

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 19474/19

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

Date: 18 JULY 2022 E van der Schyff

In the matter between:

KUTIYA JOHN

PLAINTIFF

and

THE MINISTER OF POLICE

DEFENDANT

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JUDGMENT

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Van der Schyff J

**Introduction**

[1] On 22 March 2019, the plaintiff, Mr. John Kutiya, issued a summons against the Minister of Police. In the particulars of claim, it is stated that Mr. Kutiya is a Zimbabwean national. On 8 December 2017 he was a passenger in a Mercedes-

Benz mini-bus traveling from Zimbabwe to Cape Town. He traveled with four minor children in his care while having the minors' passports and the necessary consent letters from their parents. The mini-bus was stopped at a roadblock near Soweto and Lenasia. Police officers demanded to inspect the passengers' travel documents. The passengers were then taken to the nearest Home Affairs offices to verify the travel documents and the authenticity thereof. The officials at the Soweto Home Affairs office verified his and the minors' travel documents and confirmed that the documents were legitimate and correct, he was unlawfully arrested and detained and charged for human trafficking and contravening the Immigration Act, 2002. He was detained from 8 December 2017 and maliciously prosecuted. He was granted bail on 27 December 2017 and had to surrender his passport and remain in Gauteng Province. On 28 April 2018, the charges against him were withdrawn for lack of evidence. The notice in terms of s 3 of Act 40 of 2002 was served on the defendant on 11 October 2018, within six months after the charges against him were withdrawn.

- [2] The defendant raised the issue of non-compliance with the provisions of the Institution of Legal Proceedings against Certain Organs of the State Act, 40 of 2002, (Act 40 of 2002) as a special plea. The plea on the merits comes down to a bare denial.

### **Postponement application**

- [3] The matter was allocated to me on 9 June 2022. At the onset, the defendant sought a postponement from the bar. No substantive postponement application was filed. However, an affidavit commissioned as early as 16 April 2021, wherein one Captain Swartz stated that he could not trace the docket as it seems to be lost, was presented to the court. The defendant did not subpoena any witness to testify at the hearing.
- [4] The plaintiff objected to the matter being postponed. The plaintiff's attorney submitted that the matter was previously postponed at the defendant's request. He stated that his client is prejudiced by the postponements in that he is a Zimbabwean

citizen who must travel to attend the court proceedings at high costs and was recently employed by a new employer.

- [5] It is trite a postponement is an indulgence. The application must be made timeously and as soon as the circumstances that give rise to the application are known to the party seeking the postponement. In *National Police Service Union and Others v Minister of Safety and Others*, the Constitutional Court stated that a postponement is not merely for the taking and set out the factors that need to be taken into account when an application for postponement is considered:<sup>1</sup>

‘The postponement of a matter set down for hearing on a particular date cannot be claimed as of right. An applicant for a postponement seeks an indulgence from the Court. Such postponement will not be granted unless this Court is satisfied that it is in the interests of justice to do so. In this respect the applicant must show that there is good cause for the postponement. In order to satisfy the Court that good cause does exist, it will be necessary to furnish a full and satisfactory explanation of the circumstances that give rise to the application. Whether a postponement will be granted is therefore in the discretion of the Court and cannot be secured by mere agreement between the parties. In exercising that discretion, this Court will take into account a number of factors, including (but not limited to): whether the application has been timeously made, whether the explanation given by the applicant for postponement is full and satisfactory, whether there is prejudice to any of the parties and whether the application is opposed.’

- [6] I dismissed the postponement application, considering the following: the matter was previously postponed; the absence of a substantive postponement application that was timeously brought; the defendant's failure to secure the attendance of its witnesses; and the prejudice that the plaintiff stood to suffer if the matter is continually postponed.

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<sup>1</sup> 2000 (4) SA 1110 (CC) at par [4].



