



NOT REPORTABLE

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)**

In the matter between:

Case No: 1874/2017

NTABANKULU NKWAHLA

Plaintiff

And

THE MINISTER OF POLICE

First Defendant

THE MINISTER OF JUSTICE AND CORRECTIONAL

SERVICES

Second Defendant

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Third Defendant

JUDGMENT

Govindjee AJ:

Background

[1] The plaintiff was arrested by a member of the South African Police Service (SAPS) on 7 December 2009 for the alleged rape of a child, who was his stepdaughter. He was detained from 7 December 2009 until 18 December 2009, when he was released on free bail. The plaintiff was convicted on two counts of rape

and sentenced, on 1 April 2014, to seven years on each count, to run concurrently. He was acquitted on appeal on 9 September 2015 and released from custody.

[2] The plaintiff initially instituted claims against the defendants for unlawful arrest and detention, malicious prosecution and loss of income. The loss of income claim was subsequently withdrawn.

The special plea

[3] The defendants raised a special plea of prescription to the plaintiff's claim for unlawful arrest and detention. That defence was partly upheld. The plaintiff's claim for the arrest on 7 December 2009 and his detention thereafter until 18 December 2009 was held to have prescribed in terms of section 11(d) of the Prescription Act. The plaintiff's claim for the further detention from 1 April 2014 was found not to have prescribed in its entirety: only that portion between 1 April 2014 and 29 May 2014 had prescribed and the claim for unlawful detention between 30 May 2014 and 29 September 2015 had not prescribed in terms of the Prescription Act. In the circumstances, and with due regard to Rule 33(5), the issue of costs was reserved for later determination.

[4] For the sake of completeness, the reasons provided for these conclusions are now repeated. The parties agreed to submit a stated case, in terms of Rule 33 of the Uniform Rules of Court, on the following statement of agreed facts:¹

[5] The plaintiff was arrested by a member of the South African Police Service on 7 December 2009 for the rape of a child, his stepdaughter. He was detained from 7 – 18 December 2009 when he was released on free bail and was legally represented by Ms Britz.

- a. The criminal trial commenced on 10 September 2011 (the docket having been received on 2 June 2011) and the plaintiff was represented by Mr Ntsilatana. Various witnesses testified. He was convicted on two counts of rape and sentenced, on 1 April 2014, to seven years on each count, to run concurrently.

¹ See, in general, *Mtokonya v Minister of Police* [2017] ZACC 33.

- b. The plaintiff was acquitted on appeal on 9 September 2015 and released from custody.
- c. It is accepted that the plaintiff was not legally educated and lacked the finances to instruct attorneys. His present legal representatives have assisted him on a contingency fee basis since 17 February 2017.

[6] The issue to be decided is whether the plaintiff's claim for arrest on 7 December 2009 and his subsequent detention until 18 December 2009 has prescribed; and whether the plaintiff's claim for the further detention between 1 April 2014 and 29 May 2015 has also prescribed in terms of section 11(d) of the Prescription Act, 1969 (Act 68 of 1969).

[7] The plaintiff contends as follows:

- a. he could only institute his claim once his appeal was successful and his conviction and sentence set aside in terms of the principles set out in ***Njongi v MEC for Social Development***;²
- b. that the defendants waived their right to claim prescription when they condoned the late filing of a notice in terms of s 3(4)(b) of the Institution of Legal Proceedings Against Certain Organs of State Act; and
- c. in terms of s 12(3) of the Prescription Act 'the only period that the plaintiff took into account of his personal circumstances that he could be deemed to have personal knowledge of the identity and the facts from which the debt arises, is when he was released from prison and consulted with his legal representative which was on 12 February 2017' (*sic*).

[8] The defendants' special pleas rely on the service of summons more than three years after the date on which the debt for the initial arrest and detention fell due, so that it is suggested that the entire claim in that regard has prescribed. In addition, it was argued that the claim based on the further detention, alternatively at least that portion between 1 April 2014 and 29 May 2014, should suffer the same fate.

² [2008] ZACC 4.

The reliance on administrative action and *Njongi*

[9] The plaintiff replicated to the special plea in the following terms:

- a. the decision to arrest and to further detain the plaintiff, which resulted in the plaintiff suffering damages as claimed in the particulars of claim, is an administrative action, within the meaning of section 1 of the Promotion of Administrative Justice Act, 2002 (Act 3 of 2002);
- b. until such invalid administrative action is set aside by a court or is disavowed by the decision maker, the plaintiff could not successfully claim damages arising from such invalid administrative action; and
- c. in terms of the principles set out in *Njongi*, the date on which the debt fell due is the date on which the arrest and detention of the plaintiff was declared by the court to be unlawful (ie 9 September 2015).

[10] It was correctly conceded during argument that this approach and the reliance on *Njongi*, in particular, was misplaced. That case dealt with the situation where social grants had been terminated by unlawful administrative action that had not yet been set aside on review. The debt was considered to become due should the provincial government expressly disavow reliance on unlawful administrative action, which had not occurred so that the running of prescription had not yet started in that instance. In any event, I have serious misgivings as to whether or not the arrest constituted administrative action for purposes of PAJA being applicable. The issue does not appear to have been definitely decided. In ***Minister of Safety and Security v Sekhoto and Another***³ (and with reference to ***Greys Marine Hout Bay (Pty) Ltd v Minister of Public Works***),⁴ Harms JA held as follows:

‘This court has accepted that these traditional common-law grounds of review should be used to test the legality of the exercise of discretion to arrest’ (at para 35) and ‘Although this approach tends to suggest that the ‘executive discretion’ of a peace officer is ‘administrative’ and may therefore be regulated by s 33 of the Bill of Rights, which guarantees the right to just administrative action, I am somewhat loath to hold as much simply because it could mean that the

³ 2011 (1) SACR 315 (SCA).

⁴ [2005] ZASCA 43.

provisions of PAJA would apply and this could imply that if the discretion was 'incorrectly' exercised the claimant would only in exceptional circumstances be entitled to 'compensation' and not damages.'

