IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2013/26724

(1) REPORTABLE: **YES**
(2) OF INTEREST TO OTHER JUDGES: **YES**
(3) REVISED. **YES.**

3 February 2015 .....

DATE SIGNATURE

In the matter between:

MAKHWELO, BUSANI Applicant

And

MINISTER OF SAFETY AND SECURITY Respondent

JUDGMENT

SPILG J:

3 February 2015

THE APPLICATION

1. This is an urgent application to condone the late delivery of a notice of intention to institute legal proceedings against the Minister of Police under the dispensation provisions of section 3(4)(a) of the Institution of Legal Proceedings Against Certain Organs of The State Act, 40 of 2002 (‘*the Act*’).

2. The matter is claimed to be urgent because the trial is set down for the following day.

BACKGROUND

3. The applicant alleges that he was unlawfully arrested and detained by members of the South African Police Service ('*SAPS*'). The arrest was effected on 10 March 2012 and he was detained for over a year until April 2013 when charges were withdrawn and he was released.

4. He also claims that as a consequence he lost employment and hence his salary during the period of his detention.

5. On 20 June 2013 the applicant gave notice of his intention to institute legal proceedings in terms of section 3(2) (a) of the Act. The summons was subsequently served on 23 July 2013.

THE PROCEEDINGS

6. The plaintiff's summons contains two distinct claims, the first for unlawful arrest and detention (claim A) and the other for special damages arising from the loss of income sustained while in detention (claim B).

7. Initially the amount under claim A was for R182 500 000 and under claim B for R44 208.

   Pursuant to a notice, the particulars were formally amended on 9 December 2014 and the amount for claim A was increased to R7.84 million reckoned at damages sustained of R20 000 for each day in detention.

8. The original plea consisted of bald denials and no grounds were set out to justify the arrest and continued detention of the applicant.

9. In paragraph 11 of the original particulars of claim the applicant alleged that the section 3 notice of institution of legal proceedings had been properly given and attached a copy of the notice. These allegations were responded to by way of a rolled up plea resulting in the applicant not knowing whether the respondent denied that any notice had been given, or that the notice given was not the one attached to the claim or was not received on the date alleged. The plea therefore offended the requirement that a denial must be unambiguous. See *FPS Ltd v Trident Construction (Pty) Ltd* 1989 (3) SA 537 (A) at 542.

10. A pre-trial conference was held on 4 December 2014. The applicant indicated that he would be amending the particulars of claim and the respondent confirmed that it would effect consequential amendments to its plea. The respondent did not indicate that it was proposing to effect substantial amendments to its own plea or that it would be introducing special pleas. Although not recorded in the pre-trial minute it appears to be common cause that the respondent requested the plaintiff for a copy of its section 3(a) notice. As indicated earlier this document had been attached to the original summons.

11. The amended particulars were filed, subsequent to which a completely revised plea was served just before 13h00 on Friday 23 January 2014.

    The amended plea contained two special pleas which addressed matters unaffected by the amendments. The special pleas therefore did not arise as a consequence of any amendment to the particulars of claim. The plea also substituted the bare denial of a wrongful arrest and detention with a confession and avoidance plea which justified the applicant's arrest and detention on the ground that *'he was reasonably suspected of having committed the offence of murder and armed robbery'*.

12. The first special plea averred that the applicant had failed to give the statutory notice within the six month period required under section 3(2)(a) of the Act and that therefore the claim fell to be dismissed. The second special plea averred that the National Prosecuting Authority (*'NPA'*) should have been joined.

13. The amended plea was served two court days before the trial date. The applicant took the position that it was entitled to seek an urgent order condoning the late delivery of the statutory notice.

14. Instead of bringing the application before the trial court, the applicant believed that the urgent court could make a determination and if successful he could then proceed to trial. The applicant's legal team appears to have taken the view that the issues arising from the second special plea were straightforward and would be readily disposed of by the trial court. The basis appears to be that the applicant only had to prove 1% liability against any person who had caused or contributed to the loss sustained in order to recover the full extent of his damages, leaving it for the respondent to claim an apportionment from any joint wrongdoer. The common thread relied upon in each claim is the alleged wrongful actions or statements by the police on which the prosecution and court subsequently relied.

SECTION 3 OF ACT NO 40 OF 2002

15. It is convenient to set out the relevant provisions of section 3 of the Act in order to appreciate the point taken by the respondent and the basis upon which condonation may be sought to overcome a failure to give notice. Section 3 reads:

> *3(1) No legal proceedings for the recovery of a debt may be instituted against an organ of state unless -*

(a) the creditor has given the organ of state in question notice in writing of his or her or its intention to institute the legal proceedings in question; or

(b) the organ of state in question has consented in writing to the institution of that legal proceeding(s) –

(i) without such notice; or

(ii) upon receipt of a notice which does not comply with all the requirements set out in ss (2).