## Two special pleas

- [7] The defendant raised two special pleas, to wit, non-compliance with s 3 of Act 40 of 2002, and the non-joinder of the National Director of Public Prosecutions (the NDPP). The parties addressed the court on the merits of the special pleas, but no evidence was led at this stage of the proceedings.
- [8] I dismissed the special plea and indicated that the reasons for the dismissal would be provided in the final judgment.
- (i) *Non-compliance with s 3 of Act 40 of 2002*
- [9] The defendant's counsel submitted that the notice in terms of s 3(2) served on 11 October 2018, was served out of time. Counsel submitted that the notice had to be served within six months from the date when the debt became due. The defendant contended that the debt became due on the day the arrest occurred, so the notice had to be served by 8 June 2018. The pre-trial minute reflects that the defendant indicated during the pre-trial held on 19 November 2020 that they would consider withdrawing the special plea relating to the s 3 notice by 19 December 2020. The special plea was, however, not withdrawn and the defendant submitted that in the absence of a condonation application, Mr. Kutiya's claim based on unlawful arrest prescribed. The same holds true for the claim for unlawful detention since Mr. Kutiya was released on bail on 27 December 2017. The s 3 notice relating to a damages claim for unlawful detention had to be served by 27 June 2018.
- [10] Mr. Kutiya's attorney submitted that the six-month period provided for in Act 40 of 2002, commenced when the charges against Mr. Kutiya were withdrawn. He submitted that it was only when the charges against Mr. Kutiya were withdrawn that Mr. Kutiya was able to initiate legal proceedings since the existence of a civil claim depended on the outcome of the criminal proceedings.
- [11] The relevant portions of s 3 of Act 40 of 2002 provide as follows:

(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 proceedings—

(i) without such notice; or

(ii) upon receipt of a notice which does not comply with all the requirements set out in subsection (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 section 4 (1); and

(b) briefly set out—

...

(3) For purposes of subsection (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

...

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

[12] For this discussion, a differentiation must be made between the damages claimed based on Mr. Kutiya's alleged unlawful arrest and detention, and the claim based on malicious prosecution.

[13] It is explained in *Thompson and Another v Minister of Police and Another*<sup>2</sup> that:

'In a claim for damages for wrongful arrest, the delict is committed by the illegal arrest of the plaintiff without the due process of law, i.e the

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<sup>2</sup> 1971 (1) SA 371 (E) at 373F-G.



injury lies in the arrest without legal justification, and the cause of action arises as soon as that illegal arrest has been made, and, in order to comply with the requirements of section 23 of the Police Act, 7 of 1958, the action must be commenced with[in] six months of the cause of action arising.

In an action for damages for malicious arrest and detention where a prosecution ensues on such arrest, however, as in the case of an action for damages for malicious prosecution, the proceedings from arrest to acquittal must be regarded as continuous, and no action for personal injury to the accused will arise until the prosecution has been determined by his discharge, whether by an initial acquittal or by his discharge after a successful appeal from a conviction.'

- [14] The principle that in a claim based on malicious actions of the police, prosecution or third parties, the cause of action is only completed when the ensuing legal proceedings are terminated was confirmed in *Els v Minister of Law and Order*.<sup>3</sup> The underlying principle is that this cause of action cannot be used to prejudice the reasonableness of proceedings that form the subject of the complaint. There is consequently no merit in the special plea as far as it relates to the claim based on malicious prosecution.
- [15] The position is, however, not so obvious where a plaintiff's claim is based on the plaintiff's unlawful arrest and detention. In *Mtokonya v Minister of Police*,<sup>4</sup> the parties agreed for purposes of a stated case, to accept the plaintiff's contentions that he did not know that the conduct of the police was wrongful and actionable, that he did not know that at the time of his arrest the police did not have information upon which they could have formed a reasonable belief that he committed the offence for which he was arrested and thereafter detained and that he could sue the police. The Constitutional Court confirmed in *Mtokonya*, on the facts before the court, that

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<sup>3</sup> 1993 (1) SA 12 (C). See also *Lemue v Zwartbooi* (1896) 13 SC 403.

<sup>4</sup> 2018 (5) SA 22 (CC).

knowledge that the conduct of the debtor giving rise to the debt is wrongful, is a conclusion of law, and not a fact. As a result, they dismissed the appeal. The Constitutional Court emphasised throughout the judgment, however, that they were bound to the set of facts and the questions for determination contained in the stated case.

