**IN THE HIGH COURT OF SOUTH AFRICA**
**GAUTENG LOCAL DIVISION, JOHANNESBURG**

**CASE NO: 41499/2018**

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES

.....  23/06/2021
.....

**SIGNATURE** **DATE**

In the matter between:

| | |
|---|---|
| **ZAKHELE MANYONI** | **Plaintiff** |
| **and** | |
| **THE MINISTER OF POLICE** | **First Defendant** |
| **THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS** | **Second Defendant** |

*Damages claim for unlawful arrest and prolonged detention of more than eight months. The arrest was irrational and thus unlawful. Double compensation and date for determination of damages and date from which interest would be payable in issue, as well as quantum.*

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**JUDGMENT**

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**DE VILLIERS, AJ:**

[1] This matter is the story of a man who, although innocent of a crime, spent about eight-and-a-half months in prison. The respondents (I refer to them as "*the state*" herein) aver that his arrest and detention was lawful and that it is not liable to compensate him for his arrest and detention. The plaintiff seeks damages under the *lex aquila* and the *actio iniuriarum*, being for damages caused by wrongful, culpable acts of the state. He seeks compensation for a loss of income and general damages.

**Lawful arrest and detention?**

[2] The first and main question to determine liability of the state is the question of whether the arrest and detention of the plaintiff were lawful. The state bears the onus to show this.[1]

[3] It was common cause that the plaintiff was arrested and charged with a Schedule 1 offence as contemplated in section 40(1)(b) of the Criminal Procedure Act 51 of 1977:

> "Arrest by peace officer without warrant
> (1) A peace officer may without warrant arrest any person-
> (a) …
> (b) whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody".

[4] If the section was properly complied with, the arrest would have been lawful. The investigating officer arrested the plaintiff knowing the facts set out next - facts that appear (a) from a statement by a complainant; (b) the investigating officer's entries into the docket; and (c) in one instance, a common cause fact. On these facts the investigating officer had to form the opinion that he reasonably suspected the plaintiff of having committed an offence referred to in Schedule 1 to the Criminal Procedure Act:

[1] *Minister of Law and Order and Others v Hurley and Another* 1986 (3) SA 568 (A) at 589E-F.

[4.1] A woman woke up during the night on 6 May 2017 and found that a man had broken into her house, he was standing over her, and he started to undress. The intruder's face was half-covered;

[4.2] They started to wrestle and the intruder assaulted the woman in this struggle. The intruder used his hand to close her mouth and later, as the complainant described it to the police -

> "… put his fingers in my mouth as he wants to pull out my tongue. I then bite his fingers. When he took them out of my mouth …";

[4.3] The complainant managed to scream, and the intruder fled. As he ran away, she saw that he wore navy, morning slippers;

[4.4] The police found a fingerprint on the window where the perpetrator gained entry and blood in the room;

[4.5] On 17 May 2017 the complainant advised the investigating officer that she would not be able to identify the intruder should she see him again;

[4.6] On 19 May 2017 the complainant advised the investigating officer that someone in the community where she lived, told her that the plaintiff had a bandage on his left hand; and

[4.7] The plaintiff lived in the same street that the complainant lived in, and was in fact known to her, as his sister was her friend.

[5] The state argued that by conveying to the police that the complainant had heard that the plaintiff had a bandage on his hand, the complainant had pointed him out as the perpetrator of the crime. I respectfully disagree. She conveyed hearsay evidence of an injury to the plaintiff. No evidence was led that she, at any stage, changed her version to one that she could or did identify the plaintiff as the intruder. In fact, the complainant was not called to testify, despite having been at a court to testify on a previous occasion. Her absence was not explained.

[6] The state argued that the complainant bit the intruder on his fingers or his hands. I respectfully disagree. The statement by the complainant refers to her biting the assailant's fingers that were in her mouth. No evidence was led that she had bitten a part of the hand of her assailant other than the fingers.

[7] The evidence at this point diverges. The investigating officer's evidence was that he and the complainant arrested the plaintiff at the plaintiff's house in the early evening of 19 May 2017 (almost two weeks after the incident). The state did not argue that I must disbelieve its own witness. The investigating officer testified that the complainant had a bandage on his hand, but that he did not look at the plaintiff's hand. According to him, the plaintiff advised him that he had injured his hand in assisting others with home renovation work. The investigating officer did not make inquiries about this version. I point out that no evidence was led that the investigating officer formed an opinion that the injury to the plaintiff's hand was consistent with the complainant's evidence that she bit the fingers of her assailant.

[8] If the investigating officer is to be disbelieved, and the evidence of the plaintiff is to be accepted in full, the matter becomes worse for the state. On the plaintiff's version, the police came to his house when he worked night shift. This was reported to him. As a result, he reported to the police station early the next day. He was arrested at about 11H00 in the presence of the complainant at the police station. The objective evidence of the cell register bears out the time of his arrest. The plaintiff testified that he showed his hand to the investigating officer and to the complainant. On his version, the complainant stated that his injuries were not consistent with an injury caused by a bite. He later, before his first court appearance**,** told the investigating officer that he injured his hand on a razor wire fence at his place of work when he struggled with a guard dog.

[9] The state argued that the only difference in the versions of the investigating officer and that of the plaintiff, was about the time (and place) of arrest. I respectfully disagree. The evidence on having looked at the hand, and the evidence on the explanation given, differed too.

[10] I do not intend to resolve the conflicts between the two versions. I will assume for the purposes of this judgment that one could accept the investigating officer's version, being the version best for the state. Accordingly, on the evidence of the investigating officer, the plaintiff was arrested for (a) having an injury to his hand, (b) being a man, and (c) living in the same street as the complainant, who had reported a crime involving a man whose fingers she had bitten. This arrest occurred despite the plaintiff giving an explanation for his injury, without the investigating officer looking at the injury, or making enquiries about it. No evidence was led that the plaintiff was found in the possession of navy, morning slippers, or if they were searched for.

[11] The issue before me was if the investigating officer reasonably suspected the plaintiff of the crimes he was charged with and thus lawfully arrested him in terms of section 40(1)(b) of the Criminal Procedure Act. It is a test of rationality. The test is more clearly formulated as (a) if the investigating officer had a suspicion, and (b) if so, if his suspicion rested on reasonable grounds. See *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) at 818H, a decision by the Supreme Court of Appeal ("the SCA").

