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**REPUBLIC OF SOUTH AFRICA**



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

**Case No: A3051/2022**

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| (1) REPORTABLE: NO<br>(2) OF INTEREST TO OTHERS JUDGES: NO<br>(3) REVISED: NO |
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**29 NOVEMBER 2023**

DATE

SIGNATURE

In the matter between:

**MINISTER OF POLICE**

Appellant

and

**ISHMAEL SHIMANE MASIBI**

Respondent

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties /their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date for hand-down is deemed to be 29 November 2023

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## JUDGMENT

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### **BOTSI-THULARE AJ: (NOKO J CONCURRING)**

#### ***Introduction:***

[1] This is an appeal brought by the Minister of Police (appellant) against the whole judgment and order delivered by Magistrate Viana on 10 March 2022 at the Johannesburg Regional Court in favour of Ismael Shimane Masibi (the respondent). The learned Magistrate found that the arrest and detention of the respondent on 5 May 2012 to 12 October 2012 were unlawful.

#### ***Background Facts***

[2] The following facts are largely common cause or are not in dispute between the parties. In the early hours of 05 May 2012, respondent was arrested without a warrant by members of the police service (SAPS) on suspicion of business robbery and detained at Mondeor Police Station until his first appearance on 07 May 2012.

[3] On 11 May 2012 he attended an identification parade but was not pointed out by anyone at said parade. He remained in custody at Mondeor Police Station until his next appearance on 14 May 2012. The matter was postponed again, and the respondent was transferred to Johannesburg Central Prison until 12 October 2012 when the charges against him were withdrawn and he was released.

[4] The respondent instituted a delictual claim for unlawful arrest and detention against the appellant with summons being issued on 03 December 2012. The trial was

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heard on 03 November 2021 and 02 February 2022. Judgment was granted by the Magistrate on 10 March 2022.

[5] At trial, the appellant called one witness, Constable Sithole (Constable) who testified that she was the investigating officer assigned to investigate a charge of theft of a motor vehicle and a business robbery that occurred at McDonalds restaurant early in 2012. She attended the scene of crime along with Sergeant Rikhotso (Sergeant) to obtain further information and received statements from the staff. She was informed that the manager of McDonalds, Bheki Ndlebe (Manager) did not return to his shift after the robbery. The Constable and Sergeant then embarked on what is called “suspect raiding”. They went to the manager’s place of residence and arrested him. He pointed at another suspect and that pointing led to the arrests of other suspects with the respondent being the last person to be arrest on 5 May 2012.

[6] Although the Constable was at the scene when the respondent was arrested, along with several police officials, she was in the police van and did not personally effect the arrest. Instead, the Sergeant who effected the arrest. It is noteworthy that these other officials did not testify, as the version was that they had either retired, resigned or were sick. Though still a member of SAPS at the hearing of the trial, the Sergeant, for reasons unknown, did not testify. When asked why a warrant of arrest was not obtained as some time had passed between the robbery and the arrest of the respondent she replied that Captain Du Toit (Captain) was of the view that they had sufficient evidence to effect the arrest. It was the captain, a senior to both the Constable and Sergeant, who instructed the latter to arrest the respondent.

[7] Constable was not privy to the discussion between the Captain and Sergeant. In this regard, it was her evidence that Sergeant was following the Captain’s instructions regarding the arrest and attended to the detention of the respondent and the other arrestees. The respondent was detained at Mondeor Police Station.

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[8] Subsequent to the arrest, an identification parade was held on 11 May 2012. The Constable, who was the investigating officer was not present at the parade and was not aware of its outcome as the docket was with the captain. It is common cause that the respondent was not identified at the identification parade. During cross-examination the Constable was asked why she failed to bring to the court's attention the outcome of the parade, she stated, "I see no reason to explain to the court something I did not know". As investigating officer, it was her duty to bring the docket to court. When asked about the respondent's further detention for a further five months, she was of the view that the court must have had reason to remand the respondent for a further five months. She stated it was the court's responsibility to decide whether to keep the respondent in custody or release him.

