HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 63867/2017

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.
DATE: 24 NOVEMBER 2023

SIGNATURE

In the matter between:

SIMON SONGO Plaintiff

and

THE MINISTER OF POLICE First Defendant

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS Second Defendant

THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICE Third Defendant

Summary: *Claim for damages pursuant to a successful appeal against conviction in a criminal matter. Claim not falling under the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 nor are the circumstances of such a nature*

that the common law should be developed to provide for such claims. Special pleas regarding non-disclosure of a cause of action upheld.

ORDERS

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1. The fourth and fifth special pleas are upheld.

2. Each party is ordered to pay its own costs.

J U D G M E N T

This matter has been heard in open court and is otherwise disposed of in terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

DAVIS, J

Introduction

[1] Of course, any innocent person wrongly incarcerated has suffered a deprivation of his freedom, but whether such a person has a claim for damages after he had initially been found guilty and only been released after a successful appeal, was the question to be determined in this case. If the law didn't allow for such a claim, the ancillary question was whether this case merits the development of the common law.

[2] The plaintiff's counsel formulated the issue as follows: "*Judges are often wrong and courts of appeal exist to correct their mistakes. But restoration of freedom by acquittal on appeal is not enough*".

Background facts

[3] The heads of argument delivered on behalf of the plaintiff states that from the police docket and the court record (in the criminal trial and subsequent appeal) it appeared that the police had been summoned to a scene left by an assault by the community of two "boys".

[4] The scene was close to the houses of the Lebese and Songo families. The plaintiff, Simon Songo lived in the one house and two of his co-accused, Messrs Vincent and Gilbert Lebese, lived in the other house. At the scene, the investigating officer encountered the body of an unknown young man. A forensic team was called in and the cause of death was found to be "head injuries". In the indictment it was alleged that the deceased was killed by having been "kicked with booted feet and whipped with hosepipes".

[5] The plaintiff's warning statement taken down by the police later on the same day, read as follows: "*That on 18.06.2006 at about 22h00 I was from a stokvel at Jakkalsdans. When as I was about to enter my parental yard, I saw a group of people of Lebese family house. I then stopped my car at the gate and went to investigate what was happening at Lebese's place. I found two black males wearing only their Jockeys and soaked with water. They were being assaulted with a hosepipe, kieries, others were kicking them. They informed me that the two deceased had robbed Mr Lebese. I took a hosepipe and assaulted the one of Mahlangu known as Thebo only thrice. I then left in my car. Then Vincent requested me to take one suspect to Phasha Village. I realized that he was severely injured. I stopped at the suspect's place. Vincent and Gilbert took*

the suspect inside the yard. They came back and we drove back to Masonga stand. I then went to my place and slept. Amongst the people who assaulted the two deceased, I saw Gilbert and Vincent in possession of hosepipes. There were other people also having their share at beating. That is all".

[6] The second "suspect" mentioned by the plaintiff had also passed away as a result of the beating and the plaintiff and four co-accused were charged with a double murder, having acted in common purpose.

[7] The trial came before Hendricks (then) J in the North West Division. After having heard the evidence of six prosecution witnesses as well as that of all the accused and a single defence witness (who confirmed the plaintiff's attendance at a stokvel in Jakkalsdans) and after having considered the formal admissions regarding the post-mortems findings and the identification of the deceased, the plaintiff was found guilty of two counts of murder (together with his co-accused) and was sentenced to 18 years imprisonment.

[8] On 15 October 2015, a full court of the North West Division of the High Court upheld the plaintiff's appeal against conviction and sentence and ordered his release.

[9] Almost two years later, the plaintiff launched the current action for damages on 14 September 2017, citing the Minister of Police, the National Director of Public Prosecutions and the Minister of Justice as the first, second and third defendants respectively.

[10] After an exception had been lodged, the plaintiff replaced his particulars of claim pursuant to a notice to amend, dated 27 February 2018 to read as follows:

"*5. On the 19th of June 2006 and at Masonga Stand, Phasha a group of people ordinarily resident in the Phasha community assaulted and murdered two men.*

6. Members of the South African Police Service, including one Inspector Modiba, arrested the plaintiff, who was standing in his yard, which is in close proximity of the scene of the crime, and detained him at Klipgat police station.

