

Editorial note: Certain information has been redacted from this judgment in compliance with the law.

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

Case No: 45105/2021



(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED YES/NO
.....
SIGNATURE	DATE

In the matter between:

ALI BIRIGIGI MANGASA

Applicant

and

MINISTER OF POLICE

First respondent

CAPTAIN REGINALD MXOLISI ZULU N.O.
(Service number: [...])

Second respondent

NATIONAL PROSECUTING AUTHORITY

Third respondent

Delivered: This judgment was prepared and authored by the Judge whose name is reflected in it 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 CaseLines. The date for hand-down is deemed to be 22 February 2024.

JUDGMENT

DUNN AJ:

INTRODUCTION

General:

[1] This is an application for condonation (**the condonation application**) in terms of s 3(4) of the Institution of Legal Proceedings against certain Organs of State Act 40 of 2002 (**ILPA**). The application was instituted by Mr Ali Birigigi Mangasa (**Mr Mangasa**), a Ugandan national, against the Minister of Police, as the first respondent (**the Minister**). Although Captain Reginald Mxolisi Zulu, N.O. (**Captain Zulu**) and the National Prosecuting Authority (**the NPA**)¹ are cited in the application as the second and third respondents, respectively, they played no role therein whatsoever.²

[2] The Minister's opposition³ to the condonation application is based on a point of law, *viz.*, that the '*debt*' foreshadowed in Mr Mangasa's action for damages became prescribed in terms of s 11(d) the Prescription Act 68 of 1969 (**the Prescription Act**) and that, as a result thereof, condonation is not possible under the provisions of s 3 (4) (b) of the ILPA.⁴

¹ The citation of the National Prosecuting Authority is self-evidently incorrect. It is the '*National Director of Public Prosecutions*' who should have been cited *nomine officio*.

² Captain Zulu is neither a party to these proceedings nor to the action for damages that will shortly be referred to, because neither the condonation application nor the combined summons in that action were served on him. The NPA has not opposed the condonation application, and for that reason it too is not a party to the present proceedings.

³ CaseLines: Notice of opposition to the condonation application: pp. 019-6 to 019-10.

⁴ *Ibid.*, at paras 1 to 16, pp. 019-7 to 19-9.

Mr Mangasa's action for damages:

- [3] On 20 September 2021, Mr Mangasa issued a summons out of this court. The three respondents cited in the condonation application, i.e., the Minister, Captain Zulu and the NPA were cited in the summons as the first, second and third defendants, respectively (**the action for damages**).
- [4] The claims formulated in the summons against the Minister and Captain Zulu are based on an unlawful and malicious arrest and detention.⁵ In addition thereto, Mr Mangasa alleges further that he also was assaulted by Captain Zulu in the course of such arrest causing injury to his eye and disfiguring him.⁶ As far as the NPA is concerned, the claim formulated against it (and its officials) is based on its negligent, reckless and/or malicious decision to prosecute Mr Mangasa, as well as the ensuing malicious prosecution that eventually terminated in his favour when he was discharged.⁷
- [5] According to Mr Mangasa's particulars of claim the following are the salient allegations underlying these claims:
- [5.1] First, Mr Mangasa was wrongfully, unlawfully and maliciously arrested, as well as assaulted, on 18 December 2018;⁸

⁵ CaseLines: Particulars of Claim (**POC**): paras 6 to 14 (there is no para 13), pp. 001-5 and 001-8, especially at para 6.1, p. 001-5.

⁶ *Ibid.*, at paras 6.1 and 6.2.1, pp. 001-5 and 001-6.

⁷ *Ibid.*, paras 15 and 16, pp. 001-8 and 001-10.

⁸ *Ibid.*, para 6.1, p. 001-5. In some documents this date is given as '17 December 2018', but nothing of major importance turns on this.

[5.2] second, he was wrongfully, unlawfully and maliciously detained thereafter for nine (9) days, i.e., from the time of his arrest, until 27 December 2018;⁹ and

[5.3] third, he was prosecuted negligently, recklessly and/or maliciously by the NPA¹⁰ and its officials and, despite these prosecutorial endeavours, he nevertheless was discharged by a court of law on 4 May 2021 in terms of s 174 of Criminal Procedure Act 51 of 1977.¹¹

SERVICE OF THE SUMMONS

[6] On 21 September 2021, Mr Mangasa's summons was served on the State Attorney, Johannesburg, by the Deputy Sheriff, Johannesburg Central. The Deputy Sheriff issued two returns of service. In the first return, he recorded that he served the summons on a certain official at the State Attorney's offices as the '*duly authorised agents of the Minister of Police*'.¹² The second return is similarly worded, except that the above-quoted phrase, in this instance, is substituted with the wording: '*duly authorised agents of the National Prosecution Authority*'.¹³

[7] It is common cause that the summons was never served on Captain Zulu.

Notice of intention to defend:

⁹ *Ibid.*, para 6.4, p. 001-5.

¹⁰ *Ibid.*, paras 15.3 to 15.7, pp. 001-8 and 001-9.

¹¹ *Ibid.*, para 15.5, p. 001-9.

¹² CaseLines: 030: Annexures, at p. 030-5.

¹³ CaseLines: 030: Annexures, at p. 030-9.

[8] On 1 October 2021, the State Attorney's office (*per* Ms Ramsurjoo, an assistant state attorney) delivered a notice of intention to defend on behalf of all three defendants.¹⁴ Ms Ramsurjoo subsequently also performed and undertook all the further legal steps and procedures that ensued on behalf of either the Minister or the NPA. Accordingly, and unless otherwise indicated, all references to Ms Ramsurjoo herein must be understood to be a reference to the '*The State Attorney*' and *vice versa*.

[9] On 26 April 2023, Ms Ramsurjoo delivered a '*further*' notice of intention to defend on behalf of the Minister *after* the summons eventually was served on him on 23 February 2023.¹⁵

The Rule 30 (1) application:

[10] On 18 January 2022, Ms Ramsurjoo delivered an application in terms of Rule 30(1) of the Uniform Rules of Court (**URC**) with the aim of setting aside the service of summons on the Minister as an irregular step.¹⁶ The nub of the complaint formulated therein is that: (i) the summons had not been served, as it should have been, on the National Commissioner and the relevant Provincial Commissioner of the South African Police Service (**SAPS**); (ii)

¹⁴ CaseLines: Defendants' notice of intention to defend: pp. 002-1 and 002-2. In her affidavit concerning the reconstruction of the court file, Ms Ramsurjoo explains how it came about that the notice of intention to defend was served on behalf of all three defendants. In this regard, Ms Ramsurjoo explains that: '*Upon the matter being allocated to me, I proceeded to deliver a Notice of Intention to Defend. I did so on the assumption that summons was already affected [sic] on the Applicant/1st defendant and the Third Defendant and that our offices were being served in accordance with Section 2 (2) (b) of Act 20 of 1957. I did so on 1 October 2021 ...*' (Cf. CaseLines: Affidavit - Reconstruction of Court File, at p. 012-1 to 012-44, especially at paragraph 7, p. 012-5).

¹⁵ CaseLines: Minister's notice of intention to defend: pp. 002-7 and 002-8. Regrettably, no return of service was uploaded onto CaseLines and the details of precisely when and how such service took place are unknown.

¹⁶ CaseLines: Minister's application in terms of Rule 30 (1): pp. 005-1 and 005-46.

service on the latter two functionaries is a peremptory requirement of s 5(1)(b) (ii)(aa) and (bb) of the ILPA; and (iii) the mere service of the summons on the State Attorney's office, as happened on 21 September 2021, without prior service having been effected on the two Commissioners referred to, is thus ineffective and irregular.

[11] On 1 February 2022, Mr Mangasa's answering affidavit to the Minister's Rule 30 (1) application on 1 February 2022 was delivered.¹⁷ There is no indication on the CaseLines platform as to the fate of the Rule 30 (1) application. Assumedly it was abandoned as further procedural steps evolved in the progression of the matter.

THE NPA'S PLEA

[12] On 18 February 2022, the NPA delivered its plea.¹⁸ The NPA's plea is presently irrelevant, and its content requires no further attention or discussion.

¹⁷ CaseLines: Mr Mangasa's answering affidavit: pp. 005-51 to 005-57.

¹⁸ CaseLines: NPA's plea: pp. 003-1 and 003-6.