[9] The respondent testified on his own behalf and said that he operates a taxi service, and on 01 April 2012, at around 20:00, he was called by Ramoba who requested transportation. Ramoba was no stranger to the respondent as he used to transport Ramoba's child to school. The respondent picked Ramoba and another person (Galela) at the agreed location He charged them a fee and the two men asked to be dropped off at the McDonald's and that is what he did.

[10] As he was about to depart, the respondent was again approached by Ramoba and Galela who required further transport to their respective homes. He charged them an agreed amount. It appears from the record that the respondent may have stayed a few minutes after dropping off Ramoba and Galela. When cross-examined on this, he explained he had insufficient space to turn and had to turn around to exit through the drive-through, and whilst on his way to the exit he encountered Ramoba and Galela again who asked him to return them to their respective homes.

[11] The Magistrate found no discrepancies between the respondent's warning statement and his evidence during examination in chief regarding the dropping off and picking up of Ramoba and Galela. In the court *a quo's* view, the respondent merely confirmed with more detail his version mentioned to the police in his warning

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statement, during examination in chief. The court found that the warning statement was terse, giving only a brief explanation of the events. That at court, the respondent had the opportunity to explain more fully what transpired at McDonald's.

### Court a quo's findings

[12] The court *a quo* rejected the Constable's evidence, finding that it was mostly inadmissible hearsay. Further, that there was no evidence directly or indirectly implicating the respondent in the robbery. Furthermore, there was no evidence showing that the respondent benefitted from the spoils of the robbery nor was there evidence to show that he was aware that Ramoba and Galela were involved in a robbery.

[13] In finding that the respondent's arrest and detention were unlawful the court considered the jurisdictional facts that must be present for an arrest without warrant in terms of (s 40 (1)(b) of the Criminal Procedure Act<sup>1</sup> (CPA), which provides that an arrest without a warrant is only permissible where a police officer has a reasonable suspicion that the person so arrested has committed an offence listed in Schedule 1. Once these jurisdictional facts are present, the discretion to arrest or not arises.<sup>2</sup> The court accepted the Constable's evidence that she did not carry out the arrest, but rather the Sergeant, in the presence of other police officials. This he did on the instructions of the Captain. Accordingly, the court found, it was the Captain who carried out the arrest and it was he, who must harbour the reasonable suspicion. Neither the Sergeant nor the Captain testified. Therefore, the Captain's true state of mind and what suspicion he harboured remained unknown.

[14] Even the Captain harboured a suspicion based on the information about the vehicle the respondent was driving (a green Honda), it must be shown that such suspicion was reasonable. Relying on *Barnard v Minister of Police and Another*,<sup>3</sup> the

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<sup>1</sup> 51 of 1977.

<sup>2</sup> *Duncan v Minister of Law-and-Order* 1986 (2) SA 805 (A) at 818AG-H ("*Duncan*").

<sup>3</sup> 2019 (2) SACR 31 (ECG).

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court found that the Captain did not investigate exculpatory statements offered by the suspect (the respondent) before he formed a reasonable suspicion for purposes of a lawful arrest. The evidence was that at the time of arrest, he was asked if he was Shakes, he answered in the affirmative and then he was told he is under arrest for business robbery. He explained that he knew nothing about a robbery. All information the police obtained, information the court assumed was also available to the Captain was received from Ramoba. The statement by Ramoba merely states the respondent was contacted for transportation, it does not implicate him in a robbery. There was no evidence on how the Captain processed the information. The court found that the respondent was not questioned, and his exculpatory explanation was not investigated, even in a cursory manner, he was simply arrested. In these circumstances, the court *a quo* held it cannot be said that the Captain and Sergeant had sufficient information to form a reasonable suspicion. Accordingly, the appellant had failed to show the jurisdictional facts that should be present to effect a lawful arrest of the respondent without a warrant.

