Judge copy

IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case No: AR 135/2022

In the matter between:

CEDRICK SAKHILE MDLETSHE N.O. **FIRST APPELLANT**
(ESTATE LATE SIPHELELE MDLETSHE)

SMANGA TEMBE **SECOND APPELLANT**

and

THE MINISTER OF POLICE **RESPONDENT**

ORDER

On appeal from: Durban Magistrates' Court:

1. The appeal is upheld;
2. The judgment of the court a quo is set aside; and replaced with the following order:
   Judgment is granted in favour of each of the plaintiffs in the sum of R400 000 together with interest at the rate of 10.5% per annum *a tempore morae* from date of demand to date of final payment;
3. Costs of suit including costs of the appeal.

JUDGMENT

ZP Nkosi J (Kruger J concurring)

Introduction

[1] The appeal is against the judgment of the magistrate, Durban Court, dismissing the appellants' claims for malicious arrest and detention on the basis that such claims were out of time, alternatively for failure to deal with the merits of the claims for malicious arrest and detention in her final judgment. The appeal is also against the dismissal of the malicious prosecution claim.

Background

[2] The appellants instituted action (in the amount of R400 000 each) against the respondent for malicious arrest and detention and malicious prosecution out of the Durban Magistrates' Court, on 23 March 2017. The appellants further claimed for interest at the rate of 10.5% from the date of demand to the date of final payment and costs of suit.

[3] The claims are a sequelae to the arrest and detention of the appellants on 25 November 2010. Both appellants were arrested by unknown members of the South African Police Services at their respective homes in KwaMashu Township. The appellants were known to each other and grew up together in the KwaMashu Township area. It appears that both appellants were identified and implicated by their co-accused, one Sibusiso Ngcobo ("Ngcobo"), who had committed an offence of housebreaking in the Mayville area.

[4] On 28 November 2010, and while in custody for the aforementioned charge, the appellants were approached by one Detective Erasmus ("Erasmus") who informed them that they were being arrested together with Ngcobo, and that they would also be charged

for an offence committed in Amanzimtoti. Erasmus further told the appellants that he heard that the offence was committed in Amanzimtoti by males from the KwaMashu area and that they would be charged (under Amanzimtoti CAS 272/10/2010) for the offences of housebreaking, robbery and attempted sexual assault.

[5] Both appellants were then charged and brought to court on the following day, where they were informed by the court that they would not be released on bail because they were charged with Schedule 6 offences. The appellants were then subjected to a criminal trial in respect of the aforesaid offences.

[6] In the criminal trial, Erasmus, Ngcobo, and the complainant, a white female, one Lizzie Pistorius testified against the appellants. Both appellants were found not guilty and discharged on 29 July 2016.

Civil trial history

[7] The issues of liability and quantum were not separated in the trial. The plaintiffs (appellants) adduced oral evidence in support of their claim while the defendant (respondent) failed to do so.

[8] Instead, the respondent filed three special pleas, namely:

(a) non-compliance with s 3 of the Institution of Legal Proceedings against Certain Organs of State Act ("the Act");[1]

(b) prescription of the malicious arrest and detention claim; and

(c) the court's jurisdiction to entertain the claim.

The pertinent one for purposes of this case is (b), which was to the effect that the appellants' claim of malicious arrest and detention had prescribed.

[9] It was the appellants' contention (to the prescription plea) that prescription began to run from the date of the termination of the proceedings in their favour, on 29 July 2016.

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[1] Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002.

And it was so because the appellants' causes of action are based on malicious arrest and detention as well as malicious prosecution.

[10] Thus, it is further submitted by the appellants that the prescribed notice in terms of s 3 of the Act was sent timeously, on 7 December 2016; and was received and acknowledged by the respondent on 15 December 2016. The special plea on the court's jurisdiction was settled by the parties and thus requires no further determination.

[11] On the remaining special pleas, the learned magistrate ruled (in a rather mysterious, distorted and confusing fashion) as follows:[2]

'Action arose in 28 November 2010.

Having given the notice in terms of Section 3 of the Institution of Legal Proceedings against certain organs of State on 7 December 2017, that being outside the prescribed period of six months, I found that the section has been complied with and the subsequent issue of summons in respect of wrongful arrest and detention is also outside the prescribed period of three years.

Accordingly, the plaintiffs' action against the first and second respondents for wrongful arrest are out of time.

It follows therefore that both actions against the defendant are DISMISSED WITH COSTS.

The plaintiff may only proceed with their further claim based on malicious arrest – detention and malicious prosecution.'

[12] The confusing ruling prompted the discussion which ensued between the appellants' counsel and the bench in which it was indicated that the appellants did not claim for wrongful arrest and detention but for malicious arrest and detention. With the learned magistrate still sounding confused, she further compounded the mystery when she concluded the discussion by stating:[3]

'... did you listen to my judgment? In as far as there is unlawful and wrongful arrest and detention, that one would have prescribed. But because malicious arrest and prosecution – I mean and detention and prosecution are continuous proceedings, that part of it has not prescribed.'

And after further engagements, she concluded by saying:[4]

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[2] Record, Volume 1, page 48 line 19-page 49 line 6.
[3] Record Volume 1, page 50 lines 19-22.
[4] Ibid page 52 lines 15-19.

'I will revisit that and when I do my full judgment at the end of the matter.

...

I may correct that if I find that you are right in what you are saying.'