[11] The conduct of the Magistrate in convicting and sentencing the plaintiff cannot be the administrative action relied upon for purposes of this argument. Cases have confirmed that administrative action does not extend to the ordinary exercise of judicial powers.⁵ Even assuming that the conduct of the arresting officer and those responsible for detention constituted administrative action, the link between requiring that conduct to be set aside prior to launching a delictual claim, for purposes of avoiding prescription was unexplained. *Njongi* dealt with administrative action that remained effective, and is certainly no support for that proposition. In this case the arrest and initial detention ceased when the plaintiff was released on free bail on 18 December 2009. The subsequent detention followed the conviction and sentence imposed by the magistrate. In addition, *Njongi* read correctly, confirms that:⁶

'the reality is that the creditor has little or no control over the date on which prescription commences. She is obliged to make an application to set aside the administrative action concerned within a reasonable time. It is a court, not the creditor, that determines whether the time within which a claim is brought is reasonable, or not. Moreover it is the court that decides whether the lateness, if unreasonable, must be condoned. If a court finds that the period is unreasonable and that the delay in bringing the proceedings should not be condoned, the applicant cannot take the matter any further. She would have lost her case and the underlying debt would be unclaimable. This consequence would follow even if the three-year period of prescription had not yet expired... This does not mean, however, that every action must be set aside before a debt can fall due for the purposes of the Prescription Act...'

[12] There was, in any event, no effort whatsoever to challenge the arrest and initial detention by seeking to set that aside using administrative law or PAJA.⁷ The effect of the High Court judgment overturning the conviction and sentence resulted in

⁵ *Nel v Le Roux NO* 1996 (3) SA 562 (CC) at para 24 as cited in *Greys Marine Hout Bay supra* at para 24.

⁶ At paras 50, 52.

⁷ No review has been launched in terms of PAJA or in terms of Uniform Rule 53. See *Bhugwan v JSE Ltd* [2009] ZAGPJHC 33.

the magistrate's decision in that regard being replaced, so that the conviction and sentence may be treated as having not occurred. In the circumstances, the same cannot be said for the alleged wrongful arrest and subsequent detention, and certainly not based on some tenuous link with PAJA.

The section 12(3) contention

[13] The judgment of Eksteen J (as he then was) in ***Thompson and Another v Minister of Police and Another***⁸ is particularly instructive in considering when the alleged debt became due, for purposes of prescription. That case also involved a claim for damages for wrongful arrest, which was met with a special plea of prescription. The court distinguished between claims based on malicious arrest, malicious prosecution or malicious execution, as opposed to cases based on wrongful arrest, for purposes of considering the special plea. The court confirmed that in an action for malicious prosecution, malicious arrest and detention, the cause of action only arose upon the judgment of the court allowing an appeal against a conviction in the magistrate's court. In respect of a wrongful arrest claim, however, the position is different, and was described as follows:⁹

'There the delict is committed by the illegal arrest of the plaintiff without the due process of the law. Improper motive or want of reasonable and probable cause required for malicious arrest have no legal relevance to this cause of action. It is also irrelevant whether any prosecution ensues subsequent to the arrest; and, even if it does, what the outcome of that prosecution is. The injury lies in the arrest without legal justification, and the cause of action arises as soon as that illegal arrest has been made.'

[14] Similarly, the plaintiff, in this case, cannot point to any element of his cause of action pertaining to the initial arrest and detention which only came into existence

⁸ 1971 (1) SA (E).

⁹ It may be noted that Spilg J in *Makhwelo v Minister of Safety and Security* notes some significance resulting from the arrest in *Thompson* being with a warrant, so that the issue of reasonable suspicion of the arresting officer did not arise. To the extent that it is necessary to note this, the judgment in *Makhwelo* is distinguishable, dealing with an issue relating to notice in terms of the Institute of Legal Proceedings Against Certain Organs of State Act, 2002. I also do not read the remarks relating to claims based on wrongful arrest in *Thompson* to relate only to cases of arrest with a warrant.

less than three years before the institution of the proceedings.¹⁰ That alleged delict was committed when the conduct that is the cause of that complaint occurred, so that all damage resulting from that conduct, whether 'already realised or ... merely prospective' could be claimed.¹¹ As will be discussed below, the detention subsequent to the magistrate passing sentence is also of a continuing nature so that at least the bulk of that period cannot be said to have prescribed.¹² The position in respect of the alleged malicious prosecution is clearly different.¹³

[15] It is trite that prescription, for purposes of the Prescription Act, begins to run as soon as the debt is due.¹⁴ This clearly includes a delictual debt.¹⁵ A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises.¹⁶ In terms of the proviso to s12(3), a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.

[16] As counsel pointed out, s12(3) of the Prescription Act requires a creditor to do no more than what could reasonably be expected in the circumstances of a reasonable person.¹⁷ The underlying object is to ensure that it is negligent, rather than innocent, inaction that is penalised. Prescription is not intended to serve as a 'blunt instrument to achieve finality regardless of the circumstances of the creditor'.¹⁸

[17] In this instance the court is not faced with a person suffering physical disabilities or *non compos mentis*.¹⁹ Even considering some measure of equitability²⁰ The defendants have successfully alleged and proven that the plaintiff had, or ought to have had, the requisite knowledge sometime between 18 December 2009 and 2

¹⁰ See *Unilever Bestfoods Robertsons (Pty) Ltd and others v Soomar and another* 2007 (2) SA 347 (SCA).

¹¹ *Unilever supra* at para 11.

¹² See *Oslo Land Co Ltd v Union Government* 1938 (AD) 584 as cited in *Unilever* at para 12. Also see *Barnett v Minister of Land Affairs* 2007 (6) SA 313 (W); *Lombo v African National Congress* 2002 (5) SA 668 (SCA).

¹³ *Lemue v Zwartbooi* (1896) 13 SC 403; *Els v Minister of Law and Order and others* 1993 (1) SA 12 at 15G.

¹⁴ S 12(1).

¹⁵ *Truter v Deyssel* 2006 (4) SA 168 (SCA) par 16.

¹⁶ S 12(3). There is not suggestion in this case that the defendants wilfully prevented the plaintiff from coming to know of the existence of the debt.

¹⁷ *Administrator, Cape v Olpin* 1996 (1) SA 569 at 578A.

¹⁸ *Brand v Williams* 1988 (3) SA 908 (C) at 913B.

¹⁹ Cf the examples cited in *Olpin supra* at 579.

²⁰ See *Olpin supra* at 579G.

June 2011, when copies of the docket were received. Support for this conclusion is to be found in the majority judgment of Zondo J (as he then was) in **Mtokonya**.²¹

‘After all he was the one who had been arrested, detained and, according to him, also assaulted by the police. Therefore, when one talks about lack of knowledge of the existence of the debt in this case one is not, it must be remembered, talking of a debt that is based on a contract that the creditor might not be aware of for one reason or another.’

