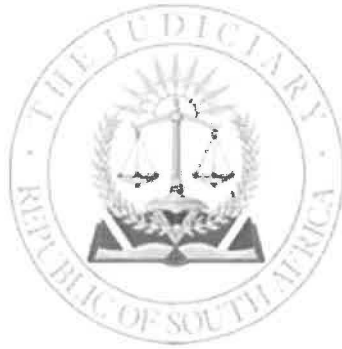




IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable	Yes/ No
Of Interest to other Judges	Yes /No
Circulate to Magistrates:	Yes/ No

Case No.: **6779/2007**

In the matter between:

MOLALE PHALA

Plaintiff

and

MINISTER OF SAFETY AND SECURITY

First Defendant

SABATA MATEASE MOHAPI

Second Defendant

CORAM: N. SNELLENBURG, AJ

HEARD ON: 19 MAY 2022

This judgment was handed down electronically by circulation to the parties' representatives by email, and release to SAFLII. The date and time for hand-down is deemed to be 12 October 2022 at 16H00.

INTRODUCTION

- [1] Mr Molale Phala, a male educator [plaintiff] issued summons in this court against the Minister of Safety and Security [first defendant] and Captain Sabata Matease Mohapi [second defendant] claiming damages for unlawful arrest and detention arising from his arrest and subsequent nine-day imprisonment as well as for malicious prosecution. The summons was issued on 14 December 2007 and served on the defendants on 4 January 2008.

THE PLEADINGS

- [2] The plaintiff's action is premised on the following claims:

- 2.1 Claim A – unlawful arrest: On 3 January 2005 the second defendant arrested the plaintiff without a warrant of arrest, alternatively the 'first defendant' had no reasonable grounds to suspect that the plaintiff had committed the offence for which he was arrested.
- 2.2 Claim B – following the arrest, the plaintiff was detained at Grootvlei Prison for a period of 9 days at the instance of the second defendant and various other policemen whose names and ranks are unknown to plaintiff. Neither the second defendant nor other police officials had reason to believe that the National Prosecution Authority might prosecute the matter and their actions were *mala fide*.
- 2.3 Claim C – the subsequent criminal proceedings against the plaintiff on charges of conspiracy to murder were malicious as the 'defendants' and other members of the South African Police Services had no reasonable and probable cause to proceed therewith; their actions were motivated by malice and were *animus inuriandi*.
- 2.4 Claim D - relates to special damages suffered as result of the initial detention after the arrest.

- [3] The plaintiff avers in para 18 of the particulars of claim that proper notice was given to the defendants in terms of ss 3 read with 5 of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 [Institution of Legal Proceedings Act].
- [4] The defendants initially served a plea on 12 March 2008 containing three special pleas and a plea over. The defendants thereafter amended their plea on 25 March 2019. In the amended plea the defendants raise the following special pleas:
- 4.1 First special plea by the first defendant – non-compliance with the requirements of the Institution of Legal Proceedings Act: The plaintiff failed to give proper notice to the first defendant within 6 months from the date on which the debt which the plaintiff seeks to recover fell due as envisaged in terms of ss 3(1) read with 3(2)(a) of the Institution of Legal Proceedings Act. The plaintiff's debt became due on 3 January 2005 whilst the s 3 notice was only served on 12 July 2005.
- 4.2 Second special plea by first and second defendants – prescription: The plaintiff's cause of action for alleged unlawful arrest and detention arose on 3 January 2005 and would, in terms of the provisions of the Prescription Act 68 of 1969 have become prescribed on 3 January 2008. As result the plaintiff's claim against the defendants had been extinguished by prescription when the summons was served on the 'defendant' on 4 January 2008.
- 4.3 Third special plea by the first and second defendants – non-joinder: The plaintiff avers in para 8 of the particulars of claim that he was detained at the Grootvlei Prison for 9 days at the instance of the first defendant's officials. In para 11 of the particulars of claim the plaintiff avers that the criminal proceedings against him on conspiracy to commit murder were

malicious in that 'the first defendant's officials had no reasonable probable cause to proceed with it'.

- [5] The plaintiff filed a replication to the defendants' amended plea only with regards to the plea of prescription. The plaintiff denies that the claim had prescribed and avers that the period of prescription would only run from date of acquittal and/or release from custody.
- [6] The following facts appear from the first and second defendants' plea that are relevant for adjudication of the special pleas. The plaintiff's arrest without a warrant on 3 January 2005 is admitted. The defendants plead that the arrest was lawful as it satisfied the requirements of s 40(1)(b) of the Criminal Procedure Act 51 of 1977. The first defendant also pleads that the plaintiff was brought before Court on the day of his arrest whereupon the Court ordered that the plaintiff be detained at Grootvlei correctional facility until his release on 12 July 2005. The first defendant pleads that the plaintiff's detention was therefore not at the first defendant's members' insistence. The period of detention is common cause. The first defendant also admits that the charges against the plaintiff were withdrawn on 5 April 2009.
- [7] The defendants' special pleas were separated in terms of the provisions of Rule 33(4) from the remaining issues to be adjudicated first. At commencement of the proceedings on 26 April 2022, the defendants' counsel informed me that, as far as they were concerned, the matter was not ripe for hearing as the plaintiff failed to comply with the directives issued by Daffue J during the Uniform rule 37(8) pre-trial proceedings. To this end Daffue J issued a direction on 20 May 2019 that the plaintiff must make application for condonation regarding non-compliance with s 3 of the Institution of Legal Proceedings Act before or on 17 June 2019. The pre-trial conference was postponed to 26 August 2019 on the assumption that the condonation application would be finalised during August 2019.

- [8] The plaintiff's counsel however recorded that they were ready to proceed, and that the plaintiff did not make an application for condonation in terms of s 3(4) of the Institution of Proceedings Act as it was not necessary.
- [9] The first defendant in turn lamented the fact that it had not been informed by the plaintiff that he had elected to abandon an application for condonation in terms of the Institution of Legal Proceedings Act. The result was that the first defendant was not properly prepared to proceed with the special pleas. The plaintiff, intending to proceed on the allocated trial dates, had drawn heads of argument to facilitate arguments of the special pleas which it served on the first defendant shortly before the proceedings commenced.
- [10] Both parties informed me that they did not intend to lead evidence regarding the special pleas but would argue the special pleas on the pleadings as they stand. I deemed it to be in the interests of justice to postpone the case to 19 May 2022 to hear the arguments on the special pleas. I reserved the costs of the postponement.

PLAINTIFF'S CONTENTIONS

[11]

- 11.1 The plaintiff contends that the unlawful arrest and detention constitute a continues wrong. In support of the contention the plaintiff relies on the unreported judgment in this Division in the matter between ***Mothobi Albert Tlake v The Minister of Police and Another***, [3777/2014] FSHC (20 October 2017) (***Tlake***). Plaintiff contends that the Court held in ***Tlake*** that the proceedings from arrest to acquittal must be regarded as continuous, and no personal injury has been done to the accused until the prosecution has been determined by his discharge. The court relied on the following

passage in **Unilever Bestfoods Robertsons (Pty) Ltd and Others v Soomar and Another¹ (Unilever)**:

“[W]hile the prosecution is pending its result cannot be allowed to be prejudged in the civil action. The proceedings from arrest to acquittal must be regarded as continuous, and no personal injury has been done to the accused until the prosecution has been determined by his discharge.”

The Court also referred to the then unreported judgment of Spilg J, which has in the meantime been reported as **Makhwelo v Minister of Safety and Security 2017 (1) SA 274 (GJ) (Makhwelo)**, where the Court reached a similar conclusion as quoted above with regards to a claim for unlawful arrest and detention.

- 11.2 It is appropriate to deal with the facts in **Tlake**. As far as can be discerned from the judgment the plaintiff relied on two distinct acts of unlawful arrest and detention. On the first occasion he was arrested and detained whereafter the charges were withdrawn. The plaintiff in that matter was thereafter again arrested, detained and prosecution ensued. The judgment summarises the claim in para 2 of the judgement as “[Plaintiff] avers that arrest(s), detention, and prosecution was unlawful, malicious, unreasonable and unjustified... He claims general damages from the defendants in the amount of R350 000.00 for unlawful detention, arrest, malicious prosecution, injury to dignity and freedom of movement.” The defendants’ special plea of prescription in that matter related only to the first arrest and period of detention. The defendants pleaded that the plaintiff’s claim for the first arrest and period of detention prescribed as summons was issued more than 3 years after the arrest and detention.