(2) A notice must –

(a) within six months from the date on which the debt became due, be served on the organ of state in accordance with s 4(1); and

(b) briefly set out –

(i) the facts giving rise to the debt; and

(ii) such particulars of such debt as are within the knowledge of the creditor.

(3) For purposes of ss (2)(a) -

(a) a debt may not be regarded as being due until the creditor has knowledge of the identity of the organ of state and of the facts giving rise to the debt, but a creditor must be regarded as having acquired such knowledge as soon as he or she or it could have acquired it by exercising reasonable care, unless the organ of state wilfully prevented him or her or it from acquiring such knowledge; and

(b) a debt referred to in section 2(2)(a), must be regarded as having become due on the fixed date.

(4)(a) If an organ of state relies on a creditor's failure to serve a notice in terms of ss (2)(a), the creditor may apply to a court having jurisdiction for condonation of such failure.

(b) The court may grant an application referred to in para (a) if it is satisfied that -

(i) the debt has not been extinguished by prescription;

(ii) good cause exists for the failure by the creditor; and

(iii) the organ of state was not unreasonably prejudiced by the failure.

(c) If an application is granted in terms of para (b), the court may grant leave to institute the legal proceedings in question, on such conditions regarding notice to the organ of state as the court may deem appropriate.

THE ISSUES

16. The respondent raises a number of grounds for opposing the present application. The first is that the matter is not urgent. The next point is that the urgent motion court is not the proper forum to hear the matter.

It is also contended that the application had to allow the respondent a proper opportunity to ventilate the issues raised by the condonation sought and that, by abridging the time limits, the applicant had effectively prevented it from being afforded a fair opportunity to respond.

Finally, and in response to an enquiry from the court as to whether the matter was not one of law, the respondent contended that the applicant was obliged to give the statutory notice within 6 months reckoned from the date when the

applicant was arrested on 10 March 2012 and not calculated from the date of his release in April 2013.

URGENCY AND CORRECT FORUM

17. The respondent raised its special pleas only two court days before the trial was due to commence.

    It is difficult to appreciate how the applicant could have anticipated that a special plea of non-compliance would be raised at the eleventh hour when this issue should have been pleaded well over a year earlier in November 2013 at the time the plea was delivered.

    In this regard the bald denial contained in the body of the original plea does not qualify as adequate notice since want of compliance with a statutory notice of this nature is a dilatory plea which is self standing and must be pleaded specially (see *Labuschagne v Labuschagne; Labuschagne v Minister van Justisie*1967(2) SA 575 (A) at 583D-G and *Masuka v Mdlalose* 1998 (1) SA 1 (SCA) at 11F-). The fact that the respondent considered it necessary to introduce a special plea which specifically averred that the notice had to be given in terms of the Act within six months from the date of arrest bears sufficient testimony to this.

18. The third point taken indicates that if the application for condonation was to be brought before the trial court then the respondent would insist on a postponement in order to be afforded the full period provided for under the rules to file an answering affidavit. The effect is that the trial would not proceed, a new trial date would have to be applied for and the condonation application would be placed on the ordinary opposed motion court for hearing in due course.

19. This much is evident because the respondent relied on the judgment delivered on 11 April 2011 by my brother Sutherland AJ (at the time) in *Labuschagne v Minister of Safety and Security and another* (unreported; SGHC case no 18769 of 2009) . In that case the defendant submitted that condonation could not be applied for from the bar because the Act required a formal application.

    The court said at pp19 and 20 of the typed judgment that;

    "*Part of the rationale for that submission was that, given the three criteria which have to be met, stated in subsection 3(4), the fact that it has not been extinguished by prescription, that good cause exists for the failure not to bring the notice timeously to the attention of the defendant and that there was no unreasonable prejudice to the defendant, the only way to ventilate these matters, was to do so on affidavit in a formal application which would come before the motion court.*

    This must be correct….

    It seems to me plain that on a fair interpretation of the section prescribing the procedure for condonation, it is intended that a court conduct an enquiry into the circumstances for the failure. It is not possible to do so simply by entertaining submissions from the bar.

    …..

    Understandably and particularly with reference to the passage I have alluded to by Heher JA, the defendant needs to be heard on these matters in order for them to be properly investigated. [1]

    (emphasis added)

20. The difficulty that confronts the respondent in relying on the passages in *Labuschange* and its application of Heher JA's statements in *Madinda* is that

[1] In *Madinda v Minister of Safety and Security* 2008(4) SA 312 (SCA) at para 14 where Heher JA dealt with the need for an explanation as to why notice was not given timeously.

the defendant in that case had filed its special plea one and a half years before the plaintiff, for the first time through counsel from the bar on the trial date, informally sought to apply for condonation under section 3(4). It is also for this reason that the application in *Labuschagne* could not have been brought as one of urgency under rule 6(12). The court was therefore not required to consider the application of this rule in a suitable case.