THE MINISTER'S PLEA

[13] On 28 April 2023,¹⁹ the Minister delivered his plea, containing two special pleas, as well as a plea over on the merits.²⁰ The first special plea raises non-compliance with s 3 of the ILPA as a defence.²¹ The second special plea raises the defence of extinctive prescription under the Prescription Act.²² The remainder of the Minister's plea represents his plea over on the merits, which traverses the allegations in Mr Mangasa's particulars of claim and essentially denies them.²³

THE WRITTEN NOTICES IN TERMS OF S 3 OF THE ILPA

[14] In the action for damages Mr Mangasa alleges in his particulars of claim that he complied with s 3 of the ILPA in so far as the Minister²⁴ and the NPA²⁵ are concerned. Although the entire paragraph 15 of Mr Mangasa's particulars of claim is devoted to the NPA's alleged wrongful acts/omissions, there are continuous and confusing references to the second defendant (i.e., Captain Zulu) and '*its employees*'. Plainly, the third defendant (i.e., the NPA) and its employees were the intended targets of all these references.

[15] Self-evidently s 3 of the ILPA was not complied with as far as Captain Zulu is concerned as no such written notice was ever served on him.

¹⁹ That is two days after the Minister's notice of intention to defend, referred to in para [9] above, was delivered.

²⁰ CaseLines: Minister's plea: pp. 015-1 and 015-9.

²¹ *Ibid.*, para 1 (*inclusive* of subparas 1.1 to 1.3, pp. 015-1 to 015-3.

²² *Ibid.*, para 2 (*inclusive* of subparas 2.1 to 2.12, pp. 015-3 to 015-6.

²³ *Ibid.*, paras 1 to 5, pp. 015-6 to 015-9.

²⁴ CaseLines: POC: para 11, p. 001-7.

²⁵ *Ibid.*, para 15.11, p. 001-10.

- [16] A written notice '*Dated May 2021*', given in terms of s 3 of the ILPA, was seemingly sent to the '*Ministry of Police*' electronically. Four official stamps appear on it. Viewing this written notice from left to right, as well as from top to bottom, the stamps that appear on it are those of: (i) the Ministry of Police dated 22 June 2021;²⁶ and (ii) the Provincial Commissioner: Legal Services: Gauteng dated 11 May 2021,²⁷ as well as two further stamps of the latter's office, both dated 29 July 2021.²⁸
- [17] A further written notice dated 11 May 2021, also apparently given in terms of s 3 of the ILPA, was seemingly sent to the NPA electronically.²⁹ It appears to have been received by the NPA's Legal Affairs Division on 11 May 2021,³⁰ as two of the stamps on it also reflect that date, while the other stamp is dated 7 June 2021.

THE CONDONATION APPLICATION

Overview:

- [18] The condonation application was delivered on 17 March 2023.³¹
- [19] The factual basis on which condonation is sought by Mr Mangasa, can synoptically be summarised as follows:³²

²⁶ CaseLines: 030: Annexures, at p. 030-3.

²⁷ *Id.*

²⁸ *Ibid.*, at pp. 030-3 and 030-4.

²⁹ CaseLines: 030: Annexures, at pp. 030-7 and 030-8.

³⁰ *Id.*

³¹ CaseLines: Condonation application: Notice of motion: pp. 017-3 to 017-5.

³² CaseLines: Mr Mangasa's founding affidavit: pp. 018-1 to 018-8, especially paras 5 to 8, p. 018-4.

[19.1] In recounting the circumstances of his wrongful and malicious arrest and detention, as well as that of the alleged assault perpetrated on him by Captain Zulu,³³ Mr Mangasa states that all of this occurred when he went to lay a charge of robbery at the Booyens Police Station.³⁴ He further elaborates thereon as follows

- ‘7. I was arrested when I went to lay a charge of robbery, whereby I was falsely accused of allegedly assaulting Captain Reginald Mxolisi Zulu, **whereas in fact it was him who assaulted me and when I informed him that I will open a case against him that is when he opened a case against me to cover up himself.**
8. On the day in question the officer was taking my statement wanted me to sign the statement before I finished reading it and when I refused to sign, that is when he told *[sic: the pronoun ‘me’ **assumedly omitted**] to leave, then I asked to speak to the O/C station, who was Captain Zulu, **on explaining to him what was happening, he responded by telling me that I shouldn’t tell them out to do their job and he then ended up assaulting me.**’

(Own emphasis and *insertion).

[19.2] Once Mr Mangasa was released on bail and attending to the ensuing criminal charges preferred against him, his focus was entirely on those proceedings;³⁵

[19.3] Mr Mangasa was traumatised by the treatment he received at the hands of the SAPS and, although he knew that he had been arrested unlawfully, he did not know that he had any right of recourse against ‘*the Defendant*’ (assumedly a reference to ‘*the Minister*’);³⁶

³³ *Id.*

³⁴ *Ibid.*, at para 8, p. 018-4.

³⁵ *Ibid.*, at para 9, p. 018-5.

³⁶ *Ibid.*, at paras 10 and 11 can, p. 018-5.

[19.4] It was only after Mr Mangasa met his present attorney of record, Mr Thobane,³⁷ who had advised him that he had a right of recourse against '*the Minister*', that he realised that he had to act with expedition, and that the serious trauma he had suffered motivated him to do so;³⁸

[19.5] Mr Mangasa was also unaware of the provisions of the ILPA until he was advised of by Mr Thobane;³⁹ and

[19.6] He instructed Mr Thobane to institute proceedings for damages against '*the Minister*' and his attorney then sent a written notice in terms of s 3 of the ILPA of his intention to institute legal proceedings.⁴⁰

Opposition to the application for condonation:

[20] The Minister delivered a notice of opposition to the application for condonation.⁴¹ The Minister's opposition is merely based on a point of law. Mr Mangasa's factual reasons for supposedly not complying with s 3 of the ILPA are therefore not contested.

[21] As indicated earlier,⁴² the point of law raised on behalf of the Minister is simply that the debt became prescribed in terms of s 11(d) of the Prescription Act and, as a result thereof, condonation is not possible under the provisions of

³⁷ Mr Thobane was not his attorney in and during the conduct of the criminal case that had been instituted against by the NPA, and in respect of which he finally was acquitted on 4 May 2021.

³⁸ *Ibid.*, at para 12, p. 018-5.

³⁹ *Ibid.*, at para 13, p. 018-5.

⁴⁰ *Ibid.*, at paras 14 and 15, p. 018-5.

⁴¹ CaseLines: Notice of opposition to the condonation application: pp. 019-6 to 019-10.

⁴² See para [2] above.

s 3(4)(b) of the ILPA.⁴³ The basis upon which the Minister contends that the 'debt' became prescribed, is as follows:

[21.1] Mr Mangasa was assaulted, arrested and detained on 18 December 2018, which resulted in his claims - and the Minister's correlative 'debt' (the singular of this noun is employed in the Minister's notice of opposition) - arising on that date, i.e., 18 December 2018;⁴⁴

[21.2] In terms of s 12(1) of the Prescription Act – subject to ss (2), (3) and (4) thereof - prescription shall commence to run 'as soon as the debt is due',⁴⁵

[21.3] In terms of s 11(d)⁴⁶ of the Prescription Act a debt of this nature prescribes after three years, save where an Act of Parliament provides otherwise,⁴⁷

[21.4] Since Mr Mangasa's claim became due on 18 December 2018 it prescribed after the expiry of three years from the latter date: In particular, because Mr Mangasa failed to serve his summons 'to date' prescription was not interrupted before the prescription period already had run its course.⁴⁸

⁴³ CaseLines: Notice of opposition to the condonation application: paras 1 to 16, pp. 019-7 to 19-9.

⁴⁴ *Ibid.*, at paras 4, 5 and 8, pp. 019-7 and 019-8.

⁴⁵ *Ibid.*, at para 7, p. 019-8.

⁴⁶ The reference to s 11 (c) in the notice of opposition is self-evidently incorrect. Ms Ramsurjoo obviously intended to refer to s 11 (d) of the Prescription Act.

⁴⁷ *Ibid.*, at para 6, p. 019-7.

⁴⁸ *Ibid.*, at paras 9 to 15, pp. 019-8 and 019-9. However, as mentioned in para [9] above, the summons was served on the Minister on 23 February 2023. This being the case, it can only mean that the notice of opposition was drawn by Ms Ramsurjoo prior to such service, alternatively that she was unaware of such service at the time she drew and finalised the notice of opposition.

