

SOUTH AFRICA / JUDGMENT

L.B.Z v National Director of Prosecutions (1195/2019) [2025] ZAMPMHC 23 (4 March 2025)

[2025] ZAMPMHC 23

COURT

Middelburg High Court, Mpumalanga

BEFORE

Langa

CASE / FILE NUMBER

1195/2019

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Note: Certain

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Policy

FLYNOTES:

CRIMINAL

– Rape – Female

accused –

Took

several minor girls to co-accused – Repeatedly raped –

Failed to act despite being informed of rapes –

Receipt of

money from co-accused indicated collusion – Decision to

prosecute based on prima facie evidence that plaintiff

unlawfully

and intentionally furthered commission of rapes – Prosecutor

had reasonable and probable cause – Request

for additional

statements demonstrated a genuine effort to assess evidence –

Malicious prosecution claim lacked merit

and dismissed.

IN

THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA

DIVISION (MIDDELBURG LOCAL SEAT)

CASE NO: 1195/2019

(1)
REPORTABLE: NO
(2)
OF INTEREST TO OTHER JUDGES: YES
(3)
REVISED
DATE
04/03/2025
SIGNATURE
In

the matter between: L[...]
B[...] Z[...]
PLAINTIFF
AND
NATIONAL
DIRECTOR OF PROSECUTIONS
DEFENDANT

JUDGMENT

Coram: Langa J:

Introduction and Facts

- [1] The Plaintiff in this matter, L[...] B[...] Z[...], instituted an action for malicious prosecution against the Defendant, the National Director of Public Prosecutions, resulting from the arrest and prosecution of the Plaintiff in respect of charges of rape. She was arrested on 13 December 2006 and appeared in the Carolina Magistrates Court the next day on 14 December 2006. The rapes involving minor children allegedly took place at the hoestead of one Johannes Malinga (Malinga) who is a traditional healer and the Plaintiff's co-accused in the criminal case. The matter was eventually transferred to the regional court for hearing. The Plaintiff was however acquitted on all 6 counts of rape preferred against her.
- [2] Before this trial could proceed, the parties agreed to proceed on the basis of a stated case as most facts were common cause. In terms thereof it is recorded that In the years 2005 to December 2006, 19 cases of rape of minor children were registered at Carolina SAPS. All the counts of rape were alleged to have taken place at the homestead of Malinga who lived on the farm Welgelegen.
- [3] The case dockets were opened after some of these minor children ranging from 6-14 years ran away from Malinga's homestead and reported the rape incidents. A social worker was involved in the matter after the rape had been reported. It is common cause that some of these children had been taken to the Malinga's homestead by the plaintiff and most were either without parents or were indigent, and Malinga was supposed to provide for them.

[4] It is common cause that on 14 December 2006 the public prosecutor charged the Plaintiff as accused 1 together with Malinga with rape. Although Malinga was charged with almost all the counts, the Plaintiff was charged with the following counts of rape:

Count 2: The rape of a 12-year-old minor child G[...] M[...] who was allegedly raped several times during 2006;

Count 4: The rape of an 8-year-old minor child N[...] M[...] also allegedly raped several times during 2006;

Count 5: The rape of a 10-year-old minor child M[...] P[...] M[...] also several times during 2006;

Count 9: The rape of a 12-year-old minor child P[...] Z[...] L[...] also allegedly several times during 2006.

Count 15: The rape of a 14-year-old minor child S[...] M[...] also raped several times during 2006;

Count 19: The rape of a 13-year-old minor child P[...] N[...] also several times during 2006.

[5] Malinga on the other hand was charged with 16 counts of rape and three counts of assault with intent to do grievous bodily harm. The case against the Plaintiff and Malinga was transferred from the district court to the Regional Court in Middleburg. It is common cause that the Prosecutor decided to proceed with the charges against the Plaintiff as accused number one (1) and Malinga as accused number two (2). The trial ran from 3 August 2007 to 26 March

2018. The Plaintiff was found not guilty and discharged on all the six counts. Malinga was found guilty of 11 counts of rape.