[12] In another judgment by the SCA, *Minister of Safety and Security v Sekhoto and Another* 2011 (5) SA 367 (SCA), regarding the rationality of an arrest under section 40(1)(b) of the Criminal Procedure Act, it was held in paras 38-39:

> "[38] … it remains a general requirement that any discretion must be exercised in good faith, rationally and not arbitrarily.[2]
>
> [39] This would mean that peace officers are entitled to exercise their discretion as they see fit, provided that they stay within the bounds of rationality. The standard is not breached because an officer exercises the discretion in a manner other than that deemed optimal by the court. A number of choices may be open to him, all of which may fall within the range of rationality. The standard is not perfection or even the optimum, judged from the vantage of hindsight — so long as the discretion is exercised within this range, the standard is not breached.[3]"

[2] "37 Masetlha v President of the RSA 2008 (1) SA 566 (CC) (2008 (1) BCLR 1) para 23."
[3] "38 Hill v Hamilton-Wentworth Regional Police Services Board [2007] 3 SCR 129 (2007 SCC 41) para 73, adapted for present purposes. Compare Al Fayed and Others v Commissioner of Police of the Metropolis [2004] EW CA Civ 1579 para 82."

[13] Determining the boundary between rationality and arbitrariness is not always easy. The parties referred me to *Mabona and Another v Minister of Law and Order and Others* 1988 (2) SA 654 (SE) as a comparable case. In that case the suspect was arrested, without a warrant, upon information given by an anonymous informer in connection with a robbery of R70 000.00. The police searched the suspect's resident, but was unable to find any large sum of money. The court held that the arrest was unlawful, after stating (the bounds of) the rationality test at 658E-H (underlining added):

> "… The test of whether a suspicion is reasonably entertained within the meaning of s 40(1)(b) is objective (S v Nel and Another 1980 (4) SA 28 (E) at 33H). Would a reasonable man in the second defendant's position and possessed of the same information have considered that there were good and sufficient grounds for suspecting that the plaintiffs were guilty of conspiracy to commit robbery or possession of stolen property knowing it to have been stolen? It seems to me that in evaluating his information a reasonable man would bear in mind that the section authorises drastic police action. It authorises an arrest on the strength of a suspicion and without the need to swear out a warrant, ie something which otherwise would be an invasion of private rights and personal liberty. The reasonable man will therefore analyse and assess the quality of the information at his disposal critically, and he will not accept it lightly or without checking it where it can be checked. It is only after an examination of this kind that he will allow himself to entertain a suspicion which will justify an arrest. This is not to say that the information at his disposal must be of sufficiently high quality and cogency to engender in him a conviction that the suspect is in fact guilty. The section requires suspicion but not certainty. However, the suspicion must be based upon solid grounds. Otherwise, it will be flighty or arbitrary, and not a reasonable suspicion."

[14] Restating these findings, would a reasonable man in the investigating officer's position, possessed of the same information, have considered that there were good and sufficient grounds for suspecting that the plaintiff was guilty of housebreaking and attempted rape? I restate the known facts: The plaintiff (a) had an injury to his hand, (b) was a man, and (c) lived in the same street as the complainant, who had reported a crime involving a man whose fingers she had bitten.

[15] It seems to me that such an arrest was arbitrary. By far the most reasonable conclusion of the facts is that the plaintiff was simply a man with an injured hand. I can see no rational basis to conclude that the three known facts point to him being reasonably suspected of the crimes committed by the unknown

intruder. My finding is strengthened by what appears to be failures by the investigating officer to consider (and possibly follow up) the explanation for the injuries to the appellant's hand, to ask to look at the injuries, to search for navy morning slippers, or to consider that the plaintiff seemingly was not a stranger to the complainant (who still did not identify him).

[16] My finding of an arbitrary arrest seems to me to accord with the reasoning in a judgment by the SCA, *Minister of Safety and Security and Another v Swart* [2012] ZASCA 16. The SCA dealt with a case where a person was arrested without a warrant on a suspicion of driving a motor vehicle on a public road whilst under the influence of intoxicating liquor. The driver of the vehicle had driven off the road on a mountain pass, seemingly when miscalculating a dangerous curve in the road. The police could smell a mild smell of alcohol when they spoke to the person who drove the vehicle (or whom they suspected to have been the driver). The court formulated an objective test to consider the rationality of the decision by the investigating officer to arrest the driver as follows in para 20 and 23:

> "[20] It is furthermore trite that the reasonableness of the suspicion of any arresting officer acting under s 40(1)(b) must be approached objectively. The question is whether any reasonable person, confronted with the same set of facts, would form a suspicion that a person has committed a Schedule 1 offence. *M v Minister of Safety & Security* 2009 (2) SACR 291 (GSJ).
>
> …
>
> [23] To my mind to conclude that the respondent was under the influence of alcohol based on the mere fact that he smelt lightly of alcohol, is more of a quantum leap in logic. It follows in my view that the second appellant's suspicion was not based on reasonable grounds and therefore that the respondent's arrest and detention were unlawful."

[17] I am satisfied that the state failed to discharge the onus to show that the plaintiff's arrest was lawful on the limited facts known to the investigating officer. It did not establish that it was rational to suspect the plaintiff of having committed the offences. The arrest and detention being unlawful, the remaining issues are causation and damages.

**Factual and legal causation**

[18] But for the arrest, the detention would not have happened. Factual causation thus was not in issue on the "*but for*" application of the test. The plaintiff was brought before court on 22 May 2017 and the matter was remanded for a bail hearing eventually on 13 June 2017. By that stage the plaintiff was represented by a public defender. Bail was refused. He was released from detention on 24 January 2018 when the prosecution's request for a postponement was refused, about eight-and-a-half months after his arrest (about 251 days).

[19] The state argued that the next matter for consideration was the impact of the decisions by the learned magistrate to keep the plaintiff in detention pending the bail hearing, and after the bail hearing pending the trial. The state argued that these were material events, and that malicious prosecution must be shown to have existed for the plaintiff to succeed in his damages claim for the period after he was brought to court and detained in a process controlled by a magistrate. I respectfully disagree. I first address the material facts upon which my disagreement is based.

[20] In opposing the plaintiff's bail application, the investigating officer made a statement that was untrue. He stated under oath that the plaintiff "… *has an outstanding case where he escaped from custody as per Krugersdorp CAS 845-2-1998*". He made this statement only relying on a report drawn from the police's records on its Crime Administration System and without investigating the correctness of the report. Upon reading the report, it shows that the matter in fact was closed. The report therefore did not reflect that there was an outstanding case as stated by the investigating officer. The presiding magistrate relied on this false statement and said:

> "*As far as the bail application is concerned, the state's case against you at the moment is not exceptionally strong; that is true. Should the DNA come back and you be linked, then it would be just about watertight. But at this stage that remains speculation; we do not know what will happen.*
>
> *But it bothers me that you have an outstanding escaping matter against you. On top of it all you are still subject to parole for some of the other matters that you had been sentenced to direct imprisonment*."