- [16] Spilg J, in dealing with the question as to whether the date on which a debt is due in a civil claim based of unlawful arrest where a person was arrested and after the effluxion of time the charges were withdrawn, held in *Makhwelo v Minister of Police*,<sup>5</sup> that he is bound by the ratio of Farlam JA in *Unilever Bestfoods, Robbertsons (Pty) Ltd v Soomar and Another*.<sup>6</sup> He pointed out that the SCA in *Unilever* extensively adopted the supportive reasoning contained in an article by Dr. C. F. Amerasinghe, *Aspects of the Actio Iniuriarum in Roman-Dutch* as to why a pending prosecution cannot be allowed to be prejudged in a civil action. These issues, Spilg J said, were never raised before the SCA in *Lombo v African National Congress*,<sup>7</sup> and applies to instances where a person was unlawfully arrested. As a result, Spilg J held the view that for purposes of a section 3(2) notice as required in Act 40 of 2002, the date on which proceedings were withdrawn is the date on which a plaintiff's claim based on unlawful arrest and detention became immediately due and payable. Spilg J explained that:

“Unique circumstances 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. 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 prior to the outcome of

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<sup>5</sup> At par [62].

<sup>6</sup> 2007 (2) SA 347 (SCA) at paras [25]-[29].

<sup>7</sup> 2002 (5) SA 668 (SCA).



the criminal trial or prior to charges being dropped or otherwise withdrawn<sup>8</sup> (References omitted, my emphasis).'

[17] Spilg J accordingly declared that the notice of intention to institute legal proceedings against the Minister was timeously given, but granted condonation in the alternative, should he be wrong.

[18] In *Unilever* the plaintiff's position was set out as follows:<sup>9</sup>

'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 Zwartboo*i, *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.'"

[19] The court continued and stated:

'The reason given in *Lemue's* case, the need to prevent the prejudging of the pending action, calls for further consideration. Dr CF Amerasinghe in his *Aspects of the Actio Iniuriarum in Roman-Dutch Law* says (at p 22) that:

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<sup>8</sup> *Supra* at paras [57] and [58].

<sup>9</sup> *Unilever, supra*, at par [25].



'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 before he is convicted but while the prosecution is still pending.'

- [20] Farlam JA, subsequently, assumed for purposes of the case before him, that this principle also applies to cases involving the abuse of civil and what he called, fiscal, proceedings.
- [21] The issue as to when a debt becomes due is multidimensional, and a court should refrain from ignoring the multiplicity thereof. I am alive to the Supreme Court of Appeal's view as expressed in *Mtokonya* that in determining whether a claim has prescribed, a court must distinguish between knowledge of a fact and a conclusion of law. For purposes of the institution of legal proceedings against certain organs of the State and the s 3-notice, the legislature has determined that a debt may not be regarded as being due until the creditor has knowledge not only of the identity of the organ of state, but also of the facts giving rise to the debt. The question, however, is

whether this means that s 3 of Act 40 of 2002 **only** requires knowledge of the material facts from which the debt arises for a finding that 'the debt became due'.

[22] Section 3(3) (a) provides that:

'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 ...'

I am of the view that the section does not provide that a debt becomes due when the creditor has knowledge of the identity of the organ of state and of the facts giving rise to the debt. It prevents a debt from becoming due before the facts giving rise to the debt, and the identity of the organ of state, came to the knowledge of a plaintiff. The wording of s 3(3)(a) leaves room for something more than mere knowledge of the facts giving rise to a debt, or the identity of the organ of state, for a debt to become due. It leaves room for the trite principle that a debt must be immediately claimable and a debtor obliged to perform immediately, before it can be held that a debt is due. Thirion J stated in *Aniruch v Gunase* 2010 (6) SA 531 (KZD) 534H that:

'A debt can only be said to be immediately claimable if the creditor has the right to immediately institute an action for the recovery of such debt ... in its ordinary meaning a debt is 'due' when it is immediately claimable by the creditor and, as its correlative, it is immediately payable by the debtor.'