7. The aforesaid policemen arrested and detained the plaintiff without a warrant on the evidence of a single eye witness, without reasonable and probable cause and without proper and diligent investigation and in the absence of any suspicion of guilt on the part of the plaintiff.

8. The aforesaid members of the South African Police Service acted in the course and scope of their employment.

9. An unknown member or members of the National Prosecuting Authority in due course indicted the plaintiff and four other accused of the murder of the deceased.

10. The aforesaid member or members of the National Prosecution Authority took the decision to indict and prosecute the plaintiff without any reasonable or probable cause to do so and in the absence of any suspicion of guilt on the part of the plaintiff, and without instructing the members of the South African Police Service in charge of the investigation into the assault and murder of the deceased to

properly investigate whether the plaintiff had committed a crime.

11. *On the 19th November 2009 the Northwest Division of the High Court convicted the plaintiff on two counts of murder and on the 6th of December 2009 sentenced him to 18 (eighteen) years imprisonment.*

12. *The trial court misdirected itself in convicting the plaintiff on the unreliable evidence of a single eye witness and in the absence of any other evidence that the plaintiff had participated in the assault on and murder of the deceased.*

13. *On the 15th October 2015 the Full Bench (sic) of the Northwest Division of the High Court upheld the plaintiff's appeal against his conviction and ordered his immediate release from imprisonment.*

14. *In the premises, there was a complete miscarriage of justice and the plaintiff was wrongfully convicted of a crime which he had not committed as a result of the aforesaid –*

    14.1 the unlawful arrest and detention of the plaintiff;

    14.2 the unlawful decision to prosecute and prosecution;

    14.3 the misdirection by the trial court.

15. *As a result of the miscarriage of justice, the plaintiff was imprisoned for a period of almost 6 (six) years, i.e. from the*

6th of December 2009 until his release on the 15th of October 2015.

16. *In the premises, and as a result of the unlawful deprivation of his constitutional right to freedom, the plaintiff suffered damages in the amount of R9 500 000.00 (Nine Million Five Hundred Thousand Rand).*

17. *The plaintiff complied with the provisions of s3 of Act 40 of 2002 and the time limits have expired*".

Procedural history

[11] The particulars of claim elicited no less than six special pleas. They were (1) and (2) that the plaintiff has failed to comply with Rules 18(1) and 18(10), (3) that there was non-compliance with the provisions of sections 3(1) and 3(2) (a) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002, (4) and (5) that no cause of action had been disclosed against the first and second defendants and (6) that the Minister of Justice had wrongly been joined as the third defendant.

[12] The first and second special pleas were subsequently abandoned. The remainder of the special pleas came before Sardiwalla J on 30 October 2019. On 5 May 2020 he condoned the plaintiff's failure to comply with the provisions of the Institution of Legal Proceedings Against Certain Organs of State Act, thereby effectively disposing of the third special plea.

[13] After the submission of further written submissions and requests by the parties, Sardiwalla J on 6 November 2020 handed down a further judgment, upholding the sixth special plea of misjoinder, but ordering that the fourth and fifth special pleas be adjudicated separately.

[14] Aggrieved by the above, the plaintiff sought and on 10 February 2021 obtained leave to appeal to the Supreme Court of Appeal. That court found on 15 March 2022 that "*it is the primary function of a court to bring finality to the dispute with such a court is seized … This, the high court in this matter has omitted to do. It resorted to postponing the determination of the fourth and fifth special pleas. It wrongly granted leave to appeal to this court instead of first exhausting that which was its duty to perform*".

[15] The matter was remitted to the High Court for the determination of the fourth and fifth special pleas and that is how the matter came before this court.

[16] In addition to the abovementioned remittal, the Supreme Court of Appeal also found as follows: "*The nature of the claim instituted by the appellant is such that it is premature to absolve the third [defendant] at this stage. It is, of course, not yet known as to how a trial court will decide the real issues set out above. It may be contrary to the dictates of justice to decide at special plea level that the third respondent was wrongly cited*". Accordingly the appeal succeeded to the extent that the sixth special plea was dismissed.