Plaintiff's contentions

[6] The essence of the Plaintiff's contention is that the prosecution had no evidence justifying the charges of rape against her and that as a female it was not possible for her to commit the offence of rape. She further contends that there was no evidence that justified the charges of rape against her either as an accomplice or accessory after the fact. The Plaintiff's case further seems to be based on the contention that she could not have been convicted as an accomplice ostensibly because at the time when she took the children to Malinga's place she did not know of the rape allegations against Malinga.

[7] The Plaintiff further contends that the prosecutor who took the decision to prosecute could not have had a genuine belief that the Plaintiff is guilty as she gave instructions that additional statements of witnesses be obtained. It is contended in this regard that by asking how accused 1 (Plaintiff) is involved in the matter the prosecutor did not have reasonable and probable cause to prosecute the Plaintiff and she knew that she was acting wrongfully and maliciously.

Defendant's contentions

- [8] The Defendant on the other hand contends that it had evidence in the form of statements implicating the Plaintiff. The Defendant however concedes that the Plaintiff could not have been convicted as a perpetrator of the offence of rape as she is a female person, but argues that there was sufficient evidence in the case dockets that she was as an accomplice and/or accessory after the fact. The Defendant further contends that the charge of an accomplice and/or accessory after the fact does not necessarily have to read as such and the charge would just be one of rape.
- [9] In addition the Defendant contends that despite the Plaintiff having been admittedly informed of the incidents of rape by the children, she did not remove the children from Malinga's house or report the rape in circumstances where she had a legal duty to report the rape incidents which were reported to her by the complainant and to take them away from Malinga.

Facts

- [10] As the saying goes the devil is in the detail. It is necessary to examine the actual evidence that the prosecution relied on in charging the Plaintiff of rape. The parties agreed that the contents of the case dockets are common cause for the determination of the action for malicious prosecution. The evidence of the various witnesses as contained in the case dockets is dealt with individually below. I will therefore deal with the individual counts in this respect.
- [11] In count 2 the complainant is G[...] G[...] M[...], a 14-year-old girl. In her statement dated the 6 December 2006 she explained that she was staying at Malinga's place when the latter raped her. In her follow up statement taken on 2 January 2008 she stated that she was taken to Malinga's place by the Plaintiff in January 2006 and she lived there until she was taken away by the social worker in November 2006. She stated that Malinga raped her three times once a month while she was living at his place. She further said Malinga refused to let her go when she wanted to go back to her father. She also stated that she informed the Plaintiff that Malinga was raping her and she wanted to leave to go to her father but Malinga refused to let her go. She said the Plaintiff did not answer her.
- [12] Count 4 involved the 8-year-old N[...] T[...] M[...] who in her statement dated the 7 December 2006 stated that the Plaintiff took M[...], N[...] and herself to Malinga's place. She explained how Malinga one day picked her up among the other girls and also raped her. She also stated that on one occasion she saw Malinga give the Plaintiff money. In another follow up statement taken on 02 January 2008 she stated that Malinga started to have sexual intercourse with her the day after her arrival at his place but could not remember how many times he raped her. She further stated in this statement that when the Plaintiff visited Malinga's place one of the days, she reported the rape to her and the Plaintiff promised to take her away once she got money.

