

REPUBLIC OF SOUTH AFRICA



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

- | | |
|-----|----------------------------------|
| (1) | REPORTABLE: YES |
| (2) | OF INTEREST TO OTHER JUDGES: YES |
| (3) | REVISED: YES |

24 October 2025
DATE


SIGNATURE

Appeal Case No: 146486/A2024
JHC Case No: 23541/2018

In the matter between:

NTOMBELA BONGANI

Appellant

and

MINISTER OF POLICE

Respondent

CORAM: WILSON J, MFENYANA J and WENTZEL AJ

Summary

The appellant was wrongfully arrested and detained for 14 months. Shortly after his release, he gave notice, under section 3 of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002, of his intention to claim for wrongful arrest and detention. At trial, the respondent conceded the merits of the claim for wrongful arrest and detention, but took the point that the notice ought to have been given within six months of the appellant's arrest. The appellant applied for condonation for his failure to give notice within six months of his arrest, but withdrew that application at the commencement of trial. The High Court dismissed the claim on the basis that the notice had been given late, and that the lateness could not be condoned because the condonation application was withdrawn. The appellant appealed.

On appeal, the minority (in a judgment written by Wentzel AJ, which appears at paragraphs 1 to 168) provides a detailed analysis of the case law on when a debt for wrongful arrest and detention falls due. The minority concludes that, as a matter

of law, the debt the appellant claims fell due on his arrest, and that notice of the claim ought to have been given within six months of that date.

The majority (in a judgment written by Wilson J, with whom Mfenyana J agrees, which appears at paragraphs 169 to 186) assumes without deciding that the debt the appellant claims fell due on his arrest, but nevertheless finds that the High Court failed to appreciate that it had a discretion to refuse to accept the withdrawal of the condonation application, and that the appeal should be upheld on that basis.

The minority agrees with the majority that the High Court ought to have refused leave to withdraw the condonation application. Accordingly, the court unanimously upholds the appeal, substitutes the High Court's decision with an order refusing leave to withdraw the condonation application, grants that application, and awards damages for wrongful arrest and detention.

JUDGMENT

WENTZEL AJ:

Introduction

[1] During June 2018 the appellant (Plaintiff in the main action) instituted legal proceedings against the respondent (Defendant in the main action) for damages in the amount of R500 000 (which were subsequently increased to R1.5 million) arising out of his alleged unlawful and wrongful arrest and detention. It is noteworthy that no claim was brought for malicious arrest and detention or for malicious prosecution and the National Prosecuting Authority ("*NPA*") was not joined to the proceedings.

[2] The respondent raised a special plea based on the appellant's alleged non-compliance with section 3(1) of the Institutions of Legal Proceedings

Against Certain Organs of State Act 40 of 2002 (*“the Institution of Legal Proceedings Act”*)

- [3] The matter was heard by Judge Francis who delivered judgment on 22 March 2024, *inter alia*, upholding the special plea with costs. On 3 April 2024, the appellant sought leave to appeal the judgment which was granted on 22 November 2024.

The Material Facts

- [4] On 16 September 2016 the appellant was arrested by unknown police officials of the South African Police Services (“SAPS”) on charges of murder and or/assault with intent to commit grievous bodily harm.
- [5] On the 14 November 2017, a year and two months later, the appellant was released on bail.
- [6] On 11 December 2017 the appellant was acquitted, although in the pleadings it was stated that the charges were withdrawn.
- [7] After his acquittal, the appellant returned home to KwaZulu-Natal. Whilst at home, he stated that he appreciated that he had been unlawfully arrested as he did not commit the crimes he had been accused of and that he should, in his words, “*make a claim, because I have lost a lot of time in detention.*” It is not clear from the appellant’s evidence when he came to

this realisation but he stated that in May 2018 he decided to “*go and consult with the lawyers.*”¹

[8] During early May 2018 the appellant approached Leon JJ Van Rensburg Attorneys (“*the appellant’s attorneys*”) for legal advice. The appellant was advised that he had a valid claim against the respondent for unlawful arrest and detention. The appellant testified that this was the first time that he acquired knowledge that he had a claim against the respondent for unlawful arrest and detention, which evidence was not challenged in cross-examination.

[9] On 15 May 2018 the appellant’s attorneys sent a notice in terms of section 3(1) of the Institution of Legal Proceedings Act (“*the section 3(1) notice*”) to the respondent per registered post. This was within 6 months of his acquiring knowledge that he had a claim against the respondent for damages.

[10] The summons was served on 27 June 2018.

[11] The respondent alleged that it only received the notice on 3 August 2018. This was not common cause (although the appellant did not serve a replying affidavit), but the appellant’s counsel argued that even if proof of

¹ Record p26-464 | 18-25

actual receipt of the section 3(1) notice was required (which was denied), this was in any event still within six months of the appellant becoming aware that he had a claim against the respondent.

[12] At the commencement of the proceedings on 24 July 2023, so confident were the counsel appearing for the parties about the strength of their respective cases that:

[12.1] The appellant's counsel withdrew his application for condonation on the basis that the appellant did not require condonation as he had served the requisite 3(1) notice per registered mail within 6 months from the date upon which the debt arose, namely on 11 December 2017 when the charges against the appellant were withdrawn.

[12.2] The respondent's counsel conceded the merits and indicated that the only issues that remained for determination were the quantum of the claim and the special plea raised by the respondent.

[13] The merits having been conceded, it is common cause that the plaintiff was wrongfully and unlawfully arrested and detained by members of the SAPS

The material findings made by the court a quo

[14] The Court *a quo* made the following material findings:

[14.1] The issue about whether the appellant's claim has prescribed does not arise since the summons was served on 27 June 2018, well within the 3-year period of prescription² as prescription commenced on the date of the appellant's arrest on 16 September 2016.

[14.2] The appellant's claim was not one for malicious arrest and detention but for wrongful arrest and detention.³

[14.3] Before issuing summons, the appellant had to comply with the provisions of sections 3 and 4 of the Institution of Legal Proceedings Act and give notice in writing of his intention to institute legal proceedings against the defendant within six months from the date on which the debt became due in terms of section 3(2) of the Act.⁴

[14.4] It was not disputed that the respondent only received the section 3(2) notice on 3 August 2017 (in fact the date was 3 August 2018) as the appellant did not file a replying affidavit. The appellant did

² Judgment, Vol 5 p 26-396, para 14.

³ Ibid, p 26-398, para 20

⁴ Ibid, p 26-397, para 18

not indicate what reasonable steps had been taken to ensure that the notice was received by the respondent.⁵

[14.5] Even if the requisite notice had been posted and received on 15 May 2017 (in fact it was May 2018), it was not served within 6 months from which the debt arose:

14.5.1. The debt for wrongful arrest arose on 16 September 2016. which was the date of the appellant's arrest.

14.5.2. The debt for wrongful detention arose on 16 September 2016 but continued until he was released on bail on 14 November 2017.⁶

[14.6] As the section 3(1) notice was not served within the requisite six months period from 16 September 2016 (in respect of his unlawful arrest claim) and 14 November 2017 (in respect of his unlawful detention claim), and the appellant had failed to apply for condonation, the special plea raised by the respondent had to be upheld.⁷

⁵ Ibid, para 22

⁶ Ibid, para 23

⁷ Ibid, para 24 and p 26-399, para 26

[14.7] It was thus not necessary for the court to decide the issue of quantum as the appellant had not served his section 3(1) notice within the requisite six month period and had withdrawn his application for condonation.⁸

[14.8] Had the appellant applied for condonation, the learned judge indicated that he would have granted condonation.⁹ In support of this, the learned judge stated the appellant “*obviously could not serve it [the section 3(1) notice] within six months whilst he was in custody. He is a lay person and was informed of his rights to do so when he consulted his attorney in May 2017. The Legal Proceedings Act makes provision for him to have applied for condonation which he initially brought and then withdrew.*” (The appellant in fact only consulted his attorney in early May 2018.)

[15] Implicit in this latter statement made by Francis J is that the *court a quo* may have accepted that the six month period for the purposes of the section 3(1) notice would not commence to run until the appellant had knowledge of his rights which only occurred in May 2018 when he consulted his attorney. I pause to mention that on this basis, the *court a quo* ought not to have found that condonation was required and the learned

⁸ Ibid, para 15

⁹ Ibid, para 25

judge made a serious mistake of fact in stating that the appellant had consulted his attorney during May 2017 as he had in fact consulted his attorney at the beginning of May 2018. On the assumption that this was the relevant date from which the six month period would commence to run, there would have been no need for the appellant to have applied for condonation as the section 3(1) notice was served on 15 May 2018, shortly after consulting his attorney.

[16] In any event, Francis J apparently refused to hear the condonation application, insisting that this needed to be heard in the interlocutory court and not by the trial court. The appellant's counsel explained that his decision to withdraw the condonation application was to avoid the postponement of the matter to bring the condonation application in the interlocutory court and the inevitable delay that this would cause in the finalisation of the matter. He stated that he felt confident that the special plea would not succeed as the appellant's attorney had timeously served the section 3(1) notice within six months of the appellant acquiring knowledge of his claim. It had also been served within six months after the appellant was acquitted on 11 December 2017.

[17] I will now deal with the arguments advanced by the party's respective counsel. For convenience, I will refer to the arguments raised by the parties' counsel as those raised by the respective parties themselves, i.e. "*the appellant*" and "*the respondent*" although in fact these arguments were

advanced on their behalf by their counsel in their heads of argument and during the hearing of the appeal.

The contentions raised by the appellant

[18] In terms of section 3(1) of the Institution of Legal Proceedings Act, the required section 3(1) notice must be issued within six months “*from the date on which the debt became due.*”

[19] However, in terms of section 3(3)(a) of the Act, “*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.*”

[20] The appellant states that he only became aware of his claim against the respondent and his rights to sue the respondent during May 2018. This is when the appellant consulted his attorney and thus when he acquired “*knowledge of the identity of the debtor and the facts from which the debt arises*”. This evidence was not contested by the respondent.

[21] It is evident that the entire set of facts and complete cause of action to

approach a court to recover the debt only occurred when the applicant approached its attorneys of record.¹⁰ This, thus, was the date upon which the respondent's debt should be regarded as being due within the meaning of section 3(3)(a) of the Institution of the Legal Proceedings Act.¹¹ For this proposition the appellant relied upon a number of authorities dealt with in the course of this judgment and referred to in the footnote below.¹²

[22] The appellant's attorney sent the section 3(1) notice by registered post to the Commissioner of SAPS in the same month and thus well within the required six month period.

[23] Accordingly, there was no need for the appellant to apply for condonation.

[24] The only issue that ought properly to have been before the *court a quo* was the quantum of the appellant's damages.

¹⁰ Appellant's HOA, p25 -76, para 4.16

¹¹ Appellant's HOA, p25-75, para 4.9-4.12

¹² ***Sello v Minister of Police N.O and Another*** (89077/16) [2022] ZAGPPHC 233 (13 April 2022), ***Diko v MEC for Health*** (583/2018) [2022] ZAECBHC 11 (22 March 2022), ***Truter and Another v Deyssel*** 2006 (4) SA 168 (SCA), ***Makhwelo v Minister of Safety and Security*** 2017 (1) SA 274 (GJ) and ***Member of the Executive Council for Education, KwaZulu-Natal v Shange*** [2013] JOL 30039 (SCA)

THE CONTENTIONS RAISED BY THE RESPONDENT

[25] The appellant never replicated to the respondent's special plea, and it was thus uncontested.¹³

[26] The relevant date for determining when the debt became due in matters involving unlawful arrest and detention is the date of arrest and not the date of the withdrawal of the matter against the plaintiff.¹⁴ (In fact the appellant testified that he was acquitted.)

[27] On this basis, the required notice was not sent within six months of the cause of action arising.

[28] Thus, it was indeed necessary for the appellant to have applied for condonation for the late filing of its section 3(1) notice.¹⁵

¹³ Respondent's HOA, p 25-37, para 2.10 read with p 25.-35, para 1.3

¹⁴ In this respect, reliance was placed on **Phala v Minister of Safety and Security** at paragraph 66 at p 357 and **Madinda v Minister of Safety and Security** [2008] 3 All SA 143 (SCA). After the hearing, the respondent uploaded a further authority, namely **Kutoane v Minister of Police and Others** (17387/19) [2024] ZAGPJHC 529 (31 May 2024) which, in the interest of justice, this court has had regard to.

¹⁵ Relying upon **Ellerines Holdings Ltd v Commissioner for Conciliation, Mediation & Others** (2008) 23 ILJ 1982 (LC), **South Africa Transport and Allied Workers Union v Tokiso Dispute Settlement & Others** (2015) 36 ILJ (LAC), **Zide Mothibeli and Minister of Police and Another** (42399/2019) [2020] ZAGPJHC 308 (4 December 2020), **Minister of Agriculture and Land**

[29] In any event, even if the debt only became due on the date of the withdrawal of the charges against the appellant during December 2017, in terms of section 4(1)(a) of the Institution of Legal Proceedings Act, a notice must be served on an organ of State by delivering it by hand or by sending it by certified mail or, subject to subsection (2), by sending it by electronic mail or by transmitting it by facsimile. In the case where the organ of State is *"the Department of Police, the notice must be sent to the National Commissioner and the Provincial Commissioner of the Province in which the cause of action arose, as defined in section 1 of the South African Police Service Act, 1995."*

[30] In terms of subsection 4(2)(a), it was incumbent upon the appellant to ensure that the notice came to the Commissioner's attention within the stipulated period. The appellant had not done so as the notice only in fact came to the attention of the respondent (as per the date stamp) on 3 August 2018, which was beyond the required which was beyond the required six month period.

[31] Moreover, in terms of section 4(2)(b) the appellant was also obliged within seven days after the date upon which that notice was so sent or transmitted, to deliver by hand or send by certified mail a certified copy of

Affairs v CJ Rance (Pty) Ltd 2010 (4) SA 109 (SCA) at para [13], ***James Brown & Hamer (Pty) Ltd v Simmons*** 1963 (4) SA 656 (A) at 660 E-G.

that notice to the relevant officer or person referred to in subsection (1), which must be accompanied by an affidavit by the creditor or the person who sent or transmitted the notice proving that the notice had been sent and indicating what steps were taken to draw it to the Commissioner's attention.

The Relevant Legislative Provisions

[32] Section 3 of the institution of Legal Proceedings Act provides:

“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.*

[33] Section 4 in turn stipulates:

“Service of notice

- (1) *A notice must be served on an organ of state by delivering it by hand or by sending it by certified mail or, subject to subsection (2), by sending it by electronic mail or by transmitting it by facsimile, in the case where the organ of state is-*
 - (a) *a national or provincial department mentioned in the first column of Schedule 1, 2 or 3 to the Public Service Act, 1994 (Proclamation 103 of 1994), to the officer who is the incumbent of the post bearing the designation mentioned in the second column of the said Schedule 1, 2 or 3 opposite the name of the relevant national or provincial department: Provided that in the case of the Department of Police, the notice must be sent to the National Commissioner and the Provincial Commissioner of the province in which the cause of action arose, as defined in section 1 of the South African Police Service Act, 1995;*
 - (b) *a municipality, to the municipal manager appointed in terms of section 82 of the Local Government: Municipal Structures Act, 1998 (Act 117 of 1998);*
 - (c) *a functionary or institution referred to in paragraph (c) of the definition of 'organ of state', to the chairperson, head, chief executive officer, or equivalent officer, of that functionary or institution, or where such functionary is a natural person, to that natural person;*
 - (d) *the South African Maritime Safety Authority, to the chief executive officer of that Authority appointed under section 22 of the South African Maritime Safety Authority Act, 1998 (Act 5 of 1998);*
 - (e) *The South African National Roads Agency Limited, to the chief executive officer of that Agency appointed under section 19 of The South African National Roads Agency Limited and National Roads*

Act, 1998 (Act 7 of 1998); or

- (f) *a person referred to in paragraph (f) of the definition of 'organ of state', to that person.*
- (2) *If a notice has been sent by electronic mail or transmitted by facsimile as contemplated in subsection (1), the creditor must-*
 - (a) *take all reasonable steps to ensure that the notice has been received by the officer or person to whom it was so sent or transmitted; and*
 - (b) *within seven days after the date upon which that notice was so sent or transmitted, deliver by hand or send by certified mail a certified copy of that notice to the relevant officer or person referred to in subsection (1), which must be accompanied by an affidavit by the creditor or the person who sent or transmitted the notice-*
 - (i) *indicating the date on which and the time at which, and the electronic mail address or facsimile number to which, the notice was so sent or transmitted;*
 - (ii) *containing any proof that it was sent or transmitted;*
 - (iii) *setting out the steps taken in terms of paragraph (a); and*
 - (iv) *indicating whether confirmation of the receipt of the notice has been obtained and, if applicable, the name of the officer or person who has given that confirmation."*

[34] Although prescription is not an issue in this matter, the provisions of the Prescription Act no 68 of 1969 ("*the Prescription Act*") remain relevant in determining when a debt is to be regarded as due.

[35] The relevant provision is section 12 of the Prescription Act which reads:

“12 When prescription begins to run

- (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.”*

[36] It is readily apparent that the wording of section 12 of the Prescription Act mirrors that in section 3 of the Institution of Legal Proceedings Act and thus the case law applicable thereto will be relevant to section 3 of the latter Act.

The Issues to be decided

[37] The issues to be decided are as follows:

[37.1] When is the debt to be regarded as due in claims for damages for unlawful arrest and detention within the meaning of section 3(2) of the Institution of Legal Proceedings Act and in particular, is this the date upon which the claimant was arrested and detained, the date

upon which he was released on bail or the date that he was acquitted?

[37.2] When did the appellant acquire knowledge of the identity of the organ of state and of the facts giving rise to the debt within the meaning of section 3(3)(a) of the Act, and in particular, whether such knowledge was only acquired on the date that the appellant consulted his attorney?

[37.3] Could the appellant on the present facts be regarded as having acquired such knowledge prior to his consulting his attorney by exercising reasonable care within the meaning of section 3(3)(a) of the Act?

[37.4] Did the respondent wilfully prevent the appellant from acquiring such knowledge?

[37.5] Was it incumbent upon the appellant to take steps to ensure that the section 3(1) notice came to the attention of the Commissioner and have to comply with the provisions of subsection 4(2) of the Act in circumstances where the notice was sent by registered mail?

[37.6] What is the effect of the appellant not filing a replication to the special plea?

[38] I will deal with the last two issues first as they are the easiest to dispose of.

The Obligation upon the Appellant to comply with section 4(2) of the Institution of Legal Proceedings Act

[39] The appellant sent the required notice to the Commissioner by registered post (certified mail) as permitted in terms of section 4(2). The notice was not sent by electronic mail or by facsimile and thus the provisions of section 4(2) did not have to be complied with.

[40] In ***Imperial Bank v Kubheka*** (28713/08) [2010] ZAGPPHC 3 (4 February 2010) the court emphasised that often the date stamp on the registered post slip is accepted as the date on which the letter would have been dispatched at the post office to the addressee. It was accepted that service by registered post creates a presumption of receipt thereof within three days from date of posting.

[41] Accordingly, the *court a quo* erred in finding that it was incumbent upon the appellant to take steps to ensure that the section 3(1) notice was received; it was presumed to have been received within three days of its despatch.

It is thus not relevant that the notice only came to the Commissioner's attention on 3 August 2018.

What is the effect of not filing a replication to the special plea?

[42] Rule 25 in relevant part provides:

“(2) No replication or subsequent pleading which would be a mere joinder of issue or bare denial of allegations in the previous pleading shall be necessary, and issue shall be deemed to be joined and pleadings closed in terms of paragraph (b) of rule 29.

(3) Where a replication or subsequent pleading is necessary, a party may therein join issue on the allegations in the previous pleading. To such extent as he has not dealt specifically with the allegations in the plea or such other pleading, such joinder of issue shall operate as a denial of every material allegation of fact in the pleading upon which issue is joined.”

[43] Thus, in terms of Rule 25(3), if you fail to replicate to a special plea, the factual allegations made in the special plea are automatically regarded as if they have been denied by the appellant. No specific replication is needed if the plaintiff is simply denying the facts and not raising new issues.

[44] Rule 25(2) makes it plain that no replication or subsequent pleading which would be a mere joinder of issue or bare denial of allegations in the previous pleading is necessary, and issue is deemed to be joined and the pleadings closed at the expiration of the relevant period of time.

When is the debt to be regarded as due in claims for unlawful arrest and detention?

- [45] This is the far more interesting question for which there is a great deal of conflicting authority.

Complete cause of action

- [46] In ***Truter and Another v Deyssel*** 2006 (4) SA 168 SCA ("**Truter**"), the Supreme Court of appeal explained that:

"A debt is due when a creditor acquires a complete cause of action for the recovery of the debt, that is, when the entire set of facts which the creditor must prove in order to succeed with his or her claim against the debtor is in place or, in other words, when everything has happened which would entitle the creditor to institute action and to pursue his or her claim."

- [47] The following year, in ***Minister of Finance v Gore NO*** 2007 (1) SA 111 (SCA) the same court held at para (17] that time begins to run against the creditor when it has the minimum facts that are necessary to institute action. This would also be the date from which the six-month period would begin to run for the issuing of a section 3(1) notice.

- [48] The question that arises is when is the plaintiff in unlawful arrest and detention claims to be regarded as having a complete cause of action in this sense? Is this the date of his arrest and detention, the date of his acquittal or withdrawal of the charges, or is it the date he consults his

attorney and acquires knowledge that he has a claim. There is authority supporting all three of these possibilities which will be examined below.

[49] In doing so, I will first deal with the authorities supporting the appellant's contention that claims for arrest and detention, like those for malicious prosecution, constitute a continuing wrong and only arise on the date that the claimant is released from detention, alternatively when the charges against the claimant are withdrawn or he is acquitted. Thereafter, I will deal with the authorities rejecting this stance and finding that claims for unlawful arrest and detention must be distinguished from claims for malicious prosecution and do not constitute a continuing wrong but rather, arise on each day of detention.

[50] After this, I will examine the cases dealing with the requirement of knowledge and the conflicting authorities as to what needs to be known to a claimant before he becomes obliged to serve the required section 3(1) notice within a period of six months of this date. In particular, I will examine the case law and consider when the claimant can be said to have acquired knowledge of his claim. Finally I will deal with the case law setting out the circumstances under which the claimant can be regarded as having deemed knowledge of the relevant facts obliging him to serve the required notice. I will do so under the headings set out below. In all of the cases cited in this judgment, the footnotes have been omitted.

Continuous Proceedings: Malicious prosecution and malicious arrest and detention- the date of withdrawal of the charges or acquittal of the plaintiff

[51] It would appear to be trite that in claims for damages for malicious prosecution, the proceedings are regarded as being continuous and thus the relevant date for the purposes of prescription and for the despatch of a section 3(1) notice is the date of the withdrawal of the charges or acquittal of the plaintiff.

[52] One of the earliest judgments on this topic was delivered by the then Chief Justice, De Villiers CJ in a case with a most unfortunate name, **Lemue v Zwartbooi** (1896) 13 SC 403 ("**Lemue**"). In this matter De Villiers CJ stated that the *actio iniuriarum* could not be brought while the prosecution was pending, but only after it had come to an end. He explained that, while a prosecution is pending, its result

" . . . cannot be allowed to be prejudged by the civil action, but as soon as the Attorney-General, in the exercise of his quasi-judicial function, has decided not to prosecute, there is a sufficient termination of the original proceedings to allow the civil action being tried."

[53] Following this judgment, it was generally accepted that in an action for malicious prosecution, no action will lie until criminal proceedings have terminated in favour of the plaintiff. The reason given for this is that the proceeding from arrest to acquittal must be regarded as continuous, and thus no action will arise until the plaintiff was discharged or acquitted.

[54] In ***Unilever Bestfoods Robertsons (Pty) Ltd and Others v Soomar and Another*** 2007 (2) SA 347 (SCA) ("**Unilever**") Farlam JA stressed that the cause of action is not complete until damage has been suffered. However, applying what is termed as the "*once and for all rule*", he stressed that both the actual damage then suffered and prospective damage needed to be claimed, unless an essential element of a claim had not yet occurred. Although the case involved a matter of maliciously instituted civil proceedings and not a claim for malicious prosecution, Farlam JA pointed out that in claims for malicious prosecution, the cause of action would not arise until the proceedings had terminated in the plaintiff's favour. It was 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 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."

[55] This approach was followed by Eksteen J in ***Thompson and Another v Minister of Police and Another*** 1971 (1) SA 371 (E) ("**Thompson**") who relied on ***Lemue*** and ***Unilever***: ***Lemue*** was relied on in support of the proposition that while the prosecution is actually pending its result cannot be allowed to be prejudged in the civil action; ***Unilever*** supported the notion that no personal injury has been done to the accused until the prosecution has been determined by his discharge. This meant that in

claims for malicious prosecution, the debt is not due until the proceedings have terminated in the plaintiff's favour.

[56] Eksteen J was the view that these principles should apply equally to claims for malicious arrest. However, Eksteen J drew a distinction between claims for wrongful arrest and malicious arrest. He stated at 374-5:

"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 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 pre-judged by the civil action (Lemue v Zwartbooi, supra arr p.407). The action therefore only arises after the criminal proceedings against the plaintiff have terminated in his favour or whether 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)."

[57] **Thompson** is thus authority for the proposition that both in cases of malicious arrest and malicious prosecution, the debt is only regarded as due when the prosecution has been completed in favour of the plaintiff. Eksteen, however, took a different approach to claims based on unlawful arrest and detention as explained under a separate heading below.

[58] The finding made by Eksteen J as to when a claim based on malicious prosecution arises was followed by Foxcroft J in **Els v Minister of Law and Order and Others** 1993 (1) SA 12 (C) ("**Els**"). Foxcroft J found at p 17 that Eksteen J's approach was "*fully in accordance with common sense and the practical resolution of litigation that accused persons in criminal cases against whom prosecutions had commenced should not be required to commence civil litigation before the conclusion of the criminal proceedings*".

[59] It was held further in **Els** that the cause of action for malicious prosecution commenced to run from the date on which the plaintiff was informed that the Attorney-General had decided not to prosecute him.

[60] In **Holden v Assmang Limited** (1277/2019) [2020] ZASCA 145; 2021 (6) SA 345 (SCA) (5 November 2020), the Supreme Court of Appeal stressed that only knowledge of the requisite facts is required, not the legal conclusions flowing from those facts as set out below:

“[7] The appellant’s case is that her cause of action only arose and prescription only started running after the HPCSA notified her that the respondent’s complaint against her had been dismissed and that was on 13 November 2009. It is settled law that prescription begins to run as soon as the debt is due and the creditor knows the identity of the debtor and the facts giving rise to the debt. A creditor who could have acquired the knowledge by exercising reasonable care is deemed to have such knowledge. It has authoritatively been held that knowledge of legal conclusions is not required before prescription begins to run.”

[61] The court set out the requirements for a claim for malicious prosecution and explained that because the last requirement was that the prosecution had failed, the claim could not be proceeded with until this last requirement had been met. This was essentially the approach that had been taken in **Unilever**. It was explained by Dlodlo JA who gave the unanimous judgment of the Supreme Court of Appeal:

“[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.*

[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. 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 plaintiffs’ 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. There is no discernible distinction between pending criminal proceedings and proceedings before statutorily created professional tribunals.

The HPCSA is such a tribunal. The cause of action applies to both civil and criminal proceedings and not only the latter.”

[62] The Court further explained that prescription begins to run only when the cause of action is complete and in the case of a claim for malicious prosecution, that is only when the proceedings have been resolved in favour of the plaintiff/applicant:

“[17] A debt is due, owing and payable within the meaning of s 12(1) of the Prescription Act when the creditor acquires a complete cause of action for the recovery of the debt. What this means is that the entire set of facts which the creditor must prove in order to succeed with his/her claim against the debtor must be in place. In other words, when everything has happened which would have entitled the creditor to institute action and to [pursue] his/her claim.

[18] I conclude that from the foregoing it is clear that the appellant’s cause of action only arose and prescription only started to run when the HPCSA notified the appellant that the respondent’s complaint against her had been dismissed. That was on 13 November 2009. It was only then that the appellant would have been able to establish the fourth and final requirement for an action for malicious prosecution. It follows that as at the date of summons, the claim or debt had not prescribed.”

Continuous Proceedings: Unlawful arrest and detention- the date of the termination of the detention

[63] The cases dealt with under this head emphasise that, like claims for malicious prosecution, claims for unlawful arrest and detention must be regarded as a continuous wrong and cannot be brought until the plaintiff’s period of detention has been terminated.

[64] The first case I wish to mention is a matter heard in this division by Spilg J in ***Makhwelo v Minister of Safety and Security*** 2017 (1) SA 274

(GJ) (“**Makhwelo**”). Spilg J adopted the same approach taken with regard to claims for malicious prosecution to claims based on unlawful arrest and detention, and found that the relevant date to determine whether a section 3(1) notice had been timeously served was the date that the accused was discharged.

[65] Relying on **Unilever**, Spilg J formulated his view on the following three premises:

[65.1] Claims for unlawful arrest and detention, like claims for malicious prosecution, constituted a continuous wrong and before the plaintiff could be expected to institute his action, it was necessary that he be able to quantify his damages. As the quantum of his damages was dependent upon the period of his detention, it stood to reason that this was not possible until the period of his detention had terminated.

[65.2] Wrongful arrest and detention claims were distinguishable from other delictual claims where the plaintiff was expected to claim his actual and prospective damages upfront as until the proceedings were terminated in favour of the plaintiff, his prospective damages suffered would be pure speculation.

[65.3] The requirement of knowledge in section 3 of the Institution of Legal Proceedings Act meant that the plaintiff could not be expected to be aware of the facts establishing his cause of action unless and until he had had sight of the docket.

[66] Spilg J reasoned that because the claimant would not have sight of the docket at the time of his arrest, the claimant would not be able to ascertain whether or not the arresting officer had a reasonable suspicion that he had committed an offence at the time of his arrest. Thus, he found that even in the case of unlawful arrest, the claim would not necessarily arise at the date of the arrest.

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

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

55. As to the first requirement of knowledge of the material facts: It is difficult to appreciate that at the time of the arrest or even during detention the suspect would have sight of the docket in order to form a view that the arresting officer did not have a reasonable suspicion that an offence had been committed. ...

...

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

against him.

- [67] Splig J went on to further reason that because a claim for wrongful arrest and detention are regarded as a single cause of action, the claim for wrongful arrest cannot lie until the claim for wrongful detention is complete; the latter is not complete, so he said, until the period of detention is known and the claimant is released from detention following the withdrawal of the charges, his acquittal or discharge. He explained that unlike other claims based on the *lex Aquilia*, prospective damage cannot be claimed for the wrongful detention at the date of the arrest as this would be mere speculation. He stated:

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

...

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

Accordingly the fundamental rationale for calculating prospective damages is wanting; namely that either there was a single injury which has resulted in sequelae that can be assessed provided suitable contingency factors are taken into account and on which actuarial assessments can be made, or that prospective damages can be determined on a daily basis as long as the harm continues and for which contingencies are capable of some rational assessment.

Personal injury cases illustrate the former....

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

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

*In the case of an arrest and detention there is a deprivation of liberty and loss of dignity which will be justified if there is a conviction. It is difficult to appreciate how a debt can be immediately claimable and therefore justiciable which is the second requirement for a debt being due (see Deloitte Haskins) prior to the outcome of the criminal trial or prior to charges being dropped or otherwise withdrawn.” [The case referred to is **Slomowitz v Vereeniging Town Council** 1966 (3) SA 317 (A)].*

- [68] The Free State High Court, Bloemfontein agreed with **Unilever** that claims for unlawful arrest and detention should be considered as a continuing wrong in **Mothobi Albert Tlake v The Minister of Police and Another**, (377/2014) [2017] ZAFSHC 178 (20 October 2017) (“**Tlake**”) where it was held that the claim does not arise before the acquittal of the claimant. It was stated:

*“[9] Not only am I bound by **Unilever** supra but do I respectfully align myself therewith that the proceedings from arrest to acquittal is to be regarded as continuous and that the plaintiff's claim did not arise before his acquittal. The special plea therefore stands to be dismissed.”*

- [69] Hulley AJ took a slightly different approach in **Minister of Police v Lebelo** 2022 (2) SACR 201 (GP) (“**Lebelo**”). Hulley AJ (who delivered the judgment for the full court in this division) stressed that unlawful arrest and

detention must not be conflated with malicious arrest and detention: In cases of wrongful arrest, this arises at the date of the arrest as it involves a single act. Hulley AJ explained, however, that so long as the claimant remained in detention, his detention constituted a continuing wrong:

"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."

[70] A novel approach was taken by Holland-Muter J in ***Mashaba v Minister of Police*** (54940/2012) [2023] ZAGPPHC 2023 (18 December 2023) based upon the manner in which the claim for wrongful arrest and detention had been pleaded. The court emphasised that the cause of action in the summons was for the unlawful arrest and detention of the plaintiff; there was no separate claim for the unlawful arrest and unlawful detention, and a globular amount of damages was claimed for his allegedly unlawful arrest and detention.

[71] The Court reasoned that, where a claim had only been for unlawful arrest, or where the claimant was released for a certain period and detained again later, the cause of action would be completed upon arrest. However, in matters such as the one that was before court, where there was an unlawful arrest and continuous unlawful detention, this amounted to a “*continuing wrong*” and thus prescription only started to run from the date of release from custody. Accordingly, the Court held that the claim had not

prescribed, and the Minister's special plea was dismissed. Holland-Muter

J stated:

"[17] The present matter ought to be distinguished from those instances where the arrest does not result in a continuous detaining of the person because "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 prosecution has been determined by his discharge"

...

[19] In those instances where the arrest and detention constitutes a continuing wrong, the basic facts to allege to institute action will only manifest after release from custody. If that is correct, prescription can only start to run after release from custody.

[20] It is not for this court to decide on the correctness of the pleaded cause of action but merely whether the pleaded cause of action has prescribed or not. In my view the particulars of claim purports to allege one cause of action and a single award for damages in claimed for the personal injury suffered by the plaintiff. It would have been different if a separate cause of action for the arrest and a second cause of action for the on-going detention were averred, but as is, the circumstances favour the notion that the plaintiff instituted a single action for the alleged suffering he sustained due to the one alleged wrong committed by the members of the defendant."

[72] It is not clear whether the court was suggesting that where separate damages are claimed for the unlawful arrest and detention, the relevant date for the claim for the unlawful arrest would be the date of the arrest, as the arrest and detention would not constitute continuing wrongs; the claim based upon unlawful detention would, however, arise on the date that his detention ceased.

[73] More recently in **Makhatholela v Minister of Police and another** 2024 JDR 3502 (GJ), the court relied on a number of cases,

including ***Nkosi v Minister of Police and Another*** (43325/2019), ***Thabang v The Minister of Police N.O & Another*** (89077/2016) [2022] ZAGPPHC para 15 (13 April 2022) and ***Mashaba*** which held that arrest and detention through to discharge is continuous. The court accordingly found that the debt only became due on discharge of the plaintiff and thus, the matter had not prescribed.

[74] Similarly, in ***Malgas and Others v Minister of Justice and Correctional Services***, [2024] ZAGPPHC 1222 (25 November 2024) it was found by Makhoba J that the cause of action became complete, and by extension, prescription started to run, when the Constitutional Court vitiated the plaintiffs' convictions and sentences and ordered their release.

Non-continuous: The date of the arrest and the date of each day of detention (each being a distinct cause of action)

[75] The authorities dealt with in this section suggest that there is a distinction between claims for damages for allegedly maliciously instituted prosecutions (which arise in the normal course on the date that the charges are withdrawn or the accused was acquitted by the court) and those where the cause of action is unlawful arrest and detention. They adopt the approach that a claim for unlawful arrest arises at the moment of arrest, even if the detention continues after this. A claim for unlawful detention

arises when a person is not brought to court after his arrest within 48 hours and no court has ordered his lawful detention.

[76] Thus, even if the person was detained for a lengthy period after his arrest, the cause of action arises for the unlawful detention at the moment it became unlawful. Accordingly, in a claim for damages for unlawful detention, prescription commences when the detention becomes unlawful. Where the initial arrest was lawful, but the continued detention became unlawful as he was not brought to court timeously and/or a court had not authorised his continued detention, the cause of action arises from the moment his detention became unlawful and a new cause of action arises on each day of the plaintiff's detention. The subsequent withdrawal of charges or acquittal is not what makes the arrest or detention unlawful-it may support a claim for malicious prosecution which is a separate cause of action.

[77] This was an approach already taken by the Supreme Court of Appeal during 2002 in ***Lombo v African National Congress*** 2002 (5) SA 668 (SCA) ("***Lombo***") in which the Smalberger ADP explained that claims for unlawful detention arise each day of the accused's unlawful detention. It was held that only those days of detention falling within the three-year prescription period reckoned backwards from the date upon which the summons was issued would be competent. Smalberger ADP explained:

*"[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.*

[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."

[78] In **Thompson**, Eksteen J stressed that in the case of wrongful arrest, unlike cases for malicious arrest, the proceedings are not regarded as continuous and the cause of action arises at the date of the arrest. Applying these principles to the facts before him, Eksteen J found that the plaintiff had not complied with the notice provisions in section 32(1) of the Police Act 7 of 1958 (*"the Police Act"*), which was similar to those found in section 3 of the Institution of Legal Proceedings Act. He stated at p. 375:

"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 29 April, 1969. This means that, in giving notice to the second defendant on 20 September, 1968 and issuing summons on 25 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 10 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."

[79] In a judgment by Baqwa J in ***Annari du Plessis v Minister of Police and 2 Others*** ("Du Plessis") (42774/2016) (2018) ZAGPPHC (18 June 2018), sitting in the Gauteng Division, Pretoria, the plaintiff waited for the criminal trial and thereafter, her appeal to be finalised before she sued the defendant for wrongful arrest and her detention from 12-14 August 2011.

[80] Baqwa J warned that claims for malicious prosecution and claims for wrongful arrest ought not to be conflated and stressed:

"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 plaintiffs claim is thus not assisted by any legal conclusion that may be reached by the court, setting aside her conviction and sentence."

- [81] Baqwa J relied on the judgment of Mali AJ in ***Lawrence Nyiko Nkwinika v Detective Malapane and Another*** (19477 /2018) (2015) ZAGPJHC 42 (27 February 2015) who had, in turn had relied on the matter of ***Marchel Labuschagne v Minister of Safety and Security*** (44033/19) [2023] ZAGPPHC 844 (17 July 2023) to find that the so-called “*trigger date*” is the date of the arrest and not the date of the withdrawal of the matter against the plaintiff.
- [82] In ***De Klerk v Minister of Police*** [2019] ZACC 32; 2020 (1) SACR 1 (CC), the main issue for determination was whether the Minister of Police (was liable to compensate Mr de Klerk for the entire period of his detention following his unlawful arrest, including the period following his first appearance in court.
- [83] The Constitutional Court made it clear that where a person was lawfully arrested his unlawful detention claim arose when the police failed to inform the magistrate that he was entitled to bail - not at the date of his later release or acquittal.
- [84] In ***Minister of Police and Another v Yekiso*** 2019 (2) SA 281 (WCC) (“***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 timeously serve a section 3(1) notice in respect of his claims for damages based on unlawful detention and

malicious prosecution. The court *a quo* had reached a similar finding as the Court did in **Tlake** and **Makhwelo**, 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.

[85] The Full Court rejected this contention and found that the plaintiff's detention gave rise to a separate cause of action for each day that the plaintiff had been in detention and distinguished claims for unlawful arrest and detention from claims for malicious prosecution. Davis J stated:

"[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 **Lomba 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].'

...

[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'."

[86] In ***Khanya v The Minister of Police*** (5458/2014) [2019] ZAFSHC 81 (20 June 2019) Meintjies AJ, applying ***Lombo*** and ***Yekiso***, 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."

[87] ***Phala v Minister of Safety and Security*** 2022 JDR 3007 (FB) ("***Phala***"), is one of the cases relied upon by the respondent in their heads of argument. The plaintiff contended that his unlawful arrest and detention constituted a continuous wrong. In support of this contention the plaintiff relied on ***Tlake*** and argued that the

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

[88] After dealing with the doctrine of legal precedent, Snellenburg AJ declined to follow **Tlake** and **Makhwelo** as he was of the view that these decisions were clearly wrong. He pointed out that the plaintiff relied on three distinct claims, unlawful arrest, unlawful detention following the arrest and malicious prosecution. He explained at para [43]:

*“[43] The court in **Tlake** 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 [on] the one hand and malicious arrest and detention with or without prosecution on the other hand as will be dealt with below.*

*The court in **Makhwelo** 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.*

*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.*

*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.”

[89] Referring to **Thompson**, Snellenburg AJ said:

“[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.

...

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.”

[90] Slellenburg AJ also made reference to the decision of the Constitutional Court in **Mahlangu and Another v Minister of Police** (CCT 88/20) [2021] ZACC 10 (“**Mahlangu**”) that emphasised 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. The Constitutional 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. The defendant bears the onus to prove justification for the interference.”

[91] Snellenburg AJ went on to state:

“[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. The lawfulness or unlawfulness of an arrest does not by implication render subsequent detention lawful or unlawful.

[54] Whilst arrest is frequently followed by detention, wrongful detention need not be preceded by any arrest.

[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'.

...

[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.”

[92] Referring to the decision of Baqwa J in **du Plessis**, Snellenburg AJ associated himself with Baqwa’s findings and said:

*“[65] Baqwa J was, amongst others, called upon to consider the judgment of Spilg J in **Makhwelo**, the lastmentioned case which was also referred to, as stated above, in **Tlake** in support of the conclusion reached by the Court. At para 17 the Court held, with reference to **Thompson**, that regarding the cause of action based on unlawful arrest, prescription begins to run as soon as the illegal arrest has been made.”*

[93] With regard to **Unilever**, Snellenburg AJ opined:

“[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 that a claim for detention arises only on release is wrong.” [The case referred to is **Mofokeng v Minister Of Police** (A2023/009958) [2023] ZAGPJHC 1052 (15 September 2023)]*

[94] Snellenburg AJ stressed the distinction between claims for unlawful arrest and detention and malicious arrest and detention and stated:

“[70](sic) 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.”

[95] He then went on to explain the difference of the situation when the claim is one for malicious prosecution with reference to **Thompson** and **Holden** and held:

*“[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.”

- [96] Snellengurg AJ concluded that prescription would ordinarily commence to run in unlawful arrest cases, immediately after his arrest and in unlawful detention cases on each day of his detention which gives rise to a separate cause of action. It was explained thus:

“[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.”

The requirement of knowledge-the date that the claimant consulted his legal representatives

- [97] The kernel of the appellant’s argument and the authorities cited were based upon Section 3(3) of the Institution of Legal Proceedings Act, which, like that of section 12(3) of the Prescription Act, stipulates that for a debt to be regarded as due, the creditor must have knowledge of the identity of the organ of state and of the facts giving rise to the debt.

[98] It was argued that the appellant did not acquire the required knowledge that he had a claim for damages for unlawful arrest and detention until after he had consulted with his attorney during May 2018; this is the date, so it was argued, that the six-month period began to run within which the appellant was required to serve the required 3(1) notice on the respondent-not 11 December 2017 when he was told the charges against him were withdrawn nor November 2017 when he was released on bail.

[99] The appellant referred us to a number of cases in support of their assertion that the appellant could not have acquired knowledge of his claim before he consulted his attorney. The first was **Sello v Minister of Police N.O and Another** (89077/16) [2022] ZAGPPHC 233 (13 April 2022) where the court held that a debt is due when it is immediately claimable by the creditor and immediately payable by the debtor. Accordingly, it was held that the debt became claimable by the applicant on the date of his release from incarceration on 15 October 2015. However, the complete cause of action as defined in **Truter** was only established after consultation with his attorneys on 6 June 2017; although the right to claim the amounts arose the day after his release from incarceration, in absence of any knowledge of the identity of the respondents, the applicant's rights in law only became enforceable on 6 June 2017.

[100] The second case we were referred to was **Diko v MEC for Health** (583/2018) [2022] ZAECBHC 11 (22 March 2022) heard in the Eastern

Cape Local Division that involved a medical negligence claim. The plaintiff claimed that he only became aware of the facts giving rise to the debt when he consulted his attorney on 12 June 2018 and after receipt of the medical report from a specialist.

[101] It was held at para [19] that:

“In the context of a medical negligence claim, the meaning of the phrase ‘knowledge of the facts from which the debt arises’ includes knowledge of facts showing that the defendant, in treating the plaintiff, failed to adhere to the standards of skill and diligence expected of the practitioner in the former’s position.”

[102] The court followed the reasoning of the Constitutional Court in **Links v the Department of Health, Northern Province** 2016 (4) SA 414 (CC) and concluded on the facts before the court at para [84]:

“But even assuming I must accept that he was told that there had been “a problem” with the fixation, what about this information or knowledge on his part would have been an indication for him that the staff may have been negligent in carrying out the procedure. Also, the fact of his complications, as obvious as they may have been to him, would not have suggested to him that the treatment administered to him was incorrect or inadequate and most certainly not that the hospital had used a wrong pin that is contraindicated in orthopedic practice. His situation is similar in my view to Links in which the court held that that plaintiff could not reasonably have known, without seeking the opinion of a specialist, that the care administered to him was substandard. The same applies to the other indications that all was not well with his leg. He could not reasonably have gleaned on his own that a wrong pin had been inserted and inadequately at that, neither would these manifestation on their own have caused him to make enquiries along the line whether the staff might possibly have been negligent in carrying out the procedure.”

[103] On appeal ([2023] ZAECBHC 29 (15 September 2023)) the full bench adopted the approach taken by the trial court and found that:

“[21] Practically speaking, and drawing from his particulars of claim, the questions to be asked are whether Mr Diko knew that the wrong nail had been utilised or that the surgical procedure was defective, or that other ‘advantageous and less damaging treatment options’ had not been properly investigated. While it was unnecessary for him to know, conclusively, that there had been such errors, he was required to have ‘knowledge of’ sufficient facts of the treatment administered to reasonably have placed him in a position to form a ‘belief’, and to investigate the matter further.

...

[24] The requirement ‘exercising reasonable care’, in the s 12(3) proviso, requires ‘diligence not only in the ascertainment of the facts underlying the debt, but also in relation to the evaluation and significance of those facts’. Mr Diko is deemed to have the requisite knowledge, so that the debt is due, at the point that a reasonable person in his position would have deduced the identity of the debtor and the facts from which the debt arose.”

[104] The full court concluded at [34] to [36] that even exercising reasonable care the respondent could not have been expected to have realised he had a claim for medical negligence, particularly as he was a person without medical knowledge.

[105] The third case referred to was ***Member of the Executive Council for Education, KwaZulu-Natal v Shange*** [2013] JOL 30039 (SCA) in which the Supreme Court of Appeal accepted that the respondent became aware of his claim on 18 January 2006, the date of the first consultation with his attorney.

[106] Finally, we were referred to ***Makhwelo*** in which the Supreme Court of Appeal stated:

"As to the first requirement of knowledge of the material facts: It is difficult to

appreciate that at the time of the arrest or even during detention the suspect would have sight of the docket in order to form a view that the arresting officer did not have reasonable suspicion that an offence had been committed."

- [107] However, the Supreme Court of Appeal made it plain that a debt becomes due when the creditor has knowledge of the minimum facts necessary to institute the action, even if the full extent of the damage is still unknown- ie. how long the person had been incarcerated. It was held that:

"In a delictual claim ... the cause of action is complete when the wrongful act or omission has occurred, the wrongdoer is identified, and the resultant damage is suffered."

- [108] In addition, at 175 B Van Heerden JA stated that:

"...Section 12(3) of the Act requires knowledge only of the material facts from which the debt arises for the prescriptive period to begin running-it does not require knowledge of the relevant legal conclusions (i.e. that the known facts constitute negligence) ..."

- [109] Similarly, in **Mohlomi v Minister of Defence** 1997 (1) SA 124 (CC), it was made clear that only the material facts giving rise to the claim need be known for the purpose of determining the date upon which prescription would begin running against the claimant, not the final quantum. This puts paid to the argument that the cause of action for unlawful detention does not arise until the plaintiff released from detention as this was only when he would have been aware of the number of days he was in confinement and thus be able to ascertain the quantum of his damages.

[110] Moreover, in **Kruger v National Director of Public Prosecutions** [2018] ZACC 13 Froneman J, for the majority of the Constitutional Court, made it plain that it is only the relevant *facta probanda* and not the evidence (*facta probantia*) that need be known to a creditor for prescription to begin to run against the creditor. Commenting on the minority judgment of Zondo J, Froneman J stated:

“[78] I have had the benefit of reading the judgment of Zondo DCJ (first judgment), but I cannot agree with its reasoning and outcome. The reason is that the first judgment conflates what must be proved to establish a claim for malicious prosecution with the evidence that proves those facts. To prove malicious prosecution, the plaintiff here needed to establish only (a) lack of reasonable and probable cause and (b) intent to injure (animus injuriandi). Only these two facts are relevant to this case as they are “the facts from which the debt arises”. Of these only, a creditor needs to have knowledge for prescription to start running in terms of section 12(3). A plaintiff does not need to know the further facts that establish the absence of reasonable probable cause and intent to injure.”

[111] Froneman J made it plain that lack of reasonable and probable cause with intent to injure may be inferred from the fact that the charges were dismissed but stressed that this was a question of fact in every case. He disagreed that lack of reasonable and probable cause only arose once the claimant had sight of the docket and explained:

“[79] Lack of reasonable and probable cause and intent to injure will almost invariably have to be proved by inference from other, secondary, facts. This will be done by assessing whether the facts presented in evidence lead to the probable conclusion that the prosecution took place without reasonable and probable cause and with intent to injure. The factual evidence that, taken together, proves the absence of reasonable and probable cause plus animus injuriandi will vary from case to case. It is impossible to state a general legal rule by which factual evidence is necessary as proof of these ultimate legal requirements.

[80] It is not clear to me whether the first judgment purports to lay down a legal rule that in all debts arising from delictual claims based on malicious prosecution, prescription starts to run only when a claimant has knowledge of the contents of the police docket. That would be a disquieting departure from the clear conceptual logic of the precedents in this area. For the reason stated above – that the evidence to prove lack of reasonable and probable cause and intent to injure will vary from case to case – a legal rule to that effect cannot and should not be posited.

[81] Did Mr Kruger's claim prescribe? The only question to ask is whether the facts known to him on the day the charge was withdrawn were sufficient to ground the likely inference that there was no reasonable and probable cause for his prosecution and that his prosecution proceeded with intent to injure on the part of the public prosecutor.

[82] Asking this question does not entail propounding a legal precept. It simply involves employing "a rule of logic, an instrument for the avoidance of fallacious inference." Asking whether Mr Kruger knew enough on the day the charge against him was withdrawn to infer that, probably, he could sue for malicious prosecution is a question of fact. It is akin to enquiring whether the factual conclusion reached by the High Court is correct. It is the kind of issue this Court generally eschews enquiring into."

[112] In ***Mtokonya v Minister of Police*** 2018 (5) SA 22 (CC) ("***Mtonkonya***") the legal question faced by the Constitutional Court 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 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.

[113] Zondo J (as he then was) stated that:

"[36] Section 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”.

[114] Zondo J (as he then was) explained:

“Whether the police’s conduct against the applicant was wrongful and actionable is not a matter capable of proof. In my view, therefore, what the applicant said he did not know about the conduct of the police, namely, 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.”

[115] In this regard Zondo J warned that were this not so, prescription would hardly ever run against a claimant. He opined:

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

[116] In the **Minister of Police v Zamani** (CA 10/2021) [2021] ZAECHBHC 41; 2023 (5) SA 263 (ECB) (12 October 2021) Van Zyl DJP criticised **Makhwelo** which it was found was contrary to **Mtokonya** and stated that:

“[27] The decision in Makhwelo is also in conflict with the judgement of the Constitutional Court Mtokonya. In Mtokonya the Court dealt with a case of unlawful arrest and detention. The case was “about whether section 12(3) of the Prescription Act requires a creditor to have knowledge that the conduct of the debtor giving rise to the debt is wrongful and actionable before prescription may start running against the creditor”. The Court concluded that section 12(3) does not require knowledge of legal conclusions or the availability in law of a remedy. “Whether the police’s conduct against the applicant was wrongful

and actionable is not a matter capable of proof. In my view, therefore, what the applicant said he did not know about the conduct of the police, namely whether their conduct against him was wrongful and actionable, was not a fact and, therefore, falls outside of s 12(3). It is rather a conclusion of law,” and “[k]nowledge that the conduct of the debtor is wrongful and actionable is knowledge of a legal conclusion and is not knowledge of a fact. Therefore, such knowledge falls outside the phrase ‘knowledge ... of the facts from which the debt arises’ in s 12(3). The facts from which a debt arises are facts of the incident or transaction in question which, if proved, would mean that in law the debtor is liable to the creditor.” The finding in Gore that the running of prescription is not delayed until a creditor is aware of the full extent of his legal rights, is consistent with the “well known principle in our law that ignorance of the law is no excuse. A person cannot be heard to say that he did not know his rights.”

[117] More recently in ***Manchu v Minister of Police and others*** [2024] ZAGP JHC 536 (3 May 2024) (“***Manchu***”) the court went even further. The plaintiff appealed his conviction and sentence which was set aside on 29 January 2019, on which date he was released from prison. He alleged he only became aware of the identity of the defendant and the facts giving rise to the debt when he consulted his attorney during 2019.

[118] Mathopo AJ considered the question when prescription begins to run for the alleged unlawful arrest and detention and in particular whether they should be considered to be a continuous wrong. It was explained:

“[26.] The plaintiff’s argument appears to be that their claim for unlawful arrest and subsequent detention should be considered as a continuous transaction, not complete until the outcome of their criminal prosecution, which resulted in the setting aside of his conviction and sentence. The contention is that his arrest and detention, though separate legal processes, are interconnected and should be viewed as part of a single ongoing wrong.

[27.] However, this position is in contrast to the established principles that there is a distinction between a single completed wrongful act and a continuous wrong in the course of being committed. While a single wrongful act may give rise to a single debt, a continuous wrong is seen as generating a series of debts arising moment by moment as long as the wrongful conduct persists.

[28.] In this context, the courts indicate that an unlawful arrest is not inherently a continuing wrong, nor is it necessarily linked to any subsequent unlawful detention. Arrest and detention represent a separate and distinct legal process. While both involve the deprivation of an individual's liberty, this shared outcome does not merge them into a single legal process. Each may be considered a distinct cause of action, with its own legal implications and limitations. Thus, in a case of unlawful arrest and detention, the debt arises from the moment of his arrest and each day in detention constitutes a new debt as long as the wrongful conduct endures.

[29.] This reinforces that the plaintiff's claim should be analysed as based on separate causes of action, rather than as a single continuous transaction."

[119] Mathopo AJ stressed that for the claimant's arrest and detention to be considered as a continuing wrong until the conclusion of the criminal proceedings he would have had to have pleaded the elements necessary for malice and lack of reasonable and probable cause, but he pleaded his case for unlawful arrest and detention separately from his claim for malicious prosecution.

[120] Mathopo AJ then went on to analyse the plaintiff's defences based on Section 12(3) of the Prescription Act and stated:

[38.] Notably, section 12(3) does not mandate that the creditor must be cognizant of the debtor's actions being wrongful and legally actionable before the debt can be considered due or before prescription can commence. This distinction is crucial as it pertains to legal interpretations or conclusions rather than factual awareness."

[121] After citing **Mtokonya, MEC for Health, Western Cape v M C** (1087/2019) [2020] ZASCA 165 (10 December 2020), **Le Roux and Another v Johannes G Coetzee and Seuns and Another** 2024 (4) BCLR 522 (CC) at para 40] and **Drennan Maud & Partners v Pennington Town Board** [1998] ZASCA 29; 1998 (3) SA 200 (SCA) at 209F-G] it was stated that:

“[42.] In matters of unlawful arrest and detention, the relevant material facts to be considered from a creditor's pleaded claim include the acts or omissions that pertain to wrongfulness or unlawfulness. It is not necessary for the creditor to know that these material facts legally support a conclusion of wrongfulness or unlawfulness; it is enough to have actual or deemed objective awareness of facts that could be characterized as wrongful or unlawful. The legal consequences must be derived from these facts. Therefore, the prescription period is not delayed until the creditor fully appreciates the extent of their rights. To hold otherwise would undermine the purpose of the Prescription Act, which aims to protect litigants from delays caused by litigants who do not enforce their rights promptly.”

[122] In conclusion to the special plea of prescription, the court stated:

[50.] For the aforementioned reasons, I am satisfied that the plaintiff knew the identity of the defendants and the facts from which the debt arose on 10 September 2014, regarding the arrest and each day of his continued detention.

...

[53.] The plaintiff's claim for unlawful detention arose on 10 September 2014, as he was detained from his arrest until his release on 29 January 2019.

[54.] Since each day of detention constitutes a new and separate debt for the purposes of section 11(d) of the Prescription Act, the unlawful detention prior to 21 January 2018, three years before the service of summons on 20 January 2021, is extinguished by prescription. However, the plaintiff's claim for unlawful detention from 21 January 2018 onwards has not been prescribed.

[55.] I therefore find that the defendants' special plea regarding the

prescription of the plaintiff's unlawful detention before 21 January 2018 is upheld.

[123] The court then explained the purpose of section 3 of the Institution of Legal Proceedings Act and made it clear that where this was served beyond the stipulated six-month period, he could not assist the plaintiff unless he had brought a formal application for condonation; an application from the Bar by counsel was not sufficient. It was said:

“[56.] The primary purpose of a section 3(1) notice under the Institution of Legal Proceedings Act is expediency, enabling the relevant organ of state to conduct thorough investigations into the claim. This process allows the organ of state to decide whether to settle the claim or contest the proposed legal action.

...

[63.] Compliance with the provisions of section 3(2) of the Institution of Legal Proceedings Act is statutory, and applying to a court for condonation requires a formal application supported by an affidavit. Section 3(4) specifies that the court must be satisfied that the three requirements under section 3(4) are met before it can exercise discretion to condone.

[64.]...

[65.] In cases involving statutory time frames, non-compliance is a jurisdictional issue that must be resolved before the court can consider the dispute. If statutory provisions are not followed, the court lacks jurisdiction unless condonation is granted, making an application for condonation mandatory unless otherwise specified. Without such an application, the court cannot assist a party. [emphasis added]

[66.] Since the defendants' plea was served around 20 April 2021, the plaintiff has failed to apply for condonation under section 3(4) of the Institution of Legal Proceedings Act, and no such formal application is before this court. The request for condonation is therefore made from the bar, without any satisfactory explanation of good cause or assurance that the defendants would not be unreasonably prejudiced.

[67.] Therefore, in light of the above, it is found that, having failed to apply for condonation under the provisions of the Institution of Legal Proceedings Act, this court is neither invited to be satisfied nor able to exercise its discretion to condone the non-compliance.

[68.]The special plea regarding non-compliance with the Institution of Legal Proceedings Act concerning the unlawful arrest and unlawful detention (for debts prior to 20 December 2018) is upheld.”

Deemed knowledge and reasonable care

[124] This brings me to the next aspect of knowledge and that is the question of deemed knowledge. It is not sufficient that the appellant in fact only had knowledge of his claim after consulting his attorney (who then gained access to the docket) as it is sufficient for the purposes of prescription and serving a section 3(1) notice that the appellant could reasonably have acquired the required knowledge had he exercised reasonable care.

[125] This was an issue considered in the Northwest Provincial Division of the High Court, Mahikeng in ***Aphindile v Minister of Police*** (573/021) [2024] ZANWHC 16 (25 January 2024) (“***Aphindile***”). The court considered whether prescription only begins to run from the date upon which the plaintiff acquired knowledge of his cause of action and whether such knowledge could only be gleaned following a legal consultation.

[126] The Applicant averred that on or about 28 March 2017, he was unlawfully arrested and detained by members of the SAPS employment. Further, he stated that he was arrested and detained on allegations of murder which

were unfounded and not true. He insisted that that he was not aware that he had a civil claim against the organ of the state and only became aware of the requirements of section 3 of the Institution of Legal Proceedings Act on 23 January 2019, when he consulted with his attorney of record.

- [127] Moagi AJ found that the applicant could have acquired knowledge of his claim by the exercise of reasonable care upon his release on bail:

“[29] Even if it can be argued that the Applicant did not have knowledge of the debtor, which is not the contention raised on behalf of the Applicant, I am convinced that he could have acquired such knowledge, by exercising reasonable care to establish the people who arrested him upon his release on bail, on 17 August 2017, and not after his charges were withdrawn.”

- [128] Moagi AJ held that the applicant’s contention that he only became aware of the unlawfulness of his arrest when he received a section 174 discharge was a misdirection of the law of prescription and was contrary to

Mtokonya:

“[32] Having regard to the majority decision in Mtokonya, in my view, the Applicant’s contention, that he only became aware of the unlawfulness of the arrest when he was discharged in terms of section 174 of the CPA on 21 May 2018, is a conclusion of law and not what section 12(3) of the Prescription Act contemplated.

...

[34] The contention that the Applicant had no facts to rely on at the time of his arrest, detention and subsequent malicious prosecution, and that such facts could only be established if not found guilty, is a misdirection of the law of prescription.”

[129] Referring to **Thompson** and its finding that the arrest and acquittal must be regarded as one continuous action the court commented:

"[36] The facts in the present matter are distinguishable from those in Thompson and another v Minister of Police (supra) and case law relied on by Counsel for the Applicant in the heads of argument.

[37] I am not persuaded from the merits of this case that the unlawful arrest, detention and the subsequent malicious prosecution should be treated as one continuous transaction which is not completed until the outcome of the criminal prosecution. It should be noted that the Applicant limited his claim to unlawful arrest, detention and loss of income. There is no claim instituted by the Applicant for malicious arrest and/or malicious prosecution against the National Director of Public Prosecutions."

[130] In dealing with the facts the court stated:

"[41] In the context of the claim in the present matter, the Applicant was not required to conclusively know that the arrest and detention was unlawful but rather, to know, sufficient facts which would reasonably have placed him in a position to form the belief that the arrest and detention was without justification.

...

[42] In considering the available evidence in totality, it can be said that the Applicant could have acquired knowledge of the debtor and required facts immediately after his arrest and detention, alternatively immediately after he was released from detention.

[43] In applying the objective standard, of a reasonable person in his position, the Applicant failed to institute action timeously, caused by inaction and not an inability to obtain knowledge of the identity of the debtor and the facts timeously. I find that the Applicant's claim has prescribed.

[44] There is no evidence which was presented before this court to demonstrate that the Applicant was prevented from giving instructions to an attorney to institute proceedings on his behalf. The fact that the Applicant may not have known what his legal rights were, did not delay the running of prescription. Section 12(3) of the Prescription Act does not require the creditor to have knowledge of any right to sue the debtor.

[45] The need for a cut-off point beyond which a person who has a civil claim to pursue against an organ of state, has been stated clearly by the Constitutional Court in Road Accident Fund and Another v Mdeyide (CCT 10/10) [2010] ZACC 18; 2011 (1) BCLR 1 (CC); 2011 (2) SA 26 (CC) (30 September 2010).

[46] I find that the Applicant's claim has prescribed, in the circumstance, it will serve no purpose to deal with the other requirements of section 3(4)(b) of Act 40 of 2022 listed above."

[131] In **Manchu** the plaintiff was legally represented during his detention the at the criminal trial and appeal, with the mandate, in his own words, "*to get him out of prison and custody*". However, he insisted that he never discussed the institution of a civil claim against the defendants with his legal representatives at the time. He claimed that following his release, around February 2019, he was advised by his friend's girlfriend to seek legal assistance for a civil claim. He thereafter consulted with his attorney and gained knowledge of his right to sue.

[132] Mathopo AJ considered the question of deemed knowledge and held that even if the plaintiff did not have actual knowledge, he could have acquired such knowledge by exercising reasonable care. Moreover, unless it could be established that he was wilfully prevented from acquiring the required knowledge, he must be deemed to have had the required knowledge prior to his release from detention:

"[46.] The plaintiff states that he was first legally represented from his second court appearance. He had legal representation throughout the criminal trial and his detention, with the primary mandate on his version being to secure his release from prison. He was also represented by Legal Aid South Africa during his appeal.

[47.] The plaintiff's incarceration did not prevent him from instructing an attorney to investigate or initiate a civil claim. He does not claim that he was denied access to legal representation or hindered by any superior force as outlined in section 13(1)(a) of the Prescription Act.

[48.] At most, the Plaintiff was unaware that he had a legal remedy against the defendants throughout his arrest and detention. However, his lack of knowledge regarding the right to claim, the cause of action, or the appreciation of wrongfulness constitutes a legal conclusion, not the material facts required to support it.

[49.] In respect of his actual knowledge, the plaintiff averred that he had no knowledge of who the defendants would be. Objectively, a reasonable person in the plaintiff position would have deemed knowledge of the identity of debtors as police officials and the facts, including the acts and/or omissions from which the debts arose. There is no evidence that he could not have acquired such knowledge by exercising reasonable care."

[133] The question of deemed knowledge was also considered in the recent case of ***Kutoane v Minister of Police and Others*** (17387/19) [2024] ZAGPJHC 529 (31 May 2024). Van Tonder AJ, sitting in this division expressed the view that an innocently arrested and detained person must of necessity be aware or deemed to be aware of the unlawfulness of his arrest and detention at the moment of his arrest and detention. It was stated in relevant part:

"[71] A compliant notice of "the debt" hinges on the principle stated in the latter part of section 3(3)(a) of the Act that "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".

[72] It is evident from the essence of section 3, that the question of timeous compliance hinges on the moment in time when a "debt may... be regarded as being due", and in turn on proof of the moment of actual or deemed knowledge of "the facts giving rise to the debt", and of the identity of the relevant organ of state as debtor. By when would a creditor with reasonable care have had "such knowledge"? The extent of knowledge recorded in the notice is that which has to be tested against "reasonable care". How can an innocently arrested person

escape the simple presumption that knowledge of innocence is virtually immediate upon being arrested? Is it not so that, generally speaking, all that remains is an explanation as to why such knowledge could not have been acted on?

[73] If that what is postulated above is correct, then it narrows down the risk embedded in contending for wide discretion that can be tested over and again. It should serve as a narrow guideline for what has to be alleged and established in order to satisfy a court in respect of the knowledge and prevention features.”