[15] On the respondent's detention for a period of 174 days, the court *a quo* had no doubt on the liability of the appellant for the unlawful detention from 05 May 2012 until 14 May 2012, a period of days. The court found the appellant liable for the further detention of the respondent from 14 May 2012 until 12 October 2012. Relying on *De Klerk v Minister of Police*<sup>4</sup> where the majority of the Constitutional Court held that the Magistrate concerned should not be exclusively liable for the court-ordered detention after the unlawful arrest, given the original delict by the arresting officer and a subjective foresight of the subsequent detention and the harm associated therewith, the court *a quo* held the defendant liable for this period. This was compounded by the fact that the Constable, despite being the investigating officer, did not acquaint herself with the contents of the docket, nor did she bring it to the attention of the court the outcome of the identification parade. This failure, so found the court, led to the respondent appearing another 15 times and remaining in custody for nearly 6 months. The court noted the lacklustre approach to the matter by members of the SAPS and

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<sup>4</sup> 2021 (4) SA 585 (CC).

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their failure to bring essential information to the attention of the prosecutor or court. That the matter was simply left in the court's hands, whilst the appellant's employees were aware the matter would be mechanically remanded.

[16] Having considered the principles enunciated in *Seymour*<sup>5</sup> on the trial judge's wide discretion to award what it considers to be fair and adequate compensation, the fact that he was awoken at night whilst at home with this family, pointed with a firearm and arrested in their presence, the conditions of the cell he was incarcerated in, and embarking on a comparative study of similar case law, the court awarded the plaintiff R 400 000.00 plus interest at 15.5% from 11 January 2013 being the date of issue of the demand.

#### Grounds for appeal

[17] The appellant alleges the court *a quo* misdirected itself in several aspects and raises these grounds of appeal:

17.1 That the Magistrate misdirected himself or made an error in law when he found that the evidence of the Constable was inadmissible hearsay – that no evidence was shown that the respondent was either directly or indirectly implicated in the robbery that occurred at McDonald's.

17.2 That he misdirected himself or made an error in law when he found that the arrest was effected on the command of the Captain, though the physical part of the arrest was carried out by the Sergeant. Accordingly, that it was the Captain who carried out the arrest.

17.3 That he misdirected himself by finding that appellant failed to show the jurisdictional facts that should be present to effect a lawful arrest.

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<sup>5</sup> *Minister of Safety and Security v Seymour* 2006 (6) SA 320 (SCA).

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17.4 That he misdirected himself when he granted the respondent the amount of R 400 000.00 with interest from 11 January 2013 the date the letter of demand was issued.

17.5 That he misdirected himself when he awarded interest at the rate of 15.5% when the current rate is 7.5%.

### ***Issues for determination***

[18] The issues to be determined in this matter are the following:

18.1 Whether the evidence led by the Constable before the court *a quo* regarding the unlawful arrest and detention was hearsay?

18.2 Whether the jurisdictional requirements of a lawful arrest and detention without warrant were met?

18.3 Whether the claim amount granted with interest is payable as at the date of letter of demand or at the date of the judgement?

18.4 Whether the awarded interest is at the prescribed rate as gazette?

### ***Law applicable to the facts***

[19] It is generally accepted that a court of appeal would not be inclined to reject the factual findings of the trial court in the absence of demonstrable and material misdirection by the trial court. The findings of fact by the trial court are presumed to be correct and would only be disregarded if the recorded evidence showed them to be clearly wrong.<sup>6</sup> I have not been able to find any demonstrable errors on the part of the trial court to justify interference with its credibility findings.

[20] It is trite that an appellate court will not lightly interfere with the decision of a lower court exercising a discretion when determining an issue unless the discretion

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<sup>6</sup> *S v Livanje* 2020 (2) SACR 451 (SCA) at para18.



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was not exercised judicially and properly. Put differently, when a lower court exercises a discretion in the true sense, it would ordinarily be inappropriate for an appellate court to interfere unless it is satisfied that this discretion was not exercised judicially, or that it had been influenced by wrong principles or a misdirection of the facts. To achieve this, the appellate court must investigate whether the discretion was in the true sense or in the loose sense.<sup>7</sup>

[21] In *Trencon Construction v Industrial Development Corporation of South Africa Limited and Another*<sup>8</sup> the court, dealing with the issue of the court exercising a discretion stated the following:

*“[85] A discretion in the true sense is found where the lower court has a wide range of equally permissible options available to it. This type of discretion has been found by this Court in many instances, including matters of costs, damages and in the award of a remedy in terms of section 35 of their Restitution of Land Rights Act. It is “true” in that the lower court has an election of which option it will apply and any option can never be said to be wrong as each is entirely permissible.*

*[86] In contrast, where a court has a discretion in the loose sense, it does not necessarily have a choice between equally permissible options. Instead, as described in Knox, a discretion in the loose sense-*

*‘means no more than that the court is entitled to have regard to a number of disparate and incommensurable features in coming to a decision.’*

*[87] This court has, on many occasions, accepted and applied the principles enunciated in Knox and Media Workers Association. An appellate court must heed the standard of interference applicable to either of the discretions. In the instance of a discretion in the loose sense, an appellate court is equally capable of determining that matter in the same manner as the court of first instance and can therefore substitute its own exercise of the discretion without first having to find that the court of first instance did not act judicially. However, even where a discretion in the loose sense is conferred on a lower court, an appellate court’s power to interfere may be*

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<sup>7</sup> *S v Francis* 1991 (1) SACR 198 (A) at para 204c-e.

<sup>8</sup> 2015 (5) SA 245 (CC).

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*curtailed by broader policy considerations. Therefore, whenever an appellate court interferes with a discretion in the loose sense, it must be guarded.”*

[22] An appellate court’s discretion is therefore restricted.

### ***Application***

#### **First Ground**

[23] The appellant takes issue with the finding by the court *a quo* that the evidence of the Constable was inadmissible hearsay evidence. In its heads of argument, the appellant goes into detail on the involvement of the Constable as investigating officer, in the investigation of the robbery and the eventual apprehension of the alleged suspects. Essentially, the appellant seeks to show that Constable had deep and intimate knowledge of the matter and all the arrests. It is conceded that though she did not effect the physical arrest of the respondent, she was present on the day and said arrest was done after the investigation was done. Accordingly, it is submitted her evidence cannot be classified as inadmissible hearsay as she was always involved in the arrest of the respondent on the reasonable suspicion that he has committed the offence.

[24] The respondent contends the court *a quo* made no misdirection regarding the Constable’s Sithole evidence. She was not the arresting officer as she was not physically present when the arrest was effected and therefore could not testify regarding the jurisdictional requirements set out in s 40 (1)(b) of the CPA.

[25] Hearsay evidence is regulated by s 3 of the Law of Evidence Amendment Act.<sup>9</sup> It provides:

*“3. Hearsay evidence*

*(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless-*

*(a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;*

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<sup>9</sup> 45 of 1988.

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*(b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or*

*(c) the court, having regard to-*

*(i) the nature of the proceedings;*

*(ii) the nature of the evidence;*

*(iii) the purpose for which the evidence is tendered;*

*(iv) the probative value of the evidence;*

*(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;*

*(vi) any prejudice to a party which the admission of such evidence might entail; and*

*(vii) any other factor which should in the opinion of the court be taken into account,*

*is of the opinion that such evidence should be admitted in the interests of justice.*

*(2) The provisions of subsection (1) shall not render admissible any evidence which is inadmissible on any ground other than that such evidence is hearsay evidence.*