- [13] The next complainant was the 17 year old N[...] P[...] Z[...] who in her statement alleged that she was taken to Malinga by her father for treatment. Malinga paid R2000 to her father and she stayed with Malinga as his wife. She said Malinga used to parade the girls naked and the girls would tell her that they had the sexual intercourse with the king.
- [14] In count 5 the complainant is M[...] P[...] M[...] who made her statement on 7 December 2006. She alleged in this statement that the Plaintiff took her and her sister G[...] M[...] to Malinga's place. She said Malinga told them that they would be his wives and the next day they went to his bedroom naked. Malinga raped her three times on different occasions and threatened to assault her when she refused to have sexual intercourse with him. In her follow up statement dated 02 January 2008 she said she reported to the Plaintiff that Malinga had raped her, but the Plaintiff did nothing about it. In her warning statement the Plaintiff did not deny that she was informed about the rape incidents.
- [15] In count 9 the complainant P[...] Z[...] L..., a 9-year-old girl who is also the Plaintiff's child, stated in her statement dated 7 December 2006 that in 2004/2005 the Plaintiff took her to Malinga's place where she found other girls. She also stated that the girls would go to Malinga's room every night to say good night and Malinga would choose one girl to spend the night with him. On one occasion Malinga chose her and raped her. She stated in her statement that she did not tell anyone about the rapes, including her parents. However, in another statement dated the 20 December 2007 she stated that in November 2005, she ran away from Malinga, but the Plaintiff took her back there. She later saw Malinga giving the Plaintiff money but she could not count how much money.
- [16] Count 15 involved a 14-year old girl S[...] M[...] who made a statement dated 7 December 2006 in which she also stated that the Plaintiff took her to Malinga's place in February 2006. This was after the Plaintiff asked permission from her step mother who agreed. She also confirmed that she found many children there inter alia M..., V..., Z[...] and N[...] who were known to her. Like the other girls, she also alleged that the girls would go to Malinga's bedroom naked every night to say good night and Malinga would choose one of the girls to spend the night with. One night she was chosen by Malinga who then raped her. In her follow up statement dated 22 December 2007 she stated that Malinga in all raped her six times. She said he assaulted V[...] and Z[...] for running away. She confirmed the evidence of the other girls that she also saw Malinga giving the Plaintiff money but could not say how much he gave her. In her warning statement on this count the Plaintiff confirmed that she took S[...] to Malinga's house so that she could assist her children with washing their clothes because she was older.
- [17] Count 19 involved a 13year old P[...] N[...] who stated in her statement dated 20 December 2006 that Malinga who is her grandfather came to her home in December 2005 and asked her to come and stay with her. She stated that she went to stay with him at his homestead where he raped her almost every day.

- [18] In addition to the above mentioned complaints, one further girl namely G[...] P[...] M[...], a 14 year old girl, submitted a statement in which she stated that she and Z[...] went to visit Welgelegen farm where they found other girls residing there with a man they called King whose name is Malinga. She was told by the other girls to take off her clothes and they went to King to say good night. On this night he chose N[...] to sleep with him and she remained there with him for three days. After three days they went back to his room and this time he chose her to sleep there. She tried to resist and run away but was Malinga slapped her and forced her to join him on the bed where he sexually penetrated her. This witness alleges that Malinga raped her several times and that one day she saw the Plaintiff receive R200 00 from Malinga.
- [19] When she was charged the Plaintiff made the so-called warning statement in which she stated that in 2005 the complainant, N[...] G[...] M[...] and her sister, G[...] G[...] M[...] would frequently ask her to give them money and she would give them money whenever she had. She then decided to take them to Malinga to stay there permanently. She admitted that the complainant N[...] told her that Malinga raped her when she was with N[...]. She conceded that some of the girls told her that they could not stand it and were planning to run away from Malinga's place. She told them that they must not run away as they were orphans.

Common Cause Facts

- [20] It is common cause as agreed on by the parties that the Plaintiff was arrested on 13 December 2006 by the police on charges of rape and subsequently appeared before the Carolina Magistrate's Court on 14 December 2006. It is further not in dispute that the Public Prosecutor stationed at Carolina decided to prosecute the Plaintiff on six counts of rape, thereby setting the law in motion against the Plaintiff. It is also common cause that the prosecution of Plaintiff failed as she was acquitted in respect of all six counts of rape.

The issues and questions of law

- [21] Based on the stated case the issues to be determined are whether the prosecutor, in deciding to prosecute the Plaintiff, had a reasonable and probable cause and an honest belief founded on reasonable grounds that the institution of the proceedings was justified. Secondly whether the prosecutor acted with malice (or *in juriandi*).
- [22] The issues for determination in turn involve the determination whether the State had sufficient evidence against the Plaintiff that she had committed the offence of rape. A further determination is whether the Plaintiff, as a female person, could be charged and convicted of the offence of rape as at December 2006. Lastly, whether she could be convicted as an accomplice or as an accessory to the offences of rape.

[23] From the facts and based on the contentions by the parties, the issues for determination are criss. Firstly, it is whether the prosecutor who set the law in motion and continued with the prosecution had reasonable and probable cause and an honest belief founded on reasonable grounds that the institution of the proceedings was justified. Secondly, it must be determined whether the prosecutor who took the decision to prosecute the Plaintiff acted with malice or animus injuriandi.

[24] Concomitant to these issues are the following legal questions:

24.1. Whether there was sufficient evidence in the case dockets against the Plaintiff that she had reasonably committed the offence of rape.