[134] The court stressed that Kutoane’s belief in his innocence was all that was required for him to know that his arrest and detention was unlawful, from which date he had six-months to provide the required section 3(1) notice:

“[74] Kutoane alleges that it is common cause that the impugned notice was served on the offices of the National Commissioner of the South African Police Service on 10 September 2018, being a period of 68 days after acquittal. This, however, was more than two years after his initial stated indignance at being arrested and detained innocently, which, even if providing different debts or causes of action, are based on the same simple set of facts. The extent of the debt might increase over time, but the initial “debt” is immediate. [emphasis added]

[75] Kutoane alleges that immediately after his acquittal, he approached his current attorney to assist him with the institution of the main proceedings against the Respondents.

[76] Kutoane alleges he could not have instructed his attorneys to proceed to institute any legal proceedings against the 1st and 2nd Respondents for the logical reason that he was still being prosecuted, and in order to avoid piecemeal litigation against the two state entities. Could any of this ever be a reasonable explanation in order to establish good cause?

[77] Kutoane argues he did not have to give notice within six months after his arrest, namely by latest 15 November 2016, in respect of the wrongful and unlawful arrest, and in the alternative that he could not have been expected, whilst exercising his constitutional right to defend any criminal charge brought by the 1st and 2nd Respondents, also to give notice of his intention to institute legal proceedings against the same organs of the state. Is it a matter of either

or? Clearly not. The Act requires action in the form of a “notice” once the basic facts are known. It does not contemplate the luxury of wait and see if some other, different or better position in relation to the basic facts evolve. One such fact is belief of innocence by applicants such as Kutoane, which stands unrelated to the outcome of any consequential or ancillary legal conclusion thereof.”

[135] **Kutoane** argued that if his section 3(1) notice was late, then he was entitled to apply for condonation. In dealing with his condonation application, the court pointed out good cause for condonation required **Kutoane** proving a reasonable explanation for not timeously filing his notice, which then required considering whether his lack of knowledge was reasonable. If not reasonable, the court stressed that the only basis for condonation would be evidence that the respondent had wilfully deprived him of acquiring knowledge of his rights or prevented him from providing the required notice. The court adopted a strict approach and stated all that is required is to have knowledge of the facts; a claimant need to have knowledge of damages; proclaimed innocence is all that is required to have knowledge of the necessary facts to pursue a claim for unlawful arrest and detention:

“[83] Kutoane submits that the claim against the 1st and 2nd Respondents did not prescribe on 15 May 2019, being three years after his arrest, but rather only three years after 2 July 2018, when he was acquitted.

...

[86] After sifting through volumes of paper in this matter, the core contention, or “pith” of it, is the allegation by Kutoane that he suffered damages after he was (according to him) innocently arrested on 15 May 2016 and detained for 747 days. But he did nothing about it until long after his release, when he gave notice to the organs of state.

[87] Such notice had to inform the organs of state, as alleged debtor, of “(i) the facts giving rise to [a] debt; and (ii) such particulars of such debt as are within the knowledge of the creditor” in terms of section 3(2)(b) of the Act. Such “debt” relates to that “for which an organ of state is liable for payment of damages” [emphasis added].

[88] The wording of 3(2)(b)(ii) indicates that it is not necessary for a creditor to have knowledge of all facts in support of the debt/damages, only such particulars of which the creditor has knowledge – some basic initial knowledge is enough, more about this aspect below. However, the first day of not being able to work, or earn money upon being arrested innocently, is sufficient knowledge of the facts to comply with 3(2)(b)(ii). It is significant though that, contrary to the first leg in section 3(2)(b)(i), the second leg in section 3(2)(b)(ii) (“such particulars of such debt as are within the knowledge of the creditor”) is not part of the definition of when a debt becomes “due”. This distinction is highly relevant to avoid confusion about the requirement for “due”. It requires knowledge of the “facts”, not knowledge of “damages”.

[136] The Court stressed that a strict approach was required to prevent the floodgates being opened to any claimant to wait until his acquittal before instituting a claim for unlawful arrest and detention; a *fortiori* when it is alleged that the claimant did not have knowledge of his claim until he consulted his attorney after his release from prison:

“[89] As alluded to above, facts similar to this matter provokes the floodgates to be opened for every criminally accused person that ultimately gets acquitted, by waiting until after acquittal before proclaiming that damages resulted from the alleged innocent prosecution, arrest and detention. Proclaimed innocence being the kernel fact in each such case, it stands to reason that such a person has full knowledge of the damage-causing event (“facts giving rise to the debt”) shortly after arrest or detention longer than 48 hours (see section 50 to 60 of the Criminal Procedure Act, 51 of 1977). On ordinary probability the “facts giving rise to the debt” would be within the knowledge of the innocent criminally accused at an early stage. Those are the same facts that are required to be put forward in the prerequisite notice.

...

[94] Kutoane alleged in par 5.5 of his founding affidavit that he could not have instructed his attorneys to proceed to institute any legal proceedings against the 1st and 2nd Respondents for the logical reason that he was still being

prosecuted, and in order to avoid piecemeal litigation against the two state entities. The latter aspect ignores that the giving of a notice does not constitute litigation, nor does it preclude a subsequent notice or the option to simply not proceed in terms of the notice.

...

[96] Kutoane's reference to "piecemeal litigation" is unrelated to or at the very least does not fully engage with the prevention principle despite the provisions of section 3 of the Act. It appears to be merely relying on alleged convenience or inconvenience.

[97] The former basis, namely that Kutoane could not have instructed his attorneys, has not been substantiated by any level of detail, but in any event it is contradicted by the undisputed fact that Kutoane had the benefit of legal representation long before his acquittal. It begs the question whether the right to instruct an attorney prior to giving notice of the requisite knowledge would ever be a reasonable explanation, absent facts that establish failed attempts to give a notice without the help of an attorney. If absurdly such reasoning were to be given traction, it could equally serve a plaintiff to escape the effect of prescription or compliance with almost any obligation, by simply resorting to the prior need for legal advice.

...

[103] Still pursuing the objective to provide legal certainty in the context of similar applications, it remains significant that the phrase "the facts giving rise to [a] debt" is repeated in two different contexts of section 3 of the Act: (i) it instructs the required contents of the notice to be given, and (ii) it defines when a debt of an organ of state becomes due. In short, the requisite notice must "set out" the exact facts required for a debt to become due, being in turn the moment when prescription is deemed to commence, or "regarded" as being due. The notice, once given, represents the creditor's own version of what he is required to know in order to interrupt prescription.

[104] In cases like the present, the wording in the belated notice ultimately given by the creditor, for which condonation is applied, should serve as major guide to determine if "good cause" exists for not having relied on such knowledge earlier or timeously. After all, it is the creditor's self-proclaimed innocence that constitutes the starting point of the requisite knowledge. Once arrested, all the requisite facts are known. An applicant would have to explain (i) when each aspect of the knowledge first came to it, (ii) that the knowledge in the notice was not available prior to the expiry of the six-month period, and (iii) why it was ultimately only acted upon when the notice was given. The facts from which the debt arises would have had to be concealed or excluded from the applicant's knowledge for some reason that is explained in detail. On a

proper interpretation of the Act, it is arguable that such explanations would be limited to “the organ of state wilfully prevent[ing] [the creditor] from acquiring such knowledge”. If not, what purpose does such wording serve? In the context of innocently arrested individuals, logic would dictate that, absent exceptional circumstances, the only remaining alternative reason would have to relate to actual-, physical prevention of giving the notice itself, despite knowledge of the facts from which the debt arises. To widen the nature of the discretion is likely to undo or disregard the consequences of the deeming provision section 3(3)(a), if not the entire objective of the Act. A wider discretion would result in more litigation, instead of the intended less.

[137] At paragraphs [109] and [110] the court emphasised that “*reliance on “ignorance of the law” needs to be dealt with great circumspection, as it is bound to convert strict compliance with the statutory gateway to litigation through prior notice, into a floodgate for collateral litigation upon failure to comply.*” It was also stressed that “[t]he legislator deliberately referred to facts, not some legal phrase such as “cause of action” .

[138] The Court warned at paragraph [112] and [113]

“[112] In summary, to simplify these kind of applications for condonation, a creditor and its legal representatives would be well advised to realise that what has/had to be stated in the notice in terms of the Act, may well seriously impede a subsequent argument based on lack of knowledge for purposes of condonation, unless a clear case for prevention can be established. If an organ of state has acted, or failed to act, it is often axiomatic that some form of “debt” is instantaneous. Those simple facts justify the giving of a notice and allow the organ of state to act/stop the harm or to mitigate it. Such essential facts in a notice will not improve over time, but the risk of not obtaining condonation will increase.”

[113] Once the basic facts are known, the need for reliance on prevention in support of a condonation application is expressly prompted by the Act, arguably to the exclusion of any other ground in support of good cause as an essential element to satisfy the court to grant condonation. Ultimately a “reasonable explanation” comes down to what has prevented (i) acquiring the knowledge or (ii) the ability to act on the knowledge, despite proof of having exercised reasonable care in obtaining and acting on the simple facts. An

applicant must explain that despite “reasonable care”, which has to be detailed, it could not have obtained or have acted on the obtained knowledge.”

- [139] The court rejected that the fact of the claimant’s incarceration does not provide good cause for failing to provide the required notice. It was stated:

[130] It is doubtful that the mere fact of incarceration or access to an attorney would in itself create support good cause, unless it results in absolute prevention. An applicant would have to explain why, because of his innocence, no other means existed to give notice of the facts that deprives him of freedom or income, resulting in loss. Based on the reasoning in the previous section, Kutoane in any event simply failed to explain step by step when he obtained the last element of his requisite knowledge of the debt and why he did not give notice earlier.

[131] It is not merely the period after expiry of the six months that weighs in on the question of good cause or prejudice, but also the reasons for not giving notice prior to the expiry of the six-month period.”

- [140] The court rejected **Kutoane’s** argument that the state would not be prejudiced:

“[132]Kutoane argues that the Respondent will not suffer any prejudice due to alleged non-compliance with the provisions of the Act, if any. The organ of state was “prejudiced” every day after Kutoane had knowledge of his alleged innocent arrest, without giving notice of it. If Kutoane gave notice as contemplated in the Act, the relevant organs of state could have acted there and then to limit the extent of the debt, as opposed to allegedly having created the debt. It is hard to see how this would not be the situation in all similar cases. The sooner the organ of state is notified after the occurrence of the facts, the less the prejudice. As stated above, significantly it is not merely the period after expiry of the six-month period that weighs in on the question of good cause or prejudice, but also the reasons for not giving notice prior to the expiry of the six-month period.”

- [141] In conclusion the court emphasised the importance of providing timeous notice to an organ of state of a claim and found:

[149] On the Kutoane's own version "the facts giving rise to the debt" were within his knowledge from the moment he got arrested, alternatively when he realised that information relating to his alibi was deliberately being concealed.

[150] ...

[151] The mere fact that Kutoane was in detention did not in itself prevent him from acting on his knowledge of "the facts giving rise to the debt."

[152] ...

[153] Kutoane would have had to explain that during the 747 days he had not been able to seek or obtain legal advice, even if the doctrine of ignorance of law had been relied upon and might have served to benefit him. Access to a lawyer was not even alleged to be a prerequisite for compliance with the notice requirements. But if that was a requirement, Kutoane had access to and the benefit of legal representation. He is at liberty to blame his legal representation for not advising him earlier, or for advising him to wait until after his acquittal, if those are the facts.

...

[157] The facts of this matter is a classic example of depriving the relevant organs of state of the opportunity to act upon the alleged facts giving rise to the debt, in order to mitigate or terminate the consequences of state liability, which ultimately draws on the liability on of taxpayers.

[158] The Act is clearly not intended merely to deal with the timeous notice in respect of the ultimate result of liability on the part of a state organ, but to inhibit a burden on state resources, encumbered damage-causing events, of which the officials in power would want to be informed, as soon as possible to mitigate liability and to avoid expenditure in the form of litigation, investigation, and disbursements, where witnesses and evidence may no longer be readily available. Absent prompt compliance, the state organ is deprived of the opportunity to stop or mitigate or to curtail the costs related to obtaining information and witnesses after the fact at greater expense as time goes by. It could well be argued that a failure to give notice is tantamount to a failure to mitigate. The obligation to mitigate the debt by giving prompt notice is then arguably an element of what constitutes reasonable conduct, in particular the pace at which a notice is given after knowledge of the requisite facts is obtained. The inverse result is "unreasonably prejudicing" the organ of state.

[159] It is axiomatic that the failure on part of Kutoane to have notified the organs of state for some 747 (and several weeks thereafter) of the intended

legal proceedings, unreasonably prejudiced the said organs of state, if not already a few days after arrest. It is more than likely that a prompt notice with the known facts, at the latest after the first failed bail application, supported by a reference to the alleged alibi, would have caused the organs of state to intervene and to curtail the debt-causing events, in line with the obvious purpose of the Act.

[160] It follows from this ground alone that the court has no jurisdiction to grant leave to institute the legal proceedings in question, Kutoane having failed to satisfy the court in respect of two of the three requirements in subsection 3(4)(b) of the Act."

[142] In the more recent case of **Gcam-Gcam v Minister of Police** 2025 JDR 2648 (ECM) ("**Gcam**") the same approach was taken. The plaintiff's case was that he became aware of the debt on 25 March 2015, being the date on which the appeal succeeded and relied upon **Malgas** and **Makhwelo**. The defendant on the other hand argued that prescription started to run from the date that the plaintiff was arrested and premised his submission on the **Minister of Police v Zamani** 2023 (5) SA 263 (ECB) at paras 12-17.