[17] When the matter came before this court, the parties elected not to lead any evidence, despite the contemplation of the possibility thereof by the Supreme Court of Appeal. They accordingly proceeded to argue the fourth and fifth special pleas with the material at hand. The relief sought by the plaintiff, as set out in heads of argument by his counsel, advocates T.P Kruger SC, C D'Alton and S Barreiro was the following:

> *(i) That the remaining special pleas raised by the defendants be dismissed;*

(ii) That exceptional circumstances have been established and that the plaintiff is entitled to compensation in terms of the Article 85(3) of the RSICC and accordingly that it is declared that the defendant jointly and severally are liable for such damages as proven by the plaintiff or agreed by the parties;

(iii) Alternatively to paragraph (ii)

(a) It is declared that an innocent person who has been convicted in a court of law and sentenced to any period of incarceration, and who has later been found to have been innocent of the crime(s) he/she has been charged with, is entitled to institute action for recovery of damages;

(b) The relief set out in paragraph 3.1, is suspended for a period 24 months to enable the President and Cabinet, together with Parliament to comply with Article 2(3) of the ICCPR.

(iv) That the issue of quantum be postpone sine die;

(v) *That the defendants jointly and severally, are ordered to pay the costs of the action, including the cost of three counsel*". The reference to the "RSICC" in the proposed order is a reference to the Rome Statute of the International Criminal Court and the reference to the "ICCPR" is a reference to the International Covenant on Civil and Political Rights.

The Rome Statute Implementation Act

[18] The Rome Statute of the International Criminal Court (the Rome Statute) is an international legislative instrument adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998. The Rome Stature was ratified by the Republic of South Africa on 10 November 2000.

[19] The Rome Statute was domesticated by way of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 (the Implementation Act) with date of commencement thereof being 16 August 2002.

[20] The Implementation Act provides the framework whereby effective implementation of the Rome Statute, primarily dealing with genocide, crimes against humanity and was crimes is to take place. It provides for a "Central Authority" and implements provisions regarding complementarity and co-operation between the Republic and the International Criminal Court. It also provides that the National Prosecuting Authority may prosecute and the High Courts can adjudicate crimes contemplated in the Rome Statute and provides for ancillary matters such as warrants of search and seizure and arrests and detention.

[21] Despite the fact that none of the crimes contemplated in the Implementation Act or in the Rome Statute itself feature in this matter, counsel for the plaintiff argued that Article 85 of the Rome Statute itself finds application.

[22] Both the Implementation Act and the Rome Statute itself, are only concerned with crimes as defined therein. Those crimes are those defined in Schedule 1 to the Implementation Act and in Articles 5, 6, 7 and 8 of the Rome Statute itself. These are the crimes of genocide, crimes against humanity and war crimes, including acts of aggression in international conflict and breaches of the Geneva Convention of 12 August 1949.

[23] Even in so far as crimes against humanity include murder, for purposes of the above instruments it would mean murder *"... when committed as part of a widespread or systemic attack directed against any civilian population …*[1]*"*.

[24] Nevertheless, counsel for the plaintiff urged this court to apply Articles 85(2) and 85(3) of the Rome Statute, which provide as follows: "*85(2) When a person has by final decision been convicted of a criminal offence and when subsequently his or her conviction has been reversed on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him or her.*

85(3) In exceptional circumstances, where the Court finds conclusive facts showing that there has been a grave and manifest miscarriage of justice, it may in its discretion award compensation, according to the Rules of Procedure and Evidence, to a person who has been released from detention following a final decision of acquittal or a termination of the proceedings for that reason".

[25] Apart from the fact that the murders of which the plaintiff had been found guilty are not crimes contemplated in the Rome Statute, the Article has no

[1] Part 2 of Schedule 1 of the Implementation Act.

application as it refers to convictions by "the court", which has been defined by both instruments to mean the International Criminal Court established by Article 1 of the Rome Statute (as opposed to the "High Court" as also defined in section 1 of the Implementation Act).