The relevant provisions of the ILPA:

[22] S 3 of ILPA provides as follows:

- ‘3. Notice of intended legal proceedings to be given to organ of state.—**
- (1) No legal proceedings for the recovery of a debt may be instituted against an organ of state unless —**
- (a) the creditor has given the organ of state in question notice in writing of his or her or its intention to institute the legal proceedings in question; or**
 - (b) the organ of state in question has consented in writing to the institution of that legal proceedings —**
 - (i) without such notice; or**
 - (ii) upon receipt of a notice which does not comply with all the requirements set out in subsection (2).**
- (2) A notice must—**
- (a) within six months from the date on which the debt became due, be served on the organ of state in accordance with section 4 (1); and**
 - (b) briefly set out —**
 - (i) the facts giving rise to the debt; and**
 - (ii) such particulars of such debt as are within the knowledge of the creditor.**
- (3) For purposes of subsection (2) (a) —**
- (a) a debt may not be regarded as being due until the creditor has knowledge of the identity of the organ of state and of the facts giving rise to the debt, but a creditor must be regarded as having acquired such knowledge as soon as he or she or it could have acquired it by exercising reasonable care, unless the organ of state wilfully prevented him or her or it from acquiring such knowledge; and**
 - (b) a debt referred to in this 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.’**

(Own emphasis).

[23] Consequently, in terms of s 3 of the ILPA, the following essential requirements must be met:

[23.1] First, unless a *creditor*,⁴⁹ such as Mr Mangasa in this instance, has given the required written statutory notice envisaged in s 3(1)(a), he/she/it may not institute legal proceedings against an *organ of state*⁵⁰ for the recovery of any *debt*⁵¹ allegedly owed by the latter to the creditor. However, this is subject to the qualification that the organ of state in question may consent in writing to the institution of legal proceedings against it where no such written notice was given to it by the creditor, and it could also do so in circumstance where a defective and non-compliant notice was given to it;⁵²

⁴⁹ The expression '*creditor*' is defined in s 1 of the ILPA to mean: '**... a person who intends to institute legal proceedings against an organ of state for the recovery of a debt or who has instituted such proceedings**, and includes such person's tutor or curator if such person is a minor or mentally ill or under curatorship, as the case may be.' (Own emphasis).

⁵⁰ The expression '*organ of state*' - insofar as it is relevant in the present matter - is defined in s 1 of the ILPA to mean -

- (a) **any national or provincial department;**
- (b) ...;
- (c) **any functionary or institution exercising a power or performing a function in terms of the Constitution**, or a provincial constitution referred to in section 142 of the Constitution;
- (d) ...;
- (e) ...;
- (f) ...; and
- (g) **any person for whose debt an organ of state contemplated in paragraphs (a) to (f) is liable.'**

(Own emphasis).

⁵¹ The expression '*debt*' is defined in s 1 of the ILPA to mean:

'... any debt arising from any cause of action -

- (a) which arises from delictual, contractual or any other liability, including a cause of action which relates to or arises from any—
 - (i) act performed under or in terms of any law; or
 - (ii) omission to do anything which should have been done under or in terms of any law; and
- (b) **for which an organ of state is liable for payment of damages**, whether such debt became due before or after the fixed date.'

(Own emphasis).

⁵² S 3 (1) (b) (i) and (ii) of the ILPA.

- [23.2] Second, such written statutory notice⁵³ must be served on the organ of state in question, in accordance with s 4(1) of the ILPA, within six months from the date on which the debt became due;⁵⁴
- [23.3] Third, where the relevant organ of state is the *Department of Police*⁵⁵ - of which the Minister is the executive authority⁵⁶ - such written statutory notice had to be delivered to both the National Commissioner of the SAPS, as well as the Provincial Commissioner of SAPS in the province in which the cause of action arose (i.e., Gauteng);⁵⁷ and
- [23.4] Fourth, once such written statutory notice has properly been delivered in accordance with s 4(1)(a) of the ILPA, no legal process through which legal proceedings are instituted, as contemplated in s 3(1) of the ILPA, could be served on the Minister *before* a period of 60 days has expired *after* such written notice had been served.⁵⁸

⁵³ In terms of s 3 (2) (b) of the ILPA, such notice is required to 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.

⁵⁴ S 3 (2) (a) of the ILPA.

⁵⁵ See, in this regard, paragraph (a) of the definition of '*organ of state*' in s 1 of the ILPA, which includes, among others, a '*national department*', which latter expression, in turn, is defined with reference to the first column of Schedule 1 to the Public Service Act, 1994 (Proclamation No. 103 of 1994) to include, among other national departments, the '*Department of Police*'. Although Captain Zulu and the National Director of Public Prosecutions (incorrectly cited by Mr Mangasa as, simply, '*the NPA*') play no active role in the condonation application, it should be noted that the former falls within the definition of '*organ of state*' in s 1 of the ILPA by virtue of the provisions of paragraph (g) thereof, i.e., as someone for whose debt the Department of Police could vicariously be held liable, while the National Director of Public Prosecutions would fall within the same definition by virtue of the provisions of paragraph (c) thereof, i.e., as a functionary who exercises a power or performs a function in terms of s 179 of the Constitution of the Republic of South Africa, 1996, read with s 5 of the National Prosecuting Authority Act 32 of 1998.

⁵⁶ S 5 (1) (a) and (b) (ii) (aa) and (bb) of the ILPA, read with s 2 (1) of the State Liability Act 20 of 1957).

⁵⁷ S 4 (1) (a) of the ILPA.

⁵⁸ S 5 (2) of the ILPA, read with s 3 (2) (a) and s 4 (1) (a) thereof.

[24] Moreover, in terms of s 5(1)(a) and (b)(ii)(aa) and (bb) of the ILPA, read with s 2(1) of the State Liability Act 20 of 1957, Mr Mangasa was also obliged to serve his summons on both the National Commissioner of the SAPS, as well as the Provincial Commissioner of SAPS in the province in which the cause of action arose (i.e., Gauteng). This he apparently failed to do before 23 February 2023.

[25] In order for this court to grant the condonation application presently sought, it is clear that it must be satisfied that:

[25.1] the debt has not been extinguished by prescription;

[25.2] good cause exists for Mr Mangasa's failure to have given the written statutory notice envisaged in s 3(1)(a) of the ILPA timeously, i.e., within six months from the date on which the debt became due, as he was obliged to do in terms of s 3 (2) (a) thereof; and

[25.3] the Minister is not unreasonably prejudiced by such failure.⁵⁹

[26] In *Madinda* the Supreme Court of Appeal (SCA) held that the phrase '*if [a court] is satisfied that*' - which also appears in s 3(4)(b) of the ILPA – has:⁶⁰

'... long been recognised as setting a standard which is not proof on a balance of probability. Rather it is the overall impression made on a court which brings a fair mind to the facts set up by the parties. See e.g., *Die Afrikaanse Pers Beperk v Nesor* 1948 (2) SA 295 (C) at 297. I see no reason to place a stricter construction on it in the present context.'

(Own emphasis).

⁵⁹ *Madinda v Minister of Safety and Security* 2008 (4) 312 (SCA) at para [6], p. 315 E- G.

⁶⁰ *Ibid.*, at para [8], p. 316 C – D.

[27] Although the Minister's objection is focussed only at the first of these requirements, that will not relieve the court from *also* having to be satisfied in respect of compliance with the second and third requirements in the event of the Minister's objection not being upheld. Indeed, the structure of s 3(4) of the ILPA is such that the court must be satisfied that *all* three requirements have been met.⁶¹ It is only then, once the court is so satisfied, that the discretion to condone can become operative. Such discretion must be exercised according to established principles.

[28] The first requirement is logical. If a debt has already become prescribed, it will serve no purpose in granting condonation to a creditor for having failed to serve the statutory notice according to s 3 (2)(a), or for their failure to have served a notice that complies with the prescriptions of s 3 (2)(b). Condonation can only be granted in circumstances where the debt is still extant.⁶²

[29] The second requirement of *good cause* enjoins a consideration of, among other factors, the prospects of success in the proposed action, the reasons for the delay, the sufficiency of the explanation offered, the *bona fides* of the creditor, and any other relevant contribution by other persons or parties to the delay and the creditor's own responsibility for such delay.⁶³ As far as the prospects of success are concerned, it was held in ***Madinda*** that:⁶⁴

'Good cause for the delay' is not simply a mechanical matter of cause and effect. The court must decide whether the applicant has produced acceptable reasons for nullifying, in whole, or at least substantially, any culpability on his or her part which attaches to the delay in serving the notice timeously. Strong merits may mitigate fault; no merits may render mitigation pointless. There are two main

⁶¹ *Ibid.*, at para [16], p. 318 C - D.

⁶² *Ibid.*, at para [9], p. 316 D.

⁶³ *Ibid.*, at para [10], p. 316 E - G.

⁶⁴ *Ibid.*, at para [12], p. 317 C - G.

elements at play in s 4(b), viz., the subject's right to have the merits of his case tried by a court of law and the right of an organ of state not to be unduly prejudiced by delay beyond the statutorily prescribed limit for the giving of notice. Subparagraph (iii) calls for the court to be satisfied as to the latter. **Logically, subparagraph (ii) is directed, at least in part, to whether the subject should be denied a trial on the merits. If it were not so, consideration of prospects of success could be entirely excluded from the equation on the ground that failure to satisfy the court of the existence of good cause precluded the court from exercising its discretion to condone. That would require an unbalanced approach to the two elements and could hardly favour the interests of justice. Moreover, what can be achieved by putting the court to the task of exercising a discretion to condone if there is no prospect of success? In addition, that the merits are shown to be strong or weak may colour an applicant's explanation for conduct which bears on the delay: an applicant with an overwhelming case is hardly likely to be careless in pursuing his or her interest, while one with little hope of success can easily be understood to drag his or her heels. As I interpret the requirement of good cause for the delay, the prospects of success are a relevant consideration ...**

[13] **The relevant circumstances must be assessed in a balanced fashion. The fact that the applicant is strong in certain respects and weak in others will be borne in mind in the evaluation of whether the standard of good cause has been achieved.'**

(Own emphasis).

[30] The third requirement is the absence of *unreasonable prejudice* to the organ of state as a result of the failure to comply with the statutory notice requirements. The fact that it is separately listed from the second requirement of *good cause* was seen in *Madinda* as denoting a legislative intention of emphasising:

'... the need to give due weight to both the individual's right of access to justice and the protection of state interest in receiving timeous and adequate notice.'

(Own emphasis).

[31] Each of the three requirements will now be considered in accordance with the approach approved of in *Madinda's* case.

HAVE THE 'DEBT(S)' ARISING FROM MR MANGASA'S 'CLAIMS' PRESCRIBED?

General – applicable legal principles:

[32] Since prescription – subject to certain express statutory qualifications or limitations⁶⁵ - commences running 'as soon as the debt is due' in terms of s 12(1) of the Prescription Act, it is necessary to draw a distinction between the creation of a debt (i.e., its coming into existence) and its enforceability or recoverability. Even though a debt may have come into existence, if it is not *immediately claimable* (i.e., recoverable) it cannot be considered to be 'due'. As soon as a debt becomes *immediately claimable*, it becomes *due*.⁶⁶

[33] According to **Truter** this stage is only reached:⁶⁷

'... 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.'

(Own emphasis).

[34] Three further important considerations concerning this specific rubric are emphasised in **Truter**. They are:

⁶⁵ These qualifications are contained in ss (2), (3) and (4) of s 12 of the Prescription Act.

⁶⁶ **Truter and Another v Deysel** 2006 (4) SA 168 (SCA) at paras [16] to [19], pp. 174 C – 175 A; **Trinity Asset Management (Pty) Ltd v Grindstone Investments 132 (Pty) Ltd** 2018 (1) SA 94 (CC) at (first judgment) paras [36] to [38], p. 107 A – F, and (second judgment) at paras [96] to [98], pp. 121 C – 122 D; **Standard Bank of South Africa Ltd v Miracle Mile Investments 67 (Pty) Ltd and Another** 2017 (1) SA 185 (SCA) at para [24], pp. 193 I to 194 D; **Deloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty) Ltd** 1991 (1) SA 525 (A) at p. 532 H – I.

⁶⁷ **Truter**, *supra*, at para [16], p. 174 C – D.

[34.1] First, in a delictual claim, that the requirements of ‘*fault*’ and ‘*unlawfulness*’ do not constitute *factual* elements of the cause of action - but they are *legal conclusions* that are to be inferred from the established facts;⁶⁸

[34.2] second, with reference to the ambit of the non-deeming provision (i.e., ‘[a] *debt shall not be deemed to be due*’ (own emphasis)) in s 12(3) of the Prescription Act, which serves to defer the running of prescription, the court referred to its earlier judgment in ***Van Staden v Fourie***⁶⁹ in which it had pointed out that the commencement of prescription is *not deferred* (under such non-deeming provision) until the creditor has acquired knowledge of the full extent of his or her rights (*‘die volle omvang van sy regte’*), but that any such deferral invariably is restricted (i.e., apart from the need to know the identity of the debtor) to knowledge of ‘*the facts from which the debt arises*’;⁷⁰ and

[34.3] third, that the expression ‘*cause of action*’, for the purposes of prescription, means:⁷¹

‘... every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.’

⁶⁸ *Ibid.*, para [17], p. 174 E – F.

⁶⁹ 1989 (3) 200 (A) at p. 216 D – E.

⁷⁰ ***Truter*** at para [18], p. 174 G. See too: ***Mtokonya v Minister of Police*** 2018 (5) SA 22 (CC) at para [62] and [63], p. 46 B – G.

⁷¹ *Ibid.*, at para [19], pp. 174 G – 175 A, citing ***McKenzie v Farmers Co-Operative Meat Industries Ltd*** 1922 AD 16 at p. 23 (per Maasdorp JA, with Innes CJ, De Villiers JA, Juta JA, and JER de Villiers AJA concurring). See too: ***Ascendis Animal Health (Pty) Ltd v Merck Sharp Dohme Corporation and Others*** 2020 (1) SA 327 (CC) at paras [50] to [53], pp. 343 and 344.

(Own emphasis).

- [35] In instances where multiple causes of action are pleaded, and each one of them gives rise to a different debt, it is not uncommon that the due date(s) for such debts *might* – and sometimes probably *will* - be different too.⁷²
- [36] It is vital that a distinction must be drawn between a *wrongful arrest* and one that takes place *maliciously*. In ***Relyant Trading (Pty) Ltd v Shongwe and another***⁷³ the SCA (*per* Malan AJA [as he then still was]) described this distinction – and the associated concept of a *malicious prosecution* – in the following terms (footnotes omitted):⁷⁴

[4] *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. **An arrest is malicious where the defendant makes improper use of the legal process to deprive the plaintiff of his liberty.** In both wrongful and malicious arrest not only a person's liberty but also other aspects of his or her personality may be involved, particularly dignity. In *Newman v Prinsloo and another* the distinction between wrongful arrest and malicious arrest was explained as follows:

“[I]n wrongful arrest . . . the act of restraining the plaintiff's freedom is that of the defendant or his agent for whose action he is vicariously liable, whereas in malicious arrest the interposition of a judicial act between the act of the defendant and apprehension of the plaintiff, makes the restraint on the plaintiff's freedom no longer the act of the defendant but the act of the law.”

[5] *Malicious prosecution* consists in the wrongful and intentional assault on the dignity of a person comprehending also his or her good name and privacy. The requirements are that the arrest or prosecution be instigated without reasonable and probable cause and with “*malice*” or *animus iniuriarum*. Although the expression “*malice*” is used, it means, in the context of the *actio iniuriarum*, *animus iniuriandi*. In *Moaki v Reckitt & Colman (Africa) Ltd and another*, Wessels JA said:

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

⁷² John Saner SC, **Prescription in South African Law**, LexisNexis, Durban [Issue 34], p. 3-135.

⁷³ [2007] 1 All SA 375 (SCA).

⁷⁴ *Ibid.*, at paras [4] and [5], pp 377 and 378.

(Own emphasis).

[37] To succeed with a claim for malicious prosecution, a plaintiff must allege and prove that:⁷⁵

[37.1] The defendant(s) set the law in motion (i.e., instigated or instituted the proceedings);

[37.2] the defendant(s) acted without reasonable and probable cause;

[37.3] the defendant(s) acted with ‘malice’ (or *animus injuriandi*); and

[37.4] the prosecution has failed.

Mr Mangasa’s different causes of action:

[38] Mr Mangasa’s particulars of claim is by no means a model of clarity. Nonetheless, the averments made therein reveal that Mr Mangasa contends that: (i) Captain Zulu assaulted him and caused and injury to his eye;⁷⁶ (ii) he was unlawfully and *maliciously*⁷⁷ arrested and detained;⁷⁸ (iii) he was handcuffed and unlawfully detained;⁷⁹ (iv) his aforesaid ‘incarceration’ was caused by, among others, the *malicious actions* of the Minister and Captain

⁷⁵ ***Minister of Justice and Constitutional Development and others v Moleko*** [2008] 3 All SA 47 (SCA) at para [8], p. 46. See too, in this regard, ***Lederman v Moharal Investments (Pty) Ltd*** 1969 (1) SA 190 (A) at pp. 196 G – 197 F; and LTC Harms, ***Amler’s Precedents of Pleadings***, 2018 - Ninth Edition, LexisNexis (Durban), p. 256.