21. In the present case the respondent is the author of the urgency by filing its special plea only two court days before the date of trial. Moreover in the circumstances of the case it might have been open for the applicant to argue that the special plea amounted to a withdrawal of an admission.

    It should therefore not be allowed the benefit of the ordinary time periods to file an answering affidavit unless it can demonstrate prejudice and tenders the wasted costs of trial on an appropriate scale.

22. The question before this court is whether the requirements for urgency have been satisfied. This will include an enquiry into whether the respondent was responsible for creating the urgency through delay. If the answer is in the affirmative then the respondent cannot be heard to complain of the short time provided within which to answer. At best, if it can demonstrate prejudice because of an inability to prepare an answering affidavit in time and also explain the reason for the delay, then it will bear the applicant's trial costs should a postponement be necessitated.

23. The first issue is whether a court should ensure as far as possible, and in the absence of prejudice, that a matter should proceed on the date allocated for the trial hearing. The answer appears obvious. The procedures governing trial actions are directed to that end.

24. This division has also implemented case management procedures with the objective of disposing of action proceedings efficiently and fairly. To this end pre-trial conferences in damages claims have been conducted before judges

in an attempt to ensure that matters which are capable of proceeding are trial ready. This is achieved, *inter alia* , by requiring amendments to be brought in good time before the hearing.

These interventions by the court recognise the litigant's entitlement to have his or her case heard and finalised within a reasonable time. They also recognise the need to utilise the court's resources efficiently.

Accordingly, absent prejudice, it is a court's function to facilitate that a matter proceeds to trial on its allocated date.

25. The applicant submits that the matter is urgent because if the condonation application cannot be decided by the date of trial then there will be an inevitable postponement of the trial despite the applicant and his legal team having prepared for the case. The applicant contends that this will delay the hearing for up to a year before another trial date is obtained.

26. The significant resources that a conscientious litigant and his legal representatives must dedicate in time, effort and money (including in cases of contingency litigation) to ensure that a case is trial ready on the date allocated and the resources of the judiciary that are directed to facilitate the hearing on the allocated date warrant finding that an application should be heard as one of urgency if it's objective is to overcome an obstacle created at the last moment by the other party to trial proceeding, provided of course there is no prejudice.

27. In the present matter an outcome favourable to the applicant will obviate a postponement of the trial for potentially a substantial time.

In my view placing a matter before the urgent court to determine if condonation should be granted will achieve that objective. The objective is unlikely to be achieved if the application is brought before the trial court as the respondent has already indicated that it will rely on *Labuschagne* and insist that it be afforded the ordinary time limits within which to deliver an answering

affidavit. The trial court however does not have the capacity to postpone an application for the filing of answering and replying affidavits in the ordinary course and then still be able to hear the trial if condonation is granted. The trial roll does cater for it.

28. It also appears to be proper practice for a section 3(4) condonation application to be brought before a motion court and resolved before the matter comes to trial. It is for this reason that the second special plea stands on a different footing. That being so, an applicant is entitled to rely on rule 6(12) in appropriate circumstances to contend that the ordinary forms and time limits for motion proceedings be abridged.

29. I had discussed with the learned Deputy Judge President the advisability or otherwise of the urgent court considering the application rather than the trial court. The Deputy Judge President endorsed this approach on practical grounds in appropriate circumstances as it did not unduly burden the trial judge with skirmishes when matters are meant to be trial ready on the allocated date. It also allowed an allocation of a trial at roll call because there was a determination on an issue that might otherwise have been the subject of an opposed postponement at trial.

NO OPPORTUNITY TO RESPOND

30. The respondent did not file opposing papers and claims that it wishes to do so.

31. The inability of the respondent to prepare an affidavit is of its own making. It elected to amend its plea at the last minute and introduce a substantive dilatory plea. The respondent received the section 3(4) condonation application yesterday at just after 10am. It effectively had just over a day to file answering affidavits in relation to a matter which would have been essentially covered when preparing for trial. It also should have anticipated

such an application when belatedly serving its special plea. One would have thought that if it had seriously deliberated over the matter before introducing the special plea, as one would expect of a litigant, then it would already have been able to deal with at least with the issue of prejudice.

32. Instead it sat idly by and waited until the hearing set down for 14h00 today before claiming that the ordinary time limits should apply to filing an answering affidavit. The respondent did not afford the applicant that opportunity when it introduced the special plea on the eve of the trial. The respondent cannot elevate its own tardiness into a virtue.

    Moreover no explanation was offered as to why it could not present the court with an affidavit setting out its opposition to the application.

33. Ordinarily a court will allow the respondent an opportunity to put its version on affidavit. In the present case I believe that the respondent had a sufficient opportunity to do so but elected not to.

34. Moreover the facts relied upon by the applicant are straight forward. He states the following in the application;

    > "*I firmly believe that I instituted legal action at an appropriate moment in that had I instituted action within six months, I would have been claiming my damages in a piecemeal (*fashion).