¹ 2007 (2) SA 347 (SCA) at para 25.

11.3 It is not readily discernible whether the plaintiff's claim was premised on malicious arrest, detention and prosecution or unlawful arrest, unlawful detention and malicious prosecution, or unlawful arrest and detention on the first occasion and thereafter malicious arrest, detention and prosecution.

11.4 The judgment was interpreted and argued before me as determining that in the event of any unlawful arrest and detention, proceedings from arrest to acquittal must be regarded as continuous, and no personal injury has been done to the accused until the prosecution has been determined by his discharge.

[12] Regarding the method of computation of the period for delivery of the s 3 notice and prescription, the plaintiff argued that the civil method of computation would result in the first day being excluded and the last day being included except where the contrary intention appears from legislation. The plaintiff relied on the dictum in **RAF v Masindi 2018 (6) SA 481 (SCA) paras 12 and 13.**

[13] The plaintiff contends that its s 3 notice was served within the required 6-month period as the debt would only have become due when the charges were withdrawn, thus 3 years from 5 April 2009. The plaintiff's counsel also argued that whilst the plaintiff was incarcerated, he could not consult with legal representatives.

[14] As far as non-joinder of the National Prosecuting Authority is concerned, the plaintiff submitted in its heads of argument that a case is made against the second defendant that the latter 'instigated' a prosecution and would be held personally liable. The argument is therefore that the issue of non-joinder does not arise.

FIRST DEFENDANT'S CONTENTIONS

- [15] The first defendant contends that the plaintiff's claim which he seeks to recover became due on 3 January 2005 and as such the notice which was transmitted by fax on 12 July 2005 was not given within the required 6-month period.
- [16] Based on the contention that the debt became due on 3 January 2005, the first defendant also contends that the debt would have been extinguished by prescription when the summons was served on 4 January 2008.
- [17] The first defendant did not address the issue of non-joinder in its heads of argument nor pursued the issue in argument. It was however also not formally abandoned.

LEGAL PRINCIPLES

The doctrine of legal precedents

- [18] The doctrine of precedent requires courts to follow the decisions of coordinate and higher courts, save if they are clearly wrong, and is an intrinsic feature of the rule of law, which is in turn foundational to our Constitution.² In **Camps Bay** Brand AJ held as follows:

"The doctrine of precedent not only binds lower courts, but also binds courts of final jurisdiction to their own decisions. These courts can depart from a previous decision of their own only when satisfied that that decision is clearly wrong. Stare decisis is therefore not simply a matter of respect for courts of higher authority. It is a manifestation of the rule of law itself, which in turn is a founding value of our Constitution. To deviate from this rule is to invite legal chaos."

² *True Motives 84 (Pty) Ltd v Mahdi and Another*, 2009 (4) SA 153 (SCA) ([2009] ZASCA 4) at para 100; *Makhanya v University of Zululand* 2010 (1) SA 62 (SCA) ([2009] 4 All SA 146; [2009] 8 BLLR 721 at paras 6-7. *Camps Bay Ratepayers' and Residents' Association and Another v Harrison and Another* 2011 (4) SA 42 (CC) (2011 (2) BCLR 121; [2010] ZACC 19) para 28; and *Bwanya v The Master of The High Court and Others* 2022 (3) SA 250 (CC) para 156.

- [19] I may only depart from this Court's decision in **Tlake**, if it held in the event of unlawful arrest and detention that proceedings from arrest to acquittal must be regarded as continuous, and no personal injury has been done to the accused until the prosecution has been determined by his discharge, if I am satisfied that the decision is clearly wrong.
- [20] For the reasons that follow below, I respectfully disagree with the *ratio decidendi* in **Tlake** to the extent that it held or is capable of being interpreted to establish that in the event of any unlawful arrest and detention, the proceedings from arrest to acquittal must be regarded as continuous, and no personal injury has been done to the accused until the prosecution has been determined by his discharge.

The nature of civil litigation in our adversarial system

- [21] In light of the approach of the parties to have the special pleas adjudicated, it is imperative to bear in mind the nature of civil litigation in our adversarial system.
- [22] In **Mtokonya v Minister of Police**³ (**Mtokonya**) the Constitutional Court reiterated the injunction - issued by that Court⁴ - that courts must not decide cases based on issues that have not been raised by the parties in the papers. As Zondo J explained, a court should not tell a litigant what it should complain about. The injunction is subject to one qualification, namely that a court may decide a matter on a point of law that has not been raised by the parties in the papers where the common approach of the parties proceeds on a wrong perception of what the law is, and the point of law is apparent on the papers.
- [23] Theron JA and Wallis JA explained it as follows in **Fischer and Another v Ramahlele and Others**⁵:

³ 2018 (5) SA 22 (CC) (2017 (11) BCLR 1443; [2017] ZACC 33) at 76-77.

⁴ *CUSA v Tao Ying Metal Industries and Others* 2009 (2) SA 204 (CC) (2009 (1) BCLR 1; [2009] 1 BLLR 1; (2008) 29 ILJ 2461; [2008] ZACC 15) at paras 67-68.

⁵ 2014 (4) SA 614 (SCA) ([2014] ZASCA 88) paras 13-15.

"[13] Turning then to the nature of civil litigation in our adversarial system, it is for the parties, either in the pleadings or affidavits (which serve the function of both pleadings and evidence), to set out and define the nature of their dispute, and it is for the court to adjudicate upon those issues. That is so even where the dispute involves an issue pertaining to the basic human rights guaranteed by our Constitution, for '(i)t is impermissible for a party to rely on a constitutional complaint that was not pleaded'. There are cases where the parties may expand those issues by the way in which they conduct the proceedings. There may also be instances where the court may *mero motu* raise a question of law that emerges fully from the evidence and is necessary for the decision of the case. That is subject to the proviso that no prejudice will be caused to any party by its being decided. Beyond that it is for the parties to identify the dispute and for the court to determine that dispute and that dispute alone.

[14] It is not for the court to raise new issues not traversed in the pleadings or affidavits, however interesting or important they may seem to it, and to insist that the parties deal with them. The parties may have their own reasons for not raising those issues. A court may sometimes suggest a line of argument or an approach to a case that has not previously occurred to the parties. However, it is then for the parties to determine whether they wish to adopt the new point. They may choose not to do so because of its implications for the further conduct of the proceedings, such as an adjournment or the need to amend pleadings or call additional evidence. They may feel that their case is sufficiently strong as it stands to require no supplementation. They may simply wish the issues already identified to be determined because they are relevant to future matters and the relationship between the parties. That is for them to decide and not the court. If they wish to stand by the issues they have formulated, the court may not raise new ones or compel them to deal with matters other than those they have formulated in the pleadings or affidavits.

[15] This last point is of great importance because it calls for judicial restraint."

The institution of legal proceedings act

[24] It is common cause that the debts forming the subject matter of the plaintiff's claims respectively constitute 'a debt' as envisaged in the Institution of Legal Proceedings Act. Although there was initially a dispute regarding whether a notice was indeed 'served' on the first defendant when the matter served before me on the first occasion, the first defendant limited its argument at the hearing to the

question of whether the plaintiff complied with s 3(2)(a) of the aforesaid Act, in other words whether the plaintiff served the notice of its intention to institute proceedings for recovery of the debt within six months from the date on which the debt became due.

[25] Section 2 of the Institution of Legal Proceedings Act provides in relevant parts that, subject to s 3 and subsections (3) and (4), a debt which became due after the date of commencement of the aforesaid Act, will be extinguished by prescription as contemplated in Chapter III of the Prescription Act, 1969 (Act 68 of 1969), read with the provisions of that Act relating thereto.

[26] Section 3 provides as follows:

“3 Notice of intended legal proceedings to be given to organ of state

- (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-
 - (i) the facts giving rise to the debt; and
 - (ii) such particulars of such debt as are within the knowledge of the creditor.
- (3) For purposes of 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

- (b) a debt referred to in section 2(2)(a), must be regarded as having become due on the fixed date.
- (4) (a) If an organ of state relies on a creditor's failure to serve a notice in terms of subsection (2) (a), the creditor may apply to a court having jurisdiction for condonation of such failure.
- (b) The court may grant an application referred to in paragraph (a) if it is satisfied that-
 - (i) the debt has not been extinguished by prescription;
 - (ii) good cause exists for the failure by the creditor; and
 - (iii) the organ of state was not unreasonably prejudiced by the failure.
- (c) If an application is granted in terms of paragraph (b), the court may grant leave to institute the legal proceedings in question, on such conditions regarding notice to the organ of state as the court may deem appropriate."

[27] With regards to the Institution of Legal Proceedings Act, Moseneke DCJ explained in his minority judgement in *Barkhuizen v Napier*:⁶

"[115] Fourth, at least since the advent of our democracy, Parliament seems to have adopted a new approach to ameliorate the consequence of time-limitation clauses in statutes. Here I have in mind the Institution of Legal Proceedings Against Certain Organs of State Act. Its declared purpose is to regulate and harmonise the periods of time within which to institute legal proceedings against certain organs of State and to give notice of such proceedings. Under s 2(2)(b), debts that became due..."

[Footnotes excluded]

[28] The Deputy Chief Justice continued to say:

"[116] The effect of this is that the prescription period for delictual debts against the State organs, governed by the Institution of Legal Proceedings against certain Organs of State Act, is now three years. This is in line with the prescription period that pertains to delictual debts in general. The period within which legal proceedings may be instituted against State

⁶ 2007 (5) SA 323 (CC) (2007 (7) BCLR 691; [2007] ZACC 5).

organs has therefore been extended to three years. In addition the notice of such proceedings must now be given within six months from the date on which the debt became due.

[117] What is more, a court is empowered to condone non-compliance with the notice provision if it is satisfied, among other things, that good cause exists for the failure to give timeous notice, and the organ of State was not unreasonably prejudiced. This statute therefore permits account to be taken of the claimant's fault or the lack of it, as well as prejudice suffered by the State or the absence of it. In my view these statutory trends in prescription of delictual claims against the state and private entities are indicative of the *boni mores*."

[Footnotes excluded]

[29] Didcott J held in ***Mohlomi v Minister of Defence***⁷ :

"The conventional explanation for demanding prior notification of any intention to sue an organ of government is that, with its extensive activities and large staff which tends to shift, it needs the opportunity to investigate claims laid against it to consider them responsibly and to decide, before getting embroiled in litigation at public expense, whether it ought to accept, reject or endeavour to settle them."

[30] Section 3 of the Institution of Legal Proceedings Act is designed primarily for the benefit of organs of state, rather than prospective litigants.⁸

[31] The plaintiff's reliance on ***RAF v Masindi supra*** in these proceedings can be disposed of at this juncture. As emphasised in ***Masindi***⁹, the Road Accident Fund Act 56 of 1996 [the RAF Act] is social legislation, the primary purpose thereof being to give the greatest possible protection to persons who had suffered loss through negligence or unlawful acts on the part of a driver or owner of a motor

⁷ 1997 (1) SA 124 (CC) (1996 (12) BCLR 1559; [1996] ZACC 20) at para 9.

⁸ *Mabaso v National Commissioner of Police and Another* 2020 (2) SA 375 (SCA) para 13 (*Mabaso*) with reference to *Mogopodi v Member Executive Council, Free State* [2008] ZAFSHC 38 at para 7.

⁹ Para 12 above.

vehicle. The Court in *Masindi* was concerned with “striking a balance between an infringement of the guaranteed right of access to courts and the objective of statutory time limits whose function is 'bringing certainty and stability to social and legal affairs, and maintaining the quality of adjudication”.

- [32] The Court in *Mabaso*¹⁰ had to consider whether there was a duty on an organ of state receiving a notice in terms of the Institution of Legal Proceedings Act to make a decision to accept, reject or settle a claim prior to commencement of litigation. Regarding the reliance on the RAF Act in those proceedings, Makgoka JA held as follows:

“There are clear and discernible philosophical orientations between the legislative scheme of the Fund and the Act under consideration. Significantly, there is also a limit placed on the degree of compensation in relation to the Fund. Moreover, their respective stated purposes are vastly different. The RAF Act was enacted for the benefit of claimants. On the contrary, as stated already, the Act under consideration was, in the main, enacted for the benefit of the organs of state, rather than the claimants.”¹¹

- [33] Earlier in the judgment Makgoka JA said:

“[26] There is no constitutional challenge to the validity of s 3. It must also be borne in mind that s 3 envisages that in the event of a claim being repudiated, the dispute would be fully ventilated before a court of competent jurisdiction. Against that background it is difficult to understand how s 34 of the Constitution supports the appellant's case. If anything, s 3 preserves the appellant's right to have his case adjudicated by court. It is thus difficult to see, as contended for by the appellant, how a litigant's right is frustrated thereby. As pointed out above, s 5(2) of the Act affords the state an opportunity to repudiate liability to a claimant, but it certainly does not oblige it to respond during the 30-day period.

[27] It is plain that the dispute envisaged in s 34 is one in respect of which legal proceedings have been instituted, and is therefore capable of resolution by the application of law in a

¹⁰ *Mabaso* above n8.

¹¹ *Ibid* at para 37.

'public hearing before a court'. At the stage when a s 3 notice is given, and until legal proceedings are instituted, there is no adjudicable 'dispute'. It follows that s 3 does not implicate the right of access to courts."

[34] The reliance on *Masindi* is therefore misplaced in my view.

Prescription

[35] The extinction of debts by prescription is governed by the Prescription Act 68 of 1969. The applicable provisions, in relevant parts, provides as follows:

35.1 Section 10(1) provides that subject to the provisions of Chapter 3 and 4 of the Prescription Act, a debt shall be extinguished by prescription after the lapse of the period which in terms of the relevant law applies in respect of the prescription of such debt.

35.2 Regarding the period of prescription, s 11(d) finds application to the claims under consideration. Section 11(d) provides as follows:

"save where an Act of Parliament provides otherwise, three years in respect of any other debt."

35.3 Section 12 determines when prescription starts running and provides in relevant parts as follows:

"(1) Subject to the provisions of subsections (2), (3), and (4), prescription shall commence to run as soon as the debt is due.

(2) If the debtor wilfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.

(3) 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: Provided that a

creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.”

35.4 Section 13 provides that the completion of prescription will be delayed if any of the impediments listed in the section is present.

35.5 Sections 14 and 15 provides for the interruption of prescription by respectively an acknowledgement of debt or service on the debtor of any process whereby the creditor claims payment of the debt subject thereto that the creditor successfully prosecutes the claim under the process in question to final judgment and does not abandon the judgment or the judgment is not set aside.

[36] For a debt to be due and prescription to start running s 12(3) requires that the creditor must have knowledge of the identity of the debtor and of the ‘facts from which the debt arises’. Section 12(3) does not require, before a debt can be said to be due or before prescription can start running, that the creditor must know that the conduct of the debtor giving rise to the debt is wrongful and actionable as that is a legal conclusion and not a fact. In this regard Zondo J observed in *Mtokonya*¹² Zondo J:

“Furthermore, to say that the meaning of the phrase ‘knowledge . . . of the facts from which the debt arises’ includes knowledge that the conduct of the debtor giving rise to the debt is wrongful and actionable in law would render our law of prescription so ineffective that it may as well be abolished. 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. However, it would also not run against trained lawyers if the field concerned happens to be a branch of law with which they are not familiar. The percentage of people

¹² *Mtokonya* above n3.

in the South African population against whom prescription would not run when they have claims to pursue in the courts would be unacceptably high.”¹³

- [37] The commencement of prescription is not dependent on the plaintiff having knowledge of the legal consequences of the facts.¹⁴
- [38] When considering prescription, whilst it often leaves an unpalatable taste because a party may receive a benefit without rendering the required counter performance or be left without recourse where a liability is extinguished, this is a result inherent in the law of prescription. The law tolerates the extinction of debts through prescription because of the public interest in finality. For these reasons it is necessary to remind oneself that unreasonableness of the result of extinctive prescription or what on the face of it may appear to be unjust are not relevant issues when considering whether a debt has prescribed.
- [39] The onus to prove extinctive prescription rests on the first defendant, being the debtor claiming prescription, to establish the date by which the claimant acquired, or could by exercising reasonable care have acquired, knowledge of the facts giving rise to the claim.¹⁵ If a plaintiff relies on the interruption or delay of the running of prescription, the plaintiff bears the onus to prove that. In **Cook v Morrison and Another**¹⁶ (**Cook**) Rogers AJA explained:

“In regard to s 13(1)(d) of the Act, Cook did not file a replication alleging that completion of prescription was delayed by virtue of a relationship of partnership between himself and the defendants. Although the onus rested on the defendants to establish when prescription began to run, the onus was on the plaintiff to allege and prove that the completion of

¹³ *Mtokonya* above para 63.

¹⁴ *Mtokonya* above para 50 approving *Claasen v Bester* 2012 (2) SA 404 (SCA) ([2011] ZASCA 197) para 15; Also see *Truter and Another v Deyzel* 2006 (4) SA 168 (SCA); *Drake Flemmer & Orsmond Inc v Gajjar NO* 2018 (3) SA 353 (SCA).

¹⁵ *Gericke v Sack* 1978 (1) SA 821 (A) at 826B – 828C; *Yarona Healthcare Network (Pty) Ltd v Medshield Medical Scheme* 2018 (1) SA 513 (SCA) para 61.

¹⁶ 2019 (5) SA 51 (SCA) at para 18.

prescription was delayed (Naidoo NO and Others v Naidoo and Another 2010 (5) SA 514 (KZP) para 16 and authorities there cited)."

[40] The default position is that a plaintiff must raise the issue of interruption or delay in the running of prescription by means of a replication. It may not be necessary if the facts giving rise to the interruption or delay in completion of prescription is sufficiently alleged in the plaintiff's particulars of claim. In **Cook**¹⁷ Rogers AJA explained:

"I accept that a replication may be unnecessary where the facts giving rise to the delay in completion of prescription are sufficiently alleged in the creditor's particulars of claim. That was not the case here."

When does prescription start with regards to unlawful arrest, unlawful detention and malicious prosecution

[41] As stated above, the plaintiff relies on three distinct claims, to wit unlawful arrest, unlawful detention following the arrest and lastly based on malicious prosecution.

[42] The claims so formulated by the plaintiff corresponds with the well-established legal position regarding unlawful arrest, detention and malicious prosecution.

[43]

43.1 The court in **Tlake**¹⁸ was concerned with two separate acts of unlawful arrest and detention and as stated above, it is not discernible from the judgment whether the plaintiff relied on unlawful arrest and detention or malicious arrest, detention and prosecution. The distinction is an important one as different considerations will apply to unlawful arrest and detention with or without prosecution one the one hand and malicious arrest and

¹⁷ *Cook* above n 16 at para 19.

¹⁸ Para 11 above.

detention with or without prosecution on the other hand as will be dealt with below.

43.2 The court in ***Makhwelo***¹⁹ was concerned only with claims for unlawful arrest and detention but applied the well-established principles regarding prescription in claims for malicious prosecution to claims for unlawful arrest and detention.

43.3 Insofar as the court in ***Tlake*** was not concerned with malicious arrest, malicious detention and malicious prosecution or in the event that the dictum is susceptible to being interpreted as holding that prescription only commences to run in the event of a claim for unlawful arrest and detention when criminal prosecution is finalised, thus that the unlawful arrest, unlawful detention and subsequent criminal prosecution is to be treated as one continuous transaction which cannot be regarded as complete until the outcome of the criminal prosecution is known, I am respectfully of the view that the dictum is clearly wrong.

43.4 I disagree that prescription regarding claims for unlawful arrest and unlawful detention only commence to run when the criminal prosecution is finalised, as is the case with a claim for malicious prosecution. ***Makhwelo*** and to the extent that ***Tlake*** is capable of being read to endorse the same conclusion as arrived at in ***Makhwelo***, then it too, depart from the well-established principles relating to prescription of claims for unlawful arrest and detention.

[44] The question regarding when prescription commences to run with regards to unlawful arrest, unlawful detention and malicious prosecution respectively has been authoritatively decided and concomitantly therefore the question whether a

¹⁹ Ibid.

claim for unlawful arrest and subsequent detention (as opposed to malicious prosecution which may include malicious arrest and/or detention) and the prosecution thereafter is to be treated as one continuous transaction which cannot be regarded as complete until the outcome of the criminal prosecution is known.

- [45] In ***Thompson and Another v Minister of Police and Another***²⁰ (***Thompson***) the plaintiffs in the two actions both instituted actions against the Minister of Police and a Warrant Officer in which they claimed damages in respect of an alleged wrongful arrest; and in the alternative they claimed damages against the Warrant Officer alone in respect of an alleged malicious arrest, malicious detention and malicious prosecution. The Court was requested to adjudicate on a special plea of prescription raised by the defendants in each case by means of a stated case. Eksteen J held as follows in the passage at 374G-376A, which apposite to the matter at hand:

“Both claims, i.e. in respect of the wrongful arrest and in respect of the malicious arrest, are based on the *actio injuriarum* and in both instances the *animus injuriandi* or *dolus* is an essential element. *In the case of wrongful arrest, however, the intention may be said to be direct - dolus directus - as it is done with the definite object of hurting the defendant in his person, dignity or reputation* (Melius de Villiers on The Law of Injuries, p. 27). *The arrest itself is prima facie such an odious interference with the liberty of the citizen that animus injuriandi is thereby presumed in our law, and no allegation of actual subjective animus injuriandi is necessary* (Foulds v. Smith, 1950 (1) SA 1 (AD) at p. 11). *In such an action the plaintiff need only prove the arrest itself and the onus will then lie on the person responsible to establish that it was legally justified.* (Theron v. Steenkamp, 1928 CPD 429 at p. 432; Ingram v. Minister of Justice, 1962 (3) SA 225 (W) at p. 227).

In the case of malicious arrest the intention to injure is indirect - dolus indirectus - as the action of the defendant in instigating the arrest or setting the wheels of the criminal law in motion is done as a means for effecting another object, viz. the arrest of the plaintiff, the

²⁰ 1971 (1) SA 371 (E).

consequence of which act the defendant is aware will necessarily be to hurt the plaintiff in regard to his person, dignity or reputation.

In an action based on malicious prosecution it has been held that no action will lie until the criminal proceedings have terminated in favour of the plaintiff. This is so because one of the essential requisites of the action is proof of a want of reasonable and probable cause on the part of the defendant, and while a prosecution is actually pending its result cannot be allowed to be prejudged by the civil action (Lemue v Zwartbooi, supra at p. 407). The action therefore only arises after the criminal proceedings against the plaintiff have terminated in his favour or where the Attorney-General has declined to prosecute. To my mind the same principles must apply to an action based on malicious arrest and detention where a prosecution ensues on such arrest, as happened in the present case. The proceeding from arrest to acquittal must be regarded as continuous, and no action for personal injury done to the accused person will arise until the prosecution has been determined by his discharge. (Bacon v. Nettleton, 1906 T.H. 138 at pp. 142 - 3).

From this it follows that the plaintiffs' cause of action in respect of the alleged malicious arrest and detention in the present case, can only have arisen on the judgment of this Court allowing the appeal against their conviction in the magistrate's court, i.e. on 29th April, 1969. This means that, in giving notice to the second defendant on 20th September, 1968 and issuing summons on 25th October, 1968, they were complying with the provisions of sec. 32 of Act 7 of 1958, and it consequently becomes unnecessary for me to consider whether they were in fact required so to comply or whether the second defendant was acting in pursuance of the Police Act at the time he was alleged to have committed the delict.

In the main claim based on wrongful arrest however the position is different. 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. In the present case, therefore, the cause of action in the main claims arose on 10th April, 1967. In terms of the stated case I am asked to assume not only that the arrest was wrongful, but also that in effecting the arrest Hansen was acting in pursuance of the Police Act. That being so, sec. 32 of Act 7 of 1958 applies and it is clear that this section has not been complied with inasmuch as both the notice

given to the defendants and the subsequent issue of summons were outside the periods prescribed by that section. Plaintiffs' actions against first and second defendants for wrongful arrest are therefore out of time and cannot be entertained. This is the only cause of action preferred against the first defendant, and in the light of the conclusions to which I have come, it follows that both the plaintiffs' actions against the first defendant must be dismissed with costs, which costs include the first defendants costs in this proceeding."

[Emphasis added]

- [46] Eksteen J dealt with two distinct claims, one for wrongful or unlawful arrest and an alternative claim for malicious arrest and detention where a prosecution ensues. A proper reading of the afore quoted passage clearly establishes that Eksteen J was not dealing with the claim for wrongful/unlawful arrest when he said, *'the proceeding from arrest to acquittal must be regarded as continuous, and no action for personal injury done to the accused person will arise until the prosecution has been determined by his discharge'*. Eksteen J was concerned with the claim for malicious arrest and detention from which a prosecution ensued which the learned Judge held would in his view be subject to the same principles that govern a claim for malicious prosecution, ergo the claim in such an instance only arises when the prosecution has been finalised in the plaintiff's favour or the prosecution has been withdrawn.
- [47] The quoted passage clearly distinguishes between a claim for wrongful/unlawful arrest and malicious arrest and detention from which prosecution ensues. As aptly stated by Eksteen J, in the case of a claim for unlawful arrest the delict is committed by the illegal arrest of the plaintiff without the due process of the law. Therefore, improper motive or want of reasonable and probable cause that would be required for malicious arrest have no legal relevance to the cause of action. It is legally irrelevant whether any prosecution ensues subsequent to the arrest or 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.

- [48] Rabie CJ said in *Minister of Law and Order and Others v Hurley and Another*²¹:

“An arrest constitutes an interference with the liberty of the individual concerned, and it therefore seems fair and just to require that the person who arrested or caused the arrest of another person should bear the onus of proving that his action was justified in law.”

Unlawful arrest and detention involve constraints on personal liberty where the wrongdoer's legal liability exists even in the absence of his appreciation of the wrongful nature of his injurious act.²²

- [49] In *Minister of Safety & Security v Sekhoto*²³ (*Sekhoto*) Harms DP held:

“[42] While it is clearly established that the power to arrest may be exercised only for the purpose of bringing the suspect to justice, the arrest is only one step in that process. Once an arrest has been effected, the peace officer must bring the arrestee before a court as soon as reasonably possible; and at least within 48 hours, depending on court hours. Once that has been done, the authority to detain, that is inherent in the power to arrest, is exhausted. The authority to detain the suspect further is then within the discretion of the court.

[43] The discretion of a court to order the release or further detention of the suspect is subject to wide-ranging, and in some cases stringent, statutory directions. Indeed, in some cases the suspect must be detained pending his trial, in the absence of special circumstances. I need not elaborate for present purposes, save to mention that the Act requires a judicial evaluation to determine whether it is in the interests of justice to grant bail; that in some instances a special onus rests on a suspect before bail may be granted; and the accused has in any event a duty to disclose certain facts, including prior convictions, to the court. It is sufficient to say that, if a peace officer were to be permitted to arrest only once he is satisfied that the suspect might not otherwise attend the trial, then

²¹ 1986 (3) SA 568 (A) at 589E – F.

²² *Minister of Justice v Hofmeyr* 1993 (3) SA 131 (A) ([1993] 2 All SA 232; [1993] ZASCA 40) 154J *et seq.*

²³ 2011 (5) SA 367 (SCA) (2011 (1) SACR 315; [2011] 2 All SA 157; [2010] ZASCA 141).

that statutory structure would be entirely frustrated. To suggest that such a constraint upon the power to arrest is to be found in the statute by inference is untenable.

[44] While the purpose of arrest is to bring the suspect to trial, the arrestor has a limited role in that process. He or she is not called upon to determine whether the suspect ought to be detained pending a trial. That is the role of the court (or in some cases a senior officer). The purpose of the arrest is no more than to bring the suspect before the court (or the senior officer) so as to enable that role to be performed.”

[Footnotes and case law referred to in the text omitted]

[50] ***Sekhoto*** was referred to and explained in ***De Klerk v Minister of Police***²⁴ (***De Klerk***) where the majority in the Constitutional Court established that the Minister of Police may in certain circumstances be held liable for post-remand detention where the requisite causality therefore is established. In ***De Klerk*** the unlawfulness of the arrest and fault was not contested, only the liability of the Minister of Police for the post-remand detention.

[51] The Constitutional Court emphasised in ***Mahlangu and Another v Minister of Police***²⁵ (***Mahlangu***) that the ‘prism through which liability for unlawful arrest and detention should be considered is the constitutional right guaranteed in s 12(1), not to be arbitrarily deprived of freedom and security of the person’ which rights together with the right to human dignity are fundamental rights entrenched in the Bill of Rights.²⁶ The Court confirmed:

“It follows that in a claim based on the interference with the constitutional right not to be deprived of one's physical liberty, all that the plaintiff has to establish is that an interference has occurred. Once this has been established, the deprivation is prima facie unlawful, and the defendant bears an onus to prove that there was a justification for the interference.”²⁷

²⁴ 2021 (4) SA 585 (CC) (2020 (1) SACR 1; 2019 (12) BCLR 1425; [2019] ZACC 32). Also see *Mahlangu and Another v Minister of Police* (CCT 88/20) [2021] ZACC 10; 2021 (7) BCLR 698 (CC); 2021 (2) SACR 595 (CC).

²⁵ *Mahlangu* n24 above.

²⁶ *Mahlangu* above n24 at para 25.

²⁷ *Mahlangu* above at para 32.

- [52] Once the plaintiff in an action for unlawful arrest and detention has established deprivation of his physical liberty, the deprivation is *prima facie* unlawful. The defendant bears the onus to prove justification.
- [53] It is not necessary that a person must be convicted of the offence he was arrested for in order for the arrest to have been lawful. The eventual acquittal or conviction by itself does not prove that an arrest was lawful or unlawful nor would it prove that detention following the arrest was lawful or unlawful.²⁸ The lawfulness or unlawfulness of an arrest does not by implication render subsequent detention lawful or unlawful.²⁹
- [54] Whilst arrest is frequently followed by detention, wrongful detention need not be preceded by any arrest.³⁰
- [55] A claim for wrongful arrest and detention 'seeks to compensate a claimant for the infringement of different interests of personality, namely the restriction of his or her physical freedom of movement and also impairment of his or her subjective feelings of dignity or self-respect'.³¹
- [56] Unlawful arrest and detention must not be conflated with malicious arrest and detention. Hulley AJ explained in *Lebelo*³²

"An arrest is malicious if the arrestor makes improper use of the legal process to deprive the plaintiff of his liberty. In other words, if he arrests the plaintiff for a purpose not

²⁸ Compare for example *R v Moloy* 1953 (3) SA 659 (T) at 662E.

²⁹ *Mofokeng and Others v The Minister of Police and Another* (3953/2019) [2022] ZAFSHC 193 (24 August 2022) applying *Isaacs v Minister van Wet en Orde* 1996 (1) SACR 314 (A) at 323H-J.

³⁰ *Minister of Police v Lebelo* 2022 (2) SACR 201 (GP) [*Lebelo*].

³¹ *Brandon v Minister of Law and Order and Another* 1997 (3) SA 68 (C): dictum at 78F – I/J; *Minister of Police v Lebelo* supra at para 65.

³² *Lebelo* n30 above at paras 69-70.

contemplated in the empowering statute. Intent and motive, whilst related, are discrete concepts. As pointed out by Stratford JA in *Gluckman v Schneider* 936 AD 151 at 159.: 'Motive . . . is the actuating impulse preceding intention.' Intention is an expression of the will, rather than a desire³³; motive is the desire.

[70] It is important to bear in mind that the present matter is concerned with unlawful arrest and detention, and not malicious arrest and detention. It is therefore important to ensure that traces of the latter cause of action not seep into the former.”

[57] In this Division³⁴ as well as other Divisions it has consistently been held that prescription for unlawful arrest will in principle commence to run when the act of arrest is completed. In the words of Hulley AJ on behalf of the Full Court in ***Lebelo***³⁵:

“A wrongful arrest involves a single act, but, for so long as the accused remains in the detention of or under the vicarious control of the Minister of Police, his detention constitutes a continuing wrong.”

[58] In ***Sefatsa and Others v Minister of Police and Others (A44/2019) [2019] ZAFSHC 217 (14 November 2019)*** the Full Court (Van Zyl J, P.E. Molitsoane J and L Moeng AJ) heard an appeal against the dismissal of an application for condonation for failure to give a s 3 notice (in terms of the Institution of Legal Proceedings Act) timeously. The applicants issued summons claiming damages for unlawful arrest and detention and malicious prosecution. The court a quo refused to grant condonation for the failure to give notice within the required period with regards to the claims for unlawful arrest and detention but granted condonation regarding the claim for malicious prosecution. The appellants were arrested by members of the IPID. The Court per Molitsoane J held that prescription did not start to run on the date of arrest or detention in that matter

³³ *Minister of Justice v Hofmeyr* 1993 (3) SA 131 (A) ([1993] 2 All SA 232; [1993] ZASCA 40) 154-155 at 154.

³⁴ For instance, *Moloi v Minister of Safety and Security and Others* (3861/2013) [2014] ZAFSHC 76 (12 June 2014); *Mofokeng* above n29.

³⁵ *Lebelo* above n30 at para 111.

because the evidence established that the appellants did not know the identity of the debtor when they were arrested and detained. The debt only became due when they were later advised of the identity of the debtor.

- [59] Unlawful arrest, subsequent detention and prosecution is not to be treated as one continuous transaction which is not completed until the outcome of the criminal prosecution.
- [60] In ***Minister of Police and Another v Yekiso***³⁶ (***Yekiso***) the Full Court of the Western Cape High Court heard an appeal against the decision of the court *a quo* to grant condonation for the failure of the respondent (Mr Yekiso) to comply with the notice requirements set out in s 3 of the Institution of Legal Proceedings Act, in respect of his claims for damages against the Minister of Police based on unlawful arrest and detention, and against the National Prosecuting Authority (NPA) based on unlawful detention and malicious prosecution. The court *a quo* from which the appeal lay, had reached a similar finding as the Court did in ***Tlake***³⁷ and ***Makhwelo***³⁸, namely that the claim for unlawful arrest, subsequent detention and malicious prosecution was a continuous transaction which could not be regarded as complete until the outcome of the criminal prosecution.
- [61] In order to determine whether the requirements of s 3(4) of the Institution of Legal Proceedings Act were satisfied, the Full Court had to determine whether the applicant in the court *a quo* had shown that good cause existed for the failure of an applicant to comply and whether the debt had not been extinguished by prescription.
- [62] It is necessary to briefly deal with the relevant facts in ***Yekiso***. Mr Yekiso was arrested on 21 February 2006 and detained for the period 22 February 2006 until

³⁶ 2019 (2) SA 281 (WCC).

³⁷ Para 11 above.

³⁸ *Ibid.*

7 October 2011 when he was released. He served his summons on the Minister and the NPA on 21 July 2014 and 1 September 2014, respectively. The Minister and NPA contended that Mr Yekiso's claim based on his unlawful arrest and detention had prescribed in terms of s 11(d) of the Prescription Act.

[63] The Full Court held as follows with regards to the court a quo's finding that the claim for unlawful arrest, subsequent detention and malicious prosecution was a continuous transaction which could not be regarded as complete until the outcome of the criminal prosecution:

"[18] In the ordinary course the respondent's claims based on unlawful arrest in February 2006 prescribed on 21 February 2009 in terms of s 11(d) of the Prescription Act. Before the court a quo, respondent contended that the claim for unlawful arrest, subsequent detention and malicious prosecution was a continuous transaction which could not be regarded as complete until the outcome of the criminal prosecution.

[19] The court a quo unfortunately erred in finding that the claim for unlawful arrest and subsequent detention and prosecution was to be treated as one continuous transaction which could not be regarded as complete until the outcome of the criminal prosecution. This finding is clearly in conflict with the approach adopted in *Lombo v African National Congress* 2002 (5) SA 668 (SCA) para 26 and with the concept of a continuous wrong as set out in *Barnett and Others v Minister of Land Affairs and Others* 2007 (6) SA 313 (SCA) (2007 (11) BCLR 1214; [2007] ZASCA 95) para 20:

'In accordance with the concept, a distinction is drawn between a single, completed wrongful act — with or without continuous 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 with regard to a continuous wrong is essentially that it results in a series of debts arising from moment to moment, as long as the wrongful conduct endures. (See e.g. *Slomowitz v Vereeniging Town Council* 1996 (3) SA 317 (A); *Mbuyisa v Minister of Police, Transkei* 1995 (2) SA 362 (TK) (1995 (9) BCLR 1099); *Unilever Best Foods Robertsons (Pty) Ltd and Others v Soomar and Another* 2007 (2) SA 347 (SCA) in para [15].'

[20] It appears that Mr Godla, who appeared on behalf of the respondent, was alive to this difficulty and, accordingly, in his heads of argument prepared for this appeal changed respondent's case and raised the issue of s 13 of the Prescription Act to counter the problem of there being a discrete set of events rather than one continuous process from arrest to release. This latter argument had not been pleaded by the respondent, and it had not been raised in the founding affidavit in the application for condonation nor canvassed in argument by respondent in the court a quo when the condonation application was heard.

....

[27] On the basis that the continued detention from 22 February 2006 until 7 October 2011 gave rise to a separate cause of action for each day that he was so detained, the detention period from 22 February 2006 until 21 July 2011 had also prescribed for the same reasoning as employed in respect of the unlawful arrest. The proceedings against first appellant commenced when summons was issued on 21 July 2014 and therefore it would mean that a period of more than three years had elapsed for the detention period ending on 21 July 2011. On the same basis a period of more than three years had elapsed since 1 September 2011 when the respondent served summons on the second appellant on 1 September 2014.

[28] Accordingly, the respondent has not satisfied the first requirement for condonation in terms of s 3(4) of the Act, namely that the debt had not been extinguished by prescription, in respect of his detention until 2 September 2011. The claims based on malicious prosecution and for the detention from 2 September 2011 to 7 October 2011 have not prescribed. This latter situation requires an examination as to whether respondent has met the requirement of 'good cause'."

[64] In *Annari du Plessis v Minister of Police and 2 Others*³⁹ (*Du Plessis*), a judgment of Baqwa J, Gauteng Division, Pretoria, the Court was called upon to decide whether the plaintiff's claim for wrongful arrest and subsequent detention, had prescribed. The relevant facts were as follows. The plaintiff was arrested without a warrant and charged for defeating the ends of justice. She was subsequently convicted and sentenced. The conviction and sentence were later set aside on appeal. The plaintiff waited for the criminal trial and thereafter the

³⁹ (42774/2016) (2018) ZAGPPHC (18 June 2018).

appeal to be finalised whereafter she sued the defendant for wrongful arrest and her detention from 12-14 August 2011.

- [65] Baqwa J was, amongst others, called upon to consider the judgment of Spilg J in **Makhwelo**⁴⁰, the last-mentioned case which was also referred to, as stated above, in **Tlake**⁴¹ in support of the conclusion reached by the Court. At para 17 the Court held, with reference to **Thompson**⁴², that regarding the cause of action based on unlawful arrest, prescription begins to run as soon as the illegal arrest has been made. Baqwa J held as follows with regards to the plaintiff's reliance on **Makhwelo**⁴³:

"The fact of the matter is that the plaintiff's claim in the present action is not malicious prosecution in which case the plaintiff would have to wait for the criminal case to run its course. The requirements for a malicious prosecution claim and the requirements for a claim arising out of wrongful arrest ought not to be conflated. The plaintiff's claim is thus not assisted by any legal conclusion that may be reached by the court, setting aside her conviction and sentence."

I associate myself fully with Baqwa J's observations.

- [66] Baqwa J also relied on another unreported decision in the matter of **Lawrence Nyiko Nkwinika v Detective Malapane and Another**⁴⁴ where Mali AJ held:

"In *Marchel Labuschagne v Minister of Safety and Security*, the court found that the trigger date was the date of the arrest and not the date of the withdrawal of the matter against the plaintiff. This matter has similarity of certain facts in the present case."⁴⁵

⁴⁰ Para 11 above.