[23] Based on Farlam JA's approach in *Unilever*, and in support of Spilg J's view in *Makhwelo*, I am of the view that policy considerations may in appropriate circumstances render an existing debt not yet due, in particular where a civil action based on unlawful arrest and detention runs parallel with criminal proceedings flowing from the alleged unlawful arrest. A pending prosecution can be jeopardised by civil action for several reasons, which may include undue pressure on a presiding officer, police officer or prosecutor. Witnesses may be required to testify in the civil proceedings before the criminal trial is finalised regarding issues that also need to be considered in the criminal trial. The quality of adjudication in criminal matters may



be negatively affected if civil proceedings based on arrests that gave rise to the criminal charges, and culminated in criminal prosecutions, are dealt with prior to the finalisation of the criminal proceedings.

- [24] The need for a cut-off point beyond which a person who has a civil claim to pursue against an organ of state, is obvious, and has been stated clearly by the Constitutional Court in *Road Accident Fund v Mdeyide*:<sup>10</sup>

‘This Court has repeatedly emphasised the vital role time limits play in bringing certainty and stability to social and legal affairs, and maintaining the quality of adjudication. Without prescription periods, legal disputes would have the potential to be drawn out for indefinite periods of time, bringing about prolonged uncertainty to the parties to the dispute. The quality of adjudication by courts is likely to suffer as time passes, because evidence may have become lost, witnesses may no longer be available to testify, or their recollection of events may have faded. The quality of adjudication is central to the rule of law. For the law to be respected, decisions of courts must be given as soon as possible after the events giving rise to disputes, and must follow from sound reasoning, based on the best available evidence.’

- [25] The acknowledgement that policy considerations may in particular circumstances preclude the institution of legal proceedings in civil claims based on unlawful arrest until the finalisation or termination of criminal proceedings, will not result in the drawing out of legal disputes for indefinite periods. A fixed date, namely the date on which the proceedings are terminated or finalised, is still determinable.

- [26] For these reasons the special plea of non-compliance with s 3(2) of Act 40 of 2002 was dismissed.

(ii) *Non-joinder of the NDPP*

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<sup>10</sup> 2011 (2) SA 26 (CC) at par [8].

- [27] The defendant submitted that the claim stands to be dismissed because of the non-joinder of the NDPP. The plaintiff objected to this special plea that was belatedly raised from the bar. I dismissed the special plea on the basis that it was held by the Constitutional Court in *De Klerk v Minister of Police*.<sup>11</sup>

'The Minister of Justice and Director of Public Prosecutions might be jointly and severally liable with the Minister of Police, but it is sufficient for one of them to be sued for their proven delict for the applicant [plaintiff] to succeed. A plaintiff may elect to sue only one person whose delict caused her harm, even if another person's independent delict also causes that same harm. It is not obligatory that *all* joint wrongdoers be sued in the same action. Where all joint wrongdoers have not been sued, a court is not barred from determining the liability, if any, of the party or parties before it.'

### **The plaintiff's evidence**

- [28] Mr. Kutiya testified that he was traveling from Zimbabwe to Cape Town on 7 December 2017. He entered the country at the Beitbridge border post on 6 December 2017. The taxi he traveled in was stopped at a roadblock. He showed his passport to the police officials when they asked for it. The taxi was escorted to a police station in Soweto. Whilst there, personnel from the Department of Home Affairs came to the police station because the police wanted the officials from the Department to verify the authenticity of the stamps in his passport. He was arrested around midnight for human trafficking and taken to the police cells. On his first court appearance, his legal representative requested that he be granted bail but the investigating officer (the IO) refused. The IO stated that he needed more time to investigate the matter. The case was remanded and he was transported to the prison. The circumstances in prison was appalling and he could not communicate with other inmates or guards due to a language barrier. His food was taken by senior inmates, and the food that his relatives brought were taken by other inmates. He

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<sup>11</sup> 2020 (1) SACR 1 (CC) at par [83].



tried to raise these issues with prison officials but he was beaten with a club. His matter proceeded to be postponed. During the third appearance, the prosecutor indicated that the charges were changed from human trafficking to a contravention of the Immigration Act. He was granted bail on 27 December 2017 on the strict conditions that he had to report four times a week to the police station, and he had to surrender his travel documentation. As a result, he was away from his family for a very long time. This was very hard specifically on Christmas day and on his birthday. The charges against him were later withdrawn.