⁷⁶ *Ibid.*, at paras 6.1 and 6.2.1, pp. 001-5 and 001-6.

⁷⁷ Ordinarily, an allegation of ‘*intention to injure*’ (i.e., *animus injuriandi, dolus*) is necessary in an action for malicious arrest (Cf. ***Tödt v Ipser*** 1993 (3) SA 577 (A) at p. 586 F). However, in ***Moaki v Reckitt and Colman (Africa) Ltd and Another*** 1968 (3) SA 98 (A) at pp. 103 G – 104 F, Wessels, JA (writing for the court) acknowledged that the use of the term ‘malice’ had become customary to denote and intention to injure or *animus iniuriandi*.

⁷⁸ CaseLines: POC, para 6.1, p. 001-5.

⁷⁹ *Id.*

Zulu;⁸⁰ (v) the Minister ‘... *set wheels justice on motion*’ [sic];⁸¹ and (vi) he had additionally suffered a deprivation of his freedom and bodily security, and an impairment of his person, dignity and reputation.

[39] All these (allegedly) infringed facets of Mr Mangasa’s personality are protected by various provisions of the Bill of Rights in the Constitution of the Republic of South Africa, 1996 (**the Constitution**). So, for example, Mr Mangasa’s human dignity is protected by s 10 thereof (*Everyone has inherent dignity and the right to have their dignity respected and protected*); and Mr Mangasa’s freedom and security of the person is protected by s 12(1) thereof (*Everyone has the right to freedom and security of the person, which includes the right ... not to be deprived of freedom arbitrarily or without just cause*).

[40] Actionable relief for such infringements is claimable under the *actio iniuriarum*. In this instance, Mr Mangasa’s claims for assault and malicious arrest and detention are included in his particulars of claim under, what is referred to therein as, ‘*Claim A*’, while the claim for malicious prosecution is included therein under ‘*Claim B*’.

When did the claim for the alleged assault become due?

[41] The Minister’s approach is overly simplistic. His approach boils down to this: The claim(s) for alleged assault, arrest and detention – without the Minister giving any recognition to the *malicious* nature attributed to the latter in Mr

⁸⁰ *Ibid.*, para 6.2, pp. 001-5 and 001-6.

⁸¹ *Ibid.*, para 6.4, p. 001-6. On a benevolent reading of the pleading, I consider that the pleader seeks to assert that the Minister (vicariously through the actions of Captain Zulu) ‘*set the law in motion (instigated or instituted the proceedings)*’ See too, **Lederman**, *supra*, at p. 196 G – H.

Mangasa's particulars of claim – are simply pooled together and treated as if they constitute one '*debt*'. Therefore, since the claims for alleged assault and arrest both arose on 18 December 2018, on which date prescription supposedly commenced running, the alleged debt the Minister vicariously became liable for, was extinguished by prescription on 17 December 2021. Moreover, as the summons was only served on the Minister as late as 23 February 2023, it was way out of time to interrupt the running and completion of the prescriptive period prior to its expiry.

[42] I agree with the Minister's contention only as far as the alleged assault is concerned. The cause of action for an unlawful assault gives rise to a claim under the *actio iniuriarum* since it constitutes a violation of a person's bodily integrity.⁸² In terms of s 12(3) of the Prescription Act the debt is regarded as being due from the moment in time when the creditor has knowledge of the identity debtor and the facts giving rise to the debt. In the case of an assault, such as the one perpetrated on him by Captain Zulu, who was in charge of the Booyens Police Station at the time, Mr Mangasa reasonably ought to have known immediately who his assailant was and of the factual circumstances under which the assault occurred. After all, Mr Mangasa called for the attendance of the officer in charge of the Booyens Police Station when the officer, who was taking down Mr Mangasa's statement in respect of the robbery complaint, insisted that he should sign the statement before he had even finished reading it. It seems quite improbable that Mr Mangasa would not have been aware of Captain Zulu's identity from the moment that the latter intervened in the evolving dispute between himself and the officer who

⁸² **Mabaso v Felix** 1981 (3) SA 865 (A) at p. 873 G - p. 874 E.

recorded his statement of complaint. In any event, it was not suggested that any of these facts were unknown to Mr Mangasa at the time the assault took place. On the contrary, his founding affidavit in the condonation application conveys that he was fully aware of all these facts.⁸³ In these circumstances, it seems clear to me that the debt arising from the alleged assault perpetrated on him by Captain Zulu became due on the day of the alleged assault (i.e., 18 December 2018) and prescribed three years later on 17 December 2021.⁸⁴

When did Mr Mangasa's claims for wrongful and malicious arrest and detention and malicious prosecution become due?

[43] It is convenient to deal with the last of these claims (i.e., the one based on malicious prosecution) at the outset.

[44] It is trite that no action based on malicious prosecution will become due until the criminal proceedings have terminated in the plaintiff's favour. This was the position 128 years ago, when ***Lemue v Zwartbooi***⁸⁵ was decided by a full bench of the former Supreme Court of the Cape of Good Hope, and it is still the position today. The facts in ***Lemue*** were that Zwartbooi (**Z**) (the respondent in the appeal) was employed as a herd by Lemue (**L**) (the appellant in the appeal). On 27 April 1896, L charged Z with the contravention of a statutory offence for having absented himself from his service without lawful cause. The magistrate of Albert, who tried the case, dismissed the

⁸³ CaseLines: Mr Mangasa's founding affidavit: paras 7 and 8, p. 018-4.

⁸⁴ E Cameron 'Time', Volume 27, **Law of South Africa ('LAWSA')**, Second Edition, para 285. According to the civilian method of computation '... a period thus always commences at the start of the day in the later course of which the initiating event occurs. ... the period must end at midnight at the end of the day before the day in the course of which the period would according to the natural method of calculation have expired.' See too: ***Ex parte Minister of Social Development and Others*** 2006 (4) SA 309 (CC) at para [24], p. 316 G – I.

⁸⁵ (1896) 13 SC 403.

charge against Z because the magistrate believed that Z had requested L's consent to absent himself to go to Burghersdorp. Thereafter, on 9 May 1986, a preliminary examination was held before the assistant resident magistrate of Albert on a charge of perjury that L had instituted against Z. L and his wife had both deposed to affidavits that Z had given false evidence at the previous trial. A warrant for Z's arrest was issued by the assistant resident magistrate after L and his wife had made the affidavits. On the record of the preliminary examination, which was sent to the Solicitor-General for consideration, the latter declined to prosecute, and Z was discharged. Z then instituted an action for damages against L in the sum of £20 for malicious arrest and prosecution. The assistant resident magistrate upheld the Z's claim for damages in the amount of £ 7 and costs. L then appealed to the Supreme Court on the grounds that the prosecution had not terminated in Z's favour, but that the Solicitor-General had merely declined to prosecute him.

[45] It was in this context that De Villiers, CJ (with whom Buchanan, J and Maasdorp, J concurred) stated that:⁸⁶

*'Matthæus (De Crim. p. 642) appears to doubt whether the actio iniuriarum could be brought against a person who has maliciously accused an innocent person of a crime, although, strangely enough, he assumes that the actio calumniæ could still be brought. He adds, however, that if the former action still lay, it could not be brought while the prosecution was pending, but after it had come to an end. iniuriarum actio, si modo ea in calumniatorem datur, non pendente accusutione, sed finita datur. The doubts expressed by Mattheus have never been shared by this Court, nor, so far as I am aware, by any of the other South African Courts. **The essential requisites of an action are proof of malice on the part of the defendant and want of reasonable and probable cause for the prosecution. While a prosecution is actually 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 of the civil action being tried.'*

(Own emphasis).

⁸⁶ At p. 407.

[46] In *Els v Minister of Law and Order and Others*⁸⁷ the above-quoted statement in *Lemue* was criticised by the defendant's counsel on the basis that De Villiers CJ supposedly had misunderstood the words *non pendente accusatione* in the quotation taken from *Matthaeus*.⁸⁸ In a careful and considered analysis of the authorities, the court (*per* Foxcroft J) stated the following about the above-quoted statement in *Lemue*:⁸⁹

'It is fully in accordance with common sense and the practical resolution of litigation that accused persons in criminal cases against whom prosecutions have commenced should not be required to commence civil litigation before the conclusion of criminal proceedings. The extraordinary consequences of such a view would be that many civil actions for wrongful or malicious prosecution would have to be commenced, later in most cases to be abandoned when the criminal case was resolved in favour of the State and where no civil claim could succeed.

Far from being persuaded that *Lemue v Zwartbooi* misunderstood *Matthaeus* and laid down an incorrect legal principle, I am satisfied, with respect, that this decision of three Judges of the Cape Supreme Court was correct.