[26] Even if the plaintiff had been convicted by the International Criminal Court, Article 85(2) would not find application as no "new fact" which has afterwards been discovered, is being relied on.

[27] In counsels' attempt to brand the plaintiffs circumstances as "exceptional" for purposes of Article 85(3), the jurisdictional hurdles in the way of direct application of the Rome Statute have not been overcome. It is perhaps for this reason that the plaintiff seeks an order from this court, compelling Parliament to enact certain legislative provisions. I shall deal with this aspect and the aspects of exceptionality or gravity of injustice later when considering the aspect of the development of the common law. Suffice to say for now that I find that Articles 85(2) and 85(3) of the Rome Statute cannot be invoked by the plaintiff.

Development of the common law

[28] On behalf of the plaintiff, it was conceded that "as the law stands the plaintiff has no cause of action". The plaintiff conceded that he could not rely on a claim for wrongful arrest and detention or malicious prosecution. In the words of his counsel: "*Those causes of action are ill-suited for the claim intended by the plaintiff, mostly because a court had adjudicated the matter. The plaintiff's case is founded on the legal system's failure due to a miscarriage of justice. There was, as the Full Bench (sic) found no evidence to convict the plaintiff. He should never have been found guilty and sentenced to a long prison term. The court of first instance should have acquitted the plaintiff … In*

South Africa, the plaintiff has in terms of the common law and current legislation no remedy, except if the court were to hold that in terms of the Implementation Act, he had shown exceptional circumstances".

[29] Insofar as the plaintiff claims that he has no right to claim for compensation following upon incarceration due to judicial error or an incorrect finding of guilty by a court of first instance, which was later corrected or overturned on appeal, he is correct. Should his case have demonstrated some wrongful prosecutorial conduct or any other act by an organ of state involved in his prosecution, which could have satisfied the elements of a delict, he may have had a case[2].

[30] Faced with this difficulty, it was argued on behalf of the plaintiff that the common law should be developed to cater for a claim which is, in effect, predicated on judicial error. In equating such error to a "miscarriage of justice", counsel for the plaintiff averred in heads of argument that *"… it is clear that all over the world, in many democracies, the right to compensation for wrongful conviction and punishment or incarceration is recognized*". In support hereof, reference was made to the position in some foreign jurisdictions.

[31] It is trite that when a court considers the development of the common law in instances where it is alleged that a Constitutional right (in this case the rights of freedom of movement and to a fair trial, enshrined in the Bill of Rights[3]) has been infringed, regard should be had to international law[4]. This includes references to the jurisprudence in foreign jurisdictions.

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[2] Such as contemplated in *Nohour and Another v Minister of Justice and Constitutional Development* 2020 (2) SACR 229 (SCA) (*Nohour*) and *Minister of Safety and Security NO v Schubach* [2014] ZASCA 216 (1 December 2014).

[3] Sections 12(1)(a), and 21(1) and 35(3) of the Constitution and see footnote 5 hereunder.

[4] Section 39(1)(b) of the Constitution, *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) and *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre* at [23].

[32] In argument on behalf of the plaintiff, references were indeed made to the law in certain foreign jurisdictions and certain international instruments. Unfortunately, these references were both scanty and cursory, leaving the court with the onerous task of trawling through the bundles of authorities to extract the relevant provisions referred to and their context. I shall nevertheless deal with those references hereunder, in the sequence that they were presented to the court.

Canada

[33] Reference was made to *Henry v British Columbia* (*Attorney General)* 2015 SCC 24 [2015] 2 SCR 14. The question posed in that case was "*Does section 24(1) of the Canadian Charter of Rights and Freedoms authorize a court of competent jurisdiction to award damages against the Crown for prosecutorial misconduct absent proof of malice?*" The question was answered in the affirmative in the circumstances of that case where the prosecutor withheld information material to the defence which failure impinged on the accused's ability "to make a full defence". Apparently this decision was upheld on appeal. It was not argued that this judgment represented the final stage of enquiry into claims of this nature or even the current state of the law in Canada, but even if it is, it does not assist the plaintiff in the current matter as his case was not premised on prosecutorial misconduct.