[18] The plaintiff’s suggestion appears to be that his personal circumstances were such that he could not have had ‘personal knowledge of the identity and the facts from which the debt arises...’ As **Mtokonya** confirms, there is simply no proper basis for such a finding. Plaintiff’s counsel’s contention effectively boils down to the suggestion that the plaintiff was uninformed about the possibility of a legal claim until he consulted with his current legal representatives sometime in February 2017, despite having had other legal representation previously. The plaintiff, in this case, was free between 18 December 2009 and 1 April 2014, and seemingly with access to a legal representative. He had spent time in custody and knew that it was the first defendant’s employees, at least, that had caused his arrest and detention. The exercise of a modicum of reasonable care, which s 12(3) provides for, would have overcome this alleged barrier. S 12(3) does not require the creditor to have knowledge of any right to sue the debtor, nor does it require him or her to have knowledge of legal conclusions that may be drawn from ‘the facts from which the debt arises’.²² As **Eskom** suggests, grave absurdity would result were this not the case.²³

[19] In **Yellow Star Properties**,²⁴ it was argued that, by reason of section 12(3), prescription had begun to run only once the High Court had delivered a judgment to the effect that a sale was invalid because, until then, the applicant in that case could

²¹ At para 21.

²² **Mtokonya** at para 36. As that decision clarifies, ‘Whether the police’s conduct against the applicant was wrongful and actionable is not a matter capable of proof...whether their conduct against him was wrongful and actionable was not a fact and, therefore, falls outside of section 12(3). It is rather a conclusion of law.

²³ **Eskom v Bojanala Platinum District Municipality** 2003 JDR 0498 (T) at para 16.

²⁴ **Yellow Star Properties 1020 (Pty) Ltd v MEC, Department of Development Planning and Local Government Gauteng** [2009] ZASCA 25 at para 37. Also see **Claasen v Bester** [2011] ZASCA 197.

not have known that the sale was invalid. The SCA rejected this contention confirming that failure to appreciate legal consequences flowing from the facts did not result in a delay to the commencement of prescription.

[20] As in **Mtokonya**, it cannot be said that the true issue in dispute in this instance relates to an uninformed person's lack of knowledge of the identity of a debtor.²⁵ Even if that has been argued in the manner in which para 12.3 of the stated case has been phrased, there appears to be no basis for such a finding, unlike the case of **Shenge**.²⁶ There does not appear to be any proper basis for suggesting that a strict interpretation of the prescription legislation would result in injustice in this instance.²⁷

[21] To hold otherwise on the strength of the papers before me 'would render our law of prescription so ineffective that it may as well be abolished'.²⁸ As the majority concluded in **Mtokonya**:²⁹

'I say this because prescription would, for all intents and purposes, not run against people who have no legal training at all. That includes not only people who are not formally educated but also those who are professionals in non-legal professions...The percentage of people in the South African population against whom prescription would not run when they have claims to pursue in the courts would be unacceptably high.'

Waiver

[22] The final basis relied upon by the plaintiff is waiver. Did the second and third defendants waive their right to raise a special plea of prescription because they consented to an Order of Court condoning the late filing of a notice in terms of s3 of the Institution of Legal Proceedings Against Organs of State Act, 2002?³⁰

²⁵ *Mtokonya* at para 55, 56. It is notable that the plaintiff's replication does not specifically raise any of the exceptions set out in section 12 of the Prescription Act, and also does not set out any facts in support of this contention.

²⁶ *MEC for Education, KwaZulu-Natal v Shange* [2012] ZASCA 98.

²⁷ *Cf Links v Department of Health, Northern Province* [2016] ZACC 10.

²⁸ *Mtokonya* at para 63.

²⁹ At para 63. See *Road Accident Fund v Mdeyide* [2010] ZACC 18 on the importance of prescription.

³⁰ Act 40 of 2002 ('the Institution of Legal Proceedings Act').

[23] S 3(4) of that Act provides that a Court may grant an application for condonation, *inter alia*, if the debt has not been extinguished by prescription. The plaintiff suggests that the defendants' consent to an order for condonation (in respect of the notice letter required in terms of the Institution of Legal Proceedings Act) on 21 February 2020, results in their acceptance that the entire claim had not prescribed.

[24] That argument appears to me to be misguided. The Institution of Legal Proceedings Act recognises, in its preamble, that the Prescription Act is the cornerstone of the laws regulating the extinction of debts by prescription, and confirms that the provisions of Ch III of the Prescription Act are applicable to all debts (preamble). Its primary aim is to create harmony in respect of the pre-existing different notice periods for institution of legal proceedings against certain organs of state, by replacing those notice periods with a uniform notice period.

[25] S 2(2)(b) of the Institution of Legal Proceedings Act provides that a debt which became due after the fixed date will be extinguished by prescription as contemplated in Ch III of the Prescription Act, 1969, read with the provisions of that Act relating thereto. In so far as the notice of intended legal proceedings to be given to certain organs of state, it is so that a court may grant an application for condonation if certain requirements exist. One of those is that the court should be satisfied that 'the debt has not been extinguished by prescription'.

[26] In this case the defendants contend that part of the plaintiff's claim has prescribed (which this judgment has confirmed is the case). Is that prescription saved by the defendants having consented to condonation of the plaintiff's failure to timeously give notice of its intention to institute its delictual claims? Should the defendants have applied, for example, to set aside the order granting condonation because of its part-prescription defence?

[27] The case of **Premier Attraction 300 CC t/a Premier Security v City of Cape Town**³¹ appears to confirm the answer to this argument. In that case, the court found that a portion of the applicant's claim had prescribed and that that portion of the

³¹ [2016] 2 All SA 888 (WCC).

claim must fail. The applicant had purported to send a notice advising the respondent of the institution of legal proceedings a day before it launched its application. The respondent took the point that the notice had not been served on the relevant organ of state within six months from the date on which the debt became due and that condonation was required.³² The applicant belatedly sought condonation at the commencement of the hearing (despite having been given the opportunity to do so prior to that time). The court noted that its finding in respect of part-prescription meant that part of the claim had not prescribed. It had no difficulty in applying the other requirements in section 3(4) (namely good cause and consideration of the issue of prejudice) in granting condonation, despite the application having been launched at ‘the proverbial thirteenth hour’.

[28] The judgment confirms, in effect, that condonation for non-compliance with the Institution of Legal Proceedings Act is possible in cases where only part-prescription is at play, so that the issue of waiver cannot succeed. In any event, the issue of waiver must be considered objectively and based on its outward manifestations. The outstanding manifestations can consist of words; or some other form of conduct from which the intention to waive is inferred; or even of inaction of silence the duty to act or speak exist. There is ultimately nothing to show that the defendants either expressly or by conduct waived or agreed to abandon the prescription point, and their consent to the condonation of the lateness of the notice of institution of legal proceedings cannot constrain them given that it is accepted that at least part of the plaintiff’s claim had not prescribed. This court need not decide what the position is or would be had condonation been erroneously granted for the institution of proceedings in a case where the entire claim was alleged to have or in fact had prescribed.