- [29] During cross-examination, Mr. Kutiya's attention was drawn to the fact that the stamps in his passport reflecting his entry into the country bear the date stamp of 8 December 2017 and not 7 December 2017. Mr. Kutiya explained he made a mistake regarding the date, which explanation I accept since the date reflected in the particulars of claim corresponds with the date stamp in the passport.
- [30] Mr. Kutiya testified during cross-examination that he traveled with three minor children under his care. When they were at the police station the officials from Home Affairs arrived. He handed his travel documents, as well as the children's travel documents to the police officials, who in turn handed it to the Home Affairs officials. Home Affairs officials later brought the documentation back. He saw the Home Affairs officials left whereafter he was arrested and taken to the Lenasia police station. One Captain Baloyi informed him that there was concern that he was traveling with minors and the police wanted to verify the information with the minor's parents. The minors were taken to a place of safety.
- [31] Mr. Kutiya testified that he appeared in court for the first time on 11 December 2017. He was charged with human trafficking. He declined to make a statement. He related to the police that his fixed address in South Africa is an address in Hermanus, Cape Province. It was only during his last appearance that the IO and his attorney agreed that he could be granted bail.
- [32] It emerged during cross-examination that Mr. Kutiya's passport was never surrendered after bail was granted. He testified that the IO said he had to keep the passport as there was no register to record the handover of the passport in. He

conceded that he departed from, and entered the country several times after being released on bail in contravention of his alleged bail conditions. He said that he reported four times a week at the police station.

## Submissions

- [33] The parties' legal representatives filed extensive written heads of argument. Mr. Kutiya's legal representative submitted that a proper case has been made out and referred the court to applicable case law.
- [34] Counsel for the Minister submitted that Mr. Kutiya's claim for damages is without any merit. He contended that Mr. Kutiya was unable to prove his arrest and detention because: (i) his pleaded case bore material contradictions and omissions if compared to his oral evidence; (ii) he failed to provide the court with any documentary evidence in support of his cause of action. Counsel submitted that Mr. Kutiya led evidence on aspects that were not pleaded, e.g. that he was assaulted by prison officials, and that he had to report to a police station four times a week after his release on bail.

## Discussion

### *(i) Arrest and detention from 8 December 2017 to first appearance in court*

- [35] The defendant denied in its plea that Mr. Kutiya was arrested, and submitted that since Mr. Kutiya did not provide any documentary proof of his arrest the court must dismiss the claim. The Minister's legal team, however, handed in an affidavit attested to by one Captain Swartz when it applied for a postponement. Captain Swartz stated that he was unable to trace the docket in question, but he annexed the SAP 14 and SAP 10 to his affidavit. It is indicated in the SAP 10 that Mr. John Kutiya was arrested by Captain Swanepoel on 8 December 2017 at 23:55 for contravening the Immigration Act. It is registered in the SAP 14 that Mr. Kutiya was detained in the police cells from 8 December 2017 until 11 December 2017 when he was transported to the Lenasia court. This evidence, together with Mr. Kutiya's oral



evidence is sufficient to prove that Mr. Kutiya was indeed arrested, and detained at the police's behest until he was transferred to court on 11 December 2017.

- [36] It is trite that an arrest and detention is *prima facie* unlawful. It is for the defendant to allege and prove the lawfulness of the arrest and detention. When the police have arrested and detained a person and the arrest and detention is established, the onus of proving lawfulness rests on the State.<sup>12</sup> *In casu*, no evidence was led on behalf of the defendant that the arresting officer entertained a suspicion that rested on reasonable grounds, that the arrestee committed an offence. The contention that the court should draw an inference from the plaintiff's evidence that reasonable grounds existed for his arrest, is untenable. The court cannot assume on what grounds the arresting officer exercised his discretion to effect an arrest. In the absence of any explanation at all, this court cannot but find that the Minister failed to discharge the onus resting on it as far as the arrest and detention up to Mr. Kutiya's first appearance in court are concerned.