[21] The public defender immediately addressed one error in the reasoning by the learned magistrate. He stated that his client was no longer on parole. The learned magistrate then stated:

> "*But if you have already escaped and you know they are looking for you now, the likelihood of escaping again is now just about inevitable, irresistible some may say. So in the circumstances I refuse bail*."

[22] According to the record, the false statement about a pending escape matter sealed the plaintiff's fate at the bail hearing and he remained in custody pending completion of the investigation. Having been arrested on irrational grounds, he now was detained on a false version that he had a pending case against him for having escaped.

[23] In the end, the fingerprint analysis only became available on 15 August 2017 (it pointed to a person other than the accused). It is not clear to me if this fact was brought immediately to the court's attention in considering the continued detention of the plaintiff. As reflected above, the plaintiff was released from detention on 24 January 2018 when the prosecution's request for a postponement was refused. The DNA analysis only became available after the release of the plaintiff. It also exonerated the plaintiff.

[24] I next address the legal basis why I disagree that malicious prosecution must be shown to have existed for the plaintiff to succeed in his damages claim for the period after he was brought to court and appeared before a magistrate.

[25] I do not have to resolve the onus regarding pleading and proving legal causation[4] in this judgment. In the end, foreseeability was not in issue before me, and the case was conducted by the plaintiff on the impact of the false averment by the investigating officer in his affidavit submitted at the bail hearing (with an eye to rely in argument on the leading case addressed next).

[26] The leading case is *De Klerk v Minister of Police* 2020 (1) SACR 1 (CC). In a court consisting of ten judges, Thereon J (four judges concurring)[5] gave the

[4] This judgment does not call for a full discussion of the factual causation versus legal causation. In this regard see *Nohour and Another v Minister of Justice and Constitutional Development* 2020 (2) SACR 229 (SCA) at paras 15-19.
[5] Basson AJ, Dlodlo AJ, Khampepe J and Petse AJ concurring.

majority judgment in the Constitutional Court ("the ConCourt"), and Cameron J a concurring one. The ConCourt dealt with a case where the plaintiff was kept in custody for eight days. He was taken to court on the first day of his arrest, but foreseeably so, the case was simply remanded for a bail hearing. The case was withdrawn and the plaintiff released from detention. The police argued that the plaintiff's first court appearance and the court remand order, collectively constituted *a novus actus interveniens* - breaking the chain of causation that started with the unlawful arrest. It seems that this was the intended pleaded case before me as well, and the basis for the argument that malicious prosecution must be proven to succeed with a claim after the first remand by a magistrate.

[27] *De Klerk* decided the matter based on causation, an approach in which any lawful detention after the unlawful arrest is but a factor to consider in determining legal causation. *De Klerk* held that the facts of a matter may mean that the wrongdoer, for reasons of public policy, is not held liable for harm that is too remote from the unlawful arrest. However, in our law there is no blanket principle that the police's liability terminates on the first appearance of an unlawfully arrested person. Even if the continued detention of the unlawfully arrested person is lawful after a court appearance, the police's liability may continue. It is but a factor to consider from amongst all factors. The ConCourt held in para 63 (underlining added):

> "In cases like this, the liability of the police for detention post-court appearance should be determined on an application of the principles of legal causation, having regard to the applicable tests and policy considerations. This may include a consideration of whether the post-appearance detention was lawful.[6] It is these public policy considerations that will serve as a measure of control to ensure that liability is not extended too far. <u>The conduct of the police after an unlawful arrest, especially if the police acted unlawfully after the unlawful arrest of the plaintiff</u>,[7] is to be evaluated and considered in determining legal causation. In addition, every matter must be determined on its own facts –

[6] "[92] Importantly, this relationship between lawfulness of the decision to remand and legal causation of the unlawful arrest is distinct from the relationship between wrongfulness and legal causation of the same delict. I make no pronouncements on the latter."

[7] "[93] In all the cases discussed above this was the case. Examples include misleading a court or presenting false evidence."

> there is no general rule that can be applied dogmatically in order to determine liability."

[28] Footnote 93 in para 63 bears repeating:

> "[93] In all the cases discussed above this was the case. Examples include misleading a court or presenting false evidence."

[29] Due to the false evidence about the appellant having escaped from detention, there could have been no argument that the factual chain of causation was disturbed by legal causation. As appears from *De Klerk*, one of the cases referred to in para 63 was *Woji v Minister of Police* 2015 (1) SACR 409 (SCA).[8] This is how the ConCourt in *De Klerk* summarised the facts in *Woji* in para 42:

> "… In Woji, the accused was lawfully arrested. At the bail application, the arresting officer testified that the accused could clearly be seen in video footage of the alleged robbery for which he were arrested. The accused was consequently remanded in custody. The police officer's evidence, however, turned out to be false – the video did not clearly depict the accused. …"

[30] Hence the detention, despite a court order, was not lawful detention (to the extent that this is a factor in evaluating legal causation).

[31] The next leading case is *Mahlangu and Another v Minister of Police* 2020 (2) SACR 136. The court also dealt with the liability of the police for an unlawful arrest after the first remand before a magistrate. The court was split. Koen AJA[9] wrote the majority judgment. The plaintiffs were arrested on 29 May 2005, and were released on 10 February 2006 after the charges were withdrawn. The plaintiffs never pursued a bail application. Ultimately this failure meant that the police's liability ended as at 14 June 2005. Van der Merwe JA held that De *Klerk* did not overturn *Woji*, the effect of which he describes as follows in para 69:

> "In Woji, therefore, this Court held the respondent liable for post-appearance detention where the wrongful and culpable conduct of the police had materially influenced the decision of the court to remand the person in question in custody. It is immaterial whether the unlawful police influence is exerted directly or through the prosecutor. …"

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[8] *Woji* is also reported as *W v Minister of Police* [2014] ZASCA 108.
[9] Cachalia JA and Dolamo AJA concurring.

[32] This is really the end of the matter on the question of causation. The state did not argue (and could not argue in my respectful view) that damages suffered after detention by court order were too remote to be recovered from the police; and could not argue in my respectful view that such an order was a *novus actus interveniens*; and did not argue (and could not argue in my respectful view) that such damages were not foreseeable. In the circumstances of this case, the false affidavit by the investigating officer meant that the police remained liable for damages caused by the unlawful detention. If the plaintiff bore the onus[10] to show legal causation, he succeeded.

**Malicious prosecution**

[33] Although there are, in theory, two possible causes of action available to the plaintiff in this matter (unlawful arrest and detention and malicious prosecution), and although both were pleaded, he is perfectly within the law to seek payment for damages for the whole period of his detention as having been caused by his unlawful arrest. As such I need not deal with the alternate claim for malicious prosecution. The pursuit of the alternative claim caused minimal additional cost. I respectfully disagree with the state's submission that I am obliged to dismiss the alternative claim. In my view, I need not deal with it as it has become moot if the main claim is upheld, and I can make an order on costs that is fair. That fair order is that the state must pay the costs of the action. It is trite that fairness is the proper test in deciding costs. See *Gelb v Hawkins* 1960 (3) SA 687 (A) at 694A.