*(3) Hearsay evidence may be provisionally admitted in terms of subsection (1)(b) if the court is informed that the person upon whose credibility the probative value of such evidence depends, will himself testify in such proceedings: Provided that if such person does not later testify in such proceedings, the hearsay evidence shall be left out of account unless the hearsay evidence is admitted in terms of paragraph (a) of subsection (1) or is admitted by the court in terms of paragraph (c) of that subsection.*

*(4) For the purposes of this section-*

*“**hearsay evidence**” means evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence;*

*“**party**” means the accused or party against whom hearsay evidence is to be adduced, including the prosecution.”*

### Second and Third Grounds

[26] *Duncan*<sup>10</sup> is the leading case on the jurisdictional facts that must be present for an arrest without warrant to be lawful. The onus of proof for lawful arrest rests with the appellant, who should, on a balance of probabilities, show and satisfy the court that the peace officer reasonably suspected that the respondent committed an offence referred to in Schedule 1. Section 40(1)(b) does not necessarily require direct evidence but rather the arresting officer should hold a suspicion which should be formed on reasonable grounds. Accordingly, the circumstances giving rise to the suspicion must be such as would ordinarily move a reasonable man to form the suspicion that the arrestee has committed a Schedule 1 offence.

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<sup>10</sup> *Duncan* above n 3.

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[27] Reaffirming *Duncan*, the court in *Mabona and Another v Minister of Law and Order*<sup>11</sup> stated the following on reasonable suspicion:

*“There can be no doubt that he was given information which caused him subjectively to suspect the plaintiffs of involvement in the robbery. The question is whether his suspicion was reasonable. The test of whether a suspicion is reasonably entertained within the meaning of s 40(1)(b) is objective (S v Nel and Another 1980 (4) SA 28 (E) at 33H). Would a reasonable man in the second defendant's position and possessed of the same information have considered that there were good and sufficient grounds for suspecting that the plaintiffs were guilty of conspiracy to commit robbery or possession of stolen property knowing it to have been stolen? It seems to me that in evaluating his information a reasonable man would bear in mind that the section authorises drastic police action. It authorises an arrest on the strength of a suspicion and without the need to swear out a warrant, i.e. something which otherwise would be an invasion of private rights and personal liberty. The reasonable man will therefore analyse and assess the quality of the information at his disposal critically, and he will not accept it lightly or without checking it where it can be checked. It is only after an examination of this kind that he will allow himself to entertain a suspicion which will justify an arrest. This is not to say that the information at his disposal must be of sufficiently high quality and cogency to engender in him a conviction that the suspect is in fact guilty. The section requires suspicion but not certainty”.*

[28] To ascertain whether a suspicion that a Schedule 1 offence has been committed is “reasonable”, there must obviously be an investigation into the essentials relevant to each particular offence.<sup>12</sup>

[29] In *Law of Damages*<sup>13</sup>, the authors state that in wrongful or malicious arrest cases, the following factors play a role in the assessment of damages:

*“[The circumstances under which the deprivation of liberty took place; the presence or absence of “improper motive” or “malice” on the part of the defendant;*

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<sup>11</sup> 1988 (2) SA 654 (SE) at 658D-H.

<sup>12</sup> *Ramakulukusha v Commander, Venda National Force* 1989 (2) SA 813 (V) at 836G – 837B.

<sup>13</sup> Potgieter, Steynberg and Floyd Visser & Potgieter *Law of Damages* 3 ed (Juta, 2012).

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*the harsh conduct of the defendants; the duration and nature of the deprivation of liberty; the status, standing, age, health and disability of the plaintiff; the extent of the publicity given to the deprivation of liberty: the presence or absence of an apology or satisfactory explanation of the events by the defendants; awards in comparable cases; the fact that in addition to physical freedom, other personality interests such as honour and good name as well as constitutionality protected fundamental rights have been infringed; the high value of the right to physical liberty; the effect of inflation; the fact that the plaintiff contributed to his or her misfortune; the effect that the award may have on the public purse; and according to some, the view that actio iniuriarum also has a punitive function".<sup>14</sup>*

[30] On the authority of *Bhika v Minister of Justice and Another*<sup>15</sup> it is abundantly clear that even though the physical act of arrest may have been carried out by subordinates, the officer ordering the arrest is to be considered the arrestor.

[31] It is uncontested that the Constable did not effect the physical arrest of the plaintiff, rather the Sergeant arrested on the orders of the Captain. This, the respondent contends in his heads of argument, is on its own unlawful. Neither the Sergeant nor the Captain testified to their suspicion and the reasonableness thereof.

#### Fourth and Fifth Grounds

[32] This is the ground most seriously contested by the appellant and such contestations have some merit.

[33] Judgment was granted in favour of the respondent for the amount of R 400 000.00, including interest from 11 January 2013, when the letter of demand was issued. The defendant complains that the interest awarded was based on the rate of 15.5% and not the prevailing rate, 7.5% for illiquid debt at the time of judgment. In the

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<sup>14</sup> Id at 15.3.9.

<sup>15</sup> 1965 (4) SA 399 (W). The court here following the authority in earlier cases *Birch v Johannesburg City Council* 1949 (1) SA 231 (T) and *Minister of Justice v Ndala* 1956 (2) SA 777 (T).

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respondent's heads of argument, the contention is that the rate is actually 7.25% and not 7.5%.

[34] The appellant submits that the interest should have been granted from the date of payment of judgment at the legal rate at the time of judgment. That, at the date when summons was issued on 03 December 2012, there was no debt due to the respondent as the claim is delictual in nature and would only be due once judgment was granted in favour of the respondent and once the amount due is determined. If this quantification on this rate is allowed, the *in duplum* rule will be violated.

[35] In *MEC: Police, Roads and Transport Free State Provincial Government v Bovicon Consulting Engineers CC and Another*,<sup>16</sup> the court confirmed the settled position of *Paulsen and Another v Slip Knot Investment 777 (Pty) Limited* [2015] (3) SA 479 (CC) and held that interests run anew from the date that the judgment debt is due and payable. The rule is that the arrear interest stops accruing when the sum of unpaid interest stops equals the extend of the outstanding capital.

[36] On the question on when interest should begin to accumulate on unliquidated claims, Ledwaba DJP stated the law thus in *Blything v Minister of Safety and Security*,<sup>17</sup> a matter not dissimilar to the one in *casu* involving damages for unlawful arrest and detention –

**The Law:**

[11] *Before the introduction of section 2A (hereinafter referred to as "Act 55 of 1975"), no common law principle or statutory enactment provided for the award of pre-judgment interest on unliquidated damages.*

[12] *Section 2A reads as follows:*

*"2A. Interest on unliquidated debts.-*

*(1) Subject to the provisions of this section the amount of every unliquidated debt as determined by a court of law, shall bear interest as contemplated in s 1.*

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<sup>16</sup> [2023] ZASCA 99.

<sup>17</sup> 2016 JDR 1653 (GP).

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(2) (a) Subject to any other agreement between the parties and the provisions of the National Credit Act, 2005 the interest contemplated in subs (1) shall run from the date on which payment of the debt is claimed by the service on the debtor of a demand or summons, whichever date is the earlier.

(5) Notwithstanding the provisions of this Act but subject to any other law or an agreement between the parties, a court of law, .... may make such an order as appears just in respect of the payment of interest on an unliquidated debt, the rate at which interest shall accrue and the date which interest shall run.