(ii) *Subsequent detention*

- [37] The Supreme Court of Appeal held in *Isaacs v Minister van Wet en Orde*<sup>13</sup> that the competence afforded by s 50(1) of the Criminal Procedure Act 51 of 1977, is not dependent on the prior arrest being lawful. Theron J explained in *De Klerk v Minister of Police*<sup>14</sup> that the Appellate Division in *Isaacs* found that:

'a detainee's continued detention pursuant to an order of court remanding him in custody in terms of section 50(1) of the Criminal Procedure Act may be lawful even though the detention followed from an unlawful arrest.'

- [38] Theron J<sup>15</sup> highlighted that the mere existence of a remand order is not enough to break the chain of causation, and the proposition that remand pursuant to an unlawful arrest will necessarily be lawful is not supported by *Isaacs*. She explained

<sup>12</sup> *Minister of Law and Order v Hurley* 1986 (3) SA 568 (A) at 589E-F.

<sup>13</sup> 1996 (1) SACR 314 (SCA)

<sup>14</sup> 2020 (1) SACR 1 (CC).

<sup>15</sup> At par [45].

that in determining liability for subsequent detention, a plaintiff needs to prove that the unlawful, wrongful conduct of the police factually and legally caused the harm, the post-court hearing deprivation of liberty. Theron J summarised the principles emerging from our jurisprudence as follows:<sup>16</sup>

'The principles emerging from our jurisprudence can then be summarised as follows. The deprivation of liberty, through arrest and detention, is per se prima facie unlawful. Every deprivation of liberty must not only be effected in a procedurally fair manner but must also be substantively justified by acceptable reasons. Since *Zealand*, a remand order by a Magistrate does not necessarily render subsequent detention lawful. What matters is whether, substantively, there was just cause for the later deprivation of liberty. In determining whether the deprivation of liberty pursuant to a remand order is lawful, regard can be had to the manner in which the remand order was made.'

[63] 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. It is these public policy considerations that will serve as a measure of control to ensure that liability is not extended too far. The conduct of the police after an unlawful arrest, especially if the police acted unlawfully after the unlawful arrest of the plaintiff, is to be evaluated and considered in determining legal causation. In addition, every matter must be determined on its own facts – there is no general rule that can be applied dogmatically in order to determine liability.' (Footnotes omitted).

[39] Mr. Kutiya's evidence that he applied for bail since his first appearance in court was not challenged under cross-examination, neither was the evidence that the matter was postponed for further investigation while he remained in custody. A reasonable

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<sup>16</sup> At paras [62] and [63].



arresting officer in the circumstances should have foreseen the possibility that, pursuant to an unlawful arrest, Mr. Kutiya would be remanded in custody because he was a foreigner charged with human trafficking and contravening the Immigration Act. In these circumstances, and in the absence of any evidence to the contrary, it is reasonable and fair to hold the defendant liable for the harm suffered by Mr. Kutiya for the whole period during which he was detained.

[40] As for the duration of the detention, I consider that Mr. Kutiya was detained from 8 December 2017. It is indicated on the charge sheet, a discovered document, uploaded to Caselines, that the charges against Mr. Kutiya were withdrawn on 25 April 2017. I take cognisance of the charge sheet because it is recorded in the pre-trial minutes that the parties agreed that '[t]he plaintiff did discover the charge sheet and the verdict from the Lenasia Magistrate Court, and the document is not disputed.'

[41] As for the claim based on malicious prosecution, it cannot be found that Mr. Kutiya made out a case that the police acted with malice. Mr. Kutiya cannot succeed in this regard.

## **Damages**

[42] Mr. Kutiya claimed damages for his:

- i. Unlawful arrest and detention;
- ii. Malicious prosecution;
- iii. The restriction of his movement even after he was granted bail;
- iv. Humiliation and defamation; and for
- v. Loss of income and business opportunities.

[43] No evidence was presented in support of a claim for loss of income and business opportunities. As for the alleged restriction of Mr. Kutiya's movement after bail was granted, I need only refer to the contradiction in Mr. Kutiya's evidence in this regard. Although Mr. Kutiya testified in chief how his movement was restricted because he had to surrender his passport, his evidence under cross-examination was that he

freely crossed the South African – Zimbabwean border after being released on bail. As a result, no case was made out under this head of damages.