[13] Unfortunately, and to the detriment and prejudice of the appellants' case, the confounding ruling was never revisited in the final judgment as promised. Instead, the learned magistrate proceeded as though she had, in her earlier ruling, dismissed the appellants' claim of malicious arrest and detention and only allowed malicious prosecution to be proceeded with.[5]

[14] The learned magistrate concluded, on the conspectus of evidence adduced that:

(a) there was insufficient evidence before the court, which justified a finding that the respondent acted without reasonable and probable cause; and

(b) no evidence was placed before the court to justify any conclusion that there was *animo iniuriandi* on the part of the respondent. The learned magistrate then made an order granting absolution from the instance in favour of the respondent, with each party to pay its own costs.

Issue(s)

[15] The main issue in this appeal is whether or not the court a quo misdirected itself in dismissing the appellants' claims (a) of malicious arrest and detention on the basis that they were out of time; and (b) of the malicious prosecution on the basis of insufficient evidence. And if so, whether this court is at large to consider the questions of quantum, interest and costs.

Malicious arrest and detention – the applicable law

[16] In *Law of Delict*[6] under the caption 'Malicious deprivation of liberty' the learned authors aptly state:

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[5] Volume 2, page 98 lines 1-40.

[6] Neethling and Potgieter *Law of Delict* 8 ed (2020) at 398-399.

'Unlike the wrongful deprivation of liberty, where the result complained of must have been caused without justification by the defendant himself or some person acting as his agent or servant, the conduct in the case of malicious deprivation of liberty takes place *under the guise of a valid judicial process*. The defendant makes improper use of the legal machinery of the state, either through a policeman acting on his own discretion or through a valid warrant, in depriving the plaintiff of his liberty. The actual deprivation of liberty is consequently not carried out by the defendant himself or by his servant or agent, but by the machinery of the state through a valid judicial process.
As a result, the plaintiff will have to prove the following in order to succeed in an action based on the malicious deprivation of liberty: that the defendant *instigated* the deprivation of liberty; that the instigation was *without reasonable and probable cause*; and that the defendant acted *animo iniuriandi*. These requirements are similar to those for *malicious prosecution*. Note that if a criminal prosecution results from the deprivation of liberty, the plaintiff will also have to prove that the prosecution failed before he will be able to succeed in an action based on the malicious deprivation of liberty.' (Footnotes omitted).

[17] In *Thompson and Another v Minister of Police and Another*[7] which case is on all fours with this case, it was held:[8]

'In claims based on malicious arrest, malicious prosecution or malicious execution, however, it has been held that it is essential for the plaintiff to allege and prove that the defendant acted maliciously and without reasonable and probable cause (see *Hart v Cohen*, 16 S.C 363); *Estate Logie v Priest*, 1926 A.D. 312 at p.315; *Beckenstrater v Rottcher and Theunissen* 1955 (1) SA 129 (AD) at p. 135; *Van Der Merwe v Strydom* 1967 (3) SA 460 (AD) at p. 467).'

[18] The court further held:[9]

'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 results cannot be allowed to be prejudged by the civil action. (*Lemue v Swartbooi*, *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

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[7] *Thompson and Another v Minister of Police and Another* 1971 (1) SA 371 (E).
[8] Ibid at 373F-G.
[9] Ibid at 375A-D.

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 plaintiff's 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...'

[19] In *Nel and Another v Minister of Safety and Security and Others*[10] the plaintiffs were arrested on 28 January 2003. They were charged and prosecuted and were discharged on 1 April 2004. The defendant took special pleas, inter alia, that the plaintiffs failed to commence their action within six months after the cause of action had arisen in terms of the Act and the matter had prescribed in terms of the Prescription Act ("the Prescription Act")[11] as the summons had been served on 9 May 2006 after a period of three years. The presiding judge, with reference to *Thompson v Minister of Police*[12] held:

'[19]...from the above, it follows that the plaintiffs' claim in respect of the alleged malicious arrest and detention became due on April 1, 2004, the date on which they were discharged.'

[20] The court held:

'[20] The plaintiffs gave notice in terms of section 3 of Act 40 of 2004 in a letter dated 17th September 2004 which was received by the first defendant on 28th September 2004. Quite clearly, notice was given within a period of six (6) months from the date on which a debt became due. The plaintiffs, undoubtedly, acted within a prescribed period. The result is that the defendant's first special plea must fail.'

And the court further held:

'[21] The summons commencing the plaintiff's action was issued on the 21st April 2006, and served on the defendants on 24th April 2006, 8th May 2006 and 9th of May 2006, respectively.

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[10] *Nel and Another v Minister of Safety and Security and Others* (1686/2006) [2008] ZAFSHC 88 (28 August 2008).

[11] Prescription Act 68 of 1969.

[12] *Thompson and Another v Minister of Police and Another* 1971 (1) SA 371 (E).

This was approximately two (2) years from the date on which a debt became due, that is, April 1, 2004. The plaintiffs acted within a prescribed period of three (3) years. Therefore, the second special plea must also fail.'

[21] From the foregoing, it is abundantly clear that the learned magistrate was wrong in her findings on the special pleas, and should have held that:

(a) the appellants cause of action of malicious arrest and detention, started on their discharge on 29 July 2016; and

(b) since the respondent had received notice in terms of s 3 of the Act, on 15 December 2016, within six months and summons having been served on 11 April 2017, the appellants had complied with all the requirements. Therefore, her findings, being an infraction, must be set aside.

[22] Since the legal requirements for claims based on malicious arrest and detention are similar to those for malicious prosecution, it appears to me that the former would have suffered the same fate as the latter according to the learned magistrate's assessment and reasoning of the facts placed before her. Therefore, a correct analysis and assessment of the facts presented to her during the trial needs to be made in order to establish whether or not her findings are assailable, bearing in mind the onus which rested on the appellants.[13]

Evaluation

[23] It is undeniable that Erasmus set the law in motion, on 28 November 2010 when he arrested and charged the appellants at the Durban Central Police Station (under Amanzimtoti CAS 272/10/2010) for housebreaking with intent to rob and robbery and contravention of the Criminal Law (Sexual Offences and Related Matters) Amendment Act.[14] Once a charge is laid, the prosecution has begun.[15]

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[13] *Gordon Lloyd Page and Associates v Rivera and Another* 2001 (1) SA 88 (SCA) at 90G-H; *Minister for Justice and Constitutional Development and Others v Moleko* 2009 (2) SACR 585 (SCA).
[14] Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.
[15] See *Kroomen v Lobascher* (1903) 13 CTR 674; *Lederman v Moharal Investments (Pty) Ltd* 1969 (1) SA 190 (A) at 197; *Waterhouse v Shields* 1924 CPD 155 at 160; and Rudolph and Others v Minister of Safety and Security and Another 2009 (2) SACR 271 (SCA) para 19

[24] The following emerged from the appellants' evidence which remained unchallenged:

(a) Erasmus stated to the appellants at the time of their arrest that he would arrest them for an Amanzimtoti case the reason being that he did not want or like males from KwaMashu and had heard that the offences had been committed by males from the KwaMashu area. Erasmus further stated that he wanted them to rot in jail and did not want them to be released on bail;[16] and

(b) this was reiterated in the second appellant's evidence who stated that Erasmus said that he had heard that the offences had been committed by people from KwaMashu and he was going to charge them for those offences because people from KwaMashu caused a lot of trouble in the Amanzimtoti area. He further stated that he (Erasmus) would ensure that they would rot in jail and would not get bail.[17]

[25] In *Beckenstrater v Rottcher and Theunissen*[18] the court stated, in relation to the requirement of absence of reasonable and probable cause, that:[19]

'When it is alleged that a defendant had no reasonable cause for prosecuting, I understand this to mean that he did not have such information as would lead a reasonable man to conclude that the plaintiff had probably been guilty of the offence charged;'

[26] In *Ramakulukusha v Commander, Venda National Force*[20] the court stated in this regard as follows:[21]

'Insofar as the absence of "reasonable and probable cause" is concerned... Plaintiff did not have to produce more than slight evidence of this (see *Pyett v Francis* (1907) 28 NLR 194 at 200), and

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[16] Record, Volume 1, page 63 lines 9-18.
[17] Ibid page 81 lines 18-25; page 82 lines 1-5.
[18] *Beckenstrater v Rottcher and Theunissen* 1955 (1) SA 129 (A).
[19] Ibid at 136A-B.
[20] *Ramakulukusha v Commander, Venda National Force* 1989 (2) SA 813 (V).
[21] Ibid at 844I-845A.

defendant had to show that its servants had good grounds for their belief in the truth of the accusation against plaintiff which they failed to show...' [22]

[27] In this regard, and viewed from the perspective of the appellants' evidence it seems to me, on a prima facie level, that Erasmus displayed unhindered prejudice towards males from KwaMashu for the reasons he mentioned to them at the stage of their arrest. Erasmus seems to have undertaken a personal crusade against men from KwaMashu in the matter being investigated and charged the appellants based on little to no evidence to support the charges and failed to show good grounds for his belief.

[28] In *Trust Bank of Africa Ltd v Senekal*[23] the court stated thus:[24]

'To the same effect as the opinion of Bloch, J, in *R v Mantell*, 1959 (1) SA 771 (C), that *prima facie* evidence if unanswered would justify men of ordinary reason and fairness in affirming the question which the party upon whom the *onus* lies is bound to maintain (at p. 775). How far the defendant's evidence need to go in order to answer *a prima facie* case depends upon the facts of each particular case. Whilst no *onus* of proof is cast on him, he must adduce evidence sufficient to destroy the *prima facie* proof and thus prevent such proof from ripening into conclusive proof (*Arthur v Bezuidenhout and Mieny*, 1962 (2) SA 566 (AD) at p. 575, (*Salmons v Jacoby*, 1939 AD 588). Merely to cast suspicion on the correctness of the fact or facts *prima facie* established and mere theories or hypothetical suggestions will not avail the defendant; the defendant's answer must be based on some substantial foundation of fact (*Arthur's* case, *supra* at p. 575), *Nicholls & Whitelaw, N.O. v Akoo*, 1948 (4) SA 197 (N), *R v Chizah*, 1960 (1) SA 435 (AD).'

[29] The appellants' evidence contained prima facie proof of the allegations made against Erasmus. Since there was no evidence that was tendered on behalf of the respondent, such evidence went unchallenged and thus became conclusive. The learned magistrate should therefore have found that the appellants had proved the absence of reasonable and probable cause on the part of the respondent.

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[22] In *Pyett v Francis* (1907) 28 NLR 194 at 200 the court stated the following: 'It is not enough that the defendant believed in the truth of his accusation: he must show good ground for his belief.'
[23] *Trust Bank of Africa Ltd v Senekal* 1977 (2) SA 587 (W).
[24] Ibid at 593B-E.

[30] In *Pyett v Francis* it was stated that:[25]

'The second question, as to the defendant's honest belief in the case he laid before the Magistrate, is closely connected with the third – was the defendant actuated by an indirect motive in preferring the charge, and both these questions have to be considered in arriving at the conclusion whether there was malice. In De Villiers on I*njuries* (p. 207), it is said: "The absence of probable and reasonable cause, will, as a rule, be an ingredient assisting the Court in arriving at a conclusion whether *animus iniuriandi* was present or not" ... It has been held in English cases that want of reasonable and probable cause may be equivalent to malice – that, the latter may be inferred from the former...'

[31] In *C v C and Others*[26] the Supreme Court of Appeal stated as follows:

'[66]...As I have pointed out earlier, once it is found that there was no reasonable or probable cause for initiating the prosecution and defaming the plaintiff, the defendant attracted an evidential burden to rebut the natural inference that she acted *animo iniuriandi*. In the absence of any evidence from her as to her state of mind, or any other admissible evidence, she faced an almost insurmountable hurdle to rebut this inference...'

[32] It is not sufficient for a defendant to merely deny *animus iniuriandi*, he/she must allege and prove the factual basis for the absence of *animus iniuriandi*.[27]

[33] According to the appellants' unchallenged evidence referred to hereinbefore, they were arrested for no reason other than the fact that they were from KwaMashu and that Erasmus had heard that the offences, for which he charged them, had been committed by the "boys" who were causing trouble in the Amanzimtoti area. As alluded to above, Erasmus seems to have undertaken a personal crusade against men from KwaMashu whom he believed were responsible for the high crime rate in Amanzimtoti area without, I venture to say, information as would lead a reasonable man to conclude that the appellants had probably been guilty of the offence charged.

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[25] *Pyett v Francis* (1907) 28 NLR 194 at 199-200.
[26] *C v C and Others* (205/2019) [2021] ZASCA 12 (3 February 2021).
[27] *Mdhlovu v Natal Director of Public Prosecutions* [2023] 1 All SA 458 (MM) para 21 (with reference to *Ramsay v Minister van Polisie* 1984 (1) SA 802 (A) at 802A-C; *Jansen van Vuuren and Another NNO v Kruger* 1993 (4) SA 842 (A) at 856A-857G).

[34] Even if I am wrong in my assessment or deduction of Erasmus's state of mind, the fact of the matter is that the respondent did not give evidence as to his (Erasmus's) actual state of mind. Thus, the conclusion that Erasmus was actuated by malice, is unavoidable.

Malicious prosecution

[35] As adumbrated herein earlier, all the authorities referred to under malicious arrest and detention, apply with equal force with malicious prosecution as the requirements/elements of these causes of action are the same. In regard to this claim the learned magistrate held that the first appellant's evidence was that there were a number of detainees from KwaMashu who were charged with the first appellant after Ngcobo had pointed them out.[28] In truth, throughout his evidence in chief and under cross-examination the first appellant never testified at all that there were other detainees from KwaMashu other than the three of them that were charged.

[36] I have also discerned from the record of the proceedings that she actually misdirected herself on a host of other facts/findings which I mention below:

(a) in holding against the appellants that no explanation why Ngcobo, who was also from KwaMashu, was left out as he was also arrested and charged by Erasmus. The actual reason why only the three (the appellants and one Mxolisi Khumalo) were charged was never disclosed since Erasmus was never called to testify.[29] In any event it is evident that Ngcobo was used by the State to testify for it in the criminal trial;

(b) in holding that the first appellant's evidence was that, on the following day he appeared in court, where he was granted bail which was fixed at R2 000. And that he was taken to Westville Prison because he did not have bail money and his mother paid the amount seven days later and he was released, accordingly, there was no sufficient evidence before the court which justified a finding that the

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[28] Record, Volume 2, page 102 lines 34-40.
[29] Ibid page 102 lines 40-41; page 103 lines 1-3.

respondent acted without reasonable and probable cause.[30] On the contrary, the true version given by the first appellant is that he appeared in court in connection with the offences for which Erasmus charged him on the following day. He applied for bail and he did not get bail and the reasons furnished to them was that they were facing Schedule 6 offences. After the refusal of bail, he reapplied for it in September 2011 and it was granted in the sum of R2 000 and he paid it and was then released. There is no reference on record of the first appellant's mother and seven days in any context whatsoever;[31]

(c) in holding that the second appellant's evidence to the effect that upon interacting with Erasmus and the second appellant having confirmed that he was from KwaMashu, and that Erasmus charged him for housebreaking, robbery and attempted sexual assault, that such evidence alone was not sufficient for the court to reach the conclusion that the respondent acted without reasonable and probable cause.[32] In the absence of evidence contradicting the second appellant on this score, the learned magistrate should have held that such evidence became conclusive;

(d) in holding that just because the appellants appeared in court and were warned of the seriousness of the charges against them, that the criminal trial proceeded, that the complainant and Erasmus testified and that the prosecutor was never called to testify in order to show that there was no malice, accordingly, no evidence was placed before the court to justify the conclusion that there was *animo iniuriandi* on the part of the respondent[33] and that the appellants failed to discharge the onus on the balance of probabilities and thus it could not be said that the respondent had no reasonable and probable cause much less malice in instituting the proceedings.[34] The court should have held that the unchallenged evidence of the appellants as to the reasons for their arrests and charging, which must be accepted as the truth, in the absence of a challenge by the respondent, was sufficient to infer

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[30] Ibid page 103 lines 4-9.
[31] Record, Volume 1, page 64 lines 1- 2.
[32] Record, Volume 2, page 103 lines 10-18.
[33] Ibid page 103 lines 32-40.
[34] Ibid page 104 lines 1-5.

malice on the part of the respondent. Alternatively, that on the face of such evidence, the respondent failed to discharge its evidential burden.[35]

[37] The learned magistrate was not privy to the contents of the complainant's and Erasmus's evidence in the criminal trial. She thus misdirected herself in concluding that their testifying signaled the presence of reasonable and probable cause and absence of malice. In my view, the appellants had established a prima facie case and did not need the evidence of the prosecutor.

Legal causation

[38] In *De Klerk v Minister of Police*[36] the Constitutional Court held:

'[47]....liability should be determined in accordance with the principles of legal causation, including constitutionally infused considerations of public policy'.

It further held earlier in the judgment that:

'[25] "Legal causation" is concerned with remoteness of damage. This entails an enquiry into whether the wrongful act is sufficiently closely linked to the harm for the liability to ensue'. (Footnote omitted.)

[39] In *Mahlangu and Another v Minister of Police*[37] the Constitutional Court cited with approval the case of *Botha v Minister of Safety and Security and Others; January v Minister of Safety and Security and Others*[38] where it was stated:

'[30] This, in my view, includes any further detention for as long as the facts which justify the detention are within the knowledge of the police official....Where there are no facts which justify the further detention of a person, this should be placed by the investigator before the prosecutor of the case, and the law casts an obligation on the police official to do so.'[39]

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[35] See *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) paras 61-63; *Brits v Minister of Police and Another* (759/2020) [2021] ZASCA 161 (23 March 2021) para 5.

[36] *De Klerk v Minister of Police* 2021 (4) SA 585 (CC).

[37] *Mahlangu and Another v Minister of Police* 2021 (2) SACR 595 (CC) para 40.

[38] *Botha v Minister of Safety and Security and Others; January v Minister of Safety and Security and Others* 2012 (1) SACR 305 (ECP).

[39] Also see *Singatha and Another v Minister of Police and Another* (284; 285/2012) [2015] ZAECBHC 19 (26 March 2015) paras 42, 43 and 45.

[40] In *Shabalala v Minister of Police*[40] the court held:

'[27] It is not disputed that the servants of the defendant caused the institution of the prosecution of the plaintiff in the matter *in casu*. The prosecution was based on the same information relied upon for the unlawful arrest. It therefore follows that there was no reasonable or probable cause to prosecute the plaintiff. At that stage, more importantly, the servants of the defendant were aware that neither the victims of the robbery nor the CCTV footage could link the plaintiff to the robbery. Despite this, the defendant proceeded to instigate the prosecution of the plaintiff, regardless of the consequences of its conduct. In acting as it did, it acted *animo injuriandi*.'

[41] The court continued:

'[29] After the plaintiff's first appearance on 29 April 2016, the Magistrate postponed the case on numerous occasions until it was subsequently withdrawn by the state. The defendant's counsel argued that the further detention of the plaintiff from 29 April 2016 up to 28 June 2016, when the plaintiff was denied bail, and the further detention up to 2 March 2017, constituted an intervening event that cannot be attributable to the defendant. It was argued that the defendant should not be liable for the further detention.

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[31] .... In the absence of the investigating officer's testimony at the bail hearing, the only inference to be drawn is that the investigating officer opposed the release of the plaintiff on bail, notwithstanding the weak evidence available against the plaintiff.'

[42] The conduct of the respondent in this matter, after the arrest, is to be carefully scrutinised to assess whether the full truth was brought to the court's attention for purposes of the consideration of the bail application.

[43] In the matter of *Minister of Safety and Security v Tyokwana*[41] the police also failed to fairly bring the full facts before the court. The Supreme Court of Appeal stated that:

'[41]... Kani, as well as Muller, failed dismally to give a fair and honest statement of the relevant facts to the prosecutor and to bring all the relevant circumstances under the attention of the magistrate. On the contrary, they wilfully distorted the truth thereby misleading the prosecutor and

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[40] *Shabalala v Minister of Police* (2017/12111) [2021] ZAGPJHC 598 (3 November 2021).
[41] *Minister of Safety and Security v Tyokwana* 2015 (1) SACR 597 (SCA).

the magistrate, with the result that the respondent was remanded in detention and refused bail, and remained in custody until his acquittal on 20 July 2009.

...

[43] In *Zealand v Minister of Justice and Constitutional Development and Another* 2008 (2) SACR 1 (CC) (2008 (4) SA 458; 2008 (6) BCLR 601 , a claim for delictual damages for wrongful detention was considered and it was held that the detention of the plaintiff for the entire period of his incarceration was unlawful, in that s 12(1)*(a)* of the Constitution was unjustifiably and unreasonably violated....

[44] In my view, the respondent has shown that the circumstances in which the appellant's employees instigated and persisted with his prosecution amounted to an unjustifiable breach of s 12(1)*(a)* of the Constitution. This is sufficient to establish delictual liability on the part of the appellant for the full period of the respondent's detention from 2 October 2007 to 20 July 2009.'

[44] A similar approach was followed recently by the Constitutional Court in the matter of *Mahlangu and Another v Minister of Police*.[42] The Court referred to the matter of *Woji v Minister of Police*, as well as the matter of *Zealand*, and stated:

'[33] In *Woji*, the SCA followed *Zealand*. It held that the Minister was liable for post-appearance detention, where the wrongful and culpable conduct of the police had materially influenced the decision of the court to remand the person in question in custody. Its reasoning effectively means that it is immaterial whether the unlawful conduct of the police is exerted directly or through the prosecutor.

...

[44] If we are to give meaning to freedom as a foundational value of our Constitution and to the right to freedom and security of the person, we cannot allow the police to deprive people of their freedom by so simple a stratagem as behaving in the egregious manner in which they did here, and then lying low and keeping quiet to see if anything will come to the rescue of the victims of their nefarious deeds. If we allow that to happen, then police – like they did before the advent of our democracy - will continue to ride roughshod over the freedoms of our people. So, generally in circumstances like the present, public policy dictates delictual liability must attach, lest we find ourselves in the situation where freedom as a constitutional value and the right to freedom and security of the person are devalued.

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[42] *Mahlangu and Another v Minister of Police* 2021 (2) SACR 595 (CC).

[45] The unlawful continued concealment by the police, of the fact that the confession was obtained illegally, therefore provides the applicants with a basis for holding the Minister delictually liable for the full detention period...' (Footnote omitted.)

[45] In *De Klerk v Minister of Police*[43] the Constitutional Court stated as follows:
'[83] The Minister of Justice and Director of Public Prosecutions might be jointly and severally liable with the Minister of Police, but it is sufficient for one of them to be sued for their proven delict for the applicant to succeed. A plaintiff may elect to sue only one person whose delict caused her harm, even if another person's independent delict also caused that same harm. It is not obligatory that *all* joint wrongdoers be sued in the same action. Where all joint wrongdoers have not been sued, a court is not barred from determining the liability, if any, of the party or parties before it...'

[46] Erasmus charged the appellants with serious offences of housebreaking with intent to rob and robbery and sexual offences falling under Schedule 6 in terms of s 60 (11) of the Criminal Procedure Act,[44] which places the onus on the accused person to prove the existence of exceptional circumstances, which in the interest of justice warrant his/her release on bail. Erasmus must have foreseen, and by inference did foresee that the appellants would not be released on bail as they also faced a charge of housebreaking, which fell under Schedule 1, where ordinarily, the applicant for bail is entitled to be released and the onus is on the State to prove otherwise.

[47] The undisputed evidence of the appellants is that Erasmus informed the appellants that he would ensure that they would not get bail and would 'rot' in jail. The inference is inescapable that Erasmus never brought to the attention of the prosecutors and/or judicial officers who were involved in the criminal proceedings against the appellants that the charges at best were weak or at worst were fabricated by him with the help of Ngcobo who was possibly coerced and found himself under duress to point the appellants as his partners in crime. I say so because the criminal proceedings against the

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[43] *De Klerk v Minister of Police* 2021 (4) SA 585 (CC).
[44] Criminal Procedure Act 51 of 1977.

appellants never went beyond the State's case which strongly suggests that the State's case had all along been a weak and hopeless one.

[48] Hence, the appellants remained in custody for almost ten months. I hold the view that the respondent should be held liable for the entire period of detention of the appellants, commencing on 28 November 2010 up to their release in September 2011.

Quantum

[49] Having found that the respondent is liable for malicious arrest or deprivation of liberty and malicious detention and malicious prosecution, it appears it would be appropriate, just, and convenient that the court should also determine the quantum of damages for the injuries suffered by the appellants. No objection to the fixing of damages has been raised/voiced by any party to the appeal. A remittal to the trial court to determine the damages would simply involve needless delay and additional costs. More so in this instance where extensive arguments/submissions in regard to quantum have been submitted.[45]

Malicious arrest and detention

[50] In Visser and Potgieter's *Law of Damages*[46] under the heading **'Unlawful and malicious deprivation of liberty or arrest'** the learned authors state:

'A distinction is made between "false imprisonment" or "wrongful arrest" and "malicious imprisonment" or "malicious arrest" as forms of infringement of physical freedom. However, in all these delicts the amount of satisfaction is assessed in terms of the same basic factors.

In deprivation of liberty the amount of satisfaction is in the discretion of the court and calculated ex aequo et bono. Factors which can play a role are the circumstances under which the deprivation of liberty took place; the presence or absence of improper motive or "malice" on the part of the defendant; the harsh conduct of the defendants; the duration and nature (eg solitary confinement or humiliating nature) of the deprivation of liberty; the status, standing, age, health and disability of the plaintiff; the extent of the publicity given to the deprivation of liberty; the presence or absence of an apology or satisfactory explanation of the events by the defendant;

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[45] *Neethling v Du Preez and Others*; *Neethling v Weekly Mail and Others* 1995 (1) SA 292 (A) at 297-298.
[46] Visser and Potgieter's *Law of Damages* 3 ed (2012) at 545-548, para 15.3.9.

awards in previous comparable cases; the fact that in addition to physical freedom, other personality interests such as honour and good name as well as constitutionally protected fundamental rights have been infringed; the high value of the right to physical liberty; the effects of inflation; the fact that the plaintiff contributed to his or her misfortune; the effect an award may have on the public purse; and, according to some, the view that the actio iniuriarum also has a punitive function.' (Footnotes omitted).

[51] In *Masisi v Minister of Safety and Security*[47] the court said:

'[18] The right to liberty is an individual's most cherished right, and one of the foundational values giving inspiration to an ethos premised on freedom, dignity, honour and security. Its unlawful invasion therefore strikes at the very fundament of such ethos. Those with authority to curtail that right must do so with greatest circumspection, and sparingly...'

In this case, the arrest and detention were found to be malicious and detention lasted for four hours. Damages were awarded in the amount of R65 000.

[52] In *EA and Others v Minister of Police*[48] the arrest and detention were found to be malicious and lasted for 16 hours. Damages were awarded in the amount of R250 000.

[53] In *Sikhumbuzo Mfanafuthi Mthethwa v The Minister of Police*[49] the plaintiff was in custody for 42 days and was awarded damages in the amount of R30 000 in the Magistrates' Court, Ntuzuma. On appeal, the Durban High Court (per Ploos van Amstel J with Hadebe J concurring), granted the full amount claimed i.e. R200 000 for unlawful arrest and detention.

[54] In *Stayela Bhekinkosi Ngubane v Minister of Safety and Security and Another*[50] the court granted damages in the amount of R400 000. The plaintiff was detained for approximately 44 days.

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[47] *Masisi v Minister of Safety and Security* 2011 (2) SACR 262 (GNP).
[48] *EA and Others v Minister of Police* (14/41567) [2019] ZAGPJHC 9 (12 February 2019).
[49] *Sikhumbuzo Mfanafuthi Mthethwa v The Minister of Police*, unreported judgment of the High Court of South Africa, KwaZulu-Natal, Durban, Case Number: AR 186/2019 (28 July 2020).
[50] *Stayela Bhekinkosi Ngubane v Minister of Safety and Security and Another,* unreported judgment of the High Court of South Africa, KwaZulu-Natal, Durban, Case Number: 4113/2008.

[55] In *Sinovuyo Godlo v Minister of Police*[51] the plaintiff was detained for 64 days. He was awarded damages in the amount of R650 000.

[56] In *Onwuchekwa v Minister of Police and Another*[52] the plaintiff was detained for 44 days. He was awarded damages in the amount of R600 000.

[57] In *Lebelo v Minister of Police*[53] the plaintiff was detained for 101 days. Damages in the amount of R500 000 was awarded.

[58] In *Phasha and Another v Minister of Safety and Security*[54] the plaintiffs were arrested and detained for a period of 301 days and 305 days. And they were awarded R930 000 and R730 000 in damages respectively.

[59] In *Buthelezi v Minister of Police and Others*[55] the court found (per Chetty J) that there was malice in the plaintiff's detention and awarded damages in the amount of R1,6 million.

[60] The first appellant testified about the nature of his incarceration, his experiences whilst in custody and his personal circumstances.[56] The second appellant also testified about the nature of his incarceration, his experiences whilst in custody and his personal circumstance.[57]

[61] The appellants spent almost ten months in custody. I consider that the full amount claimed to be deserved.

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[51] *Sinovuyo Godlo v Minister of Police*, unreported judgment of the High Court of South Africa, KwaZulu-Natal, Durban, Case Number: 8631/2007 (4 July 2017).
[52] *Onwuchekwa v Minister of Police and Another* (58581/11) [2015] ZAGPPHC 919 (28 August 2015).
[53] *Lebelo v Minister of Police* (25300/2016) [2018] ZAGPPHC 69 (28 February 2019).
[54] *Phasha and Another v Minister of Safety and Security* (15751/09) [2015] ZAGPPHC 1117 (1 November 2016).
[55] *Buthelezi v Minister of Police and Others* (D7472/2013) [2021] ZAKZDHC 20 (2 August 2021).
[56] Record, Volume 1, page 69 lines 11-25; page 70 lines 1-25; and page 71 lines 1-9.
[57] Ibid page 84 lines 19-25; page 85 lines 1-25; page 86 lines 1-25; and page 87 lines 1-2.

Malicious prosecution

[62] In *Law of Damages*,[58] the learned writers had this to say in assessing damages for malicious prosecution:

'Satisfaction is assessed ex aequo et bono. Factors influencing the amount are, for example, the seriousness of the crime for which the plaintiff was prosecuted and the severity of the penalties in the case of a conviction; the period of incarceration; the period during which the charge hung over the plaintiff's heads; despite the plaintiff's acquittal, persistence by the defendant in the charge originally preferred against the plaintiffs; the fact that the charge had not been withdrawn but proceeded with until the plaintiff was acquitted at the end of the State case; malice on the part of the defendant; "that plaintiff has the right to be compensated for personal insult, indignity, humiliation and... inevitable defamation"; the absence of an apology on the part of the defendant; and previous awards in comparable cases (taking inflation into account).' (Footnotes omitted).

[63] In *Rautenbach v Minister of Safety and Security and Others*[59] the plaintiff appeared four to five times in court and charges were withdrawn after six months. Damages were awarded in the amount of R150 000. The plaintiff's arrest received media coverage as the plaintiff was a Chairperson of a Local Community Police Forum.

[64] In *Sithole v Minister of Safety and Security and Another*[60] the plaintiff was arrested on 13 October 2010 and remained in custody until the charges were withdrawn on 25 October 2010. Damages were awarded in the amount of R170 000.

[65] In *Sikhumbuzo Mfanafuthi Mthethwa v The Minister of Police*[61] the magistrate awarded damages in the amount of R20 000 for malicious prosecution that lasted for three months. On appeal, the High Court held that such an amount was inadequate and awarded the full amount of R200 000.

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[58] Visser and Potgieter's *Law of Damages* 3 ed (2012) at 550 para 15.3.11.
[59] *Rautenbach v Minister of Safety and Security and Others* (48774/09) [2013] ZAGPPHC 387 (20 November 2013).
[60] *Sithole v Minister of Safety and Security and Another* (63897/2011) [2016] ZAGPPHC 387 (27 May 2016).
[61] *Sikhumbuzo Mfanafuthi Mthethwa v The Minister of Police*, unreported judgment of the High Court of South Africa, KwaZulu-Natal, Durban, Case Number: AR 186/2019 (28 July 2020).

[66] Recently, in *Gumbi v Minister of Police*[62] the court (per Lopes J) awarded an amount of R570 000 for malicious prosecution. The plaintiff appeared 19 times in court and his case attracted media publicity.

[67] The appellant's prosecution is exceptionally different to the cases cited above in that the serious charges hung over their heads for almost six years with each facing the minimum sentences of 15 years' imprisonment. I am of the view that they deserve the full amount (as claimed) of R200 000 each under this head.