35. It is also evident that the applicant believed that the notice was in time but seeks condonation if he is wrong and that the period of six months only commenced on his release from detention and not from the time of arrest.

36. The respondent therefore appears to be making a mountain out of a molehill. The debt itself did not prescribe at the time summons was served and the issues as identified are whether the applicant had a reasonable explanation for being out of time (as all the other elements of showing '*good cause'* are

readily established[2]) and if the respondent is '*not unreasonably prejudiced*'[3] . See generally *Madinda* at para 15.

37. However in my view there is a preceding question; namely, whether there is any need to apply for condonation if the applicant's belief is legally correct. If I find that it is but another court finds that I am wrong then that in itself should suffice for satisfying the requirement of a reasonable explanation, leaving open only the question of unreasonable prejudice.

38. Realistically the issue of a reasonable explanation could easily have been challenged if the respondent *bona fide* believed that the explanation offered did not pass muster.

    Secondly, unreasonable prejudice, if it existed, could readily have been dealt with in an affidavit prepared on receipt of the application. If the respondent had prepared for trial, and it did not claim otherwise at the pre-trial conference, then the legal representatives would have had at their fingertips knowledge of the difficulties that the late notice presented in their ability to gather evidence. Moreover the failure to pertinently raise the special plea when the respondent first pleaded reinforces the conclusion that the issue was not of any moment. Had they been prejudiced then it would have loomed large both at that stage and now.

    Finally the defendant did not claim trial prejudice at the pre-trial conference.

39. In short if the respondent had something to say about either the want of a reasonable explanation or of unreasonable prejudice then, in circumstances which were of its own making, the respondent was obliged to present those facts to this court when the matter was called. It did not do so and every relevant factor indicates that it could not, despite the court receiving confirmation from the respondent's counsel that he had prepared for trial.

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[2] Section 3(4)(b)(ii) as explained in *Madinda* at paras 10-14
[3] Section 3(4)(b)(ii) supra

40. Accordingly I am satisfied that the respondent had an opportunity to respond and the attorney would have had the facts supporting prejudice, if it existed, readily to hand by this late stage of preparation. The respondent has itself to blame for not filing an answering affidavit but rather electing to bat it out on technicalities when it's belated special plea was the cause of the condonation application being brought as one of urgency before the trial date.

DUE DATE OF DEBT

41. In terms of section 3(1)(a) of the Act no legal proceedings may be instituted against an organ of state unless a notice of intention to do so is given.

42. Section 3(2)(a) provides that the notice must;

"(a) *within six months from the date on which the debt became due, be served on the organ of Sate and*

(b) briefly set out;-

(i) the facts giving rise to the debt; and

(ii) such particulars of such debt as are within the knowledge of the creditor

43. The present cause of action arises from a delict under the *actio iniuriarum* (leaving aside the special damges claim). A delictual debt becomes due in terms of section 3(3)(a) of the Act when the creditor has knowledge of the identity of the organ of state and of the facts giving rise to the debt or when, with the exercise of reasonable care he or she could have acquired such knowledge, unless the organ of state wilfully prevents the creditor from acquiring such knowledge. Compare *Protea International (Pty) Ltd v Peat Marwick* H *Mitchell & Co*1990 (2) SA 566 (A) at 569E and *Abrahamse v East*

London Municipality; East London Municipality v Abrahamse 1997 (4) SA 613 (SCA)at 625E-G.

44. In a case of wrongful arrest and detention Shearer J in *Ngcobo v Minister of Police*1978 (4) SA 930 (D) at 932G – 935H reluctantly considered himself bound by the appellate division authority of *Slomowitz v Vereeniging Town Council*1966 (3) SA 317 (A) on the basis that the learned judge could find no sufficiently distinguishing feature (at 935A).

Ngcobo and *Slomowitz* were subsequently applied by the SCA in *Lombo v African National Congress* 2002 (5) SA 668 (SCA) in the following manner at paras 26 and 27;

> *[26] The appellant's position is somewhat different in regard to his claim for unlawful detention. His cause of action in this respect did not arise once and for all on the day he was first detained, nor did it first arise on the day of his release from detention. His continuing unlawful detention (if such it was) would notionally have given rise to a separate cause of action for each day he was so detained (Ngcobo v Minister of Police1978 (4) SA 930 (D), following Slomowitz's case supra). The decision in Ramphele v Minister of Police1979 (4) SA 902 (W), if not distinguishable on the facts, must be taken to have been wrongly decided.*
>
> *[27] On his release in August 1991 the provisions of s 13(1) would have entitled the appellant to claim damages for wrongful detention for the full period of his detention provided he instituted action within the prescribed one-year period, something he failed to do. However, the three-year prescriptive period provided in s 11(d) of the Act preserved any claim for unlawful detention arising within the period of three years preceding the service of summons on 22 November 1993. His claim for unlawful detention for the period 23 November 1990 until his release in August 1991 would therefore still be extant. Any claim for wrongful*

detention arising before 23 November 1990 will have been extinguished by prescription in accordance with the principles enunciated above.

45. *Lombo* and the *Ngcobo* case it referred to relied on *Slomowitz* to hold that wrongful detention is a continuing wrong which commences on the date of detention and continues with a daily succession of wrongful acts with the result that prescription runs separately in respect of each wrongful act.

46. It however bears mention that *Slomowitz* was not concerned with wrongful arrest or detention.

In that case the plaintiff sued the local municipality for the alleged wrongful closure of a street for a period of nearly four years from February 1960 until mid-December 1963. The plaintiff claimed that as a result he suffered damages in the form of loss of rental. The summons was served on 24 March 1964. The defendant contended that any cause of action had prescribed because it should have been brought within six months of it arising and relied on the provisions of the Transvaal Local Government Ordinance, 17 of 1939 (T). The high court held that the cause of action arose on the date when the road was closed and the plaintiff was non-suited in respect of his entire claim.

The then appellate division upheld the appeal and found that the closure of the road constituted a continuing wrong which vested the plaintiff with a cause of action against the respondent throughout the period that the road remained closed. The plaintiff was therefore entitled to damages for the period commencing six months prior to the service of summons (ie; from 25 September 1963) until the road was re-opened.

47. It is evident that all three cases confined the enquiry to whether there was a single wrongful act which had a continuing injurious effect or whether there was a continuing wrong which until it ceased created a series of individual debts. See LAWSA vol 21 (2nd ed) para 125 against ftn 32.

48. In my respectful view the cases beg the question of when a debt first arises for purposes of a section 3(2) notice in the case of unlawful arrest and detention without a warrant.

49. So viewed there appears to be a distinction between a case where the commencement of the debt arises by reason of an objectively observed event (such as the road closure) or the infliction of bodily harm under the *lex Aquilia* and the case of wrongful arrest and detention without a warrant which requires the wrongdoer to have effected the arrest on the grounds of a reasonable suspicion that a scheduled offence had been or was about to be committed.

50. The following distinguishing features are with respect apparent. Firstly in the *Slomowitz* case the wrongful act was the closure of a public road because there had been no prior notice or advertisement as required by sec. 67 of the Local Government Ordinance, 17 of 1939. All the facts giving rise to the debt were therefore known and were not dependent on the state of mind of the offending authority.

    In the case of a claim for bodily injury the debt only becomes due when the identity of the wrongdoer can be reasonably ascertained, such as the doctor or anaesthetist whose acts or omissions resulted in a botched operation at a provincial hospital. It is in this context that the once and for all rule relating to claiming damages arises. Our law requires that prospective loss (such as damages for future medical expenses, loss of earning capacity and the general damages for continued pain and suffering) must be claimed in a single action covering both past and future damages. This is readily appreciated where a single injury was inflicted which has past and which has caused or contributed to *sequelae* that continue to cause damage or loss.

    By way of illustration, in *Truter and another v Deysel* 2006 (4) SA 168 (SCA) at paras 22 and 23 van Heerden JA expressed the position as follows;

"[22] In accordance with the so-called 'once and for all' rule, a plaintiff must claim, in one action, all damages, both already sustained and prospective, flowing from one cause of action. Therefore, a plaintiff's cause of action is complete as soon as some damage is suffered, not only in respect of the loss already sustained by him or her, but also in respect of all loss sustained later.

[23] Applied to the facts of this case, Deysel's cause of action was complete and the debt of Drs Truter and Venter became due as soon as the first known harm was sustained by Deysel , notwithstanding the fact that the loss of his right eye occurred later."

51. Another difficulty that arises in determining when a debt under an Aquilian action falls due is the requirement of culpability in the form of at least negligence as opposed to mistake. Again *Truter* dealt with the distinction courts have drawn between fact on the one hand and evidence or conclusions of law on the other in determining when a debt is due for purposes of prescription. Van Heerden JA explained it as follows in paras 16 to 21;

[16] … For the purposes of the Act, the term 'debt due' means a debt, including a delictual debt, which is owing and payable. A debt is due in this sense when the creditor acquires a complete cause of action for the recovery of the debt, that is, when the entire set of facts which the creditor must prove in order to succeed with his or her claim against the debtor is in place or, in other words, when everything has happened which would entitle the creditor to institute action and to pursue his or her claim.

[17] In a delictual claim, the requirements of fault and unlawfulness do not constitute factual ingredients of the cause of action, but are legal conclusions to be drawn from the facts:

'A cause of action means the combination of facts that are material for the plaintiff to prove in order to succeed with his action. Such facts must enable a

court to arrive at certain legal conclusions regarding unlawfulness and fault, the constituent elements of a delictual cause of action being a combination of factual and legal conclusions, namely a causative act, harm, unlawfulness and culpability or fault.'