- [44] I have already alluded to the fact that Mr. Kutiya did not succeed in making out a case for malicious prosecution.
- [45] As for the quantification of the damages suffered as a result of Mr. Kutiya's unlawful arrest and detention, I take into consideration that Mr. Kutiya was detained for 17 days. The SCA recently cautioned in *Diljan v Minister of Police*<sup>17</sup> against awarding exorbitant amounts. In order to explain the purpose for compensation of damages of the kind claimed in *Diljan*, as in this case, the SCA quoted from *Minister of Safety and Security v Tyulu*:<sup>18</sup>

'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. I readily concede that it is impossible to determine an award of damages ... with mathematical accuracy.'

- [46] Makaula AJA explained in *Diljan*:

'[17] Thus, a balance should be struck between the award and the injury inflicted. Much as the aggrieved party needs to get the required solatium, the defendant (the Minister in this instance) should not be treated as a 'cash-cow' with infinite resources. The compensation must be fair to both parties, and a fine balance must be carefully struck, cognisant of the fact that the purpose is not to enrich the aggrieved party.

[18] The acceptable method of assessing damages includes the evaluation of the plaintiff's personal circumstances; the manner of the arrest; the duration of the detention; the degree of humiliation which

<sup>17</sup> (Case no 746/2021) [2022] ZASCA 103 (24 June 2022).

<sup>18</sup> 2009 (5) SA 85.



encompasses the aggrieved party's reputation and standing in the community; deprivation of liberty; and other relevant factors peculiar to the case under consideration.

[19] Whilst, as a general rule, regard may be had to previous awards, sight should, however, not be lost of the fact that previous awards only serve as a guide and nothing more.'

- [47] Little information was provided regarding the plaintiff's personal circumstances, save that it was the first time that he was arrested and detained. He testified that he was humiliated by the ordeal and that his reputation suffered. In addition, he was deprived of his liberty, and detained in dismal circumstances. Taking into account these factors, I am satisfied that a fair and reasonable amount in the circumstances is R600 000.

### **Miscellaneous**

- [48] I find it apposite to address the submission made by the defendant's counsel that the plaintiff was a poor witness who perjured himself on multiple occasions and that the court cannot rely on his evidence to prove his cause of action.
- [49] It is indeed so that Mr. Kutiya contradicted himself as far as the restriction of his movements after his release on bail are concerned. I am of the view that this contradiction has no bearing on the claim for unlawful arrest and detention and was probably reverted to, to infuse any amount of damages that might be awarded for harm suffered subsequent to his release on bail. Since the claim for malicious prosecution is dismissed, this evidence has no effect on the quantification of Mr. Kutiya's claim. Mr. Kutiya succeeded in his claim for unlawful arrest and detention because the defendant failed to discharge the onus that rested on it. The evidence that I relied on in finding for Mr. Kutiya was provided and agreed to by the defendant, by way of the affidavit filed in support of the application for postponement and the parties' agreement during the pre-trial that the charge sheet and verdict from the Lenasia Magistrate's Court is not disputed. The evidence regarding the circumstances wherein Mr. Kutiya was detained was not challenged, except for his

evidence that he was beaten by prison guards, neither was the fact that this was the first time that he was arrested and detained.

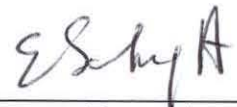
### **Costs**

[50] As for costs, no reason exists to deviate from the principle that costs follow success.

### **ORDER**

**In the result, the following order is granted:**

1. The arrest and detention of the plaintiff are declared to be unlawful;
2. The plaintiff is awarded a sum of R600 000,00 for general damages;
3. The defendant shall pay the costs of suit.




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E van der Schyff

Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email.

For the plaintiff:

Mr. C. Molatoli

Instructed by:

Chabeli Molatoli Attorneys Inc.

For the defendant:

Mr. T. Raikane

Instructed by:

The State Attorney, Pretoria

Date of the hearing:

9 June 2022

Date of judgment: