IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case No: **A320/2024**

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: NO	
(2) OF INTEREST TO OTHER JUDGES: NO	
(3) REVISED	
2026-05-29 DATE	[redacted] SIGNATURE

In the matter between:

HOSEA MADIME NKOGATSE Appellant

and

THE MINISTER OF POLICE First Respondent

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS Second Respondent

This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for handing down is deemed to be 29 May 2026.

JUDGMENT

VAN DER MERWE AJ

Introduction

[1] This is an appeal against the judgment and order of Her Ladyship Collis J that was granted on 2 June 2023, leave to cross-appeal having been granted on 21 November 2023. The leave to appeal was withdrawn.

[2] The Appellant, Hosea Madime Nkogatse [Nkogatse] instituted an action against the First Respondent, The Minister of Police [the Minister] for unlawful arrest and detention, and against the Second Respondent, The National Director of Public Prosecutions [the NDPP] for malicious prosecution. The action against the Minister was withdrawn, the matter proceeded solely against the NDPP. Judgment was granted in favour of Nkogatse and he was awarded R500,000.00 in respect of general damages.

Background of the matter

[3] Nkogatse pleaded that he was unlawfully arrested and detained on or about 19 June 2007 in Tembisa. Nkogatse appeared before the Tembisa Magistrates' Court and was charged with murder, kidnapping, and robbery with aggravating circumstances. Nkogatse was remanded into custody and he was granted bail on his next Court appearance. The case was subsequently transferred to the Regional Court in Alexandra.

[4] Nkogatse was on bail for the duration of the trial. Nkogatse was found guilty of robbery and sentenced to 15 years imprisonment on 12 May 2011. His bail was immediately withdrawn, and he was incarcerated.

[5] Nkogatse's conviction and sentence were set aside by the High Court on review on 27 March 2015 and the case was remitted to the Regional Court for trial *de novo*. The Court declared the trial a nullity.

[6] Nkogatse was remanded in custody and was only released on 18 May 2015. On the same day, Nkogatse was arrested again on the same charges, except that a charge of defeating the ends of justice was added. Nkogatse appeared before the Court for his first appearance on 19 May 2015. Nkogatse was prosecuted on the same charges, plus the additional charge for defeating the ends of justice.

[7] A prolonged trial thereafter ensued. On 29 October 2015, the Appellant was acquitted and discharged in terms of section 174 of the Criminal Procedure Act [the Act], following which he was released from custody on the same day. The amended particulars of claim referred to one prosecution that commenced on 19 June 2007 and concluded on 29 October 2015. The charges of murder, kidnapping and robbery with aggravating circumstances in both prosecutions of Nkogatse were based on the same docket and evidence, save for the additional charge of defeating the ends of justice introduced in the second prosecution. No further investigation was undertaken to justify this addition. Nkogatse was rearrested on the day of his discharge from the first prosecution, and the second prosecution commenced the following day.

[8] In this judgment, the prosecution commencing on 21 June 2007 and ending on 18 May 2015 will be referred to as the first prosecution, while the prosecution commencing on 19 May 2015 and ending on 19 October 2015 will be referred to as the second prosecution.

Argument on behalf of Nkogatse

[9] Nkogatse contends that the learned Judge erred in finding that the first and second prosecutions were two separate prosecutions, and ought to have found that the prosecutions were one prosecution. Consequently, the Court *a quo* only

awarded the Nkogatse damages in respect of the second prosecution, which the Court found to be malicious.

[10] It was argued that the Court *a quo* erred in failing to make any finding in respect of Nkogatse's detention for the period 27 March 2015, when the Review Court set aside his conviction and sentence, to 18 May 2015, when he was reportedly released from custody and immediately rearrested on the same day. It is further submitted that this continued detention was unlawful, there being no lawful basis for his continued incarceration after 27 March 2015. Nkogatse contended that his detention arose from the first prosecution, and that the Court ought to have awarded damages in respect of this period as well.

[11] Nkogatse relied on the matter of *Thompson and Another v The Minister of Police*[1] [the Thompson matter], where it was decided that in claims for malicious arrest and detention and prosecution, the entire process from arrest to final acquittal should be regarded as a single continuous event. Accordingly, a cause of action for personal injury arises only once the criminal proceedings have been finally determined in the accused's favour, whether by discharge, acquittal at trial, or discharge on a successful appeal.

[12] It was contended during argument, that the issue as to whether two distinct prosecutions existed can be resolved by enquiring whether Nkogatse would have been entitled to successfully raise a plea of double jeopardy upon being charged *de novo* on 19 May 2015. It was argued that the answer to this question is found in Sections 313 and 324 of the Act, which provides as follows:

"313. Institution of proceedings de novo when conviction is set

[1] 1971 (1) SA 371E

aside on appeal of review

The provisions of Section 324 shall mutatis mutandis apply with reference to any conviction and sentence of a lower court that are set aside on appeal or review on any ground referred to in that section."