[18] In the words of this Court in Van Staden v Fourie:

'Artikel 12(3) van die Verjaringswet stel egter nie die aanvang van verjaring uit totdat die skuldeiser die volle omvang van sy regte uitgevind het nie. Die toegewing wat die Verjaringswet in hierdie verband maak, is beperk tot kennis van "die feite waaruit die skuld ontstaan".'

[19] 'Cause of action' for the purposes of prescription thus means

'. . . every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.'

[20] As contended by counsel for Drs Truter and Venter, an expert opinion that a conclusion of negligence can be drawn from a particular set of facts is not itself a fact, but rather evidence. As indicated above, the presence or absence of negligence is not a fact; it is a conclusion of law to be drawn by the court in all the circumstances of the specific case. Section 12(3) of the Act requires knowledge only of the material facts from which the debt arises for the prescriptive period to begin running - it does not require knowledge of the relevant legal conclusions (ie that the known facts constitute negligence) or of the existence of an expert opinion which supports such conclusions.

[21] Mlonzi AJ appears to have relied on the judgment of this Court in the recent case of Van Zijl v Hoogenhout for her conclusion that knowledge of fault is a requirement for the commencement of the running of prescription. In my view, she erred in so doing. The Van Zijl case is entirely distinguishable from the present case. In the Van Zijl case Heher JA held that, where the prescription statute speaks of prescription beginning to run when a creditor has knowledge, 'it presupposes a creditor who is capable of appreciating that a wrong has been done to him or her by E another'. The plaintiff in the Van

Zijl case was found, on the facts, to have lacked capacity for many years to appreciate that a wrong had been done to her and that this had therefore delayed the commencement of the running of prescription. By contrast, in the present case, it is abundantly clear that Deysel believed and appreciated from as early as 1994 that a wrong had been done to him by Drs Truter and Venter.

52. It is also accepted that the debt must be immediately claimable for it to be due for the purposes of prescription. In *Deloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty) Ltd*1991 (1) SA 525 (A) at 532H the court said;

> '*This means that there has to be a debt immediately claimable by the creditor or, stated in another way, that there has to be a debt in respect of which the debtor is under an obligation to perform immediately. See The Master v I L Back & Co Ltd and Others1983 (1) SA 986 (A) at 1004, read with Benson and Others v Walters and Others1984 (1) SA 73 (A) at 82. It follows that prescription cannot begin to run against a creditor before his cause of action is fully accrued, ie before he is able to pursue his claim (cf Van Vuuren v Boshoff1964 (1) SA 395 (T) at 401).'*

53. In summary;

a. A debt is due only when;

i. the material facts from which the debt arises are known, or when they ought reasonably to have been known (see *Truter*);

and provided

ii. it is immediately claimable and the debtor is obliged to perform immediately (see *Deloitte Haskins)*;

b. the material facts do not include knowing that the actions were culpable as culpability, whether in the form of negligence or otherwise, is a conclusion of law drawn from the evidence. The presence or absence of negligence is therefore not a fact for these purposes (see *Truter*)

54. In the case of wrongful arrest and detention without a warrant the plaintiff must prove that the arresting officer had no reasonable suspicion that he had or was going to commit a scheduled offence. The plaintiff must also be able to quantify the damages suffered.

This results in a number of further distinguishing features which are possibly unique to claims for wrongful arrest and detention without a warrant. I attempt to deal with them in the following paragraphs.

55. As to the first requirement of knowledge of the material facts: It is difficult to appreciate that at the time of the arrest or even during detention the suspect would have sight of the docket in order to form a view that the arresting officer did not have a reasonable suspicion that an offence had been committed. The officer may have received a fabricated complaint from alleged eyewitnesses who were intent on falsely incriminating the suspect for their own ends.

Accordingly the complainant would not know at the time of arrest whether the arresting officer was reasonably relying on the accounts of a complainant who turned out to be fabricating events (in which case the claim would lie against the complainant and not the police) or whether the arresting officer in fact did not have a reasonable suspicion that the suspect had committed the offence.

Since the docket is not available to an accused until the investigation is completed and he is presented with the indictment, it is most unlikely that the identity of the complainant or the evidence that was available when the arrest was made would be known to a would be plaintiff . Without that knowledge a plaintiff cannot assume that the arresting officer was acting unlawfully when

effecting the arrest rather than that the complainant had falsified a charge against him.

56. The claim for wrongful arrest and detention has always been treated as a single cause of action. Each involves at least an aspect of the deprivation of liberty and the wrongful deprivation of liberty by the police is inextricably dependent on it being shown that the arresting officer could not have formed a reasonable suspicion that an offence had been or was going to be committed.