I have gone into this matter in some detail to show, with great respect, that the decision in *Lemue v Zwartbooi* insofar as it relies on *Matthaeus*, is clearly correct.

In any event, I am bound by the decision of De Villiers CJ, Buchanan and Maasdorp JJ in that case.'

[47] In *Els*⁹⁰ the court also referred to the case of *Thompson and Another v Minister of Police and Another*⁹¹ in support of the legal requirement currently under discussion. In *Thompson* the court (*per* Eksteen, J) was dealing with two actions in which the plaintiffs had instituted against the Minister of Police (**first defendant**) and a Warrant Officer Hansen (**second defendant**). The plaintiffs' main claim in each of these actions was for damages based on an alleged wrongful arrest. In the alternative, against the second defendant alone, the plaintiffs' claims for damages were based on an

⁸⁷ 1993 (1) SA 12 (C).

⁸⁸ *Els*, *supra*, at pp. 15 J – 16 B, as well as at p. 16 I.

⁸⁹ *Ibid.*, pp. 17 G – 18A.

⁹⁰ *Ibid.*, p. 15 G.

⁹¹ 1971 (1) SA 371 (E).

alleged *malicious* arrest, *malicious* detention and *malicious* prosecution. Apart from having pleaded over on the merits, both defendants also filed a special plea against the main claim in which they contended that it was time-barred for want of compliance with the notice requirements of s 32 of the erstwhile Police Act, No. 7 of 1958. As far as the alternative claim against the second defendant alone is concerned, the latter also filed a special plea contending that the plaintiffs' claims for damages against him based on *malicious* arrest and *malicious* detention (but *not* for the claim for *malicious* prosecution) are similarly time-barred for want of compliance with s 32. A stated case, in which the following two main questions were formulated, was presented to the court for adjudication:⁹²

- '(a) On the assumption that the second defendant in effecting the said arrests was acting in pursuance of the Police Act, 7 of 1958, but that plaintiffs' arrest was wrongful and unlawful, did plaintiffs fail to commence action within six months after their cause of action arose, and are they therefore debarred by sec. 32 of Act 7 of 1958 from bringing their action against defendants?
- (b) On the assumption that plaintiffs were maliciously arrested and detained by second defendant:
- (i) Was second defendant acting in pursuance of the Police Act. 7 of 1958;
 - (ii) Is compliance with the provisions of sec. 32 of Act 7 of 1958 a pre-requisite for the commencement of plaintiffs' action for damages against second defendant; and
 - (iii) Have plaintiffs failed to comply with the provisions of that section by failing to commence action within six months of their cause of action arising, and are they therefore debarred from bringing action against second defendant?'

The first question (i.e., as formulated in (a)) was answered by the court in favour of the defendants,⁹³ while the second question (i.e., as formulated in (b)) was answered in favour of the plaintiffs.⁹⁴ Prior to providing these

⁹² *Thompson, supra*, at p. 372 E -H.

⁹³ *Ibid.*, p. 376 D.

⁹⁴ *Id.*

answers to the stated case that was presented to him, the learned judge's rationale for such answers can be gleaned from the following passage:⁹⁵

'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 prejudged by the civil action (*Lemue v Zwartbooi*, *supra* at p. 407). The action therefore only arises after the criminal proceedings against the plaintiff have terminated in his favour or where the Attorney-General has declined to prosecute. To my mind the same principles must apply to an action based on malicious arrest and detention where a prosecution ensues on such arrest, as happened in the present case. The proceeding from arrest to acquittal must be regarded as continuous, and no action for personal injury done to the accused person will arise until the prosecution has been determined by his discharge. (*Bacon v. Nettleton*, 1906 T.H. 138 at pp. 142 - 3).

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

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

⁹⁵ *Ibid.*, pp. 374 G – 376 A/B.

that illegal arrest has been made. In the present case, therefore, the cause of action in the main claims arose on 10th April, 1967. In terms of the stated case I am asked to assume not only that the arrest was wrongful, but also that in effecting the arrest Hansen was acting in pursuance of the Police Act. That being so, sec. 32 of Act 7 of 1958 applies and it is clear that this section has not been complied with inasmuch as both the notice given to the defendants and the subsequent issue of summons were outside the periods prescribed by that section. Plaintiffs' actions against first and second defendants for wrongful arrest are therefore out of time and cannot be entertained. This is the only cause of action preferred against the first defendant, and in the light of the conclusions to which I have come, it follows that both the plaintiffs' actions against the first defendant must be dismissed with costs, which costs include the first defendants costs in this proceeding.

The fact that the plaintiffs cannot proceed with their actions against the second defendant for wrongful arrest, does not, however, mean that their actions against him fail altogether as they can still proceed with their alternative claims based on malicious arrest and detention, and for malicious prosecution, and if they succeed on these claims they will be entitled to their costs of action.'

(Own emphasis).

[48] The learned judge in *Thomson* therefore clearly delineated between the requirements or elements of a *wrongful* arrest and one that is effected *maliciously*. In the case of the former the cause of action is complete, and thus becomes due, *as soon as that illegal arrest has been made*,⁹⁶ while in the case of the latter the cause of action is complete, and thus becomes due, *when the criminal proceedings are terminated in the plaintiff's favour* (i.e., the successful appeal on 29 April 1969 against the plaintiffs' conviction in the magistrate's court).⁹⁷ These findings underscore the essence of the court's findings on each of the questions in the stated case.

[49] As far as I have been able to establish, *Thompson* has never been overruled or otherwise called into question on this specific topic. It is, therefore, unsurprising the author and academic Professor DJ McQuoid-Mason still cites *Thompson* as one of the primary judicial authorities on the rubric of malicious

⁹⁶ *Ibid.*, p. 375 G.

⁹⁷ *Ibid.*, p. 375 C - D.

arrest and imprisonment.⁹⁸ More recently, *Thompson* was also cited with approval in the SCA's judgment in *Holden v Assmang Ltd*.⁹⁹

[50] *Holden* was concerned with an appeal to the SCA by the appellant (H), a clinical psychologist, after a full bench of the KwaZulu-Natal Division of the High Court had overturned a decision made in her favour by the trial judge in an action based on malicious prosecution. Such action was instituted by H against the respondent, Assmang Ltd (A), after the latter had lodged complaints relating to a gross breach of her professional ethics against H with the Health Professions Council of South Africa (HPSCA). The relevant aspects of *Holden* can be summarised as follows:

[50.1] The complaint was dealt with by the HPCSA's Committee of Preliminary Inquiry of the Professional Board for Psychology on 30 October 2009. On 13 November 2009, the HPCSA informed the H's senior counsel that the committee had accepted the H's explanation and had resolved not to take any further action against her.

[50.2] On 6 August 2012, H instituted an action for damages against A based on malicious proceedings. Two special pleas were filed. The

⁹⁸ DJ McQuoid-Mason, 'Malicious Proceedings', Volume 28(1), *LAWSA*, Third Edition, para 38. See too: D Bouwer *et al*, 'Police', Volume 20(2), *LAWSA*, Second Edition), para 186, where the authors state, with reference to *Thompson*, p. 375: 'A cause of action in respect of malicious prosecution commences to run from the date on which the plaintiff was informed that the criminal case is concluded in his or her favour or that the Director of Public Prosecutions decided not to prosecute him or her. **It has been held that the same principles must apply to an action based on malicious arrest and detention where a prosecution ensues. The proceedings from arrest to acquittal are regarded as continuous and no action for personal injury done to the accused person will arise until the prosecution has been determined by his or her discharge.**' (Own emphasis).

⁹⁹ 2021 (6) SA 345 (SCA)

one raised the issue of prescription. The trial court dismissed this plea and found that H's claim had not prescribed because H:¹⁰⁰

'... pleaded a case premised on malicious prosecution and that **consequently, the prescriptive period would have started to run only once she was notified by the HPCSA on 13 November 2009 that no further action would be taken against her.**'

(Own emphasis).

[50.3] Before the SCA it was submitted on behalf of A that, on the basis of English case law, the strict principles of *malicious prosecution* and the requirement that the prosecution must have failed do not apply since the HPCSA is only a disciplinary body.¹⁰¹

[50.4] The SCA rejected this argument on the basis, among others, that the HPCSA is an important tribunal, whose decisions can have far-reaching consequences. Its guilty findings could result in medical practitioners losing their licences to practise. Moreover, since statutorily created tribunals, such as the HPCSA, employ the formal machinery of a criminal prosecution in disciplinary proceedings, with sanctions that are punitive in nature, such proceedings are closely analogous to and bear all of the hallmarks of a criminal prosecution.¹⁰²

[50.5] An important passage from *Thompson* was next quoted (i.e., specifically the emphasised portion of the same passage that I quoted in paragraph 47 above).¹⁰³ Immediately preceding this quotation the

¹⁰⁰ *Holden* at para [4], p. 347.