The claim based on detention post-sentence

[29] As suggested above, there is a distinction to be drawn between a single, completed wrongful act, with or without continuing injurious effects, such as a blow against the head, on the one hand, and a continuous wrong in the course of being committed, on the other. While the former gives rise to a single debt, the approach to

³² See *Minister of Agriculture and Land Affairs v CJ Rance (Pty) Ltd* 2010 (4) SA 109 (SCA) at para 30 for the rationale for the requirements in s 3(4).

the latter is to view this as a series of debts arising from moment to moment, as long as the wrongful conduct endures.³³ In the case of a 'continuous wrong', the statutory limitation provision operates, as time runs, to whittle away the enforceability of portions of the claim for damages arising from that cause until the expiry of the complete period for prescription, so that the right of action then becomes worthless for practical purposes.³⁴ This approach is confirmed by the judgment in **Lombo**:³⁵

'The appellant's position is somewhat different in regard to his claim for unlawful detention. His cause of action in this respect did not arise once and for all on the day he was first detained, nor did it first arise on the day of his release from detention. His continuing unlawful detention (if such it was) would notionally have given rise to a separate cause of action for each day he was so detained...the three-year prescriptive period provided in s 11(d) of the Act preserved any claim for unlawful detention arising within the period of three years preceding the service of summons on 22 November 1993. His claim for unlawful detention for the period 23 November 1990 until his release in August 1991 would therefore still be extant. Any claim for wrongful detention arising before 23 November 1990 will have been extinguished by prescription in accordance with the principles enunciated above.'

[30] On the strength of this authority, that portion of the plaintiff's claim based on his detention between 1 April 2014 to 29 May 2014 has also prescribed.

Withdrawal of action against the first defendant

[31] Following the decision in respect of the special plea, the action against the first defendant was withdrawn, with each party to pay its own costs by agreement.

The plaintiff's evidence

[32] The plaintiff testified first, by agreement. He explained that he could read and write but had a low level of education. He had been working at Cash Crusaders in Uitenhage for four years prior to his arrest. This occurred at 10pm on 7 December

³³ *Barnett supra* at paras 20, 21 and the cases cited there.

³⁴ *Ngcobo v Minister of Police* 1978 (4) SA 933 (D) at 933H; Also see *Slomowitz v Vereeniging Town Council* 1966 (3) SA 317 (A).

³⁵ *Lombo v African National Congress* 2002 (4) SA 668 (A) at paras 26, 27.

2009. Two police officers had arrived together with the complainant (Nonelela) and his wife (Mazomba), and informed him that he was accused of raping Nonelela. The plaintiff remains married to Mazomba but no longer resides with her.

[33] The plaintiff spent a few days incarcerated at the Motherwell Police Station. He was released on 18 December 2009 on free bail, once he had informed the magistrate that he could stay at his parental home. He was found guilty and sentenced as described above during 2014.

[34] The plaintiff confirmed that Mazomba, Nonelela, his child (Vuyiseka) and Nonelela's boyfriend had testified during his trial. He alleged that Vuyiseka had been told to say that she had witnessed him sleeping with Nonelela. She had explained this in court, which had made the prosecutor angry. It was also said that he had threatened Vuyiseka, even though he had not been with her during that time. Mazomba and their children had been taken to Qonce (King Williams' Town) and they were escorted to and from court to prevent the plaintiff from talking to them. Vuyiseka had testified from a separate, glassed space. His attorney, who was not called to testify, had told him that the prosecutor had shouted at Mazomba and Vuyiseka at some time during the proceedings.

[35] Following sentence, the plaintiff had been incarcerated at St Albans, where the conditions were bad. He had avoided the fighting that took place there and was not robbed. He had, however, been manhandled and, after approximately two months, had been told to stay on the hospital side of the prison, from where he processed his appeal personally. The conditions in that part of the prison were better. It was clean, but sitting on cement outside the cells had resulted in difficulties. The food was not good but he was able to purchase his own food when he had the money to do so. He was informed that he was to be released sometime on 15 September 2015. He remained unhappy about the manner in which the prosecutor had handled his case, because he had been incarcerated for something he had not done. His attorney had also not asked the questions that he had indicated should be asked at the time of his trial.

[36] It was put to the plaintiff in cross-examination that Vuyiseka had made a statement to the police about witnessing her father on top of Nonelela and under the blankets. She and Nonelela had slept together that evening because she was afraid of her father, who later threatened her to remain silent about what she had witnessed. She was nine years old at the time. The plaintiff testified that he had no knowledge regarding that statement. Vuyiseka had testified in court that her earlier version had been instigated. After deviating from her earlier statement, an adjournment had been sought and the child had testified again thereafter.

[37] The plaintiff and Mazomba remained estranged because of her belief that he had raped her child and was scared of him. The plaintiff felt falsely accused. He hardly saw Mazomba and Nonelela now, while Vuyiseka resided with him. He accepted that Nonelela had made a pointing out statement on 9 December 2009, and that this information was available to the prosecution and police. That was in addition to a statement from Mazomba (7 December 2009) and Nonelela (8 December 2009). He repeatedly denied the alleged rape but accepted that his legal representative had had an opportunity to cross-examine all the witnesses that had testified against him, and that all the evidence had been placed before the court which had to make a decision based on that evidence. His legal representative had also not applied for a discharge in terms of section 174 of the Criminal Procedure Act, 1977,³⁶ ('the CPA') and had also not applied for bail pending appeal.

Absolution from the instance

[38] The second and third defendant's counsel applied for absolution from the instance, in respect of the malicious prosecution claim, at the close of the plaintiff's case.³⁷ That application was upheld. The brief reasons provided for that decision are repeated for the sake of completeness.

[39] The general test to be applied, when absolution from the instance is sought at the close of the plaintiff's case, is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is

³⁶ Act 51 of 1977.

³⁷ In terms of Rule 39(6) of the Uniform Rules of Court.

evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff.³⁸

[40] The issue that is the focus of the application for absolution in this instance is the claim based on malicious prosecution (claim B to the particulars of claim). Leaving aside the averments contained in the particulars of claim, or lack thereof in this instance, to prove malicious prosecution the plaintiff here needed to establish in particular (a) lack of reasonable and probable cause and (b) intent to injure (*animus injuriandi*). The defendants clearly set the law in motion and it is common cause that the prosecution ultimately failed in the sense that the High Court overturned the magistrate's conviction and sentence.