⁴¹ Ibid.

⁴² Para 45 above, n20.

⁴³ Para 11 above.

⁴⁴ (19477/2018) (2015) ZAGPJHC 42 (27 February 2015)

⁴⁵ *Lawrence Nyiko Nkwinika v Detective Malapane and Another* above at para 8.

- [67] In *Mtokonya*⁴⁶ supra the Constitutional Court heard an appeal in the context of a special case in terms of rule 33. The facts of the matter were as follows. The applicant sued the Minister of Police for damages arising from wrongful arrest and detention by the South African Police Service. The applicant claimed that he had been detained for more than 48 hours without appearing before a court. The Minister by means of a special plea submitted that the applicant's claim had prescribed because, by the time summons was served on it during April 2014 more than three years had passed since the debt had become due i.e., on the applicants' release from detention in September 2010 when he knew that he was arrested and the identity of the debtor. The legal question that had to be decided was whether a creditor was required to have knowledge that the conduct of the debtor giving rise to the debt was wrongful and actionable before prescription could start running. The majority held, as stated above, that s 12(3) does not require, before a debt can be said to be due or before prescription can start running, that the creditor must know that the conduct of the debtor giving rise to the debt is wrongful and actionable as that is a legal conclusion and not a fact.
- [68] In *Lombo v African National Congress*⁴⁷ (*Lombo*) the Supreme Court of Appeal held as follows regarding the claim for unlawful detention:

"[26] The appellant's position is somewhat different in regard to his claim for unlawful detention. His cause of action in this respect did not arise once and for all on the day he was first detained, nor did it first arise on the day of his release from detention. His continuing unlawful detention (if such it was) would notionally have given rise to a separate cause of action for each day he was so detained (*Ngcobo v Minister of Police* 1978 (4) SA 930 (D), following *Slomowitz's* case supra). The decision in *Ramphela v Minister of Police* 1979 (4) SA 902 (W), if not distinguishable on the facts, must be taken to have been wrongly decided.

⁴⁶ *Mtokonya* n3.

⁴⁷ 2002 (5) SA 668 (SCA).

[27] On his release in August 1991 the provisions of s 13(1) [on the facts of the case] would have entitled the appellant to claim damages for wrongful detention for the full period of his detention provided he instituted action within the prescribed one-year period, something he failed to do. However, the three-year prescriptive period provided in s 11(d) of the Act preserved any claim for unlawful detention arising within the period of three years preceding the service of summons on 22 November 1993. His claim for unlawful detention for the period 23 November 1990 until his release in August 1991 would therefore still be extant. Any claim for wrongful detention arising before 23 November 1990 will have been extinguished by prescription in accordance with the principles enunciated above.”

[69] In *Khanya v The Minister of Police* (5458/2014) [2019] ZAFSHC 81 (20 June 2019) Meintjies AJ applying *Lombo*⁴⁸ and *Yekiso*⁴⁹ concluded that ‘[u]nlawful arrest, subsequent detention and prosecution is not to be treated as one continuous transaction which is not completed until the outcome of the criminal prosecution.’

[70] In *Unilever*⁵⁰ the Supreme Court of Appeal was concerned with the dismissal by the court a quo of special claims of prescription where the plaintiffs’ cause of action lied on an elaborate conspiracy entered into between all the defendants, according to the plaintiffs, which existed during the period June 1993 up to April 2001 and which had as its aim to damage or destroy the plaintiffs’ business operations in the manufacture and sale of edible oils; to damage the plaintiffs in their patrimony generally and in their good name and reputation.

[71] Farlam JA held at para 11:

“With us also there can be no question of a delict having been committed unless the conduct of the defendant of which the plaintiff complains has caused damage and then all damage resulting from that conduct, whether ‘already realized or . . . merely prospective’, can be claimed (see *Oslo Land Co Ltd v Union Government* 1938 AD 584 at 590), unless

⁴⁸ *Lombo* above n47 at para 20.

⁴⁹ *Yekiso* above n36.

⁵⁰ *Unilever* n1 above.

an essential element of the delict complained of (such as the termination of proceedings in the plaintiff's favour in the case of the delict of malicious prosecution, see *Lemue v Zwartbooi*, supra) has not yet occurred.”

[72] The Court in ***Unilever*** discussed the principles relating to malicious proceedings after assuming, without deciding, that the second plaintiff had available to it a cause of action based on the abuse of legal proceedings and the plaintiff's submission that “the ‘termination in favour of the plaintiff’ principle applicable in malicious prosecution matters, which was applied in such cases as *Lemue v Zwartbooi*, supra, and *Els v Minister of Law and Order*, supra, must be applied to cases where a defendant has maliciously made false statements to the revenue authorities to the prejudice of another and succeeded in inducing the authorities to exercise the draconian powers vested in them by the revenue legislation against that other person and to institute civil proceedings against such person, who has suffered damages in consequence.”⁵¹

[73] ***Unilever*** does not establish nor is it authority for the proposition that with claims for unlawful arrest and unlawful detention, the ‘proceedings from arrest to acquittal must be regarded as continuous, and no personal injury has been done to the accused until the prosecution has been determined by his discharge’.

[74] For sake of clarity and as should be apparent from discussion above, the finding in ***Mofokeng and Others v The Minister of Police and Another***⁵² that a claim for detention arises only on release is wrong.

Prescription regarding a claim for malicious prosecution

[75] Regarding a claim for malicious prosecution, Dlodlo JA restated the position as set out in ***Thompson***⁵³ as follows in ***Holden v Assmang Ltd***⁵⁴:

⁵¹ *Unilever* above n1 at para 17 *et seq.*

⁵² *Mofokeng* above n29 at para 52.

⁵³ *Thompson* para 45 above (n20).

⁵⁴ 2021 (6) SA 345 (SCA).

"[8] In order to succeed, on the merits, with a claim for malicious prosecution, a claimant must allege and prove —

- '(a) that the defendant set the law in motion (instigated or instituted the proceedings);
- (b) that the defendant acted without reasonable and probable cause;
- (c) that the defendant acted with malice or animus iniuriandi; and
- (d) that the prosecution has failed'.⁵⁵

[9] The importance of the fourth requirement, which is the only one with which we are concerned in this appeal, lies in the fact that the claim can only arise if the proceedings were terminated in the plaintiff's favour.⁵⁶ It is fully in accordance with common sense and the practical resolution of litigation that accused persons in criminal cases against whom prosecutions have commenced should not be required to commence civil litigation before the conclusion of criminal proceedings. The extraordinary consequences of such a view would be that many civil actions for wrongful or malicious prosecution would have to be commenced, later in most cases to be abandoned when the criminal case was resolved in favour of the State and where no civil claim could succeed. That is so because a claim for malicious proceedings cannot anticipate the outcome of proceedings yet to be finalised. To hold otherwise would permit recognition of a claim when the proceedings may yet be decided against the plaintiff.

[10] A claim for malicious prosecution can ordinarily only arise after the successful conclusion of the criminal case in a plaintiff's favour. In a criminal matter, such a favourable conclusion in the plaintiff's favour would occur on acquittal or the withdrawal of the charges. The institution of a civil claim based on a malicious prosecution, before such prosecution has been finalised in the plaintiff's favour, may amount to prejudging the result of the pending proceedings."

[76] Prescription with regards to a claim for malicious prosecution commences to run only when the criminal proceedings or, as held in **Holden** supra, proceedings before statutorily created professional tribunals, are finalised in his/her favour.

⁵⁵ *Minister of Justice and Constitutional Development v Moleko* [2008] 3 All SA 47 (SCA) ([2008] ZASCA 43) para 8.

⁵⁶ *Els v Minister of Law and Order and Others* 1993 (1) SA 12 (CC) at 15F.

Conclusion regarding prescription for unlawful arrest and unlawful detention

[77] Prescription will ordinarily therefore commence to run as follows:

- 77.1 Unlawful arrest, immediately after the arrest has been effected (the unlawful arrest constituting the so-called trigger-event);
- 77.2 Unlawful detention, each day of detention gives rise to a separate claim with prescription running in respect of each respective day.