Interest

[68] The Prescribed Rate of interest Act[63] as amended in April 1997 states that interest on illiquid claims, like this one, runs from the date of service of a demand or summons whichever date is the earlier. Prior to this amendment interest ran from the date of judgment.[64]

[69] In *Drake Flemmer and Orsmond Inc and Another v Gajjar*[65] the court aptly stated as follows:

'[63] The legislature exercised that policy choice by inserting s 2A into the Interest Act with effect from 11 April 1997. That section provides that interest at the prescribed rate runs on an unliquidated debt from the date on which payment was claimed by service of a demand or summons, whichever is the earlier...'[66]

[70] In *Nel v Minister of Safety and Security*[67] the court (the single judge) had awarded interest to run from the date of judgment. The matter was taken to the full bench which held:

'[12]...The default position of the Act is that the amount of every unliquidated debt as determined by any court of law shall bear interest at the prescribed rate a tempore mora, unless a court of

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[62] *Gumbi v Minister of Police* (D7156/2016) [2022] ZAKZDHC 17 (1 April 2022).
[63] Prescribed Rate of interest Act 55 of 1975.
[64] See *SA Eagle Insurance Co Ltd v Hartley* 1990 (4) SA 833 (A) at 841C-842B.
[65] *Drake Flemmer and Orsmond Inc and Another v Gajjar* 2018 (3) SA 353 (SCA).
[66] Also see *Khulani Springbok Patrol (Pty) Ltd v Marine Schoon*, unreported judgment of the High Court of South Africa, Pietermaritzburg, Case Number: AR 789/2005 (29 September 2006).
[67] *Nel v Minister of Safety and Security* (A1009/2010) (2012) ZAGPPHC 188 (22 August 2012)

law orders otherwise. Where a court deviates from this position, an order that it may make, must appear just in the circumstances of that case. If Du Plessis, J wanted to deviate from this position he should have given reasons in his judgment why it was just and equitable to do so. This he did not do....It seems to me more a matter of oversight on the part of my brother Du Plessis J, than anything else.'

[71] In *Sikhumbuzo Mfanafuthi Mthethwa v Minister of Police*[68] where the magistrate had awarded interest from the date of judgment, on appeal the court held:

'[14]... It will be appropriate for interest to run from the date of the service of the summons as contemplated in section 2A (2) (a) of the Act. The magistrate seems to have overlooked this provision when she awarded interest from the date of her judgment.'[69]

[72] At the time of the institution of these proceedings the interest rate was 10.5%. Interest rates have fluctuated over the years; however, the following legal principle applies:[70]

'The rate prescribed under ss (2) at the time when interest begins to run governs the calculation of interest. The rate is fixed at that time and remains constant. Subsection (1) does not provide for the rate to vary from time to time in accordance with adjustments made to the prescribed rate by the Minister of Justice in terms of ss (2). The fact that the Minister may from time to time prescribe different rates of interest therefore has no effect on the rate applicable to interest which has already begun to run.'

[73] The default position is clear as a matter of law, namely that interest runs from the date of service of a demand or summons whichever is earlier, not unless the court is asked to exercise its discretion in terms of s 2A (5) of the Prescription Act to deviate from the default position. 'Plainly, if parties wish certain facts and circumstances to be weighed in the exercise of such a discretion they must establish them.'[71]

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[68] *Sikhumbuzo Mfanafuthi Mthethwa v The Minister of Police*, unreported judgment of the High Court of South Africa, KwaZulu-Natal, Durban, Case Number: AR 186/2019 (29 July 2020).

[69] Also see *Minister of Safety and Security v Sipho Emmanuel Mzizi and Others*, unreported judgment of the High Court of South Africa, Kwa-Zulu Natal, Pietermaritzburg, Case Number: 656/13 (4 February 2015) para 22.

[70] *Davehill (Pty) Ltd and Others v Community Development Board* 1988 (1) SA 290 (A) at 301A-B.

[71] *Adel Builders v Thompson* 2000 (4) SA 1027 (SCA) para 15.

[74] In my view, there are no facts or circumstances (and none have been established) in this matter to justify a deviation from the default position of the rate of interest. More so, in this case where the respondent was well aware that it could not defend the appellants' claims on their merit.

Order

[75] Wherefore, the following order shall issue:

1. The appeal is upheld;
2. The judgment of the court a quo is set aside; and replaced with the following order:

   Judgment is granted in favour of each of the plaintiffs in the sum of R400 000 together with interest at the interest rate of 10.5% per annum *a tempore morae* from date of demand to date of final payment; and
3. Costs of suit including costs of the appeal.

Z P Nkosi J

Kruger J

Case information

DATE OF HEARING	:	3 MARCH 2023
DATE JUDGMENT HANDED DOWN	:	23 JUNE 2023

FOR THE APPELLANTS : MR T. NDLOVU
(Instructed by THAMI NDLOVU
& COPMANY
C 642 Amanzimtoti Road
KwaMashu
c/o M H Mathonsi & Associates
151 Pietermaritz Street
Pietermaritzburg
Email: mmathonsi@telkomsa.net
Tel: 083 593 7214
Ref: TN / tn / CVL 732)

FOR THE RESPONDENT : MR D. PILLAY
(Instructed by STATE ATTORNEY:
KWAZULU-NATAL
6th floor, Metropolitan Life Building
391 Anton Lembede Street
Durban
c/o Cajee Setsubi Chetty Inc
195 Boshoff Street
Pietermaritzburg
Tel: 031 306 2448
Ref: A Essa / B Enoch)