[41] It is clear, from ***Minister of Justice and Constitutional Development v Moleko***, that in an action for malicious prosecution, the plaintiff must, among others, 'allege and prove that the defendants acted without reasonable and probable cause...'.³⁹ The requirement relating to 'reasonable and probable cause' was explained in these terms:⁴⁰

'Reasonable and probable cause, in the context of a claim for malicious prosecution, means an honest belief founded on reasonable grounds that the institution of proceedings is justified. The concept therefore involves both a subjective and an objective element – 'not only must the defendant have subjectively had an honest belief in the guilt of the plaintiff, but his belief and conduct must have been objectively reasonable, as would have been exercised by a person using ordinary care and prudence.'

[42] There is also the requirement that the defendant must have acted with malice. Again relying on ***Moleko*** (and supported by the judgment of Zondo J in ***Kruger v National Director of Public Prosecutions***), the following is relevant:⁴¹

³⁸ *Gascoyne v Paul and Hunter* 1917 TPD 170 at 173; *Ruto Flour Mills (Pty) Ltd v Adelson* (2) 1958 (4) SA 307 (T).

³⁹ [2008] ZASCA 43 at para 8. Also see *Kruger v National Director of Public Prosecutions* [2019] ZACC 13 at para 50.

⁴⁰ *Moleko supra* at para 20.

⁴¹ At para 52 of *Kruger*, relying on para 61 *et seq* of *Moleko*, which relied on *Relyant Trading (Pty) Ltd v Shongwe* [2007] 1 All SA 375 (SCA) at para 14.

‘Although the expression malice has been used, it means, in the context of the *actio iniuriarum*, *animus iniuriandi*. In *Moaki v Reckitt & Colman (Africa) Ltd* Wessels JA said:

“Where relief is claimed by this *actio* the plaintiff must allege and prove that the defendant intended to injure (either *dolus directus* or *indirectus*). Save to the extent that it might afford evidence of the defendant’s true intention or might possibly be taken into account in fixing the *quantum* of damages, the motive of the defendant is not of any legal relevance.”

[62] In so doing, the court decided the issue which it had left open...namely that *animus injuriandi*, and not malice, must be proved before the defendant can be held liable for malicious prosecution as *injuria*.

[63] *Animus injuriandi* includes not only the intention to injure, but also consciousness of wrongfulness:

“In this regard *animus injuriandi* (intention) means that the defendant directed his will to prosecuting the plaintiff (and thus infringing his personality), in the awareness that reasonable grounds for the prosecution were (possibly) absent, in other words, that his conduct was (possibly) wrongful (consciousness of wrongfulness). *It follows from this that the defendant will go free where reasonable grounds for the prosecution were lacking, but the defendant honestly believed that the plaintiff was guilty.* In such a case the second element of *dolus*, namely of consciousness of wrongfulness, and therefore *animus injuriandi*, will be lacking. His mistake therefore excludes the existence of *animus injuriandi*.” (Footnotes omitted.)”

[43] As the Constitutional Court held in *Kruger*.⁴²

‘It is clear from the passage quoted in paragraph 63 in *Moleko* that the “*animus injuriandi*” requirement entails that in an action for malicious prosecution the plaintiff must allege and prove that the defendant acted “in the awareness that reasonable grounds for prosecution were absent”. In terms of that passage the plaintiff must allege and prove this because, as is stated in the passage, “the defendant will go free where reasonable grounds for the prosecution were lacking but the defendant honestly believed that the plaintiff was guilty”.

[44] I have had the opportunity to consider the testimony of the plaintiff against the background of the common cause facts in the matter. Despite an eye-witness having changed her line midships, and the hearsay claim of resultant anger on the part of

⁴² At para 53.

the prosecutor, I am unable to find that there is evidence upon which a court, applying its mind reasonably to such evidence, could or might find for the plaintiff, both in respect of the elements of lack of reasonable and probable cause and intention to injure. The second and third defendant's application for absolution in respect of malicious prosecution (claim B) is accordingly upheld.

[45] What remains for determination, and only in respect of the second and third defendants, is that part of the particulars of claim, relating to the further detention of the plaintiff, that has not prescribed (from 30 May 2014 to 29 September 2015).⁴³

The defendants' evidence

[46] Wilma Ferreira testified that she was presently employed as a regional court prosecutor dealing with sexual offences, and had worked with sexual offences matters since 2007. She had dealt with the plaintiff's prosecution during 2011.

[47] With reference to the investigation diary, the witness testified that she had worked through the docket and the statements contained therein before consulting with the complainant and her mother before trial. In this case, the docket included the statements of Nonelela, Mazomba, Nonelela's boyfriend, who was the first report, and Vuyiseka, as well as the pointing out statement. All of this was available to the witness prior to her consultations.

[48] When consultations commenced, she requested the witnesses to explain what had occurred in their own words in order to assess corroboration and whether there was a *prima facie* case which could be pursued to trial. This would include questioning the witnesses in an attempt to ascertain whether there were any discrepancies. In this instance, her comments in the investigation diary reflected that everything was in order. The statements were consistent with the information

⁴³ The plaintiff's amended particulars of claim dated 5 September 2017 claimed R1 700 000 in respect of claim A, for unlawful arrest and detention. In terms of an undated 'notice of intention to amend particulars of claim' served and filed on 14 June 2021 (and together with the submission of counsel for plaintiff's heads of argument), the plaintiff attempted to amend the claim for general damages caused by the further detention to the sum of R3 619 000,00. That 'notice' failed, however, to comply with the provisions of Rule 28(2) of the Uniform Rules of Court and was accordingly disregarded. It might be added that the notice in fact did not indicate the plaintiff's *intention* to amend and simply gave notice of amendment. An 'amended particulars of claim – dated 14 June 2021' was filed simultaneously with the 'notice'.

obtained from her interviews and all the elements of the alleged crime had been covered. Her view was that the matter could be pursued, all aspects had been dealt with satisfactorily and the case was ready for trial.

[49] When the matter had first been called at court, during May 2011, the plaintiff's legal representative had withdrawn. The state witnesses had been subpoenaed and were present at court, and Ferreira had consulted with the remaining witnesses that she had not spoken to before, namely Nonelela's boyfriend and Vuyiseka, who was approximately 12 years of age at that time. Ferreira testified that she consulted with the latter on numerous occasions because she was a child witness, and on each instance when the matter had been postponed at court. These consultations commenced with Ferreira asking Vuyiseka what she could recall, before making reference to her statements. Ferreira had followed the same procedure when consulting with Nonelela's boyfriend, who was the first report. Her view was that Vuyiseka's discussion with her corroborated her statement, as well as the version of the complainant in relation to one instance of alleged rape. The complainant's version was that she had been raped on multiple occasions. During consultation, Vuyiseka had stuck to her story throughout without deviation.