**Time value of money**

[34] Having decided that the state, through an unlawful act, acting at least negligently, caused the plaintiff to suffer damages, the remaining main issue is the amount of such damages to be awarded to the plaintiff.

[35] There is however another matter to address first. The plaintiff, as he is entitled in law to do, sought interest from the date of the summons on the damages that I may award. This demand focused the attention on the date as at which

[10] It seems that the plaintiff bears it as part of the overall onus. See *Oppelt v Department of Health, Western Cape* 2016 (1) SA 325 (CC) at para 35, perhaps an onus arises once the issue is raised by the state.

damages must be determined: Date of the delict (in this case the period from arrest to release from detention is long); date of demand; date of summons; or date of judgment; or another date. After the hearing I sought additional submissions on this aspect.

[36] In this case the relevant dates were:

[36.1] Arrest of the plaintiff 19 May 2017;

[36.2] Release of the plaintiff from detention 24 January 2018;

[36.3] Demand received by the state on or before 9 October 2018;

[36.4] Summons issued 8 November 2018;

[36.5] Summons served 27 November 2018;

[36.6] Hearing completed 12 February 2021 (and afterwards I called for further written submissions).

[37] The date as at which damages must be determined may be material. Although the assessment of general damages is not done with mathematical precision, especially in periods of high inflation, awards will differ materially in value depending if the award is determined as at date of the delict or as at date when the matter is argued. The practical norm is the later date. Counsel usually make submissions based on "*current value*" of an earlier judgment in seeking general damages. Judgments (my own too) reflect this approach. Practically it is easy and fair, as it provides for inflation. If in such a case interest is awarded from date of the award, the outcome remains fair. In fact, the Road Accident Fund Act 56 of 1996 determines in section 17(3)(a) that no interest is payable unless 14 days have elapsed from the date of the court's order.

[38] Having asked for interest from an earlier date, the plaintiff focused the attention on a problem that is immediately clear. If damages are determined in the time value of money as at date of the judgment, and interest is to run from date of demand or service of the summons, the plaintiff will receive double compensation for the period that it takes for the trial to be finalised. The

converse position is problematic too. If damages are determined in the time value of money as at date of (completion?) of the delict, and interest is to run from date of demand or service of the summons, the plaintiff will not be compensated for the period that it took to serve the summons.

[39] The Prescribed Rate of Interest Act 55 of 1975 addresses two main matters relevant to this issue, (a) the date from which the interest is to run and (b) the rate of interest.

[40] The traditional position is that unliquidated amounts, such as the claim before me, had born interest from the date of the judgment. This position appears from in the Prescribed Rate of Interest Act too. See section 2(1):

> "Interest on a judgment debt
> (1) Every judgment debt which, but for the provisions of this subsection, would not bear any interest after the date of the judgment or order by virtue of which it is due, shall bear interest from the day on which such judgment debt is payable, unless that judgment or order provides otherwise."

[41] In 1997 section 2A was inserted in the act. It has the following relevant sections:

[41.1] Section 2A(1) provides for a default position, linking judgments for unliquidated debts to section 2(1) referred to above-

> "Interest on unliquidated debts
> (1) Subject to the provisions of this section the amount of every unliquidated debt as determined by a court of law, or an arbitrator or an arbitration tribunal or by agreement between the creditor and the debtor, shall bear interest as contemplated in section 1."

[41.2] Section 2A(2) then reads that notwithstanding the previous subsection -

> "(2) (a) Subject to any other agreement between the parties and the provisions of the National Credit Act, 2005 (Act 34 of 2005) the interest contemplated in subsection (1) shall run from the date on which payment of the debt is claimed by the service on the debtor of a demand or summons, whichever date is the earlier."

[42] The debt by law thus bears interest from a date prior to the date when the court determines the amount. The first date in this matter has been the date of

service of the demand that preceded the summons. The plaintiff however sought interest from the date of the summons - 8 November 2018.

[43] These interest provisions could work unfairly, as the first case addressed below will illustrate. The act provides a solution in section 2A(5). Section 2A(5) reads:

> "Notwithstanding the provisions of this Act but subject to any other law or an agreement between the parties, a court of law, … may make such order as appears just in respect of the payment of interest on an unliquidated debt, the rate at which interest shall accrue and the date from which interest shall run."

[44] *Drake Flemmer & Orsmond Inc and Another v Gajjar* 2018 (3) SA 353 (SCA) is instructive on the fairness of the impact of the time value of money and interest. The claims in issue were for unliquidated contractual damages. The judgment dealt with the date at which such damages should be assessed. As such, the reasoning applies in the case before me too where I also had to address unliquidated damages. The plaintiff brought an action against two sets of attorneys for professional negligence. The first claim was for damages suffered when a Road Accident Fund ("the RAF") claim was settled at substantially below its true value. The second claim was for the prescription of the claim against the first set of attorneys for under-settling the RAF claim.

[45] The collision occurred in 1997. The claim was lodged with the RAF in 1999. An offer by the RAF was accepted in 1999. The plaintiff, unbeknown to the first set of attorneys, had more severe symptoms caused by the collision, and the claim was thus under-settled. The second set of attorneys issued summons against the first set of attorneys in 2005 for negligent representation. By then the claim had prescribed. A third set of attorneys joined the second set of attorneys as defendants in 2012. The trial started in 2015. Judgment followed in 2016.

[46] The SCA drew a distinction between a case where the attorney had all the relevant information for assessing a proper settlement but negligently under-settles, and a case where the attorney did not have all the information and

negligently did not investigate the matter.[11] In the under-settlement claim, the first set of attorneys did not have all the facts. They thus did not cause the loss on the date of the under-settlement in 1999, but when the matter would have served before the notional trial court as at December 2002. The SCA held that the prescription claim arose on the date of the prescription in December 2002, not when the matter would have come to trial and payment be obtained in February 2005.

[47] It is trite that in law the date for the determination of delictual damages is usually the date of the delict. Directly relevant to the matter before me, the SCA held in para 38:

> "Although delictual damages are normally assessed at the date of the delict, in personal injury claims the court takes into account events occurring up to the date of trial.[12] The claimant is entitled to compensation for all injuries and sequelae which are known or reasonably foreseeable at the trial date. I have estimated that the plaintiff's claim against the RAF would have come to trial on 1 December 2002. Any evidence that would have been available to the plaintiff at that time could have been presented in support of his claim."