[143] The court explained that once arrested and detained the detention is *prima facie* unlawful and it becomes incumbent on the defendant to establish justification; thus it is not necessary to await acquittal before bringing a claim based on unlawful arrest and detention. It was held:

"[13] Wrongful arrest consists in the wrongful deprivation of a person's liberty. Liability for wrongful arrest is strict, neither fault nor awareness of the wrongfulness of the arrestor's conduct being required. To succeed in an action based on wrongful arrest the plaintiff must show that the defendant himself, or someone acting as his agent or employee, deprived him of his liberty. All that is required of the plaintiff is to establish an act of arrest on the part of the defendant or its employees once the arrest is established, then it is incumbent upon the defendant to establish grounds of justification or the lawfulness of

the arrest. The liberty of an individual is paramount and has been observed even prior to our constitutional era.

...

[14] In **Zamani**, Van Zyl DJP, also dealt with the legal principle that proof of awareness of wrongfulness on the part of the plaintiff is not a requirement in instances of unlawful arrest, suffice for the plaintiff to establish that he had been unlawfully deprived of his liberty by either the defendant or those acting in his stead. He stated thus:

'It is consequently unnecessary for the plaintiff to allege wrongfulness, and the burden of proof in respect thereof at trial is on the defendant once the plaintiff has proved, or it has been admitted, that the defendant was arrested and detained. It is for the defendant to allege and prove the existence of grounds of justification. The reason lies in the plain and fundamental rule that every individual's liberty is invaluable. In Zealand versus the Minister of Justice and Constitutional Development Langa CJ explained it as follows:

"This is not something new in our law. It has long been firmly established in our common law that every interference with physical liberty is prima facie unlawful. Thus, once the claimant establishes that an interference has occurred, the burden falls upon the person causing that interference to establish a ground of justification ..., it must be sufficient for a plaintiff who is in detention simply to plead that he or she is being held by the defendant. The onus of justifying the detention then rests on the defendant. There can be no doubt that this reasoning applies with equal, if not greater, force under the constitution'."

[15] It is worth restating what is said in Zealand, that 'it was sufficient for the applicant simply to plead that he was unlawfully detained. This he did. The respondent then bore the burden to justify the deprivation of liberty, whatever form it may have taken. The plaintiff did not have to wait for his release from custody to institute a civil claim against the defendant. He may have done so himself or through his attorney while in custody. Furthermore, all he was required to plead is that he had been wrongfully arrested and detained by the defendant or his agents. Van Zyl DJP summed it up correctly by saying that 'the fact that the plaintiff is not required to allege and prove the absence of justification for his or her arrest and detention, means that the facts from which it must be concluded that authority for arrest of the plaintiff did, or did not exist, are not material facts from which the delictual debt is said to arise.'

[16] In addition to having knowledge of the identity of the debtor as discussed above, subsection 12(3) requires the creditor to have knowledge of 'the facts from which the debt arises.' The facts in this matter which were known or ought to have been known by the defendant are that his arrest was unlawful even

before his trial began. As previously stated, an arrest or detention is *prima facie* wrongful. It is not necessary to allege or prove wrongfulness. It is incumbent upon the defendant to allege and prove the lawfulness of the arrest or detention. Therefore, the defendant did not have to wait for the outcome of his appeal. Suffice for him to have alleged that his arrest and detention were wrongful. The contention by the plaintiff that he acquired knowledge of all the relevant facts when he was acquitted on appeal is misplaced.” [The matter referred to is **Zealand v Minister of Justice and Constitutional Development and others** [2008] ZACC 3]

[144] The court disapproved of **Malgas** and **Makhwelo** on the following basis:

“[17] ... It is trite that unlawful arrest and unlawful detention are two distinct causes of action. An arrest may be lawful but the subsequent detention be unlawful. *Malgas* does not concern unlawful arrest. *Malgas* deals with unlawful detention and deprivation of liberty. I do not appreciate the difference between unlawful detention and deprivation of liberty as was contended for in *Malgas*, on the peculiar facts of that case because to me those are the same. Wrongful deprivation of liberty consists in a person being deprived of his physical freedom without justification. To succeed in an action based on wrongful deprivation of liberty, the plaintiff must prove that the defendant himself, or a person acting as his agent or servant, deprived him of his liberty. The same requirement obtain when dealing with unlawful detention. As a rule, every interference with physical liberty is *prima facie* (in the absence of a ground of justification) wrongful. The test, therefore, is the same as in unlawful detention. All the plaintiff, in *Malgas* needed to plead, was that he was wrongfully deprived of his liberty and not wait for the outcome of the appeal. In that instance, it would have been incumbent upon the defendant to prove the ground(s) of justification, in other words it would have to allege and prove the lawfulness of his detention. The same principles dealt with above as enunciated in *Mtokonya*, *Zealand* and *Zamani* (the latter to the extent that it followed the principles in *Mtokonya* and *Zealand*, as it was bound by them), ought to have been followed by the court in *Malgas* due to the *stare decisis* principle. This court cannot, as a result follow the *Malgas* decision.

[18] Similarly,

issue of the statutory notice is intertwined with the running of prescription which started running from 6 June 2009. It follows that the statutory notice should have been issued before the expiry of 6 months period from that date.”

The once and for all rule

[145] In terms of the “*once and for all rule*”, a claimant may only claim once against a defendant for damages caused by a certain event.

[146] Whether the “*once-and- for-all rule*” applies to claims for wrongful arrest and detention and claims for malicious prosecution was considered by the in ***Olesitse NO v Minister of Police*** (470/2021) [2022] ZASCA 90 (15 June 2022). The High Court, invoking the *once-and- for-all rule* rule, had upheld the respondent’s objection that the applicant’s claim for malicious prosecution amounted to a duplication of an earlier claim for unlawful arrest and detention, that had been found to have prescribed. It held that the two claims should have been brought in a single action and the Supreme Court of Appeal agreed with this contention.

[147] Implicit in the findings of the High Court and the Supreme Court of Appeal was that where a claim for malicious prosecution is to be brought together with a claim for wrongful arrest and detention, the plaintiff would of necessity have to wait until the charges against him were withdrawn or he was acquitted before bringing his action, including his action based on unlawful arrest and detention.

[148] However, the Constitutional Court in ***Olesitse NO v Minister of Police*** [2023] JOL 61795 (CC) (CCT 183/22) [2023] ZACC 35; 2024 (2) BCLR 238 (CC) (14 November 2023) disagreed, primarily as the causes of action for wrongful arrest and detention and malicious prosecution are distinct and arise at different times, the one at the date of arrest and the other at the date of acquittal or the withdrawal of the charges against the plaintiff.

[149] Makgoka AJ summarised the approach taken by the Supreme Court of Appeal thus:

"[18] In deciding whether the second action was a duplication of the first, the Supreme Court of Appeal compared the allegations in both sets of particulars of claim. It placed much store on the fact that in both actions, the deceased had relied substantially on the same set of facts, and had, in respect of both actions, claimed R400 000 for "contumelia, deprivation of freedom and discomfort" as a result of the alleged conduct of members of the SAPS.

[19] Like the High Court, the Supreme Court of Appeal accepted that malicious prosecution on the one hand, and unlawful arrest and detention on the other, are two different and distinct causes of action. However, it held that on the facts of this case, arising as they did from the same set of facts, those differences were insignificant to allow different actions."

[150] It was stated at para [34] that both the High Court and the Supreme Court of Appeal adopted an incorrect "*legal standard*" by applying the "*once and for all rule*" to facts to which the rule does not apply. Makgoka AJ accepted that claims for unlawful arrest and detention arise at the date of the arrest and that claims for malicious prosecution arise at the time of discharge of the case. It was said:

"[58] The premise of the Supreme Court of Appeal's reasoning is erroneous. The issue is not whether there are differences in how the two causes of action were pleaded in the respective particulars of claim. It is whether the two actions, as a matter of law, are based on two different causes of action, and whether those causes of action have different elements. The comparison between the respective particulars of claim seems to have largely influenced the finding by the High Court and the Supreme Court of Appeal that the two claims should have been brought in a single action. For that reason, I find it necessary to consider the elements of causes of action based on unlawful arrest and detention, and malicious prosecution, respectively. Although the two causes of action are both based on the action iniuriarum, their elements are different.

...

[63] Given these considerations, the finding by the High Court and the Supreme Court of Appeal that the two claims should have been brought in a single action because of the apparent similarities in the respective particulars of claim, is unsustainable. Furthermore, contrary to what the Supreme Court of Appeal held, it is irrelevant that the deceased had all the facts on which to formulate both his claims when he instituted the first action. The question is one of principle and law. If the deceased was, as a matter of law, entitled to bring the two actions separately, he cannot be deprived of that right merely because when he instituted the first action, he had all the facts enabling him to also institute the second action.

[64] The other consideration is that two or more causes of action, although arising from the same set of facts, may not arise at the same time. For example, in the present case, the first action for unlawful arrest and detention arose immediately after the deceased was arrested and detained. From the beginning the arrest and detention were either lawful or unlawful. But the second action based on malicious prosecution had not arisen then, and could not be instituted at that stage, as the criminal charges against the deceased had not yet been withdrawn. This occurred almost two years later, on 17 May 2011. There would also have been the risk of prescription of the first claim, if the deceased was to wait for the termination of the criminal charges in order to combine the two claims in a single action.

*[65] On the reasoning of the High Court and the Supreme Court of Appeal, in the above scenario, the deceased would be barred from instituting the second action after the charges against him were withdrawn. Clearly that would be absurd, as the second action could only competently be instituted once the charges were withdrawn. This is further demonstrated by reference to the facts in *Evins and National Sorghum*."*

[151] It was ultimately decided that the misapplication of the “*once and for all rule*” to the facts at hand the Supreme Court of Appeal had incorrectly developed the common law which constituted a breach of the Constitutional right of the applicant to access to the courts. This would for all intents and purposes constitute the final and authoritative decision on this topic and puts paid to the appellant’s appeal.

[152] As an anecdote, I would finally like to refer to **President of the Republic of South Africa and Another v Tembani and Others** [2024] ZACC 5 (“*Tembani*”). This matter concerned certain delictual claims for damages brought by Zimbabwean farmers whose farms had been expropriated arising from the alleged unconstitutionality of former President Zuma’s participation in the 2011 suspension decision and adoption of the 2014 Protocol, the intricate detail of which is not necessary for current purposes. What is important, however, is the Constitutional Court’s approach to the question whether completion of the cause of action was delayed until the Constitutional Court made an order confirming or declaring the unconstitutionality of former President’s conduct.

[153] The plaintiffs sought condonation, to the extent necessary, for their failure timeously to serve the notice required by section 3(1) of the Institution of Legal Proceedings Act. The defendants delivered an exception to the amended particulars of claim, alleging that the plaintiff’s claims had prescribed. The defendants contended that the High Court and Supreme

Court of Appeal should have refused the condonation application because the debts which the plaintiffs were seeking to enforce had prescribed.

[154] Van Oosten J, sitting in the High Court, agreed that the plaintiffs were neither required nor able to proceed with their action until a court by judicial review had set aside the President's participation in the 2011 suspension decision and adoption of the 2014 Protocol. The High Court accepted that the provisions of section 172(2)(a) of the Constitution had the effect that a declaration that President Zuma acted unconstitutionally had no effect until confirmed by the Constitutional Court; this meant that the plaintiffs did not need condonation.

[155] The Supreme Court of Appeal reasoned that, since the High Court had made no order on the condonation application, there was no relevant order against which the defendants could appeal.

[156] In dealing when the debts became due, Rogers J stated on behalf of the Constitutional Court:

"[85] Subject to the requisite actual or constructive knowledge by the creditor, a delictual debt becomes "due", within the meaning of section 12(3) of the Prescription Act and section 3(2)(a) of the Institution Act, once the debtor's wrongful and deliberate or negligent conduct has caused the creditor to suffer damage. That is when the creditor is entitled in law to institute action for the recovery of damages. [emphasis added]

[86] In terms of section 12(3) of the Prescription Act and section 3(3)(a) of the Institution Act, this is subject to the qualification that time does not start to run (that is, the debt is not deemed to be "due") until the creditor has actual or

constructive knowledge of the identity of the debtor and the “facts from which the debt arises”. The “facts” do not include that the debtor’s conduct was wrongful or negligent or that the creditor has a right to sue the debtor, nor does it include legal conclusions that may be drawn from the facts. This Court has cited with approval the proposition that time starts to run against a creditor when it has “the minimum facts that are necessary to institute action” and that the running of prescription is not postponed until the creditor “becomes aware of the full extent of its legal rights”.

- [157] Rogers J explained that the finding of constitutional invalidity did not make former President Zuma’s acts unlawful, but merely provided confirmation thereof.

[90] The second premise is that, because a finding of constitutional invalidity has to be made or confirmed by this Court, the plaintiffs’ causes of action were not completed until such an order was made by this Court. In other words, the second premise is that until this Court made its order the President’s conduct had to be treated by a trial court as constitutional.

[91] The second premise, in my view, confuses what has to be decided with who has to decide it and when it has to be decided. If the President acted unconstitutionally in May 2011 and August 2014 in the manner alleged by the plaintiffs, his conduct was, objectively speaking, already unconstitutional then. If a court of competent jurisdiction later concludes that the President acted unconstitutionally, its conclusion is that he acted unconstitutionally when he performed the acts in question. The acts do not become unconstitutional only from the time the court makes such a conclusion. This is in accordance with the doctrine of objective constitutional invalidity.”

- [158] Similarly, the appellant’s acquittal is not what made his arrest and detention unlawful; it was his innocence that made it unlawful and his knowledge of his innocence is all that would be required for the debt of the respondent to be regarded as due within the meaning of section 3(2) of the Institution of Legal Proceedings Act.