"324. Institution of proceedings de novo when conviction set aside on appeal

Whenever a conviction and sentence are set aside by the Court of Appeal on the ground –

(a) that the court which convicted the accused was not competent to do so; or
(b) that the indictment on which the accused was convicted was invalid or defective in any respect; or
(c) that there has been any other technical irregularity or defect in the procedure, proceedings in respect of the same offence to which the conviction and sentence referred may again be instituted either on the original charge, suitably amended where necessary, or upon any other charge as if the accused had not previously been arraigned, tried and convicted: Provided that no judge or assessor before the original trial took place shall take part in such proceedings."

[13] Section 313 of the Act provides that the provisions of section 324 apply *mutatis mutandis* where a conviction and sentence are set aside on appeal or review on any of the grounds contemplated in section 324. Section 324, in turn, authorises the reinstitution of proceedings where a conviction has been set aside due to, *inter alia*, a technical irregularity or defect in the proceedings, and permits such proceedings to commence afresh as though the accused had not previously been arraigned, tried, or convicted.

[14] In the present matter, Nkogatse's conviction and sentence were set aside on review on account of a serious irregularity, namely that he had been

represented during the trial by an unqualified legal representative. The matter was thereafter remitted to the Regional Court for a trial *de novo* before a different presiding officer in accordance with the provisions of sections 313 and 324 of the Act.

[15] However, the fact that the subsequent proceedings were instituted *de novo* pursuant to sections 313 and 324 does not, in the circumstances of this matter, detract from the continuous nature of the prosecution. The statutory mechanism permitting a retrial following the setting aside of a conviction on review does not necessarily render the subsequent proceedings separate and unrelated to the original prosecution. It was argued that on the facts of the present matter, Nkogatse was prosecuted on substantially the same charges arising from the same factual matrix, was rearrested immediately upon his release, and remained subject to continuous incarceration until his ultimate discharge in terms of section 174 of the Act on 29 October 2015.

[16] Nkogatse also appeals against the order awarding costs, on the basis of the employment of only one counsel in favour of the Plaintiff, notwithstanding the complexity of the merits, the voluminous documentary bundles, the intricate legal issues raised, and the number of authorities traversed. It is trite that the question of costs lies within the discretion of the Court, which discretion must be exercised judicially upon a consideration of all relevant facts, with fairness to both parties being the overriding consideration.

[17] It was submitted that the relevant consideration for the award of two counsel, is the following:

17.1 The papers in the present case are bulky;

17.2 The issues are complicated, including the special pleas raised,

the legal argument prepared and the number of legal authorities relied on by both parties;

17.3 The NDPP applied for absolution from the instance at the end of Nkogatse's case and comprehensive heads of argument had to be prepared overnight, including preparation for the continuation of the trial.

Argument on behalf of the NDPP

[18] On behalf of the NDPP, it was contended that the prosecutions of 21 June 2007 and 19 May 2015 constituted two separate and distinct proceedings, the latter having been a trial *de novo*. It was accordingly submitted that the Court *a quo* correctly confined its consideration to a single prosecution. It was further argued that the second prosecution was wholly independent of the first, as it was conducted before a different presiding officer and constituted a fresh and discrete set of proceedings.

[19] It was submitted on behalf of the NDPP that the authority relied on by Nkogatse in the Thompson matter did not find application in the present case. The NDPP contends that, notwithstanding the order of the Appeal Court directing a trial *de novo* before a different presiding officer, the proceedings did not constitute a continuation of the original prosecution. It is submitted that the first prosecution had been finally determined, and that the subsequent proceedings commenced afresh *de novo*.

[20] In relation to costs, it was submitted on behalf of the NDPP that the matter before the Court was not of such complexity as to justify the costs of two counsel.

Reasons for decision

The prosecution

[21] The Court *a quo* erred in concluding, firstly, that there were two distinct prosecutions and, secondly, that only the second prosecution could properly find a claim for malicious prosecution.

[22] Neither the facts nor the law supports these conclusions. In the Thompson matter, it was decided that claims for arrest and detention where a malicious prosecution follows the arrest, the entire process from the initial arrest through to final acquittal constitutes a single continuous sequence. Accordingly, a cause of action for personal injury does not arise until the criminal proceedings have been conclusively resolved in the accused's favour, whether by discharge, or by acquittal at trial or by discharge pursuant to a successful appeal against conviction.[2]

[23] The fact that the second trial proceeded *de novo* is of no moment. The Court accorded this consideration excessive significance in its determination that there were two prosecutions. Properly viewed, the events reflect a single, ongoing prosecutorial continuum rather than two separate and distinct proceedings. Nkogatse's cause of action only arose on 29 October 2015. The court therefore erred in not following the principle, as set out in the Thompson matter.