[48] The SCA determined that in the matter before it, the damages must be determined as at 2002. However, on the facts of the matter it would be unjust not to compensate the plaintiff for the long delays. It was in fact the second firm of attorneys that delayed the matter till 2012. Hence the court found in para 68:

> "In summary, the correct approach in the present case would have been for the plaintiff to prove the nominal value of his damages as at the notional trial date of 1 December 2002. That would have been the value of the claim against DFO which LRI allowed to prescribe on 21 December 2002. The time value of money would have been dealt with by an order for interest in terms of s 2A(5), such interest to run from 21 December 2002. Put differently, s 2A(5) provides the means by which a court in this country can apply the interest-rate solution."

[49] The "*interest rate solution*" is the answer to the effect of *SA Eagle Insurance Co Ltd v Hartley* 1990 (4) SA 833 (A) at 840G-H on the time value of money:

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[11] Paras 40-41.

[12] "4 See eg *Botha v Rondalia Versekeringskorporasie van Suid-Afrika Bpk* 1978 (1) SA 996 (T) at 1004D – 1005B; *Beverley v Mutual & Federal Insurance Co Ltd* 1988 (2) SA 267 (D) at 271D – I; *Road Accident Fund v Monani and Another* 2009 (4) SA 327 (SCA) ([2009] ZASCA 18) para 9".

> "The principle of currency nominalism is in my view to be applied as follows in the present case. The respondent suffered a loss of income, expressed in rands, prior to the trial. That loss had to be made good by the appellant by paying to the respondent the number of rands which he has lost, irrespective of whether the purchasing power of the rand has varied in the interim."

[50] In the mater before me the delict ended on the plaintiff's release – 24 January 2018. I will determine his damages as at that date, as he suffered an ongoing wrong during the whole period of his detention, in fact he suffered repeated delicts. See *Slomowitz v Vereeniging Town Counc*il 1966 (3) SA 317 (A) at 330F-332C and *Lombo v African National Congress* 2002 (5) SA 668 (SCA) at para 26. The plaintiff sought interest from a later date, the date of the summons, 8 November 2018.

[51] In summary, the answer therefore seems to me that as damages are calculated as at date of the delict, any unjust result caused by a delay is to be dealt with by applying section 2A(5) of the Prescribed Rate of Interest Act. This section attracts no onus. See *Adel Builders (Pty) Ltd v Thompson* at 2000 (4) SA 1027 (SCA) at para 15. In this case I will act fairly to both parties if I simply apply the prescribed rate of interest as claimed.

[52] If I apply the rate as contemplated in sections 1(1)[13] and 1(2)(a)[14] of the Prescribed Rate of Interest Act, that rate is 10% per year. That was the rate that applied when summons was issued. See *Crookes Brothers Ltd v Regional Land Claims Commission for the Province of Mpumalanga and Others* 2013 (2) SA 259 (SCA) at para 22 referring to *Davehill (Pty) Ltd and Others v Community Development Board* 1988 (1) SA 290 (A) at 300J-301E.

**<u>What damages did the plaintiff suffer?</u>**

[53] I can now address the remaining issue, the amount of damages to be awarded. The plaintiff claimed damages as follows:

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[13] "If a debt bears interest and the rate at which the interest is to be calculated is not governed by any other law or by an agreement or a trade custom or in any other manner, such interest shall be calculated at the rate contemplated in subsection (2) (a) as at the time when such interest begins to run, unless a court of law, on the ground of special circumstances relating to that debt, orders otherwise."

[14] "For the purposes of subsection (1), the rate of interest is the repurchase rate as determined from time to time by the South African Reserve Bank, plus 3,5 percent per annum".

[53.1] Unlawful arrest on 19 May 2017, R50 000.00. This claim was not pursued as a separate claim in the end;

[53.2] Unlawful detention from 19 May 2017 to 22 May 2017 (3 days), R150 000.00. This claim was persisted with, plus interest at the rate of 10% from date of the summons;

[53.3] Further detention from 22 May 2017 to 24 January 2018 (according to the plaintiff computed at a fair and reasonable rate of R20 000.00 per day of incarceration, 248/240 days), R4 800 000.00. This claim in the end was reduced to R1 250 000.00, plus interest at the rate of 10% from date of the summons. I address the damages for the incarceration below. It is helpful to a court if a plaintiff seeks realistic damages, and not outrageous sums;[15]

[53.4] Loss of income for eight (8) months at R3 200.00 per month, R25 600.00. This claim, the plaintiff in the end sought to incorporate in the claim set out above in one award, but it seems to me to be an error in law to treat it as part of a general damages claim. The claim was not abandoned.

[54] The total amount claimed in the summons was R5 025 600 .00. In the end, the total amount claimed in argument was reduced to R1 400 000.00.

[55] Dealing with the claim for loss of income first, the evidence shows that the plaintiff earned R500.00 per week, or about (dependent on overtime) between R2 600.00 and R2 800.00 per month. The state argued that in the absence of "*a salary payslip or an affidavit from his employer*"[16] the claim should fail. In my view, the plaintiff could do no more than state (as he did) that he earned a cash wage, given to him in an envelope. He testified that his former employer has passed away. He presented his available evidence and is entitled to payment. It seems to be one of those cases where an estimate of a monthly loss of R2 700.00 would be appropriate for the ten months of May 2017 to January 2018, being R27 000.00. The plaintiff claimed R25 600.00 plus

[15] I appreciate the plaintiff's approach.
[16] An affidavit would have been inadmissible evidence, unless agreed to by the state.

interest at the rate of 10% per year from 8 November 2018. He is entitled to such compensation.

[56] General damages remain as the outstanding issue.

[57] In my view one should not split general damages arising from the unlawful arrest into separate general damages claims (as claimed by the plaintiff), whether broken down in claims for every day of detention, or claims dependent on the facility where the plaintiff was detained, or claims dependent on milestones in the process of arrest, initial detention at the police cells, first appearance in court, etc. Such damages arise from one event, the unlawful arrest. The experiences in some periods of detention would have been worse than others, but one should assess the whole period of detention as a period of detention.

[58] *Visser and Potgieter* Law of Damages, Third Edition, at 15.3.9 at page 545-548 states the following factors that generally play a role in the assessment of damages in similar cases, an assessment to determine what is fundamentally fair and equitable (footnotes omitted):

> "… the circumstances under which the deprivation of liberty took place; the presence or absence of improper motive or 'malice' on the part of the defendant; the harsh conduct of the defendants; the duration and nature (e.g. solitary confinement or humiliating nature) of the deprivation of liberty; the status, standing, age and health and disability of the plaintiff; the extent of the publicity given to deprivation of liberty; the presence or absence of an apology or satisfactory explanation of the events by the defendant; awards in previous comparable cases; the fact that in addition to physical freedom, other personality interests such as honour and good name as well as constitutionally protected fundamental rights have been infringed; the high value of the right to physical liberty; the effect of inflation; the fact that the plaintiff contributed to his or her misfortune; the effect an award may have on the public purse; and, according to some, the view that actio iniuriarum also has a punitive function."