Conclusion

[159] There can thus be no doubt that there are numerous conflicting judgments on when claims for unlawful arrest and detention arise and whether claimants can be said to have sufficient knowledge prior to their obtaining legal advice, which ultimately needs resolution by the Supreme Court of Appeal and the Constitutional Court. The weight of the more recent judgments have been to the effect that claims for unlawful arrest arise on the date of the arrest, if it was unlawful, and separate causes of action for unlawful detention arise on each day of the plaintiff's unlawful detention; they do not arise on the date the claimant is released from custody-nor do they only arise after the claimant has been acquitted or the charges against him have been withdrawn or the claimant has knowledge of his claims after consulting an attorney.

[160] Although an acquittal by the court or withdrawal of the charges carries with it the necessary inference that the plaintiff was wrongly arrested and detained, the reasoning adopted by Rogers J in ***Tembani*** makes it clear that no pronouncement by the court is required in this regard, either expressly or by implication in cases for wrongful arrest and detention.

[161] In the premises, the court *a quo*'s finding that the six-month period for his claim based on wrongful arrest commenced to run on the date of the appellant's arrest on 16 September 2016 was correct. The finding that the

appellant's claim for his unlawful detention only arose in November 2017 when he was released on bail, however, was not correct and he became obliged to issue the requisite section 3(1) notice and the six-month period commenced to run from the first day of his detention, each day of his detention after this constituting a distinct and separate cause of action.

[162] The required notice was not served until 15 May 2018. It was thus incumbent upon the appellant to seek condonation, which would have been competent as the appellant's claim had not prescribed as the summons was served on 27 June 2018, within three years of the appellant's arrest on 16 September 2016. It is regrettable that the appellant's counsel withdrew his application for condonation.

[163] Although I recognise that this full court is not bound by the single judge judgments in this and other divisions, there appears to be sufficient authority by the full bench in the Western Cape and by the Supreme Court of Appeal and Constitutional Court tying this courts hands in this instance.

[164] As a caveat, I feel uneasy by the approach taken by the courts in recent years cited in this judgment. The courts in the cases cited seem to assume access to lawyers and that all persons who know they have been wrongfully arrested and detained for a crime they know they did not commit, also know or should be deemed to know that they have a civil claim against the SAPS and/or the Minister of Police for unlawful arrest

and detention and need to ensure that they service section 3(1) notice within six months after their unlawful arrest and detention.

[165] In this country with extremely long periods of detention for awaiting trial prisoners in view of the serious backlog in cases able to come before the courts, the period of detention will in many, if not most cases, exceed six months. In such circumstances, it would appear to be unreasonable to expect a claimant to be aware of his claim and notify the Minister of Police of his intention to lodge a claim within six months, particularly where the claimant is without legal representation.

[166] Moreover, the fact of the claimant's incarceration should surely distinguish claims for unlawful arrest and detention from most other claims against organs of state where they are obliged to give such state entity notice of their claim within a period of six months. Incarcerated persons must in almost all cases be at a severe disadvantage in having their claims prosecuted timeously and in providing notice of their claims whilst awaiting trial and having fewer privileges than convicted prisoners. Like the plaintiff in **Kutoane**, their primary focus will be on securing their release from prison.

[167] In saying this I am mindful of the warning given my Zondo J (as he then was) in **Mtokonya** and in **Kutoane** that to hold otherwise would mean that claims would never prescribe until the claimant had sought legal advice

and representation. I am not sure what the answer is to this vexed question but am equally unsure that the approach taken ensures justice to the potential litigants; *a fortiori* in unlawful arrest and detention claims where the same approach is taken to the service of a section 3(1) notice and extremely strict requirements are imposed upon the claimants in seeking condonation. Indeed, the approach taken in ***Kutoane*** appears to be that unless the claimant can show that he was prevented from consulting an attorney or that his attempts to serve the required notice has failed, a claimant who professes his innocence will not be able to demonstrate good cause for the purposes of his condonation application.

[168] I have read the judgment of my brother Wilson J. I agree with him that my conclusion that the debt fell due when the appellant was arrested does not, in itself, dispose of the appeal. I would allow the appeal for the reasons he gives, while nevertheless expressing a final view on the issues I have decided. I agree with the order Wilson J makes.



pp SM WENTZEL

Acting Judge of the High Court

WILSON J (with whom MFENYANA J agrees):

[169] I have had the benefit of Wentzel AJ's comprehensive and closely-reasoned judgment. I agree with Wentzel AJ insofar as she concludes that (a) the appellant was under no duty to take steps to ensure that the notice given under section 3 of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 ("the Legal Proceedings Act") actually came to the respondent's attention, provided that the appellant had given notice in a manner the statute prescribes, and (b) that the effect of the appellant's failure to file a replication is that the allegations in the respondent's plea are deemed to be denied.

[170] I share my sister's misgivings about her conclusion that the debt the appellant claims in this case fell due when he was arrested. Had it been necessary for me to engage with that conclusion, my inclination would have been to depart from it. It seems to me that the "common sense" approach taken by Foxcroft J in *Els v Minister of Law and Order* 1993 (1) SA 12 (C) at p 17 – that "accused persons in criminal cases against whom prosecutions had commenced should not be required to commence civil litigation before the conclusion of the criminal proceedings" – should apply to claims for wrongful arrest, at least where the accused is held without bail between their arrest and the termination of their prosecution. I am not convinced by the reasons Eksteen J gives, in *Thompson v Minister of Police* 1971 (1) SA 371 (E), for drawing a distinction between

claims for malicious arrest and claims arising from arrests that are merely unlawful. While I agree with Wentzel AJ that the more recent Constitutional Court and Supreme Court of Appeal decisions indicate a direction of travel consistent with such a distinction, I do not think any of them binds us to reach the conclusion that the debt the appellant claims in this case fell due on the date of his arrest.

[171] Be that as it may, given what I regard to be three extraordinary features of this case, I do not think it is necessary to reach the issue of when the debt the appellant claims fell due. I shall, accordingly, assume, without deciding, that Wentzel AJ's conclusions on that issue are correct.

[172] Even if it is assumed that the debt fell due when the appellant was arrested, this appeal should plainly succeed. I reach this conclusion in light of the following three facts which were, or must be, common cause on the record, and which Wentzel AJ quite correctly accepts in her judgment. First, the respondent had no defence to the merits of the claim before the court below, and in fact conceded those merits. Second, the court below would have granted the application for condonation placed before it, had the application not been withdrawn. Third, the court below apparently felt constrained to accept the withdrawal of the application for condonation.

[173] The starting point, it seems to me, is that the court below was under no obligation to accept the decision to withdraw the application for

condonation. Rule 41 of the rules of this court states that, after set-down, an application may be withdrawn only with the court's leave or with the consent of the parties to it. In deciding whether to grant such leave, the court exercises a discretion (see **Karoo Meat Exchange Ltd v Mtwazi** 1967 (3) SA 356 (C) at 359F-G). A court faced with the withdrawal of an application set down before it must accordingly appreciate that the discretion exists, and exercise it judicially. I do not think that the court below did either of these things.

[174] There is nothing on the record to suggest that the respondent consented to the withdrawal – although I have no doubt that he would have consented had he been asked. However, he was not asked, and he did not consent. Accordingly, the application could only have been withdrawn with the leave of the court below. It is clear from the record that the court below gave no consideration to whether counsel ought to be permitted to withdraw the condonation application. Counsel made no application to withdraw it. He abandoned it from the bar after a short adjournment to take instructions. The court below, it appears, simply accepted that abandonment.

[175] This was not the correct approach. In my view, it was quite troubling, given that there was no defence on the merits of the appellant's claim, and the court recorded that it would have granted the condonation application had it not been abandoned. I accept that it is "not ordinarily the function of the court to force a person to institute or proceed with an action against his or

her will or to investigate the reasons for abandoning or wishing to abandon one” (**Levy v Levy** 1991 (3) SA 614 (A) at 620B), but, as the decision in **Levy** records, there are exceptions to this rule – for example in cases where the withdrawal amounts to an abuse of process.

[176] This case constitutes another clear exception. By permitting the withdrawal of the condonation application, the court below deprived itself of the power to grant an uncontested claim. That result was clearly unjust, and it shut the doors of the court to the appellant for no reason of substance. It would have been different had there been no condonation application at all. But in this case there was such an application, which the court allowed to be withdrawn. This led the court to dismiss an uncontested claim for wrongful arrest and detention. There was no justice in that result.

[177] I think it follows from these facts that, had the court below recognised and exercised the discretion afforded to it by rule 41 (which is no more than a codification of the common law), it would have exercised its discretion to refuse leave to withdraw the condonation application.

[178] The court below appears to have eschewed that approach because of another misconception. It is clear from the record that the court took the view that the condonation application ought not to have been enrolled at the outset of the trial, but should instead have been enrolled in the trial interlocutory court. I accept that this is the general practice, but there is

nothing in the practice directions of this court (which were in any event not binding on the court below) or the rules of court, or in the law more generally, that prevented the court below from determining the condonation application as a preliminary issue at the outset of the trial. It appears from the record that the court below did not consider that this path was reasonably open to it. That was a mistake.

[179] It follows that the court below's decision to permit the withdrawal of the appellant's condonation application is vitiated by its failure to appreciate that it was not obliged to do so, and by its erroneous assumption that the application ought not to have been enrolled at the outset of the trial. We are, I think, at large to interfere with that decision, and to consider and determine the condonation application the court below would have granted had it considered itself at large to do so.

[180] Assuming that it was required, it is inarguable that condonation should have been granted. There is good cause to overlook the delay. The explanation for the delay is that the appellant was either incarcerated or sourcing legal representation for the whole of the period of the delay. Once representation was secured, the appellant's representatives acted promptly to give the relevant notice on his behalf. The appellant's prospects of success in the main action are overwhelming, since the merits of his claim were promptly conceded at the outset of trial. The claim had not prescribed. The respondent identified no prejudice arising from late

receipt of the notice – nor could there be any such prejudice, since the merits of the claim were conceded.

[181] Condonation having been granted, there is no defence to the claim, which should obviously succeed. I need not consider the issue of whether an organ of state is entitled, in principle, to rely on the failure to apply for condonation under section 3 (4) of the Legal Proceedings Act in circumstances where the claim is conceded, but I am constrained to observe that the exercise of such an entitlement, if it exists, would be abusive. In the proceedings below, the court described itself as “flabbergasted” that the respondent took the point at all. I share that consternation.

[182] In any event, the purpose of the Legal Proceedings Act is to permit the State to keep track of its contingent liability, and to ensure that it has the time it needs to arrange to defend the claims it considers should be defended (see, in this respect, ***Johannesburg Water (Soc) Ltd v Dark Fibre Africa (Pty) Ltd*** 2025 (5) SA 452 (GJ), paragraph 11). The erection of gratuitous administrative barriers to a claim that everyone accepts must succeed is not a purpose that can reasonably be ascribed to the Act.

[183] The appeal must be upheld. We asked counsel to confer and agree on the appropriate quantum of damages in the event that we were inclined to uphold the appeal. No agreement was reached. Despite being invited to

do so, neither party's counsel addressed us in any detail on the quantum of damages that should be allowed, or on the appropriateness of a remittal to determine only that question.

[184] Given that the appellant seeks only general damages, we are in as good a position to determine his loss as any court would be on remittal. Accordingly, it falls to us to determine the appropriate quantum. Having been unlawfully arrested, the appellant was detained for 14 months. He claimed for the whole of that period, and, subject to the point taken on the failure to give notice under the Legal Proceedings Act, the whole of the claim was conceded. It is accordingly unnecessary for us to revisit the question, which caused such difficulty in *De Klerk v Minister of Police* 2021 (4) SA 585 (CC), of whether any preliminary refusal of bail rendered the appellant's detention lawful on the facts of this case, whether because they constituted intervening acts or otherwise. It was not suggested that there were any such refusals. Nor was it suggested that the arrest did not, factually, cause the full period of detention that followed it.

[185] In *De Klerk*, the Constitutional Court awarded R300 000 for seven days' detention. We must take that as our starting point. This works out at just over R40 000 per day. There is nothing said in *De Klerk* about the conditions of the plaintiff's detention, but in this case, the appellant did give evidence of the sometimes appalling conditions in which he was detained. Ultimately, though, on any approach to the quantification of damages for

14 months' detention, the R1.5 million the appellant claims is well within the guideline created by the decision in *De Klerk*. That is the amount I would award.

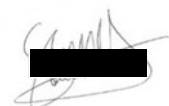
Order

[186] Accordingly, we make the following order –

[186.1] The appeal is upheld with costs, including the costs of counsel, which may be taxed on scale “B”.

[186.2] The order of the court below is set aside, and substituted with the following order –

- “1. Leave to withdraw the condonation application is refused.
2. Condonation for the late delivery of the notice required under section 3 (1) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 is granted.
3. The defendant will pay the plaintiff the sum of R1 500 000 plus interest at the prescribed rate to run from 27 June 2018 to the date on which the judgment is satisfied.
4. The defendant will pay the plaintiff's costs of suit.”



S D J WILSON
Judge of the High Court

Date of hearing: 23 July 2025

Date of judgment: 24 October 2025

This judgment was handed down electronically by circulation to the parties' representatives by email and by uploading the judgment onto CaseLines. The date of delivery of the judgment is deemed to be 24 October 2025.

Appearances:

For the Appellant:

Counsel: D Moodliyar

Instructed by: Leon JJ Van Rensburg

For the Respondent:

Counsel: R E Magongwa

Instructed by: Mr B du Preez, State Attorney, Johannesburg