[50] Nonelela, the complainant, had been the first person to testify during the criminal trial, to lay a basis for the testimony to follow. Ferreira had been satisfied with her testimony, which was consistent with her statement and dealt with all the elements and sufficient detail regarding the alleged crime. Nonelela had been cross-examined by the plaintiff's legal representative, as had her boyfriend, who was the second witness called. Ferreira kept detailed notes of the proceedings, which she had consulted prior to her testimony. Those notes indicated that Vuyiseka had testified on 23 January 2013 via a separate facility with a one-sided mirror and live streaming facility. These precautions had been necessary because she was a minor aged approximately 12-13 years of age at that time, and because she was required to give evidence against her father. The room was soundproof and Mazomba had to remain in a waiting room, together with a court preparation officer.

[51] Ferreira had consulted with Vuyiseka prior to the commencement of trial, affording her an opportunity to once again explain what had occurred. This was customary in cases involving children and child victims. She had been satisfied with

the way in which the consultation had proceeded and had accordingly called her to testify. Vuyiseka had, during examination-in-chief, deviated from her statement to indicate that she had not witnessed anything in respect of her father and Nonelela. Ferreira had been shocked and surprised but testified that this type of change could occur with children. She also observed that Vuyiseka appeared to be in distress and that her demeanour had changed. She had looked down and stopped talking. Ferreira had requested an adjournment to obtain a copy of the CPA in order to determine how she should proceed. She also requested the court preparation officer to check that everything was fine with the witness. After obtaining her copy of the CPA, she spoke to the court preparation officer, in the presence of Mazomba, to enquire whether everything was in order so that the matter could proceed. The plaintiff's representative at the time was also in the vicinity. Court then resumed.

[52] Ferreira now questioned the witness from a different angle, enquiring as to whether she recalled making a statement to the police. The magistrate had also commented to Vuyiseka that she understood that it was difficult for her to testify against her father, and that she should just tell the truth. The witness then confirmed making a statement to the police and subsequently confirmed the contents of that statement. Vuyiseka effectively reverted to her previous version and there was no need for her to be declared hostile. This approach would have been problematic for other reasons too. When asked why she had initially testified differently, Vuyiseka indicated that she had been afraid. Ferreira explained that she dealt with children on a regular basis and always held their best interests at heart. She did not want to cause Vuyiseka undue stress and understood that she was in a difficult position, being required to testify against her biological father. Cross-examination on the part of the state could have caused further mental stress and Ferreira's view was that the state's case was sufficient.

[53] Vuyiseka's evidence had been subjected to cross-examination on the same day. When asked whether anyone had spoken to her during the adjournment, she confirmed that Ferreira had not spoken to her, and that her mother and the court preparation officer had said she must speak the truth. For some reason, the plaintiff's legal representative at the time had requested a postpone in the midst of his cross-examination, and the matter had only proceeded six months later. Ferreira had

considered the way forward during this lengthy adjournment and felt that the prosecution was on track. Upon resumption, Vuyisekwa had testified that her sister had asked her to implicate the plaintiff. The defence had nevertheless not sought a section 174 discharge at the close of the state's case.

[54] Ferreira's view was that the state had sufficient evidence for a conviction based on the complainant's evidence and corroboration from her boyfriend and mother, and despite the complainant being a single witness if Vuyiseka's evidence was discarded. The case remained strong and the weight to be attached to Vuyiseka's testimony could be argued. She emphasised that the magistrate had accepted that Vuyiseka was in a difficult position when testifying against her own father. It was the magistrate that had considered all the evidence and found the plaintiff guilty.

[55] Regarding the fact that the magistrate's decision had been overturned by the High Court on appeal, Ferreira testified that she had no control over mis-directions on the part of a magistrate. In any event, a criminal case could not simply be withdrawn once it had commenced. A stay of prosecution could be sought, but in this case her opinion was that the state's case was still strong, based particularly on the complainant's evidence on record, which was the prosecution's strongest suit. Only a small component of the evidence was in question, involving a child witness. In sexual offences matters, it was in any event frequently the case that convictions were based on the evidence of a single witness. The High Court had overturned the magistrate's decision also based on various concessions on the part of counsel for the state when the appeal against the conviction was argued.⁴⁴

⁴⁴ The plaintiff sought to file a supplementary discovery affidavit after the conclusion of all the evidence, and just prior to submitting heads of argument. This in the absence of any application for leave to re-open the case, adduce further evidence or recall a witness for further examination: *Heinze v Friedrich* 1927 SWA 106 as cited in Van Loggerenberg *Erasmus Superior Court Practice (2nd Ed) (vol 2)* D1-536. The plaintiff's heads of argument then made reference to documentation listed in the supplementary discovery affidavit. The second and third defendants objected to this. That objection is upheld due to the prejudice to the second and third defendants, and the fact that each party had already closed its case by time the supplementary discovery affidavit was filed. It goes without saying that the objective of discovery is 'to ensure that *before* trial both parties are made aware of all the documentary evidence that is available' (own emphasis): *Durbach v Fairway Hotel Ltd* 1949 (3) SA 1081 (SR) at 1083. The object of the rules as to discovery is to secure the fair trial of the action in accordance with the due process of the court: *Logicrose Ltd v Southend United Football Club Ltd* [1988] 1 WLR 1256.

[56] Ferreira testified further that she had prosecuted the matter without prejudice, fear or favour and had properly made use of the information before her to place this before court, so that the magistrate could decide whether a conviction was warranted or not. She denied becoming angry with Vuyisekwa and testified that she had no reason to be angry with a child while performing the functions of her job. She had no personal interest in the matter and performed the function of placing all the evidence before court to the best of her ability, so that justice could prevail. A *prima facie* case existed and Ferreira had remained convinced of this even after all the evidence had been presented, particularly because of the strength of the complainant's testimony against the plaintiff. The magistrate had come to the same conclusion.

[57] Under cross-examination, it was put to the witness that she had failed to discharge her duty by not taking the interests of the accused into account when prosecuting the matter. Ferreira indicated that she was an officer of the court and also had to consider the rights of the plaintiff when he was the accused, in addition to the best interests of the child involved. The plaintiff's rights were also protected by his legal representative. By the time that Ferreira had received the docket, the case was already on the roll, suggesting that a *prima facie* case had been determined by whoever had perused the docket before her. All the documents were properly available for prosecution, and she had decided to proceed after consultation. The complainant had delayed in reporting the rape and had been with her boyfriend once she had finished her examinations. She had been asked about this and had testified that 'enough is enough' and she was in a safe place, with her boyfriend, to report the matter to the police. While a J88 had been handed in, the rape had allegedly happened over a long period of time, and a doctor's report would not have been of assistance.