[17] The position in respect of unliquidated damages has been set out in several judgments in our law and in Coetzee AJ in **Du Plooy v Venter Joubert Ing. en Ander** at paragraph [23] states as follows:

"In as far as s 1 do not provide for the calculation of interest on unliquidated debts, Grosskopf JA, prior to s 2A being enacted, in *SA Eagle Insurance Co Ltd v Hartley*, remarked as follows:

'... If a plaintiff through no fault of his own has to wait a substantial period of time to establish his claim it seems unfair that he should be paid in depreciated currency. Of course, in respect of many debts this problem is resolved (or partially resolved) by an order for the payment of interest, and the Prescribed Rates of Interest Act 55 of 1975 is flexible enough to permit the Minister of Justice to prescribe rates of interest which reflect the influence of inflation on the level of rates generally (see s 1(2). Its application is, however, limited to debts bearing interest (s 1(1)); and it is trite law that there can be no mora, and accordingly no mora interest in respect of unliquidated claims of damages. See *Victoria Falls & Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD at 31-33, a decision which has been consistently applied and followed, also in this Court. It follows that there is no mechanism by which a court can compensate a plaintiff like the present for the ravages of inflation in respect of monetary losses incurred prior to the trial.'

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[18] In terms of the Prescribed Rates of Interest Act it is permissible to recover mora interest on amounts awarded by a court which, but for such award, were unliquidated. Once judgment is granted such interest shall run from the date on which payment of the debt is claimed by the service on the debtor of a demand or summons, whichever date is earlier - section 2A(2) (a) of Act 55 of 1975. The word "demand" is defined in the Act to mean a written demand setting out the creditor's claim in such a manner as to enable the debtor reasonably to assess the quantum thereof.

[19] In the **Kwenda case**, Murphy J accepted that in the particular case, it was reasonably possible for the defendant to assess the quantum once the summons was issued.

[20] In **Eden & Another v Pienaar** referring to the criticism in **Hartley's case** the Full Court of the then WLD, stated that the effect of the inserted section 2A, is that; "the position in our law is now both liquidated and unliquidated debt bear interest (the latter from the date on which payment is demanded or claimed by summons) at the rate prescribed by the Minister of Justice in terms of s 1(2)."

[21] The Supreme Court of Appeal in **Thorough Breeders Association v Price Waterhouse** it was held that in the absence of a letter of demand, section 2A of Act 55 of 1975, ordained mora interest at 15.5% per annum from the date of summons. The court observed that "if the award was one for mora interest there is no reason why, having regard to s2A of the Act, interest should only run from the date of judgment and not from the date of summons." In paragraph [79] the court concludes: "since no demand prior to summons was proved, the date for the commencement for the calculation would therefore be the date upon which summons was served."

[22] The Supreme Court of Appeal further held, in **Steyn NO v Ronald Bobroff** that the term mora simply means delay or default. The mora interest provided for in the Act is thus intended to place the creditor, who has not received due payment ... in the position that he or she would have occupied had the payment been made" when it was first requested from the defendant.

[23] In **Minister of Safety and Security and others v Janse van der Walt** and another the Supreme Court of Appeal ordered the first defendant to pay the interest on the amount of damages awarded at the rate of 15.5% per annum from the date of demand to the date of payment. Similarly, the Supreme Court of Appeal in **Woji v The Minister of Police** ordered the defendant to pay interest on the sum of R500 000.00 at



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the rate of 15.5% per annum a tempore morae from date of demand to date of payment.

[24] Having regard to the above-mentioned case law and the reasoning therein concluding that interest in illiquid claims for damages may be awarded interest a tempore morae from the date of demand or summons, whichever is earlier, in terms of section 2A (2)(a) of Act 55 of 1975, it is clear in *Takawira* case the court in finding that interest on an illiquid claim for damages, can be determined from the date of judgment.

Discretion in terms of section 2A (5):

[25] In the unreported case of **Nel v Minister of Safety and Security** Kubushi J held that: The default position of the Act is that the amount of every unliquidated debt as determined by any court of law shall bear interest at the prescribed rate a tempore morae, unless a court of law orders otherwise. Where a court deviates from this position, an order that it may make, must appear just in the circumstances of that case."