[78] Significantly, the onus to justify the interference with the liberty of the plaintiff in the case of unlawful arrest and detention rests on the defendant. As stated above, all that the plaintiff has to establish is that an interference has occurred and once this has been established, the deprivation is *prima facie* unlawful.

Computation of time periods

[79] In *Ex Parte Minister of Social Development*⁵⁷ the Constitutional Court held as follows regarding the computation of time periods:

“The general common-law rule is that, in the calculation of time the civilian method is applicable, unless a period of days is prescribed by law or contracting parties intended another method to be used.⁵⁸ According to the civil computation method, a period of time expressed in months expires at the end of the day preceding the corresponding calendar day in the subsequent month. It is settled law that the commencement of a period of time in curial calculation is governed by the ordinary civilian method where any unit of time other

⁵⁷ 2006 (4) SA 309 (CC) (2006 (5) BCLR 604; [2006] ZACC 3 para 25.

⁵⁸ E Cameron 'Time' in Joubert (ed) *The Law of South Africa* vol 27 (1st reissue) in para 433 at 371.

than days is used.⁵⁹ It follows, therefore, that 18 months from the date of judgment on 6 September 2004 ended at midnight on 5 March 2006.”⁶⁰

Non-joinder

- [80] The first respondent relied on joinder by necessity in the third special plea. It however did not pursue the special plea in its arguments.
- [81] The plaintiff’s claim, for what appears to be post-remand detention, clearly lies against the first defendant. I am not concerned with the merits of the matter nor do I express any opinion on the matter in which it is pleaded. As stated above, the Minister of Police may in certain circumstances be held liable for post-remand detention where the requisite causality therefore can be established. ***De Klerk v Minister of Police***.⁶¹
- [82] In light of the circumstances I am of the view that the third special plea, if not formally abandoned by the defendants should stand over to be adjudicated with the remainder of the issues.

⁵⁹ A long line of case law has settled the issue. In *Joubert v Enslin* 1910 AD 6 at 25 - 6 the Appellate Division, expressly approving *Cock v Cape of Good Hope Marine Assurance Co* (1858) 3 Searle 114, laid down the general rule for computation: Where the period in question is expressed in terms of weeks, months or years, the period will expire at the end of the day preceding the corresponding calendar day. In *Du Plessis v United African Furnishing Co* 1921 OPD 156 a defendant who on 14 May filed an application to rescind a default judgment of which he had knowledge on 14 April was held to have missed the one-month deadline. *Du Plessis* was accepted as correct for some 20 years and, in an exhaustive consideration of the authorities and case law in *Nair v Naicker* 1942 NPD 3, another untimeous application to set aside a default judgment, Broome J was not persuaded to ignore its authority. See also *Minister of Police v Subbulutchmi* 1980 (4) SA 768 (A) at 771H - 772E and cases cited therein; Cameron above n 7 in para 431.

⁶⁰ *Ex Parte Minister of Social Development* above at para 24.

⁶¹ *De Klerk*, para 50 (n24). Also see *Mahlangu* para 51 above (n24) above.

DISCUSSION

Prescription of Claim A and Claim B

Claim A (Unlawful arrest)

- [83] Prescription regarding the claim for unlawful arrest commenced to run as soon as the unlawful arrest on the plaintiff was effected. It is not the plaintiff's case that he was not aware of the identity of the debtor or the facts from which the debt arose. Coincidentally the summons was served on 4 January 2008 whilst the charges against the plaintiff were only withdrawn thereafter on 5 April 2009.
- [84] The plaintiff averred in the replication that the debt only became due when the prosecution against him was withdrawn, alternatively after he was released. The plaintiff's counsel's attempt to rely on the fact that the plaintiff could not consult with legal representatives whilst he was incarcerated cannot be sustained. These facts were not pleaded nor was any evidence presented. It is not open to the plaintiff, in the circumstances, to pursue the point.
- [85] Service of the summons had to be effected by midnight on 2 January 2008 to suspend the running of prescription regarding the claim for unlawful arrest. The summons was only served on the first defendant on 4 January 2008, therefore after the debt had been extinguished by prescription.
- [86] Claim A has therefore been extinguished by prescription and the first and second defendants' special plea of prescription in relation to the aforesaid claim succeeds.

Claim B (Unlawful detention)

- [87] In terms of the legal precedent each day of detention would constitute a separate claim or more aptly a separate debt that would prescribe in terms of s 11(d).
- [88] The plaintiff's contention that the claim for both unlawful arrest and the detention arose on 3 January 2005 is premised on the fact that the plaintiff was brought

before the Court on the same day and his detention thereafter was by virtue of an order of the Court. The plaintiff however relies on the fact that the continued detention was at the behest of the second defendant and members of the first defendant acting in the course of their employment.

[89] The claim therefore lies against the first and second defendants for the continued detention after the court appearance.

[90] The detention commenced on 3 January 2005 and endured until 12 January 2005. The summons was served on 4 January 2008. The result is that the unlawful detention on 3 and 4 January 2005 prescribed as the summons had to be issued before midnight on 3 January 2008 to interrupt prescription for detention up to 4 January 2005. The plaintiff's claim for unlawful detention from 5 to 12 January 2005 has not prescribed.

[91] The defendants special claim is upheld with regards to the plaintiff's unlawful detention on 3 and 4 January 2005 only.

Compliance with s 3 of the Institution of Legal Proceedings

[92] The s 3 notice was served on 12 July 2005.

[93] The plaintiff is required to serve the s 3 notice within 6 months from the date on which the debt became due.

[94] The s 3 notice was not served within 6 months from the date when the debt for unlawful arrest became due.

[95] The s 3 notice was also not served within 6 months of the plaintiff's detention from 3 January 2005 to 12 January 2005.

[96] The plaintiff also failed to apply for condonation in terms of s 3(4) of the Institution of Legal Proceedings Act in terms of the direction issued by Daffue J on 20 May 2019 the during the Uniform rule 37(8) pre-trial proceedings. Insofar as a further opportunity is granted to the plaintiff to apply for condonation in terms of s 3(4) of the Institution of Legal Proceedings Act, in the order below, the plaintiff's application must also include an application for condonation for not complying with the directive issued by Daffue J during the pre-trial hearing on 20 May 2019.

[97] The s 3 notice was served before the debt with regards to Claim C for malicious prosecution became due, and was thus given within the prescribed 6-month period as far as this claim is concerned.

Reserved costs

[98] Bearing in mind that the Court issued a directive that the plaintiff applies for condonation before or on 17 June 2019, which the plaintiff failed to do, and the matter was thereafter certified trial ready, it is not clear on what grounds the first defendant could reasonably have laboured under an impression that the trial would not proceed. The first defendant's special plea regarding noncompliance with s 3 of the Institution of Legal Proceedings Act was alive. The postponement was sought because the first defendant was not ready to argue the special pleas. In my view the first defendant should have been ready to proceed. It follows that the first defendant is liable for the plaintiff's wasted costs occasioned by the postponement of the matter on 26 April 2022.

Order

[99] In the premises I make the following order:

1. The first and second defendant's special plea of prescription to Claim A in the particulars of claim is upheld.

2. The first and second defendant's special plea of prescription to Claim B in the particulars of claim is upheld with regards to the plaintiff's detention on 3 and 4 January 2005.
3. The first defendant's special plea regarding the plaintiff's non-compliance with s 3 of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 is upheld.
4. The adjudication of Claim B, regarding the part of claim for unlawful detention that has not prescribed, and Claim D of the Plaintiff's particulars of claim are suspended pending an application for condonation in terms of s 3(4) of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 which application must be served on the first defendant within 30 days from date of this order. The plaintiff must also seek condonation in the aforesaid condonation application for the plaintiff's failure to comply with the directive, issued by Daffue J during the pre-trial hearing on 20 May 2019, that the plaintiff applies for condonation in terms of s 3(4) of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 before or on 17 June 2019.
5. If the plaintiff fails to comply with the order in para 4 above, Claim B and Claim D of the particulars of claim must be deemed to be dismissed with costs.
6. The first defendant shall pay the wasted costs occasioned by the postponement of the trial on 26 April 2022.
7. The plaintiff shall pay the costs of the suit pertaining to the first and second special plea, except the reserved costs referred to in paragraph 6 above.



N. SNELLENBURG, AJ

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