24.2. Whether the Plaintiff, as a female person, could be charged with the offence of rape (in December 2006.)

24.3. Whether the Plaintiff could have been convicted as an accomplice to the offences of rape committed against the six complainants.

24.4. Whether the Plaintiff could have been convicted as an accessory after the fact to the offences of rape committed against the six complainants

[25] The issues for determination in turn involve the determination whether the State had sufficient evidence against the Plaintiff that she had committed the offence of rape. A further determination is whether the Plaintiff, as a female person, could be charged and convicted of the offence of rape as at December 2006. Lastly, whether she could be convicted as an accomplice or as an accessory to the offences of rape.

[26] The Defendant contends further that there is evidence that the Plaintiff was informed of the incidents of rape by the complainants, but she still did not remove the children from Malinga's house. The Defendant argues that although the Plaintiff admitted in her warning statement that some of the complainants reported the rape incidents to her, she did nothing about it where she had a legal duty to report the rape incidents that were reported to her by the complainants and to take them away from Malinga.

Quantum of damages

[27] Regarding quantum, the parties are in agreement that despite their agreement in the pretrial minute that the issues of liability and quantum should not be separated, they now realise that it would not be convenient for the parties and the court to deal with quantum of damages before the court has pronounced in the issue of liability mainly because the Plaintiff claims the amount of R250 000 in respect of each of the six counts of rape. The parties submit therefore that the court should allow separation of issues in terms of rule 33(4). The Plaintiff further abandons the head of damages for payment of legal representatives

Discussion The Applicable Legal Principles

[28] In the light of the agreement by the parties regarding the separation of the issues and for expediency sake I make an order that the merits and quantum be separated in terms of Rule 33(1) and proceed therefore to deal with the merits.

Whether the prosecutor had reasonable and probable cause and an honest belief founded on reasonable grounds to prosecute the Plaintiff.

[29] In the light of the Plaintiff's allegations it is clear that the main issue to be determined is whether the prosecutor had reasonable and probable cause and honest belief founded on reasonable grounds to prosecute the Plaintiff. Concomitant to this is the question whether the prosecutor acted with malice or animus injuriandi when taking the decision to prosecute her. In essence these issues involve the determination whether the prosecutor had sufficient evidence against the Plaintiff that she had committed the offence of rape and whether the Plaintiff, as a female person, could be liable as an accomplice or as an accessory for the offence of rape as at December 2006.

[30] The best place to start in dealing with these issues is the legal principles around the criminal participation. The question is whether the Plaintiff could have participated in the commission of the alleged crimes. Whether this question is answered in the affirmative or negative it will assist in determining whether or not the prosecutor had reasonable and probable cause and an honest belief to prosecute the Plaintiff.

[31] According to Criminal Law (CR Steyn, 7th ed), the different persons who may be involved in the commission of a crime are divided into three categories, namely perpetrators (and co-perpetrators), accomplices and accessories after the fact. The perpetrators, co-perpetrators and accomplices are in fact

participants as they all participate in the commission of the crime. They either commit it themselves or promote its commission. An accessory after the fact on the other hand is not a participant for he or she in no way participates in or promotes the commission of the crime but only assist the doer to escape after the commission of the crime.

[32] In simplified terms a perpetrator or even co-perpetrator is a person whose conduct satisfies all the requirements for liability contained in the definition of the crime, including where he acted together with one or more persons in common purpose. An accomplice on the other hand is a person who unlawfully and intentionally furthers, facilitates or makes possible the commission of a crime committed by somebody else (the perpetrator or co-perpetrator).

[33] According to Steyn at page 249 'An accomplice is therefore somebody who does not satisfy all the requirements for liability as contained in the definition of the crime or who does not qualify for liability in terms of the principles relating to common purpose, but who nevertheless unlawfully and intentionally furthers its commission by somebody else. Although his or her conduct does not

comply in every respect with the definition of the crime, such a person is still punishable as an accomplice'. (My emphasis).