[26] In the current matter, I find no circumstances justifying the deviation from the prescribed rate."

[37] The court then proceeded to order interest at the rate of 15.5% per annum as from the date of demand (which was 07 June 2021) to date of final payment.

[38] Section 2A (5) gives a court a discretion. There are a number of factors the court can consider: the length of time from service of summons to date of the order of the court a *quo*; the in *duplum* rule; the fact that money depreciates with time.

[39] Essentially, what is fair in this case? In *Da Cruz v Bernardo*<sup>18</sup> one of the factors considered for purposes of interest was delays in litigation with the court stating:

*"[61] Delays in litigation may run longer than it took for the interest to equal the capital at the applicable mora interest rate. In these circumstances it was preferable, as a matter of public policy and in the interests of justice, for the court to retain a discretion on how interest should be awarded, exercised on the facts of each case. Where the court had such a discretion, it could exercise that discretion to limit interest payable to*

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<sup>18</sup> 2022 (2) SA 185 (GJ).

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*a dilatory plaintiff or to allow that interest where the defendant was the reason for the delay. Section 1(1) of the Prescribed Rate of Interest Act provides the court with that discretion. The 'special circumstances' which give a court the discretion set out in s 1(1) of the Prescribed Rate of Interest Act would include circumstances where a plaintiff had been dilatory or where delay ought not to be visited on one of the parties."*

[40] In *Motladile v Minister of Police*<sup>19</sup> the SCA awarded damages with interest at 7% (the prevailing rate at the time) from the date of service of summons to the date of payment.

### **Conclusion**

[41] Given that there was no reasonable suspicion to arrest the respondent, and that the said arrestor did not give testimony in court, it is an indication that jurisdictional facts have not been met and therefore the evidence given by the Constable since she was not the arrestor is an inadmissible hearsay. Therefore, in my view, the findings of the court *a quo* in this regard, cannot be faulted.

[42] I find that the interest should run from the date of the service of summons in accordance with the prevailing interest rate of 7% at the time of the Magistrate Court judgment on 10 March 2022.<sup>20</sup>

[43] This court has partially allowed the appeal. For this reason, the cost order made by the court *a quo* should be amended. The appellant's grounds of appeal cannot be construed to have been unreasonable in as far as the interest rate in concerned. With regards to the appeal relating to the merits and quantum the opposition was reasonable hence the appeal could not be sustained. To this end the costs in the appeal should be that each party pay respective costs whereas 50% of the respondent's cost in the court *a quo* should be for the respondent's account.

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<sup>19</sup> 2023(2) SACR 274 (SCA)

<sup>20</sup> Published under Government Notice R1182 in Government Gazette No 43873 of 6 November 2020.

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## Order

In the premises I make the following order.

- 1.1 The appeal is dismissed in relation to the merits and quantum and each party to pay their respective legal costs.
- 1.2 The appeal is partially upheld and the order for the court a quo is substituted as follows:
  - 1.2.1. *“Judgment in favour of the plaintiff for R400 000.00 plus interest at the rate of 7% per annum from date of service of summons to date of payment.*
  - 1.2.2. *Defendant is ordered to pay 50% the plaintiff legal costs.”*
  - 1.2.3.

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**MD BOTSI-THULARE**

**ACTING JUDGE OF THE HIGH COURT, JOHANNESBURG**

***IT IS AGREED AND SO ORDERED***

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**M V NOKO**

**JUDGE OF THE HIGH COURT, JOHANNESBURG**

**APPEARANCES:**

**Appellant**

Counsel for the Appellant : Adv S Magaqa  
Instructed by : State Attorney

**Respondent**

Counsel for the Respondent : Adv FF Opperman  
Instructed by : M Gowrie Attorneys

**DATE OF HEARING** : 04 October 2023

**DATE OF JUDGMENT** : 29 November 2023