[59] This list of factors has been quoted with approval in this division in *Mokiyi v Minister of Police and Another* [2019] ZAGPPHC 440 at para 9 and in *Mathe v Minister of Police* 2017 (2) SACR211 (GJ) at para 19. *Visser and Potgieter* add at page 458 (footnotes omitted):

> "Neethling et al add the following factors with reference to wrongful arrest: the circumstances surrounding the deprivation of liberty, its duration, the presence or absence of an apology or satisfactory explanation. Naturally satisfaction is increased if additional personality interests such as dignity and good name are involved."

[60] Applying the above:

[60.1] Our society places a high value on the right to physical liberty. This matter is no different;

[60.2] The circumstances under which the deprivation of liberty took place were not unusually shameful or harsh. On the facts of this matter, I see this factor as a neutral factor. The same would apply to the extent of the publicity given to deprivation of liberty of the plaintiff, it too is a neutral factor on the facts of this matter;

[60.3] Unlawful detention by its nature infringes upon the rights to physical freedom, to dignity and a good name. On the facts of this matter, I see this factor as a neutral factor;

[60.4] The investigating officer erred, but I cannot find that he was motivated by improper motive on the evidence before me. On the facts of this matter, I see this factor as a neutral factor;

[60.5] The detention was of long duration, eight-and-a-half months. It seems to me that the awards in our courts start on a higher proportional award and then proportionally reduce the longer the detention is. The total award thus exceeds the awards for shorter periods, without being calculated as an incarceration-rate-per-day. In the end, the inquiry is what amount of general damages is appropriate relief on the facts of this case. I agree with the finding in *Latha and Another v Minister of Police and Others* 2019 (1) SACR 328 (KZP) at paras 11-12 relying on *Mkwati v Minister of Police* [2018] ZAECMHC 2 at para 18 and *Alves v Lom Business Solutions (Pty) Ltd and Another* 2012 (1) SA 399 (GSJ) at para 36 that it is "*not*

*helpful to calculate a daily tariff or what has been termed a 'flat-rate' in arriving at an award*";

[60.6] I did not have evidence before me to make a finding that detention in an overcrowded, violent cell is much less injurious than solitary confinement. On the facts of this matter, I see this factor as a neutral factor;

[60.7] The manner of detention was not unusually humiliating. On the facts of this matter, I see this factor as a neutral factor;

[60.8] I have some difficulty in considering the status, standing, and age of the plaintiff as factors. Yes, the plaintiff in this matter had limited education (grade seven), and yes he had a job that is not one with high status (a security guard earning relatively low wages). But the right to dignity and the right to equality seem to me to point away from using such facts as reasons to reduce an award. On the facts of this matter, I see these factors as neutral factors;

[60.9] The plaintiff was 38 years old at the time of his arrest. I have difficulty in putting a factoring value on age. At what stage(s) in one's life is age a factor to increase or decrease an award? On the facts of this matter, I see this factor as a neutral factor;

[60.10] The plaintiff's health and any disability played no role in this matter;

[60.11] The absence of an apology or satisfactory explanation of the events by the defendant, do play a role. The matter was defended to the bitter end, but so do I assume are all cases defenced on the merits and on the *quantum*. On the facts of this matter, I see these factors as neutral factors;

[60.12] The plaintiff did not contribute to his misfortune;

[60.13] I do consider the effect an award may have on the public purse;

[60.14] The plaintiff was told that he should receive lower compensation as he had been in detention before. The plaintiff had three prior convictions and he testified that he served his sentences in juvenile prisons: 1998 - four years for motor vehicle theft; 1998 - fifteen years for robbery with aggravated circumstances; and 2004 - eight years for possession of a firearm. In some sense, one could argue it was worse, as he had obtained gainful employment.

[61] The main factors are that the plaintiff was unlawfully arrested for a crime he did not commit and deprived of his freedom for a prolonged period. During his detention for about eight-and-a-half months he endured overcrowded, violent, dirty, detention conditions, and was limited in his interaction with people dear to him. There were very limited toilet and washing facilities, and initially too few matrasses and blankets. He encountered the power of prison gangs and ineffective protection by the prison warders. These facts, regrettably, are notorious and little would be added to this judgment by repeating the uncontested evidence of the horrific conditions he encountered in detention.

[62] The general damages to be awarded, despite its compensatory purpose, "… *are not susceptible to exact or immediate calculation in monetary terms. In other words, there is no real relationship between the money and the loss*". See *Van der Merwe v Road Accident Fund and Another (Women's Legal Centre Trust as Amicus Curiae)* 2006 (4) SA 230 (CC) at para 39. Still the award must be just and equitable, compensating the victim for the loss (*Van der Merwe* para 41).

[63] As verbalised in *De Jongh v Du Pisanie* [2004] 2 All SA 565 (SCA) at para 58, the difficulty is that a court is asked to determine an amount of compensation as general damages for a loss that money cannot compensate. As such, the past judgments are useful to determine the amount and as set out in *De Jongh* para 56, a court should guard against its (humane) tendency to over-compensate due to its sympathy for the victim. In considering comparable awards, they remain an aide, broad parameters, to ensure consistent and predictable awards, which I agree is an inherent requirement of fair awards. See *De Jongh* at para 64.

[64] Against this background, I turn to the last factor, the awards in previous comparable cases and the effect of inflation. Comparable decisions assist to steer me away from gut feeling and blind guesses. In this process, I do not and cannot seek mathematical accuracy in applying them, in the often widely differing cases in the comparable range. See *De Jongh* at para 63-64 and *Minister of Safety and Security v Seymour* 2006 (6) SA 320 (SCA) at para 4, and 16-20. I endeavoured not to follow them slavishly, only to use them as a guide, acutely aware of the differences in each case. Still, it is often difficult too to ascertain the reasons why some judgments contain outlier high awards.

[65] The state thought that R10 000.00 per month would suffice as general damages for unlawful detention of eight-and-a-half months (R85 000.00). If one could have understood the decision to contest merits and quantum, and if one could have understood the decision not to apologise, this submission is in its effect, insultingly low. I used it as a factor to increase the general damages awarded in this case. This is no way to treat a person, wronged by the state, a state founded on the value of human dignity. That state will make mistakes, it will, through no ill will, cause harm, and it has limited resources, but it needs to do what is right. Offering compensation in this case of R85 000.00 is not. As will appear below, the lowest comparable award was for about R300 000.00.

[66] The state relied on "*Tyulu v Minister of Safety and Security"* 2009 (5) SA 85 (SCA) at paras 26-27[17] regarding the factors to consider in my award. The

[17] The correct reference is *Minister of Safety and Security v Tyulu* 2009 (5) SA 85 (SCA) at para 26-27:

> "[26] In the assessment of damages for unlawful arrest and detention, it is important to bear in mind that the primary purpose is not to enrich the aggrieved party but to offer him or her some much-needed solatium for his or her injured feelings. It is therefore crucial that serious attempts be made to ensure that the damages awarded are commensurate with the injury inflicted. However, our courts should be astute to ensure that the awards they make for such infractions reflect the importance of the right to personal liberty and the seriousness with which any arbitrary deprivation of personal liberty is viewed in our law. I readily concede that it is impossible to determine an award of damages for this kind of injuria with any kind of mathematical accuracy. Although it is always helpful to have regard to awards made in previous cases to serve as a guide, such an approach if slavishly followed can prove to be treacherous. The correct approach is to have regard to all the facts of the particular case and to determine the quantum of damages on such facts (*Minister of Safety and Security v Seymour* 2006 (6) SA 320 (SCA) at 325 para 17; *Rudolph and Others v Minister of Safety and Security and Another* 2009 (5) SA 94 (SCA) ([2009] ZASCA 39) paras 26 - 29).
>
> [27] Having given careful consideration to all relevant facts, including the age of the respondent, the circumstances of his arrest, its nature and short duration, his social and professional standing, the fact that he was arrested for an improper motive and awards made in comparable

SCA in *Tyulu* reduced an award of R280 000.00 by the trial judge and R50 000.00 by an appeal court, to R15 000.00. A 48-year old magistrate had been unlawfully arrested and detained for being drunk in public, and thereafter on the same day for drunk driving. The first arrest was found to have been unlawful, the second not. The magistrate was in unlawful detention for 15 minutes in 2003. The principles in *Tyulu* (set out in footnote 17) guide me but, with respect, the award cannot be compared to the current facts.

[67] The state also referred me to a judgment dealing with detention for only three days, *Sithebe v Minister of Police* [2014] ZAGPJHC 201. The judgment dealt with an unlawful arrest and detention in November 2011. The learned judge awarded R150 000.00 in August 2014. It appears to me that the learned judge used the time value of money as in 2014.[18] With respect, I did not follow the argument how this award would be helpful in determining that an award for unlawful detention for eight-and-a-half months should be less - R85 000.00.

[68] As reflected, in the end the plaintiff claimed R1 400 000.00 (less the loss of income claim). I round it off to a claim for general damages for R1 375 000.00. The plaintiff referred me to *Mbwanja v Minister of Police* [2017] ZAGPPHC 176. In that case the plaintiff was unlawfully arrested in January 2006, and remained in custody for five months. The court awarded R500 000.00. The plaintiff's arrest in *Mbwanja* was more publicly demeaning than in the present case. He was 29, and had a diploma from a Technikon, and had a comfortable home life, employed as a manager in a casino. His family lost their home, and their furniture in the period that he was unemployed. The learned judge did not refer to comparable awards, and awarded interest from the date of judgment, 5 April 2017. This would mean, considering the facts of the two matters, that a comparable award in the present case would be about R800 000.00 as at 24 January 2018.

[69] The only further matter relied upon by the plaintiff with a degree of compatibility as to duration of detention is *Onwuchekwa v Minister of Police and Another*

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cases, I am of the view that a fair and appropriate award of damages for the respondent's unlawful arrest and detention is an amount of R15 000."

[18] See para 202.6 of the judgment.

[2015] ZAGPPHC 919. The plaintiff was arrested in October 2009 and he remained in detention for 44 days (one-and-a-half months). The learned judge seemingly determined the value of comparable awards as at trial,[19] and awarded R600 000.00 on 28 August 2015, but awarded interest from 14 February 2012. This would mean, considering the facts of the two matters, that a comparable award in the present case would be about R2 500 000.00 as at 24 January 2018. Such an award would be so out of proportion to any other award, that I decline to consider it as a guide.

[70] I also looked at the following comparable cases. In making an assessment of what the judgments mean for the case before me, I considered inflation, length of detention, and any peculiar facts that would have led to a higher award in the case referred to. Where I could see an indication that the judge worked with the time value of money as at date of the judgment, I used that date. Where I could see no indication, and interest was backdated to date of demand or summons, I used the date of the delict as the base to calculate present value as at date of the delict:

[70.1] *Minister of Justice v Hofmeyr* 1993 (3) SA 131 (A), a case where the plaintiff was unlawfully detained for five months from 3 May 1988, amounting to effective solitary confinement. The SCA upheld an award of R50 000.00 on 22 August 1990. A comparable award as 24 January 2018 would be substantially higher (about R300 000.00). This would mean, considering the facts of the two matters, that a comparable award in the present case as at 24 January 2018 would be about R500 000.00. I point out that this is a judgment by the SCA;

[70.2] *Mthimkhulu and Another v Minister of Law-and-Order* 1993 (3) SA 432 (E), a case where the plaintiffs were arrested on 8 March 1991, and detained for 144 days (four-and-a-half months). The judgment was delivered on 24 November 1992. The learned judge did not refer to comparable authority and ordered interest to run from date of judgment. The plaintiffs were awarded R40 000.00 each, despite

[19] Para 6.

some differences in their personal circumstances. This would mean, considering the facts of the two matters, that a comparable award in the present case as at 24 January 2018 would be about R400 000.00;

[70.3] *Zealand v Minister of Justice and Constitutional Development and Another* 2008 (4) SA 458 (CC), a case where the plaintiffs were charged and sentenced on 28 September 1998 to an effective sentence of 18 years imprisonment on a charge of murder. The convictions and sentence were set aside on appeal on 23 August 1999. Due to an error by the registrar of the Grahamstown High Court, they remained in detention for an effective further period of four years and ten months until 30 June 2004. I have been unable to trace the judgment awarding damages;[20]

[70.4] *Stemar v Minister of Police and Another* [2014] ZAGPPHC 295, a case where the plaintiff was arrested in November 2010 and he remained in detention for eleven months until October 2011. The court awarded R450 000.00 on 16 May 2014, with interest from the date of summons. The learned judge did not refer to comparable awards. This would mean, considering the facts of the two matters, that a comparable award in the present case as at 24 January 2018 would be about R400 000.00;

[70.5] *Riochards v Minister of Police and Others* [2014] ZAGPJHC 280, a case where the plaintiff was arrested in March 2010 and he remained in detention for 115 days (four months) until August 2010. Demand was made on 14 June 2012. The court awarded R500 000.00 on 23 October 2014, with interest from the date of judgment. This would mean, considering the facts of the two matters, that a comparable award in the present case as at 24 January 2018 would be about R1 000 000.00. This award seems high if compared to the judgments listed immediately above and next;

[20] But see below, it was R2 000 000.00.

[70.6] *Woji v Minister of Police* 2015 (1) SACR 409 (SCA), a case where the plaintiff was arrested in November 2007 and he remained in detention for thirteen months until January 2009. The court awarded R500 000.00 on 11 September 2014, with interest from the date of demand. This date does not appear to be reflected in the judgment. The judgment gives no other indication that the SCA considered the date of the delict to be the relevant date, but based on the interest award, I assume it did. This would mean, considering the facts of the two matters, that a comparable award in the present case as at 24 January 2018 would be about R500 000.00 too;

[70.7] *Links v Minister of Safety and Security and Another* [2015] ZAECPEHC 18, a case where the plaintiff was arrested in December 2009 and he remained in detention for three months until March 2010. The court awarded R250 000.00 on 30 March 2015, with interest from the date of demand. This date does not appear to be reflected in the judgment. The judgment gives no other indication that the court considered the date of the delict to be the relevant date, but based on the interest award, I assume it did. This would mean, considering the facts of the two matters, that a comparable award in the present case as at 24 January 2018 would be about R900 000.00. This amount seems high if compared to the judgments referred to above, including judgments in the SCA;

[70.8] *Okonkwo v Minister of Home Affairs and Another* [2015] ZAECELLC 8, a case where the plaintiff was unlawfully arrested in August 2012, and was detained for 75 days (two-and-a-half months) until May 2013. The plaintiff's arrest was a humiliating, public affair. He had to deal with unwelcome sexual advances in detention. The court awarded R600 000.00, with interest from the date of judgment, 30 June 2015. The learned judge did not refer to earlier cases. The judgment in the application for leave to appeal[21] reflects that, in fact, the award of damages was meant to cover four claims (*contumelia*,

[21] *Okonkwo v Minister of Home Affairs and Another* [2015] ZAECELLC 15.

R400 000.00 claimed, deprivation of liberty, R600 000.00 claimed, legal expenses R15 000.00 claimed, and loss of business income, R75 000.00 claimed). I do not know what happened in the appeal, and could not really use the judgment for comparison purposes;

[70.9] *Latha and Another v Minister of Police and Others* (supra) 2019 (1) SACR 328 (KZP),[22] a case where the plaintiffs were arrested in June 2006 and they remained in detention for six years and eleven months until May 2013. They were severely assaulted by the police, assaulted in prison, stabbed in prison, and the list goes on. The learned judge referred to comparable cases and referred to "*current value*" and "*present day value*" of the earlier awards and awarded R3 500 000.00 on 15 August 2018 with interest from the date of judgment. This would mean, considering the facts of the two matters, that a comparable award in the present case as at 24 January 2018 would be about R300 000.00. The learned judge, Seegobin J recorded that the award in in the *Zealand* matter was R2 000 000.00. The exercise to compare previous judgments in the *Latha* judgment was most helpful in the preparation of this judgment;

[70.10] *Lebelo v Minister of Police* [2019] ZAGPPHC 69, a case where the plaintiff was arrested in May 2013 and he remained in detention for 101 days (three-and-a-half months) until 6 September 2013. The plaintiff faced attacks in jail, including violence of a sexual nature. He was robbed. The court considered the present-day values of comparable cases, awarded R500 000.00 on 28 February 2019 and made no order as to interest. This would mean, considering the facts of the two matters, that a comparable award in the present case as at 24 January 2018 would be about R950 000.00. This amount seems high if compared to the judgments referred to above, including judgments in the SCA;

[22] It is a judgment that I made considerable use of, with gratitude for the summary of case authority on point.

[70.11] *Msongelwa v Minister of Police* 2020 (2) SACR 664 (ECM), a case where the plaintiff was arrested in August 2011 and he remained in detention for 158 days (five months) until 12 January 2012. The plaintiff was arrested at a tavern, shot in his ankle, kept under guard in a public hospital. He was assaulted in prison. The court awarded R5 000 000.00 on 17 March 2020, with interest from 30 days after date of judgment. I assume that the award was meant to be as at March 2020. This would mean, considering the facts of the two matters, that a comparable award in the present case as at 24 January 2018 would about R7 000 000.00. Such an award also would be so out of proportion to any other award, that I decline to consider it as a guide.

[71] It seems to me that the appropriate level at which to set general damages would be at R600 000.00 as at 24 January 2018. I have much sympathy for the plaintiff; I had to guard against my sympathy unduly influencing my award. Testing my award, I asked what award I would have made had the police in this instance shot the plaintiff in the arrest and rendered him quadriplegic for life, as opposed to have had him imprisoned for about eight-and-half months. I also asked what the award would have been had the plaintiff been detained for nine days as opposed eight-and-a-half months.

**Costs**

[72] The matter was previously on the roll and costs were reserved. I am advised that the presiding judge unexpectedly caused a postponement of the trial as the notes by the presiding magistrate had not been transcribed. Both parties wanted the matter to proceed, but the presiding judge saw the matter differently. Illegible handwritten notes and affidavits are a continuous problem in trials. It was a problem in this case too, after transcription of the notes by the presiding magistrate, as especially the investigating officer's handwriting is hard to read. Nothing in this judgment should be interpreted as an approval of the failure by a party to transcribe handwritten material documents. However, it seems to me to be a postponement where the appropriate costs order in respect thereof is that costs should follow the result.

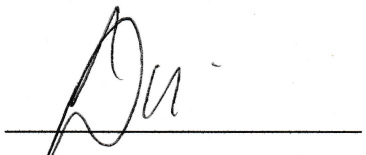
[73] The plaintiff sought penalising costs. No notice of such a request was given. It seems to me to be an unduly harsh order. I have found the defence by the state to be without merit, but I am hesitant to penalise it. A penalising costs order must remain extraordinary relief.

Accordingly, I make the following order:

1. The first defendant is ordered to pay to the plaintiff the sum of R25 600.00 plus interest at the rate of 10% per year from 8 November 2018 to date of payment in full;

2. The first defendant is ordered to pay to the plaintiff the sum of R600 000.00 plus interest at the rate of 10% per year from 8 November 2018 to date of payment in full;

3. The first defendant is ordered to pay the plaintiff's costs of the action, including all reserved costs.



DP de Villiers AJ

Heard on: 8-10 and 12 February 2021
Delivered on: 12 April 2021 by uploading on CaseLines
[Paragraph 1 revised on 23 June 2021]

On behalf of the Plaintiff: Mr L Naidoo
Instructed by: Logan Naidoo Attorney
On behalf of the Defendants: Adv M Mhambi
Instructed by: State Attorney