceedings in the criminal trial were correct or not, i.e. whether the acquittal was correct or not. *Prima facie* however, the learner as a victim was not treated fairly. The enquiry as to whether she could appreciate or understand the oath or whether

she was competent to testify either on her own or through an intermediary was done perfunctorily and superficially. See: *DPP, Transvaal v Minister of Justice & Constitutional Development* 2009 (2) SACR 130 (CC). The same principles for making these type of enquiries as applicable to minors are also applicable to witnesses who are disabled persons. See *S v Macinezela* (550/2017) [2018] ZASCA 32 (26 March 2018). Similarly, as in *S v Nedzamba* 2013 (2) SACR 333 (SCA) at paragraph 26 “*no thought was given to the desirability or otherwise of receiving the complainant’s evidence through an intermediary, nor was any consideration given to any other means to protect the child witness in a case involving a sexual offence*”.

9.2 Further, the debate at the end of the prosecution case only referred to the “mental disability” issues expressly mentioned in section 1(3)(d) and 57(2) of the Criminal Law (Sexual Offence and Related Matters) Amendment Act, 32 of 2007. No consideration was given to whether the learner was, due to her mental retardation “*incapable in law of appreciating the nature of the sexual act*” as contemplated in section 1(3) of the same Act. The manner in which she ultimately testified corresponds exactly with Dr Nkuna’s diagnosis of her.

9.3 The plaintiff’s attempted exculpatory evidence that the learner is “100%” is so at odds with the totality of the remainder of the evidence that it should be (and should have been) rejected.

9.4 However, what could and what should have happened at the criminal trial is not the decision here, but it does impact on one of the elements which the plaintiff had to prove, which I shall discuss hereunder.

9.5 As already stated, to succeed with a claim for malicious prosecution, a claimant must allege and prove:

- (a) That the defendant has set the law in motion – this is not in dispute;
- (b) That the defendant had acted without reasonable and probable cause – from the contents of the docket as discussed above, it is clear that there was a clear statement of rape by the learner. The evidence contained in in

all witnesses' statements contained in the docket as referred to by Adv MAdzutha all corroborated this. Additional weight was added by the plaintiff's silence in his warning statement. Prior to the plaintiff's bail application, the possible defence of consent had not featured and there was reasonable and probable cause to prosecute him at that stage. Did the contents of the affidavit in support of the bail application result therein that the subsequent prosecution was unreasonable? I think not, if regard is had to the contents of Dr Nkuna's report. Clearly there was reason to conclude, based thereon, that the learner had not been able to consent to intercourse or that she was vulnerable to coercion (as contemplated in section 1(2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007). In fact Dr Nkuna concluded herself that "*[the learner] is vulnerable to all types of abuse. The perpetrator took advantage of her condition and abused her sexually It is a very serious offence to undermine the learner's rights, particularly because she is mentally retarded. The Mental Health Care Act, 17 of 2002 is clear regarding the need for protection of mental health care users*".

(c) The defendant had acted with malice – the absence of malice was clearly demonstrated by the evidence of Adv Madzutha. His detailed evidence about the equally detailed evaluation of the docket and its evidence clearly displaced any imputation of malice. He is to be commended in his pro-active approach to the matter in securing the expert evidence and also in not merely having adopted a supine attitude when a withdrawal affidavit surfaced. His evidence regarding how he handled that matter and the plaintiff's attempt to avoid further prosecution is also to be commended. I interject here to state that I find the plaintiff's feigned lack of knowledge of the attempt and the denial of his apology not credible. Adv Madzutha's evidence further elucidated the existence of reasonable and probable cause dealt with under (b) above.

(d) The prosecution has failed – this is the only other element which the plaintiff has satisfied albeit under the circumstances as set out in paragraphs 8, 9.1 and 9.2 above.

9.6 Having regard to the defendant's evidence, one must be mindful that reasonable and probable cause means an honest belief founded on reasonable grounds (facts or conclusion) that the institution or (as in this case from time to time) the continuation of legal proceedings was justified. In this sense it involves both a subjective element (the *bona fide* belief itself) and an objective element (in this case, the contents of the docket). In addition to what I have already stated above ad 9.5(b) and (c) and with reference to *Prinsloo v Newman* 1975 (1) SA 481 (A), I find that both these elements have been satisfied by the defendant.

9.7 I therefore find that the plaintiff has failed, on a balance of probabilities, to prove that he had been maliciously prosecuted. The grounds relied on in paragraph 6 of the particulars of claim have also been refuted. Despite the separation of issues referred to in the introduction of this judgment, the result is that the plaintiff's claim cannot succeed.

9.8 I further find no cogent reason why costs should not follow the event.

[10] Order

The plaintiff's claim is dismissed with costs.

N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 15 – 18, 23, 26 and 29 November 2021

Judgment delivered: 12 May 2022

APPEARANCES:

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