¹⁰¹ *Ibid.*, at para [11], p. 349.

¹⁰² *Id.*

¹⁰³ *Ibid.*, at para [12], pp. 349 - 350.

SCA stated that Eksteen J's *dictum* in ***Thompson***¹⁰⁴ correctly encapsulated the legal position.

[50.6] In conclusion, the SCA – in dismissing A's appeal and overturning the full bench's judgment – held:

'[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.'

(Own emphasis).

[51] In the preceding years ***Thompson*** was referred to on only a few occasions. It was referred to in ***Makhwelo v Minister of Safety and Security***¹⁰⁵ in which the court (*per* Spilg, J) expressed the viewpoint that certain of the cases he had referred to (i.e., ***Lombo v African National Congress*** 2002 (5) SA 668 (SCA), ***Ngcobo v Minister of Police*** 1978 (4) SA 930 (D) and ***Slomowitz v Vereeniging Town Council*** 1996 (3) SA 317 (A)) do not pertinently answer the question as to when a debt first arises for purposes of a s 3(2) notice under the ILPA when an unlawful arrest and detention is effected without a warrant.¹⁰⁶ The learned judge then proceeded to state:¹⁰⁷

'So viewed there appears to be a distinction between a case where the commencement of the debt arises by reason of an objectively observed event (such as the road closure) or the infliction of bodily harm under the *lex Aquilia* and the case of wrongful arrest and detention without a warrant which requires the wrongdoer to have effected the arrest on the

¹⁰⁴ Dlodlo JA (Ponnan JA, Molemela JA, Eksteen AJA and Unterhalter AJA concurring).

¹⁰⁵ 2017 (1) SA 274 (GJ) at paras [60] and [61], p. 290 A – G.

¹⁰⁶ *Ibid.*, para [48], p. 284 H.

¹⁰⁷ *Ibid.*, para [49], p. 284 I.

grounds of a reasonable suspicion that a scheduled offence had been or was about to be committed.’

(Own emphasis)

[52] After identifying a number of so-called ‘*distinguishing features*’ between the former category (*a case where the commencement of the debt arises by reason of an objectively observed event - such as a road closure - or the infliction of bodily harm under the lex Aquilia*)¹⁰⁸ and juxtaposing them with the latter category’s features (*a case of wrongful arrest and detention without a warrant*),¹⁰⁹ Spilg J proceeded as follows:¹¹⁰

‘[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 (e.g., *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.**’

(Own emphasis).

¹⁰⁸ *Ibid.*, paras [50] to [53], pp. 285 J – 287 C. The distinguishing features mentioned are: (i) first, a debt becomes due when all the *material facts* giving rise to it are known, or ought reasonably to have been known by the creditor, and all the creditor’s damages must be claimed in a single action covering both past and future damages (para [50], pp. 284 J – 285 F); (ii) second, knowledge of such *material facts* does not require knowledge that the actions were culpable, as culpability, whether in the form of negligence or otherwise, is a conclusion of law drawn from the evidence (para [51], pp. 285 F – 286 H); and (iii) third, the debt is only due if it is immediately claimable and the debtor is obliged to perform immediately (para [52], p. 286 H – J). These features are summarised, albeit not in this exact order, at para [53], p. 287 A -C.

¹⁰⁹ *Ibid.*, paras [54] to [57], pp. 287 C – 288 G.

¹¹⁰ *Ibid.*, para [58], p. 288 G - I.

[53] The learned judge then referred to the SCA's judgment in ***Unilever Bestfoods Robertsons (Pty) Ltd and Others v Soomar and Another***,¹¹¹ and, after quoting extensively from it,¹¹² expressed the following viewpoint:¹¹³

'[62] In my respectful view I am bound by the ratio of Farlam JA in *Unilever* and the long line of cases relied on from *Lemue v Zwartbooi* (1896) 13 SC 403 to *Els v Minister of Law and Order and Others* 1993 (1) SA 12 (C). Moreover, the SCA extensively adopted in *Unilever* the supportive reasoning contained in the article by Dr CF Amerasinghe in *Aspects of the Actio Iniuriarum in Roman-Dutch Law* as to why a pending prosecution cannot be allowed to be prejudged in the civil action. By contrast it appears that this issue was not raised before the SCA in *Lombo*, and none of the cases relied upon in *Unilever* were mentioned by counsel if regard is had to the authorities listed. Perhaps more importantly, even though *Lombo* was not dealt with *Unilever* is the more recent decision and it dealt expressly with this issue.'

[54] Although I entertain grave doubts about the correctness of this latter viewpoint, it is unnecessary in the context of the present case, which is concerned with claims of *malicious* arrest and *malicious* detention, to express any affirmation for, or disapproval of, it. However, and solely for the sake of completeness, my doubts about such viewpoint mainly pertain to (i) the obvious conflation of *unlawful* arrest and detention with *malicious* arrest and detention; and (ii) the true impact of the SCA's judgment in ***Unilever***. Enough has been said about the first area of concern, which is adequately highlighted by the delineation made in ***Thompson***¹¹⁴ between the requirements or elements of a *wrongful* arrest and one that is effected *maliciously*. As far as the impact of ***Unilever*** is concerned, I have difficulty in conceiving how the judgment therein¹¹⁵ can ever be interpreted as authority for the proposition that the requirements or elements of a *wrongful* arrest and one that is effected

¹¹¹ 2007 (2) SA 347 (SCA).

¹¹² ***Makhwelo*** at para [59], pp. 288 I – 290 A.

¹¹³ ***Makhwelo*** at para [62], pp. 290 G – 291 A.

¹¹⁴ This delineation is discussed in paragraph 48 above.

¹¹⁵ Farlam, JA, with whom Brand JA, Nugent JA, Mlambo JA and Cachalia AJA concurred.

maliciously are the literally same, or somehow analogously equivalent, which is the precise effect achieved, or sought to be achieved, by the final finding made in **Makhwelo**.¹¹⁶ In any event, the SCA's judgment makes clear that the court had merely assumed, without deciding, that the second plaintiff in that case had available to it a cause of action '*based on the abuse of legal proceedings*', akin to a cause of action for malicious prosecution where the '*termination in favour of the plaintiff*' principle would find application.¹¹⁷

[55] Two further cases need to be mentioned. They serve to illustrate why it is necessary to distinguish between an *unlawful* arrest and detention and a *malicious* arrest and detention. The first case is **Minister of Police and Another v Yekiso**¹¹⁸ and the second case is **Lombo v African National Congress**.¹¹⁹

[56] In **Yekiso** a full bench¹²⁰ of the Western Cape High Court (**WCC**) held that it was necessary to separate the various claims against first appellant (i.e., the Minister of Police in that case) as the claims based on unlawful arrest and unlawful detention constitute separate causes of action.¹²¹ The facts in **Yekiso** were briefly that:

[56.1] The respondent (**Y**) was arrested on 21 February 2006; Y was released from prison on 7 October 2011; Y's summons was initially served on the first appellant on 4 October 2012 and on the second

¹¹⁶ **Makhwelo** at para [62], pp. 290 G – 291 A.

¹¹⁷ **Unilever** at paras [16] to [18], pp. 358 I – 359 H, especially the first sentence in para [18], p. 359 F.

¹¹⁸ 2019 (2) SA 281 (WCC).

¹¹⁹ 2002 (5) SA 668 (SCA).

¹²⁰ Davis J, with whom Boqwana J and Nuku J concurred.

¹²¹ **Yekiso** at para [9], p. 284 E – G.

appellant (i.e., the NDPP) on 12 March 2013; the latter action was withdrawn on 6 January 2014; and, finally, a new action was instituted with the summons therein being served on first appellant on 21 July 2014 and on second appellant on 1 September 2014.¹²²

[56.2] The court *a quo* upheld Y's application for condonation in terms of s 3(4) of the ILPA. In doing so the court *a quo* held that Y's 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.*'¹²³

[56.3] The Full Bench of the WCC (*per* Davis J) rejected this approach and, in doing so, expressed itself as follows:¹²⁴

'This finding is clearly in conflict with the approach adopted in *Lombo v African National Congress* 2002 (5) SA 668 (SCA) para 26 and with the concept of a continuous wrong as set out in *Barnett and Others v Minister of Land Affairs and Others* 2007 (6) SA 313 (SCA) (2007 (11) BCLR 1214; [2007] ZASCA 95) para 20:

"In accordance with the concept, a distinction is drawn between a single, completed wrongful act — with or without continuous injurious effects, such as a blow against the head — on the one hand, and a continuous wrong in the course of being committed, on the other. While the former gives rise to a single debt, the approach with regard to a continuous wrong is essentially that it results in a series of debts arising from moment to moment, as long as the wrongful conduct endures. (See e.g., *Slomowitz v Vereeniging Town Council* 1996 (3) SA 317 (A); *Mbuyisa v Minister of Police, Transkei* 1995 (2) SA 362 (TK) (1995 (9) BCLR 1099); *Unilever Best Foods Robertsons (Pty) Ltd and Others v Soomar and Another* 2007 (2) SA 347 (SCA) in para [15]."

¹²² *Ibid.*, at para [17], p. 285 F – H.

¹²³ *Ibid.*, at para [19], pp. 285 J - 286 A.

¹²⁴ *Ibid.*, at para [19], pp. 285 J - 286 D.

[57] **Yekiso's** case is self-evidently not applicable in the present instance as it is not concerned with a *malicious* arrest and/or detention, but rather with a claim for *unlawful arrest* and subsequent detention.

[58] The passage quoted from the judgment in **Yekiso**¹²⁵ relies on, among others, the SCA's judgment in **Lombo**.¹²⁶ This is the second of the two cases mentioned. In **Lombo** the SCA (*per* Smalberger ADP, with whom Olivier JA, Streicher JA, Farlam JA and Navsa JA concurred) held that:¹²⁷

[25] The physical detention of the appellant outside the Republic of South Africa in circumstances in which he was prevented from pursuing personally any action arising from the alleged assaults and maltreatment inflicted upon him, and totally denied access to anyone who could do so on his behalf, amounted to his being prevented by a superior force from interrupting the running of prescription as contemplated by s 13(1)(a). Consequently, he had one year from the time this impediment ceased to exist (his release from detention and return to this country) within which to institute action in respect of all causes of action arising from the alleged assaults and maltreatment to which he was subjected during his detention, and his property that was allegedly misappropriated. The Act therefore made provision for his situation to the exclusion of the common law and the maxim invoked accordingly finds no application. Unfortunately for the appellant he failed to institute action within the one-year period prescribed by s 13(1) and any claims he might have had in respect of the causes of action referred to have consequently been extinguished by prescription.

[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) 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.'

¹²⁵ See paragraph 36 above.

¹²⁶ 2002 (5) SA 668 (SCA).

¹²⁷ *Ibid.*, at paras [25] to [27], pp. 678 H – 679 F.

(Own emphasis).

[59] **Yekiso** and **Lombo** further serve to illustrate that in respect of *unlawful* detention each day spent in detention gives rise to a separate claim. Prescription for each such claim commences running separately as each day of detention passes. This is not comparable to the situation where a *malicious* arrest is effected and (subsequent) detention occurs. In this latter situation the *period from arrest to acquittal are regarded as continuous* and no action for any personal wrong done will arise until the criminal prosecution of the person wronged or injured has been determined by a favourable discharge in those proceedings. This has authoritatively been decided by **Thompson**, as explained above.

[60] In summary, I conclude that Mr Mangasa's claims for *malicious* arrest and detention only became *due* on 4 May 2021, when the criminal proceedings instituted against Mr Mangasa were successfully terminated in his favour.¹²⁸ That is the date on which Mr Mangasa became entitled to institute the *actio iniuriarum* and to pursue his claim against, among others, the Minister.¹²⁹ Consequently, I find that the earliest date on which Mr Mangasa's claim for *malicious arrest, detention and prosecution* – and, hence, the Minister's alleged *debt* to Mr Mangasa – will become prescribed, is 3 May 2024. This debt is therefore still extant for purposes of Mr Mangasa's claim, as the summons already was served on the Minister on 23 February 2023, approximately some fourteen (14) months prior to the expiry of the prescriptive period referred to in s 11(d) of the Prescription Act.

¹²⁸ See paragraph 5.3 above.

¹²⁹ **Truter**, *supra*, at para [16], p. 174 C – D.

[61] I now turn to considering – in accordance with the approach approved of in ***Madinda's*** case - the remaining two requirements stipulated in s 3(4)(b)(ii) and (iii) of the ILPA.

THE SECOND REQUIREMENT OF GOOD CAUSE

[62] It is apposite, prior to undertaking a discussion on the second requirement, to take stock of the Mr Mangasa's claims at this stage in the light of the conclusions arrived at under the first requirement.

[63] Mr Mangasa's claim for unlawful assault prescribed on 17 December 2021. His claims for *malicious* arrest, detention and *malicious* prosecution only became due on 4 May 2021 and have not yet prescribed. Had service of the summons on the Minister not occurred as far back as 23 February 2023, these claims – and the Minister's correlative debts – might otherwise become prescribed on 3 May 2024.

[64] The s 3(1) and (2) written notice was served on the Minister during May and/or June 2021.¹³⁰ As far as the Mr Mangasa's claim for assault is concerned, the notice was served far too late, but it was not served too late in respect of his claims for *malicious* arrest, detention and *malicious* prosecution. Since the debts arising from these claims only became due on 4 May 2021, the notices were self-evidently given and served timeously – i.e. well within six months from the date on which the debt became due, as contemplated in s 3(2)(a) of the ILPA.

[65] In the result, Mr Mangasa does not require any condonation for (allegedly) having failed to timeously serve the required statutory notice on the Minister (or the relevant Commissioners) in terms of the ILPA. The relevant notice

¹³⁰ See, in this regard, paragraphs 16 and 17 (as well as the source references mentioned therein) above.

was timeously served on the latter in respect of Mr Mangasa's claims for *malicious* arrest and detention.

THE THIRD REQUIREMENT OF ABSENCE OF UNREASONABLE PREJUDICE

[66] The issue of '*unreasonable prejudice*' also does not arise for consideration. Although there was a failure to comply with the notice requirements of the ILPA in respect of Mr Mangasa's claim for unlawful assault, condonation for such failure cannot be granted since that claim already has prescribed.

[67] However, in respect of Mr Mangasa's claims for *malicious* arrest, detention and prosecution, there has been no failure in respect of such notice requirements and, hence, the Minister could not have been prejudiced in respect of these claims at all.

AN ISSUE PERTAINING TO COSTS

[68] Having regard to the declaratory order I intend making, it might be understood, incorrectly so, that Mr Mangasa was the successful party. Such an understanding will be misinformed. The intended declarator is made simply to ensure that the all the parties' appreciate what their present legal position is *vis-à-vis* the written statutory notice(s) that were given by Mr Mangasa's attorney of record in terms of s 3(1) of the ILPA.

[69] Since such notice was given too late as far as Mr Mangasa's claim for unlawful arrest is concerned, condonation could not have been granted in respect thereof since it already had prescribed. In respect of his remaining

claims, which had not prescribed, Mr Mangasa did not require any condonation since the notice in respect thereof was given timeously and properly. An option would have been to simply dismiss the condonation application and then to leave it to the parties to interpret what their respective legal positions are going forward. Potentially, the latter route could create a productive area for the emergence of further disputes. The declarator made below seemed to me the better route to follow, because it informs the parties as to the way forward and, simultaneously, serves to protect their respective rights and interests as to the current position.

[70] In addition, since this is an interlocutory application, I consider that, in all the circumstances, it is fair and reasonable to both parties that the costs of the condonation application should be costs in the cause. Ultimately, the issue of malice or *animus iniuriandi*, whether established or not, may further guide the correct decision to be made on this particular issue.

ORDER

[71] In the foregoing premises, I make the following order:

[71.1] It is declared that the letter dated 'May 2021', written by the applicant's attorney, Mr TT Thobane, was timeously and properly given to, and served on, the first respondent (i.e., the Minister) as a notice to institute legal proceedings:

- (a) in terms of s 3(1)(a) of the Institution of Legal Proceedings against Certain Organs of State, Act 40 of 2002; and

(b) in respect of the applicant's claims for *malicious* arrest, detention and prosecution; and

[71.2] the costs of this application are to be costs in the cause.

EW DUNN
Acting Judge of the High Court
Gauteng Division, Johannesburg

Attorney for the applicant: Mr TT Thobane.

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Counsel for the respondent: Adv ZD Maluleke.

Instructed by: State Attorney, Johannesburg.

Date of hearing: Monday, 5 September 2023.

Date of Judgment: Thursday, 22 February 2024.

Judgment handed down electronically.