[34] Consequently, a person who consciously associates himself/herself with the commission of the crime by assisting the perpetrator or co-perpetrators or by giving them advice or supplying them with information or by offering them the opportunity or means to commit the crime or to facilitate its commission, is an accomplice. While an accomplice promotes, facilitates and furthers the commission of the crime before it is completed, the accessory after the fact, on the other hand, is somebody who, after the commission of the crime, unlawfully and intentionally helps the perpetrator or accomplice to escape liability. The accessory after the fact therefore gets

involved only after the crime has already been completed and is therefore not a participant in its commission.(my underlining).

[35] Although certain crimes can only be committed by certain persons such as for example males in respect of sexual penetration, however, persons who are not males can still be liable where they have furthered or facilitated the commission of the crime by a male persons. For example, while a crime of rape (sexual penetration) could only be committed by a males (until the law was amended), a person who had not sexually penetrated the victim could still be guilty as an accomplice where they had, by means of another act, promoted or facilitated the commission of this crime.

[36] Section 257 of the Criminal Procedure Act 51 of 1977, as amended by section 33 of act 105 of 1997, specifically deals with accessory after the fact and provides that if the evidence in criminal proceedings does not prove the commission of the offence charged but proves that the accused is guilty as an accessory after to that offence or any other offence of which he may be convicted on the offence charged, the accused may be found guilty as an accessory after the fact in respect of that offence or, as the case may be, such other offence, and shall, in the absence of any punishment expressly provided by law, be liable to punishment at the discretion of the court; provided that such punishment shall not exceed the punishment which may be imposed in respect of the offence with reference to which the accused is convicted as an accessory.

[37] When one applies these principles to the present case it is clear based on the evidence that the Plaintiff could not be convicted of rape as in the sexual penetration of the complainants in the matters she was charged with. The evidence the prosecutor had therefore did not justify the charge of rape as a perpetrator or co-perpetrator. That however does not mean that she was innocent as she did not satisfy all the requirements for liability as contained in the definition of rape. Although her conduct does not comply in every

respect with the definition of the crime, she may still be guilty of having unlawfully and intentionally facilitated and furthered the commission of the rape by her co-accused. In other words, she may still be complicit in the commission of the crimes by her co-accused Malinga who was convicted of the rapes. However, rape as a perpetrator is in my view out of the equation as far as the Plaintiff is concerned.

[38] This brings me to the next question which is whether she could have been charged and convicted as an accomplice or accessory after the fact. I will deal with the accessory after the fact first. There is uncontroverted evidence that some of the children raped by Malinga who were delivered by the Plaintiff to Malinga reported to the Plaintiff that they had been raped by Malinga. Despite this evidence the Plaintiff did not assist or attempt to assist the complainants when they reported the rapes to her. Instead, she discouraged some of them from escaping from Malinga's homestead. The State contends that she did not assist them when she had a legal duty to do so. The legal duty to report the rape and the participation in the rapes are distinct concepts. In the criminal case the Plaintiff was charged with rape and the question is whether there was sufficient evidence based on which the prosecutor could charge her with rape.

[39] As an accessory after the fact there appears to be inadequate evidence that she assisted Malinga the perpetrator to evade liability. While her failure to report the rapes to the police, authorities or parents is morally reprehensible, it is in my view not sufficient to ground a conviction as an accessory after the fact. There is no suggestion that she unlawfully and intentionally helped Malinga to escape liability. This however does not justify a conclusion that the State did not have reasonable grounds to believe that she could have participated as an accomplice.

[40] With that I turn to the question of the Plaintiff's alleged participation as an accomplice. In *R v Jackelson* 1920 AD at 486 the court defined the classical test for the conviction of an accomplice as follows:

"All persons who knowingly aid and assist in the commission of a crime are

punishable just as if they had committed it."

In *S v Gaseb and Others* 2001 (1) SACR 438 (Nms) O'Linn AJA considered the conduct of an accomplice in the case of a rape matter and stated the following:

"It seems logical and in accordance with common sense and fairness, that once

the evidence proves these elements of the crime in regard to a perpetrator and the accomplice or accomplices if any,

then the crime of rape has been proved in regard to that

perpetrator and the accomplice or accomplices if any.

Any repetition, thereafter, fulfilling the same requirements, constitutes

further crimes of rape.”