Analysis

[58] The plaintiff alleges that prosecutors in the employment of the second and third defendant were responsible for the wrongful and unlawful further detention of

the plaintiff, which resulted in him suffering the general damages claimed. In particular, that they:⁴⁵

- ‘...had control over the relevant police docket and dealt with the plaintiff, from time to time, during his court appearances prior to conviction;
- failed in his / her / their duty to acquaint himself / herself / themselves with the contents of the relevant police investigation docket from which it would have been obvious that there were no reasonable grounds or justification for the detention, further detention, and / or prosecution of the plaintiff;
- failed in his / her / their duty to timeously withdraw the charges against the plaintiff;
- failed in his / her / their duty to inform any of the presiding magistrates expeditiously that there were no objective facts reasonably linking the plaintiff to the alleged crime of rape;...
- failed to inform the presiding magistrate of the nature and quality of the evidence and evidential material in the police docket...relating to the plaintiff and the poor quality thereof (lack of evidence and poor evidential material) in support of the charges against the plaintiff;’

[59] The claim is based in delict, which comprises wrongful, culpable conduct by one person that factually causes harm to another person that is not too remote.⁴⁶ The harm that the plaintiff complains of in respect of his detention is, essentially, the deprivation of his liberty (and related harm), which is a significant personality interest.⁴⁷ The Constitution of the Republic of South Africa, 1996, enshrines the right to freedom and security of the person, including the right not to be deprived of freedom arbitrarily or without just cause. The plaintiff alleges that it was his wrongful and unlawful arrest that caused the harm (namely, the detention before and after he appeared in court).⁴⁸

⁴⁵ Para 27 of the amended particulars of claim (dated 5 September 2017) read with the plaintiff’s heads of argument.

⁴⁶ *Oppelt v Head: Health, Department of Health, Western Cape* [2015] ZACC 33 at para 34.

⁴⁷ See *Thandani v Minister of Law and Order* 1991 (1) SA 702 (E) at 707B.

⁴⁸ Para 5 of the particulars of claim, *et seq.*

[60] A claim under the *actio iniuriarum* for unlawful arrest and detention has the following specific requirements:⁴⁹

- a. The plaintiff must establish that their liberty has been interfered with;
- b. The plaintiff must establish that this interference occurred intentionally.
In claims for unlawful arrest, a plaintiff need only show that the defendant acted intentionally in depriving their liberty and not that the defendant knew that it was wrongful to do so;
- c. The deprivation of liberty must be wrongful, with the onus falling on the defendant to show why it is not; and
- d. The plaintiff must establish that the conduct of the defendant must have caused, both legally and factually, the harm for which compensation is sought.

[61] Encroachment on physical freedom must be carried out in a procedurally fair manner, and must also be substantially justified by acceptable reasons.⁵⁰ From the constitutional perspective, it may be enquired whether the plaintiff's deprivation of freedom was 'arbitrary' or 'without just cause' and whether such a violation is sufficient to justify a finding that the detention during the period in question was also unlawful and wrongful in the sense required by the private law delictual action of unlawful or wrongful detention.⁵¹

[62] In this case, the key issue is whether the second and third defendants have discharged the onus of showing that the plaintiff's deprivation of liberty was not wrongful.⁵² As the judgment of Froneman J in ***De Klerk v Minister of Police*** illustrates, this is an obvious starting point given that 'if the conduct complained of is found not to be wrongful, then there is no need to proceed further. Only if wrongfulness is established will it still be necessary to enquire into the normative issue of legal causation.'⁵³

⁴⁹ *De Klerk v Minister of Police* [2019] ZACC 32 at para 14, references omitted.

⁵⁰ See *Zeeland v Minister of Justice and Constitutional Development and another* [2008] ZACC 3 at para 43.

⁵¹ *Zeeland supra* at paras 33 and 49.

⁵² Cf *De Klerk supra* at para 33. The facts in that case raised a particular question which, according to the majority of the Constitutional Court, turned on the issue of legal causation. In *De Klerk* the question involved an 'unlawful' remand decision by a magistrate in an instance where the applicant should clearly have been released on bail.

⁵³ At para 121.

[63] The second and third defendants denied that the actions of the prosecutors were wrongful and unlawful, also pleading that the plaintiff had been convicted on two counts of rape and accordingly detained in accordance with a warrant of detention issued by the clerk of the Magistrate's Court.⁵⁴ The second and third defendants specifically pleaded that the complainant's sister had provided a statement with regard to the rape of the complainant and that additional statements had been provided by the complainant's boyfriend and mother.⁵⁵ This was in addition to the detailed statement made by the complainant to members of the first defendant, which served before the second and third defendants on 11 December 2009.⁵⁶ They also pleaded that the prosecutors had acted fairly, by carrying out their duties in accordance with the National Prosecuting Authority Act, 1998 (NPA).⁵⁷ The prosecutors had acquainted themselves with the contents of the relevant police investigation docket and were not entitled to withdraw charges against any particular plaintiff if *prima facie* evidence existed.⁵⁸ They had acted in accordance with the NPA and Code of Conduct for members of the National Prosecuting Authority.⁵⁹

[64] A survey of the evidence presented supports the conclusion that the plaintiff's deprivation of liberty was, in this case, not wrongful. It cannot be said that plaintiff's deprivation of freedom was arbitrary or without just cause. That interference with liberty was occasioned by the judgment of the magistrate and based on the magistrate's consideration of all the evidence presented and tested through cross-examination in open court. The fact that that judgment was overturned by the High Court on appeal cannot automatically result in the conclusion that the plaintiff's time in detention amounted to wrongful deprivation of liberty.

[65] Ferreira's evidence confirms that the docket she received was in good order, and included the statements of Nonelela, Mazomba, Nonelela's boyfriend, who was the first report, and Vuyiseka, as well as the pointing out statement. The contents of

⁵⁴ At para 7 of the second and third defendants' plea.

⁵⁵ At para 10 of the second and third defendants' plea.

⁵⁶ Para 28 of the second and third defendants' plea.

⁵⁷ Act 32 of 1998; para 28 of the second and third defendants' plea.

⁵⁸ Paras 29 and 30 of the second and third defendants' plea.