United Kingdom

[34] The plaintiff pointed out that in the United Kingdom the question whether an innocent person who has suffered punishment as result of his conviction, can claim damages has been codified. Reference was made to Section 133 of the Criminal Justice Act, 1988. This provides as follows: "*133 Compensation for miscarriage of justice: (1) … when a person has been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been*

pardoned <u>on the ground that a new or newly discovered fact</u> shows beyond a reasonable doubt that there has been a miscarriage of justice, the Secretary of State shall pay compensation … (1ZA). For the purposes of subsection (1), there has been a miscarriage of justice in relation to a person convicted of a criminal offence … <u>if and only if the new or newly discovered fact</u> show beyond reasonable doubt that the person did not commit the offence …" (my underlining).

[35] The underlined portions of the sections quoted largely accord with Article 85(2) of the Rome Statute but do not avail the plaintiff as no "new or newly discovered facts" are present in his matter.

[36] The plaintiff further conceded that the decision in *R (on the application of Mullen) v Secretary of State for the Home Department* [2004] 2 All ER 65 indicated that said section 133 "*… does not mean that the innocent person is in all circumstances entitled to compensation …*". The plaintiff did not elaborate on this concession, but a reading of the opinions (judgments) of the 5 Lords of Appeal reveal that section 133 of the Criminal Justice Act 1988 was enacted to give effect to Article 14(6) of the ICCPR, which international covenant had been ratified by the United Kingdom.

[37] The Lords of Appeal further stated "*Article 14(6) of the ICCPR is the provision of that instrument which is directed to ensuring that defendants hall be fairly tried. Despite differences of wording and substance, it matches article 6 of the European Convention. It also matches, for example, section 11 of the Canadian Charter of Rights and Freedoms, sections 24 and 25 of the New Zealand Bill of Rights and section 35(3) of the Bill of Rights*[5] *incorporated in*

[5] Section 35(3) of the constitution provides as follows:

"*(3) Every accused person has a right to a fair trial, which includes the right—*

(a) to be informed of the charge with sufficient detail to answer it;

(b) to have adequate time and facilities to prepare a defence;

the Constitution of the Republic of South Africa. All of these provisions lay down certain familiar principles (the presumption of innocence, the right to be told of the charge against one and so on). They address different aspect of the core right, which is to a fair trial. They have no bearing on abuses of executive power which do not result in an unfair trial …. It is for failures of the trial process that the Secretary of State is bound, by section 133 and Article 14(6) to pay compensation". On that limited ground the claim was dismissed on appeal.

[38] After long and detailed interrogation of the issue of the newly discovered (or withheld evidence) needed to prove a plaintiff's innocence and what the burden of proof should be, the court rejected the proposition by the plaintiff in that case that in all circumstance where a conviction is overturned and the other jurisdictional hurdles in section 133 have been crossed, a plaintiff should be entitled to damages. This was clearly influenced by the choice of the plaintiff in that case to only rely on the flawed procedure in his trial, skirting the issue of his actual innocence of the crimes, not unlike the plaintiff in this matter.

United States of America

(c) to a public trial before an ordinary court; (d) to have their trial begin and conclude without unreasonable delay;
(e) to be present when being tried;
(f) to choose, and be represented by, a legal practitioner, and to be informed of this right promptly;
(g) to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
(h) to be presumed innocent, to remain silent, and not to testify during the proceedings;
(i) to adduce and challenge evidence;
(j) not to be compelled to give self-incriminating evidence;
(k) to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language;
(l) not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted;
(m) not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted;
(n) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and
(o) of appeal to, or review by, a higher court".

[39] With reference to the United States Code, Title 28: Judiciary and Judicial Procedure, the plaintiff claims that the statutory provisions stipulated therein are "less burdensome". For purposes hereof, section 551495 of that Title creates a statutory cause of action which can be prosecuted in the US Court of Federal Claims by a plaintiff who "… *must allege and prove that his conviction has been reversed or set aside on the ground that he is not guilty of the offences of which he was convicted … or that he has been pardoned upon the Stated ground of innocence and unjust conviction* <u>*and that he did not commit any of the acts charged or his acts deeds or omissions in correction with such charge constituted no offence*</u> *… and he did not by misconduct or neglect cause or bring about his own prosecution …*". (my underlining) A cap is then placed on the values of the damages which may be awarded. I shall return to the relevant to the underlined portion later.

Australia

[40] The brief reference to the position in Australia was to section 23 of that country's Human Rights Act, 2004 which provides as follows:

> "*23 Compensation for wrongful conviction*
>
> *(a) anyone is convicted by a final decision of a criminal offence; and*
>
> *(b) the person suffers punishment because of his conviction; and*
>
> (c) *the conviction is reverse or he or she is pardoned,* <u>*on the ground that a new or newly discovered fact*</u> *shows conclusively that there has been a miscarriage of*

> *justice*". (again, my underlining, indicating thereby similarities with the position in the United Kingdom).

New Zealand

[41] The plaintiff pointed out that, although there are no similar provisions in New Zealand to those in neighbouring Australia, the Compensation Guidelines for Wrongful Conviction and Imprisonment that were promulgated on 19 August 2020 provide for administrative action to be taken to determine "*how and what needs to be done in instances of persons wrongly convicted, including an ex gratia payment*".

[42] A document included in the plaintiff's bundle of authorities, although not expressly relied on his behalf, is an article included in the Auckland University Law Review 1999 under the title "Compensation for Wrongful Conviction in New Zealand" by C.E Sheeby. After a through interrogation of that country's consideration of the issue by its Law Commission, including numerous references to Article 14(6) of the ICCPR, and a critical analysis of the "compelling" motivation for the adoption of a "… *defined, structured scheme of compensation for the wrongly convicted* …" the author concluded that there was a "… *desperate need for clear, effective guidelines* …". The "new" scheme then in place, went a long way to provide such guidelines but was criticized insofar as it contemplated a plaintiff having to prove his innocence beyond reasonable doubt before being able to succeed with a claim. Other factors which may also influence the claim for compensation were listed as (i) the conduct of the accused leading to prosecution and conviction; (ii) prosecutorial good faith; (iii) whether the investigation was conducted properly and fairly; (iv) the seriousness of the offence; (v) the serenity of the sentence and (vi) the nature and extent of the loss resulting from conviction.

The ICCPR

[43] In the present matter, counsel for the plaintiff in passing (but without analysis) referred to the Republic's obligation[6] to comply with international law, in particular the ICCPR. Article 3 of the ICCPR provides that each State Party to that instrument must "…*ensure that any person whose rights or freedom as recognized herein are violated, shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity*".

[44] The ICCPR has been ratified by Parliament but not domesticated into South African law as provided for in section 231(4) of the Constitution. Its application however, was considered (alongside other international instruments) in *President of the Republic of South Africa v Womens Legal Centre Trust*[7].

[45] The conclusion there reached was that while courts were not "insulated from their Constitutional responsibility" regarding the values (and even obligations) contained in such international instruments, the obligation to enact legislation (and thereby domesticate such instruments insofar as they do not otherwise have direct application[8]) is to be found in section 7(2) of the Constitution. I shall return to this later.

[46] An even more oblique reference than that made to the ICCPR was made on behalf of the plaintiff to the African Charter on human and People's Rights. As no reliance was expressly placed on this Charter or any provision thereof, I shall not search for a cause of action based thereon, on behalf of the plaintiff. To do so, would be manifestly unfair to the defendant, who had not been called on to deal with any such contention. In fact, reliance on the Rome Statute, the

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[6] This obligation arises form section 231 of the Constitution and has been affirmed by our courts on many occasions. See for example *Glenister v President of Republic of South Africa* 2011 (3) SA 347 (CC) at par [194].
[7] 2021 (2) SA 381 (SCA) from [23].
[8] As contemplated in section 231(3) of the Constitution.

Implementation Act and the ICCPR only featured in the plaintiff's heads of argument and not in the particulars of claim.

[47] Suffice to say that on behalf of the plaintiff it was argued that any of the provisions in any foreign jurisdiction or international instrument which do not require the plaintiff to show "exceptional circumstances" (such as required in Article 85(3) of the Rome statute) should be adopted and that the common law should be developed accordingly. As further motivation for this, it was argued, with reference to *President of the Republic of South African v Modderklip Boerdery (Pty) Ltd*[9] that *"… courts should not be overawed by practical problems. They should "attempt to synchronise the real world with the ideal of a constitutional world"*. Following on this, the plaintiff's heads of argument, apart from the claiming the relief referred to earlier[10] concluded as follows: "*the plaintiff then calls for the development of the common law in South Africa in line with the model applicable in the USA or Australia*".

Evaluation

[48] It is clear from the terms and context of the Rome Statute and, more directly, its domestication by the Implementation Act, that it provides for the "prosecution of international crimes where national courts are unable or unwilling to do so"[11]. The complimentarity underpinning the Implementation Act ensures such prosecution, prosecutorial assistance and inter-state co-operation. Article 85 of the Rome Statute, dealing with consequences of overturned convictions, is limited to convictions by the International Criminal Court and contextually[12] it cannot be interpreted to have the wide or general

[9] 2004 (6) SA 40 (SCA) at [42].
[10] At para [17] above.
[11] See also *Minister of Justice and Constitutional Development v SA Litigation Centre* 2016 (3) SA 317 (SCA) at [35].
[12] It is now trite that, in interpreting statutory instruments, regard is to be had to text, context and purpose in a unitary exercise – *Chisuse and Others v Director-General Department of Home Affairs* 2020 (6) SA 14 (CC) at par [52] and *Capitec Bank Holdings Ltd v Coral Lagoon Investments 194 (Pty) Ltd* 2022 (1) SA 100 (SCA) at par [25].

application in respect of convictions by other courts or for other crimes, which is the interpretation espoused by the plaintiff.

[49] The common law, as it now stands, provides that a person who has been convicted but whose conviction is later overturned, has a claim for damages, should he be able to satisfy the elements required for delictual liability pursuant to the "injury" suffered by him or her. At common law, this would be a claim in terms of the *actio iniuria*, requiring such a plaintiff to prove that, but for a wrongful act committed during the prosecution of his trial (such as prosecutorial misconduct or negligence), he would not have been convicted[13].

[50] In many foreign jurisdictions as well as Article 14(6) of the ICCPR, when a claim for damages is entertained absent the delictual requirements referred to above, such a claim is dependent on "new" or "newly discovered" facts, discovered after the initial conviction. The incorporation thereof into our common law, even without statutory domestication, would not avail the plaintiff.

[51] There might be circumstances where, even absent such a discovery, a "material miscarriage" of justice has occurred or where there are "exceptional circumstances" present. In all such cases referred to in foreign jurisdictions, however, the complete innocence of such a plaintiff appears to be pivotal. This was also the conclusion reached after academic research into this question by Prof Mujuji who, in an article[14] (not referred to by the plaintiff) espoused the development of the following law as follows: "*It is argued that in South Africa, the best approach would be to adopt the criteria suggested by the Supreme Court of the United Kingdom to the effect that a person should qualify for automatic compensation on the basis of a miscarriage of justice if they fall into*

[13] *Nohour* supra at paras [13] – [14] and [17] – [18].
[14] Compensation for wrongful conviction in South Africa, Obiter, Vol 44 n. 1 Port Elizabeth 2023 (to be found on scielo.org.za)

one of two categories – namely, either being innocent of the offence of which they have been convicted or cases where the fresh evidence so undermines the evidence against the defendant that no conviction could possibly be based on it".