- [41] With these dicta in mind, when considering the accepted statements of the complainants, it is clear that they allege that the Plaintiff took them to Malinga’s house and this is not seriously denied by the Plaintiff if at all. In fact, she has admitted that she took some of the children to Malinga’s place. It is further not seriously denied that Malinga sexually penetrated these children. It is in fact common cause that he was convicted and sentenced for the rapes of most of the girls including those who were brought to his homestead by Plaintiff.
- [42] The question to be asked is whether in the circumstances and based on the evidence the prosecutor had; it could reasonably be concluded the Plaintiff took the children to Malinga so that the latter could sexually assault them. The Plaintiff’s contention is that she could not have been convicted as an accomplice ostensibly because at the time when she took the children to Malinga’s place she did not know of the rape allegations against Malinga.
- [43] The Plaintiff contends further in this regard is that the prosecutor who took the decision to prosecute could not have had a genuine belief that she is guilty as an accomplice considering that she gave instructions that additional statements of witnesses be obtained. The argument is that the fact that she questioned how the Plaintiff was involved in the matter, the prosecutor did not have reasonable and probable cause to prosecute the Plaintiff and she therefore knew that she was acting wrongfully and maliciously.
- [44] This latter argument cannot correct. In my view the fact that the prosecutor wanted more information does not per se mean that there was no evidence against the Plaintiff at all. She cannot on the basis of this question be accused of having known that the Plaintiff was not linked to the crimes and that despite this knowledge “she continues to prosecute, reckless of the consequences of her conduct.” Recklessness or indifference cannot be inferred from her question which in my view was aimed at clarifying the existing evidence. If she was reckless she would have proceeded without any questions. On the contrary, this enquiry shows that the prosecutor wanted

clarification of the initial statements in order to understand the Plaintiff’s role or participation in the alleged crimes. It is part of the normal process for the prosecutor to ask questions or require more information before the trial begins. There was therefore nothing sinister with the prosecutor asking for supplementary information in order to satisfy herself.

- [45] Taking into account the above, I am of the view that while the evidence that she was a perpetrator or co-perpetrator to rape may not be sufficient, the evidence in the case docket suggested that she was complicit in the scheme especially if the following are considered. First she clearly identified and selected the young children who she delivered to Malinga, an adult male person who was ostensibly residing by himself. The Plaintiff’s explanation is that she wanted Malinga to care for minor female children, some 8 years of age. She did so apparently because they had nobody to care for them. It however does not make any sense that she could expect children of that age, especially girls, could be cared for by this older

man who was not qualified or experienced child caring. There was apparently no other adult or older woman or helper on the homestead who could assist with caring for these children.

[46] What is however even more perplexing is that the Plaintiff also took her own daughter to the same place while she was obviously available and able to care for her. She has not been able to explain this. It is clear that she left these girls on their own with the old man having free access to them anytime he wanted and he used that access to the fullest by helping himself with the girls.

[47] Another curious and telling fact is that the Plaintiff took and delivered only girl children to Malinga. No male child was taken to Malinga to be cared for by the latter. This was deliberate and planned. If the purpose of taking the children was a noble one to give them better care, it is not clear why there was no single boy child in that “camp”. It cannot be that there was no single boy child at all who was in need of care like the girls allegedly were. What is clear to me is that the Plaintiff was selective and deliberately chose the girls only. It can only be deduced that she chose only girls for the purpose of making them available to Malinga so that he could have sexual intercourse with them freely without any interference or hinderance as it in fact happened. The circumstances clearly support this inference and

conclusion.

[48] Furthermore, one cannot ignore the fact that despite the reports of rape made to her by some of the children the Plaintiff did not do anything to help them while she is the person who took them there. Although she can claim that she had no duty to remove the children after they reported the rapes to her, her failure to help them is an indicator that she did not care that they were raped. If she had indeed brought them to Malinga for their good, one would have expected her to spring into action to rescue them as soon as she heard of their plight. After all she is the one who put them in that position.

[49] A further factor which cannot be ignored is the evidence by more than one of the children that the Plaintiff was seen on separate occasions receiving money from the co-accused Malinga. Even though they could not tell how much money exchanged hands, their independent evidence that she received money from him suggests collusion by the Plaintiff in the crimes. Based on this evidence any prosecutor would have suspected that the Plaintiff took the children to Malinga in exchange for money and was therefore complicit in the crimes. This evidence suggests that she was trafficking the girls for the purposes of making them available to Malinga for sex.