[24] The second prosecution was instituted on substantially the same charges as the first prosecution, save for the addition of a charge of defeating the ends

[2] Thompson and Another v Minister of Police and Another 1971 (1) SA 371 (E) at par 375A.

of justice, and proceeded on materially the same factual matrix and evidentiary foundation. Significantly, the prosecutor testified that he considered there to be a *prima facie* case against Nkogatse, precisely because he was aware that the first prosecution had already culminated in a conviction and sentence. On his own version, the prior conviction formed a material basis upon which he considered the second prosecution to be justified and lawful.

Malice

[25] Having found that Nkogatse had discharged the onus of proving the requirements for malicious prosecution, including the absence of reasonable and probable cause and the existence of malice, the Court ought to have concluded that such findings extended to the entirety of the prosecutorial process, inclusive of the first and second prosecution.

[26] Moreover, insofar as the prosecutor justified the second prosecution by reliance upon the previous conviction, the subsequent setting aside of that conviction on review deprived such reliance of any lawful foundation. In the absence of new inculpatory evidence or a materially altered factual basis, the continuation of the prosecution on the same evidence and allegations could not reasonably be divorced from the defects that tainted the original proceedings. The Court *a quo* therefore erred in failing to find that the first prosecution likewise formed part of the malicious prosecution instituted and pursued against Nkogatse.

[27] The quantum of damages awarded by the Court *a quo* is flawed, as it failed to properly have regard to the full period of Nkogatse's deprivation of liberty from 21 June 2007 to 29 October 2015. Not only the second prosecution, but

the entire period ought to have been considered in the assessment of general damages, with due consideration of the cumulative effect of the prolonged detention and prosecution when determining a fair and just award.

[28] The Court *a quo* also erred in not considering the provisions of Section 313 and 324 of the Act in that Nkogatse could have raised the plea for double jeopardy when he was charged *de novo* on 19 May 2015.

[29] The ambit of section 324 of the Act is confined to circumstances in which, by reason of procedural or technical defects, no valid determination could properly have been made due to an irregularity. In the present matter, the Review Court set aside Nkogatse's conviction on the basis that he had been represented at trial by an unqualified legal representative, which the Court held constituted a material and serious irregularity in the proceedings.

[30] The Court *a quo* erred in failing to find that the scope of section 324 is confined to circumstances where, by reason of procedural or technical irregularities, a valid adjudication on the merits could not properly be reached. The concept of an "irregularity" in this context was described as one of such a fundamental nature that it vitiates the proceedings, with the result that the conviction or determination is set aside on appeal or review because the defect precludes a proper and valid consideration of the merits. In such instances, the irregularity is of such gravity that it undermines the integrity of the trial proceedings, with the consequence that the original determination cannot stand.[3]

[31] The statutory authority to institute a retrial under sections 324 and 332 of the Act is premised upon the original proceedings having been vitiated by a

[3] S v Naidoo 1962 (4) SA 348A at 352.

material irregularity, with the result that the earlier conviction or acquittal is set aside and cannot stand as a final and valid adjudication of the charge.[4]

Costs

[32] In the Court *a quo*, the parties delivered closing arguments at the conclusion of the trial. Nkogatse requested a punitive order for costs, the issue of the costs of two counsel was not addressed in the written submissions of either party at that stage, nor was it specifically raised or ventilated during argument before the Court *a quo*. The Court granted costs in favour of Nkogatse, but found that a punitive costs order was not warranted. We find that the cost order made by the Court *a quo* was appropriate.

[33] In respect of the costs of the appeal, there is no reason why costs should not follow the result. Therefore, costs are to be awarded to Nkogatse.

The following order is made:

[34] The appeal is upheld.

[35] The order of the *court a quo* in respect of general damages, is set aside;

[36] The costs order of the court *a quo* is confirmed;

[37] The matter is remitted to the court *a quo* for reconsideration of the quantum of general damages;

[38] The NDPP is to pay the costs of the appeal, including costs of counsel on Scale B.

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[4] Director of Public Prosecutions, Transvaal v Mtsweni 2007 (2) SACR 217 (SCA) at 29.

[redacted]

J VAN DER MERWE
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION PRETORIA

I agree

[redacted]

S. POTTERILL
JUDGE OF THE HIGH COURT
GAUTENG DIVISION PRETORIA

I agree

[redacted]

N.G.M. MAZIBUKO
JUDGE OF THE HIGH COURT
GAUTENG DIVISION PRETORIA

CASE NO: A320/2024

HEARD ON: 25 February 2026

FOR THE APPELLANT: ADV. S. MBHALATI

ADV. M. MATEMOTSA

INSTRUCTED BY: Mokoena Attorneys

FOR THE RESPONDENT: ADV. S.F. SIBISI

INSTRUCTED BY: State Attorney, Pretoria

DATE OF JUDGMENT: 29 May 2026