Under common law a claim for unlawful arrest and detention is not only a delict based on an infringement of liberty but also of the rights to dignity, reputation, and personal integrity. See *Matthews and Others v Young* 1922 AD 492 at 503. See also *Mabaso v Felix* 1981 (3) SA 865 (A); *Minister of law and Order & Others v Hurley & Another* 1986 (3) SA 568 (A) 589E-F; *Minister van Wet en Orde v Mtshoba* 1990 (1) SA 280 (A)284E H and 286B C; and *Law of Damages* by PJ Visser and J Potgieter, 1993 para 7.3, footnote 128.

A delictual claim for damages may also be brought in terms of Section 12(1)(a) of the Constitution. By definition such a claim is based on the unreasonable and unjustifiable infringement of an individual's right not to be arbitrarily deprived of freedom or to be so deprived without just cause. See *Zeeland v Minister of Justice and Constitutional Development & Another* 2008 (4) SA 458 (CC), at paras 24, 25 and 35.

See also *Takawira v Minister of Police* [2013] ZAGPJHC 138 at paras 26 to 29.

57. Unlike a claim under the *lex Aquilia* or possibly other causes of action where it is accepted that prospective damages must be assessed and claimed up front, it is impossible to assess a claim for damages based on speculating when the criminal trial of a person held in custody might be finalised or if charges might be dropped at some earlier stage.

Accordingly the fundamental rationale for calculating prospective damages is wanting; namely that either there was a single injury which has resulted in *sequelae* that can be assessed provided suitable contingency factors are

taken into account and on which actuarial assessments can be made, or that prospective damages can be determined on a daily basis as long as the harm continues and for which contingencies are capable of some rational assessment.

Personal injury cases illustrate the former. S*lomowitz* illustrates the latter as the claim was for loss of rental income that could be realistically assessed for every month, or part of it, that the road was blocked.

In the case of wrongful arrest, damages are not reckoned at a daily rate but by reference to the overall length of incarceration and the degradation suffered. Case law confirms that it is not a simple matter of multiplication. See generally *Minister of Safety and Security v Seymour* 2009 (6) SA 320 (A).

58. Unique considerations are involved in cases of wrongful arrest and detention because other delicts involve either physical injury , damage to or loss of property or involve an objectively ascertainable failure to comply with formalities that renders the action unlawful and which are not dependent on the outcome of criminal proceedings (eg; *Slomowitz*).

In the case of an arrest and detention there is a deprivation of liberty and loss of dignity which will be justified if there is a conviction. It is difficult to appreciate how a debt can be immediately claimable and therefore justiciable which is the second requirement for a debt being due (see *Deloitte Haskins*) prior to the outcome of the criminal trial or prior to charges being dropped or otherwise withdrawn.

59. During my research I was fortunate to find that the SCA had considered this issue in *Unilever Bestfoods Robertsons (Pty) Ltd v Soomar* 2007 (2) SA 347 (SCA). The case concerned a special plea of extinctive prescription on a debt that was claimed to be in part one of abuse of legal process. In this context the learned judge of appeal said the following at paras 25 to 29;

[25] Because he knew all the facts necessary to establish this claim (on the assumption that I have made that he had a claim) more than three years before the proceedings commenced, the only basis on which he can resist a plea of prescription is by pointing to an essential element of his cause of action which only came into existence less than three years before the institution of the proceedings. In the present case he endeavours to do this by relying on such cases as Lemue v Zwartbooi (supra) and Els v Minister of Law and Order (supra) and contending that he could not institute this part at least of his claim until the customs action and the attachments and the garnishment had been withdrawn. The principle underlying the cases relied on was stated by De Villiers CJ in Lemue's case (at 407) in the following terms: 'While a prosecution is actually pending its result cannot be allowed to be prejudged in the civil action.' A different reason for the rule was given by Solomon J in Bacon v Nettleton (supra). He said (at 142 - 3):

'The proceedings from arrest to acquittal must be regarded as continuous, and no personal injury has been done to the accused until the prosecution has been determined by his discharge.'

Both reasons were cited with approval by Eksteen J in Thompson's case (supra) at 375B - C.

[26] The reason given in Bacon v Nettleton need not detain us long. In this case the first plaintiff does not allege a continuous wrong nor that he suffered an injury to his reputation and good name only when the customs action and the attachment and garnishment were withdrawn. On the contrary he says that the institution of the action and the acts of attachment and garnishment caused the injury.

[27] The reason given in Lemue's case, the need to prevent the prejudging of the pending action, calls for further consideration. Doctor C F Amerasinghe in his Aspects of the Actio Iniuriarum in Roman-Dutch Law says (at 22) that 'reasons of legal policy which have not been expressly formulated seem to have made the termination of the proceedings in favour of the plaintiff a requirement of the iniuria [of

malicious prosecution]'. Lemue's case indicates what one at least of the policy considerations is: a court hearing a malicious prosecution case should not be called on to prejudge the findings of the criminal court. Equally, in my view, it is clear that an accused should not be allowed to launch what amounts to a pre-emptive strike against a prosecution pending against him by suing the complainant for damages. Furthermore it is undesirable that a party who loses a case before one tribunal should be allowed to attack the judgment, not on appeal, but in another court, with the resultant possibility of conflicting judgments and what one may describe as judicial discord. A convicted accused who has not appealed or whose appeal has failed should not be allowed to assert in other proceedings that his conviction was unjust and if he cannot do so after conviction, he should not be allowed to do so before he is convicted but while the prosecution is still pending.