[50] Upon a conspectus of the evidence, I am of the view the facts and evidence support the contention that the Plaintiff delivered the girls to Malinga in order to enable Malinga to have sexual intercourse with the girls and probably in exchange for money. It further suggests that she knew that the girls were being raped at Malinga's place and did not assist them despite having placed them there. Her conduct in my view clearly fits that of an accomplice. On the evidence the prosecutor was entitled to conclude that she facilitated the rapes of the

girls by presenting them to Malinga. Based on these facts the prosecution was in my view entitled to believe that the Plaintiff was complicit in the rapes and charge her as an accomplice.

[51] In *Magwabeni v Liomba* (198/2013) [2015] ZASCA 117 (11 September

2015) the Supreme Court of Appeal in paragraphs [9] to [11] stated the following in respect of malicious prosecution and the test for reasonable and probable cause:

[9] “Malicious prosecution consist of the wrongful and intentional assault of the dignity of a person encompassing his good name and privacy. To succeed with this claim, a claimant must allege and prove that:

(i) The defendant set the law in motion (instigated the proceedings);

(ii) The defendant acted without reasonable and probable cause;

(iii) The defendant acted with malice (*animo injuriandi*-the wrongful intention to defame or injure another’s reputation or personality and that;

(vi) The prosecution failed.”

[10] This court in *Beckenstrater v Rottcher and Theunissen* 1955 910 A 129 (AD) at 136A-B set out the test for absence of reasonable and

probable cause as follows:

“When it is alleged that the 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.”

[11] The test contains both a subjective and objective element, which means that there must be both actual belief on the part of the defendant and also that the belief is reasonable in the circumstances. (J Neethling, JM Potgieter and JP Visser *Neethling’s Law of Personality* 2 ed (2005) at 176).

See also *Beckenstrater v Rottcher and Theunissen* 1955 910 A 129 (AD) and *Minister of Justice and Constitutional Development & Others V Moleko* (131/07)

[2008] ZASCA 43.

- [52] Based on the above, although the Plaintiff does not satisfy all the requirements for liability as contained in the definition of rape or in terms of the principles relating to common purpose, on the statements at his/her disposal, the prosecutor was in my view entitled to conclude that the Plaintiff unlawfully and intentionally facilitated and furthered the commission of the rapes by Malinga. The Plaintiff facilitated the commission of the crime by making the girl children available to Malinga for sex.
- [53] I accordingly find that although her conduct did not comply in every respect with the definition of rape, the Plaintiff's conduct was still punishable as an accomplice and could therefore be charged and convicted of rape as an accomplice. The fact that the charge merely referred to rape and did not specify that she is charged as an accomplice or accessory after the fact is irrelevant. The important fact is that the prosecutor had evidence based on which she honestly believed that the Plaintiff was complicit in the crimes and could successfully be charged as an accomplice or accessory after the fact.
- [54] Further, as stated in the preceding paragraphs the facts do not support the contention that there was malice or animus injuriandi on the part of the prosecutor when taking the decision to prosecute the Plaintiff. The fact that the prosecutor even sought supplementary statements justifies the rejection of this suggestion that she had no animus injuriandi as suggested. I am accordingly satisfied that the prosecutor's decision to go ahead with the prosecution of the Plaintiff was based on reasonable evidence. She had sufficient evidence based on which the Plaintiff could be convicted. The fact that she was acquitted does not mean that the prosecutor had no evidence to instigate the prosecution.
- [55] Based on the above, I find that that the prosecutor had reasonable and probable cause and an honest belief founded on reasonable grounds to prosecute the Plaintiff. Although she sought further statements, the statements at the disposal of the prosecutor as at 14 December 2006 constituted prima facie evidence that the Plaintiff was complicit in the rapes. The Plaintiff's claim therefore ought to be dismissed with costs.
- [56] in the result I make the following order:

The Plaintiff's claim is dismissed with costs on Scale B.

MBG LANGA

JUDGE OF THE HIGH COURT

MIDDELBURG LOCAL SEAT

Appearances:

For the Plaintiff Advocate TP Motlatle For the Defendant Advocate S Mbhalati Date of hearing 31 October 2024 Date of judgement 4 March 2025

This judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be the 4 March 2025 at 14h00.

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Prepared on 9 October 2026 · Esheria