[52] In the present matter, there are no "new" or "newly discovered" facts and, by the plaintiff's own admission, the common law requirements for delictual liability have not been met. That leaves one with the remaining two considerations, namely exceptionality and a material miscarriage of justice. Was the plaintiff's case exceptional? I think not. Numerous appeals against conviction are regularly upheld in our courts, some from the lower courts and some from single judges sitting as courts of first instance. The law reports are replete with so many examples of this fact, that the cases need not be listed. These cases cover a multitude of permutations and factual matrixes. Some deal, as in the case of the plaintiff, with instances where multiple perpetrators were jointly charged but where there were varying degrees of participation between them. The plaintiff's case is therefore neither novel nor exceptional.

[53] Was there a "material miscarriage of justice"? This question is dependent on the plaintiffs innocence. This is not a case where the plaintiff was completely dissociated from the crime. His attempted alibi (by having been at a stokvel and therefore absent) was rejected by the full court and, having regard to his own concession in his warning statement, rightly so. The full court also found that the plaintiff's identification as one of the perpetrators by a witness, Mrs Lebese "should not carry any substantial weight". This was after Mrs Lebese, who was prepared to tell the police (and the court) about the involvement of her sons in the crime, was reluctant to involve her neigbour, the plaintiff. There may have been a multitude of (unexplored) reasons for this reluctance. She was however, as the full court had also pointed out, strangely

"worn down" in cross-examination by counsel for all the accused (i.e the Lebeses and the plaintiff) to concede that the plaintiff had participated in the assault.

[54] The full court's reasons for upholding the plaintiff's appeal were that there was "simply no evidence that the [plaintiff] took part in any assault, kidnapped anyone or caused the death of the deceased". This finding was however made without the benefit of the plaintiff's warning statement, of which he has subsequently made discovery in the matter before this court and which has been quoted in para [5] above.

[55] The result is that the plaintiff, by his own admission, was not only present at the scene of the crime where he witnessed mob justice being dispensed, but partook therein, at least in respect of one of the deceased. Even if it could be argued that this may not have amounted to having acted in common purpose with his co-accused, a finding of being guilty of assault with in intent to cause grevious bodily harm would have been a competent verdict in the circumstances. His participation after the event by driving the previously kidnapped other victim, who he had observed having been grievously assaulted to another address (in the company of other co-accused) also indicates a measure of participation rather than dissociation with the crimes in question, being murder and kidnapping. Added to this the fact that both victims succumbed to the assaults on them and passed on. When one compares the plaintiff's case with that of a completely dissociated and absent person who may have been wrongly accused and incorrectly or falsely placed on the scene, both the issues of complete innocence and the gravity of any material miscarriage of justice fade. There was no argument presented by the plaintiff that, had he only been found guilty of such lesser charge, he would have been imprisoned for a shorter period than he had actually been incarcerated.

[56] I therefore find that the simplified approach mooted by the plaintiff's counsel, namely that the common law should be developed in a generalized fashion, recognising a claim for damages in favour of all plaintiffs (including the plaintiff in this matter) whose convictions have been overturned on appeal, is not justified in the circumstances of this case.

[57] Once it is found that the development of the common law should not take place in this case, it follows that the special pleas in question should be upheld.

[58] Having reached the above conclusion, it is not necessary to consider whether the relief otherwise claimed by the plaintiff, namely a direction to Parliament to enact legislation domesticating the ICCPR, is competent or not or whether the granting of such relief would breach the separation of powers doctrine.

[59] The last issue for consideration is that of costs. Although unsuccessful, the plaintiff has attempted to assert what he perceived to have been an unjustifiable infringement of a Constitutional right. Having regard to this fact and the so-called Biowatch-principle[15], in the exercise of the court's discretion I find that it would be fair and equitable in the circumstances that each party pays its own costs.

Orders

[60] The following order is made:

1. The fourth and fifth special pleas are upheld.

2. Each party is ordered to pay its own costs.

[15] After *Biowatch Trust v Registrar of Genetic Resources* 2009 (6) SA 232 (CC).

N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 06 & 07 June 2023

Judgment delivered: 24 November 2023

APPEARANCES:

For the Plaintiff:	Adv T P Kruger SC together with Adv C D'Alton and Adv S Barreiro
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For the Defendants:	Adv M Vimbi
Attorney for the Defendants:	State Attorneys, Pretoria