⁵⁹ Para 31 of the second and third defendants' plea.

the docket appear to make out a *prima facie* case against the plaintiff, justifying the case being presented. Ferreira had clearly acquainted herself with the contents of the docket. Her subsequent consultations with the various potential witnesses confirmed the contents of those statements, supporting the decision to prosecute the plaintiff. This also explains why the various witnesses, including Vuyiseka, were called to testify before the magistrate. The presented evidence suggests that, at the very least, there were reasonable grounds for proceeding with the prosecution, even after Vuyiseka had testified. Ferreira appears to have acted with objectivity, paid attention to the contents of her docket and endeavored to protect the public interest, bearing in mind the best interests of the child as well as the rights of the plaintiff, while conducting the prosecution.⁶⁰ As such, she appears to have complied with her duty to act impartially and in good faith in assisting the court to arrive at a just outcome. Vuyiseka's about-turn, on its own, did not necessarily warrant the immediate withdrawal of charges, particularly given that the complainant's testimony had stood firm. That drastic action would normally only occur had it become clear during the course of the trial that it was impossible for the state to prove its case, or where other exceptional circumstances had arisen which made the continuation of the prosecution undesirable. Given the totality of facts in this case, it cannot be said that that point had arrived merely because of the questionable testimony of a corroborating child witness, and it was open to the court to consider all the evidence properly in determining whether the state had proved the plaintiff's guilt beyond reasonable doubt. The magistrate's subsequent conviction of the plaintiff lends further credence to this conclusion. The suggestion that the prosecutor ought to have approached the Director of Public Prosecution to seek consent for withdrawing the case against the plaintiff, merely on the strength of Vuyiseka's performance in the witness box, cannot be supported given the balance of evidence available.

[66] This is accordingly, in my view, not a case that falls into the genus of cases where there is an absence of evidence so that there is a duty on the prosecutor to bring this reality home to the presiding officer, or where the prosecutor had withheld

⁶⁰ *Minister of Police v Du Plessis* 2014 (1) SACR 217 (SCA) at paras 28, 34, as cited in *The National Director of Public Prosecutions v Hyron Swarts* (unreported case no CA 164/2019, Eastern Cape Division, Grahamstown) at paras 14 and 15.

information from the presiding officer.⁶¹ The difficulty experienced by the prosecutor was one of its witnesses, a young child, deviating from their statement during examination-in-chief, and subsequently indicating that she had been under family pressure to testify against her father. This despite the prosecutor having consulted with that witness on a number of prior occasions. Ferreira's evidence of the circumstances surrounding her prior interviews with Vuyiseka and the latter's actual testimony must be accepted on a balance of probabilities, including that she had no personal interest in securing the plaintiff's conviction and had not been angry when Vuyiseka changed her version during examination-in-chief. All of this, in any event, played out in front of a judicial officer in the Magistrate's Court, for that individual to perform their function and determine whether or not the plaintiff's guilty had been established beyond reasonable doubt. The failure of the plaintiff's representative to apply for a discharge in terms of section 174 of the CPA, at the close of the state's case, is also telling. Any irregularities in the conduct of a prosecutor or magistrate may rightly result in a criminal conviction and sentence being overturned, as occurred in this instance, without necessarily resulting in all the requirements for a successful delictual claim being met.

[67] The second and third defendants have accordingly discharged the onus to show that the plaintiff's deprivation of liberty was neither wrongful nor arbitrary or without just cause. The plaintiff's deprivation of liberty through his conviction and sentence was seemingly effected in a procedurally fair manner and was substantively justifiable in the circumstances, contrary to the allegations of wrongful and unlawful conduct on the part of the prosecutors highlighted in the particulars of claim.⁶² On the authority of *De Klerk*, confirming the requirements for a successful delictual action, there is no need to go further. It might be added, however, that I have significant doubts about whether the plaintiff has established that the conduct

⁶¹ See *Singata and another v Minister of Police and another* [2015] ZAECBHC 19 at para 43. The case is also not of the kind that stems from the failure of an investigating officer to properly investigate the crime and bring information to the attention of the prosecutor and magistrate: see *Woji v Minister of Police* 2015 (1) SACR 409; *Buthelezi v Minister of Police and others* [2019] ZAKZPHC 49.

⁶² See *Minister of Police and Another v Muller* 2020 (1) SACR 432 at para 34, as cited in *Mahleza v Minister of Police and another* 2020 (1) SACR 392 (ECG) at para 44, in the context of a remand order.

of the second and third defendants caused, in this case, both legally and factually, the harm for which compensation is sought.⁶³

Costs

[68] This case turns on the facts, so that there is no impediment to costs following the result. Claims based on wrongful arrest and detention are now commonplace and the courts have confirmed that the **Biowatch** principle is typically inapplicable.⁶⁴ The costs are to include the second and third defendants' successful prescription plea and the absolution from the instance granted in respect of the claim for malicious prosecution.

[69] A final point deserves mention. Given that it is now generally accepted that the **Biowatch** principle does not apply to cases of this ilk, litigants should be made to understand that they run the risk of an adverse costs order in pressing for an award of damages. In this matter, it is on record that the legal representatives of the plaintiff are acting on a contingency fee basis. That arrangement typically, and usefully, allows litigants to exercise their constitutional right of access to courts even where they lack the funds to remunerate their chosen representatives. There must, however, exist a duty on legal representatives engaging with prospective clients on a contingency fee basis to spell out in detail the risks associated with damages claims where the *Biowatch* principle is unlikely to find application. Failure to do so may, in appropriate cases, result in a costs order *de bonis propriis*. This is because unsophisticated clients securing legal representation in terms of a contingency fee arrangement may operate under the gross misconception that they have nothing to lose and everything to gain in launching claims for millions of rand in the High Court.

Order

[70] In the result I make the following order:

⁶³ The second defendant was cited as the executive authority responsible for the actions of the third defendant (para 3 of the particulars of claim) and the gravamen of the plaintiff's claim relates to the conduct of the prosecutors as opposed to the presiding magistrate. See, in general, *Nohour and another v Minister of Justice and Constitutional Development* 2020 JOL 46897 (SCA).

⁶⁴ See *Mbatha v University of Zululand* [2013] ZACC 43 cited with approval in *Minister of Safety and Security and another v Schuster and another* [2018] ZASCA 112, paras 25 and 26. Also see *Banda v Minister of Police* [2021] ZAECGHC 55 at paras 65 and 66.

The plaintiff's claims against the second and third defendants are dismissed with costs.



A. GOVINDJEE
ACTING JUDGE OF THE HIGH COURT

Appearances:

Obo the Plaintiff : *Adv M.W Nobatana*

Instructed by : *TM Pitana Attorneys*

Obo the 2nd and 3rd Defendants : *Adv L. Ah Shene*

Instructed by : *State Attorneys, Port Elizabeth*

Heard : *28 May 2021, 1 & 4 June 2021*

Delivered : *20 July 2021*