[28] I am prepared to assume for the purposes of this case that this principle also applies to cases involving the abuse of civil and what I have called fiscal proceedings.

[29] These considerations only really apply when the judgment in question is or may be given against the party seeking in other proceedings to controvert or anticipate a finding given or to be given against him. …

60. It is significant that the SCA dealt in para 15 with the aspect of whether the debt was due on this ground after having considered *Slomowitz* in relation to the question of whether there was a continuing wrong. In my respectful view this reinforces the consideration expressed earlier that there remains a second leg to the enquiry that was not put before the SCA in *Lembo* and which it was unnecessary to consider in *Slomowitz* as it did not concern a case of wrongful arrest and detention. *Unilever* also answers the concern Shearer J expressed in *Ngcobo.* A close reading of the judgment of Eksteen J in *Thompson and another v The Minister of Police and another* 1971(1) SA 71 at 371H to 372A shows that the arrest and detention of the plaintiffs was

pursuant to a duly issued warrant of arrest . Armed with a warrant the consideration of reasonable suspicion on the part of the arresting officer did not arise. It however arises in a case such as the present where the arrest was effected without a warrant. In this context it is significant that Farlam J cited the extract from pp375 B – 376A of Eksteen J's judgment in *Thompson*.

61. Sutherland J in *Labuschagne* cited extracts at pp374 to 375 from the judgment of Eksteen J in *Thompson.* However it is evident from p14 of Sutherland J's decision that my brother expressly refrained from deciding whether the due date of the debt was the date of arrest or of release or some other date[4]. In that case only a few days had interposed between arrest and a court ordered further detention and, ordinarily, it would make little difference.

    In the present case more than a year elapsed between the two relevant dates, which in the present case may raise an important policy consideration on which I need not decide. A lengthy delay in not bringing the suspect to trial but have him languish in prison until eventually released without being required to plead offends an individual's right to be brought before a criminal court and have his trial commence within a reasonable time. It may therefore not be a factor upon which the state ought to be entitled to rely.

62. In my respectful view I am bound by the *ratio* of Farlam JA in *Unilever* and the long line of cases relied from *Lemue v Zwartbooi* (1896) 13 SC 403 to *Els v Minister of Law and Order and Others* 1993 (1) SA 12 (C). Moreover the SCA extensively adopted in *Unilever* the supportive reasoning contained in the article by Doctor C F Amerasinghe in *Aspects of the Actio Iniuriarum in Roman-Dutch Law* as to why a pending prosecution cannot be allowed to be prejudged in the civil action. By contrast it appears that this issue was not raised before the SCA in *Lombo* . and none of the cases relied upon in *Unilever* were mentioned by counsel if regard is had to the authorities listed.

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[4] Sutherland J said: *"For the purposes of the adjudication of this matter, I have assumed without deciding that the relevant dates constitute a period any time between 18 January and 21 January (*being the date of arrest and the date when the court ordered the plaintiff's further detention) *and it is plain from applying this particular decision that the cause of action arose during that time."*

Perhaps more importantly, even though *Lombo* was not dealt with *Unilever* is the more recent decision and it dealt expressly with this issue.

63. In order to ensure that the matter proceeds to trial I have considered it prudent to grant the condonation sought in the alternative if I am wrong.

In this regard the respondent ought to have filed an answering affidavit or presented some basis for opposing the merits of the application. The failure to do so demonstrates that there is no genuine basis for opposition either on the ground of want of good cause or of there being unreasonable prejudice to the respondent. The reasons have already been dealt with fully. In this way there is little scope for delaying the trial with an application for leave to appeal.

ORDER

64. I accordingly made the following order

a. It is declared that the notice of intention to institute legal proceedings against the respondent in terms in terms of section 3(a) of the Institution of Legal Proceedings Against Certain Organs of The State Act 40 of 2002 was timeously given and if I am wrong that condonation is given for the late delivery of such notice in terms of the said Act;

b. The effect of this order is that it disposes of the first special dilatory plea;

c. the respondent is to pay the applicant's costs of the application.

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SPILG, J

DATE OF HEARING:	27 January 2015
DATE OF ORDER:	28 January 2015
DATE OF REVISED JUDGMENT:	3 February 2015

LEGAL REPRESENTATIVES:

FOR APPLICANT:	Att. B Lesomo
	Seokane Lesomo Inc
FOR RESPONDENT:	Adv B Dlamini
	State Attorney