

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA MPUMALANGA DIVISION, MBOMBELA MAIN SEAT

CASE NO: 2026/020889

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

DATE


SIGNATURE

In the matter between: -

PRINCE NHLANHLA JAPARA NGWENYAMA

PLAINTIFF

and

MINISTER OF POLICE.

1ST DEFENDANT

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

2ND DEFENDANT

This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for the hand-down of the judgment is deemed to be 10 September 2026 at 15H30

JUDGMENT

MONENE AJ

Introduction

[1] Tragic, painful, callously handled and constitutionally distasteful stories reminiscent of the apartheid colonial era of the kind in this matter, have no reason to be lived let alone told in our alleged new dispensation.

[2] A young man presents himself at a police station accompanying his girlfriend to lay a criminal complaint on 20 March 2008. On a mere whim, police officers lingering around at the police charge officer, accuse him of fitting a description of a suspect in another matter, interrogate him, assault him and there and then arrest and detain him allegedly for robbery despite the *viva voce* exculpatory intimations of two alleged robbery complainants. He is never given a chance to apply for bail and in a subsequent one-day "trial" more than a year after his arrest, where he appears unrepresented and uncertain of proceedings, he is convicted, not for robbery, but for housebreaking with intent to rape and rape and sentenced to life imprisonment. The "complainant" in the new charges is

apparently someone different from the two complainants he was allegedly initially accused of robbing. From 2010 he tries in vain to prosecute an appeal until 9 May 2025 when his conviction and sentence are set aside by a Full Court of this division. In the wake of his consequent release from prison, not on 9 May 2025 but some 7 days later, on 16th May 2025, he is bundled out of the prison gates with his meagre belongings to, on his own, find whatever home he may still be having. Indeed, let the beloved country cry *a la* literary guru, author Alan Paton's classical novel, as the more things change, the more they stay the same.

- [3] This is application for default judgement in the wake of that young man, the plaintiff *in casu*, having instituted action proceedings suing the police ministry and the prosecution authority for unlawful arrest, unlawful detention and malicious prosecution respectively and the respondents having callously, despite proper service, proffered no defence.
- [4] At issue are whether a proper case for default judgement as provided for in Uniform Rule 31(2)(a) has been made and whether the plaintiff, who beyond his default judgement affidavit testified *viva voce*, has made out a case for unlawful arrest, unlawful detention and malicious prosecution.

The facts in brief

- [5] The plaintiff was arrested on 20 March 2008 while at Masoyi Police station accompanying his girlfriend.
- [6] He was tried and convicted for Hoose-Breaking with intent to rape and Rape by the Nelspruit Regional Court 30 November 2009, having never been admitted to bail. Two sentences of life imprisonment were imposed on him.
- [7] A Full Court of this Division per Vukeya J and Roelofse AJ set his conviction and sentence aside on 9 May 2025.
- [8] He was released on 16 May 2025, some 17 years and two months after he was initially detained.
- [9] He instituted these action proceedings against the two defendants praying for general damages in the tune of R50 000 000.00 for unlawful arrest and detention and R10 000 000.00 for malicious prosecution.
- [10] No appearance to defend having been entered by the defendants the plaintiff approached this court by way of default.

Has a case for default judgement been made?

[11] The very clear and trite provisions of Uniform rule 31 can be summarised as follows:

11.1 If upon being served with summons a defendant who fails to file a notice of intention to defend or having filed it fails to file a plea, a plaintiff may apply for judgement by default. That is an application for the plaintiff's claim to be granted in the absence of the defendant or defendants since they will be in default.

11.2 If the plaintiff's claim is for a liquid claim capable of being proven on paper without oral evidence, the default application can be determined by a court registrar.

11.3 If the plaintiff's claim is, as *in casu*, illiquid or rather not capable of being simply determined on paper, then the plaintiff must apply to court, as is the case in this matter.

11.4 If the defendant or defendants filed a notice of intention to defend but defaulted only on plea, the plaintiff must in setting down the default judgement give the defendant/s notice of no less than five days. If, however, as *in casu*, not even a notice to defend was filed by the defendant/s then the plaintiff does not have to give such defendant/s notice of set down of the default judgement application.

11.5 At the hearing of the default judgement application the plaintiff must, in prosecuting his claim, lead evidence either per affidavit or orally or both; depending on what the court deems necessary.

11.6 The court is then empowered to make whatever order it determines to be just.

[12] In casu the combined summons, having been duly issued, were properly served in terms of Uniform Rule 4(1)(a)(v) on the State Attorney on 4 February 2026, on the National Director of Public Prosecutions on 4 February 2026, and on the first respondent twice on 4 February and on 6 February 2026.

[13] Neither of the Defendants entered any intention to defend.

[14] In the premises the requisites of Uniform rule 31 paraphrased *supra* are fully engaged and the plaintiff has thus duly earned his stripes to be heard in default.

The law on unlawful arrest and detention and application thereof to the facts.

[15] It is trite that in unlawful arrest and detention matters once arrest has been admitted or proven the onus is on the defendant to prove the

lawfulness of such arrest and detention, it being so that in our constitutional dispensation a very high premium is placed on the right to liberty. In this regard a plethora of authority is available. Suffice to refer only to even a pre-constitutional dispensation matter of ***Minister of Law and Order and Others v Hurley and Another 1986(3) SA 568(A)*** at 587-589 and to ***Mhaga v Minister of Safety and Security 2001(2) All SA 534(Tk)***.

[16] In *casu* the arrest and detention of the plaintiff is patent from the facts. The first defendant is, however, missing in action to justify the arrest and detention. Reasonable suspicion of commission of an offence as would traditionally be the first defendant's defence is a non-starter as it cannot be hoisted by the court in favour of a duly served no-show defendant. Thus even without recourse or reference to the ultimate setting aside of the conviction of the plaintiff, this court only has the version of the plaintiff to the effect that he was arrested without a warrant on the whim of over-eager police officers who had no reason to arrest and detain him when they unreasonably suspected him of an offence in the face of statements by witnesses that he did not fit the bill of their assailant.

[17] The plaintiff testified before this court that when the police officers confronted him on a chance encounter with him at the police station the two complainants in the matter the police sought to accuse him of had indicated that he was shorter than their assailant and that their assailant

would have bloodied clothing and that he had been found not to be glad in bloodied clothing. That is the only evidence this court has on that issue and there is no reason to reject that evidence, more so absent any counter-version.

[18] I therefore do not struggle to agree with the plaintiff's version that his arrest and consequent detention was unlawful.

[19] The remaining question then manifests as being whether the unlawful detention prevails beyond the subsequent post-court appearance detentions and post sentence detention up to release on 16 May 2025. Asked differently, the question is for how long the plaintiff was unlawfully detained post his uncontroverted unlawful arrest.

[20] Faced with a question similar to the one posed immediately *supra* in the face of a split decision from the Supreme Court of Appeal on the question of police liability for detention post court appearance following unlawful arrest, the majority in the apex court in the land in ***De Klerk v Minister of Police 2020 (1) SACR 1 (CC)*** ("***De Klerk***") at paras 62 and 63 held as follows:

"The principles emerging from our jurisprudence can then be summarised as follows. The deprivation of liberty, through arrest and detention, is per se prima facie unlawful. Every deprivation must not only be effected in a procedurally fair manner but must also be substantively justified by

acceptable reasons. Since Zealand, a remand order by a magistrate does not necessarily render subsequent detention unlawful. What matters is whether, substantively, there was just cause for the later deprivation of liberty. In determining whether the deprivation of liberty pursuant to a remand order is lawful, regard can be had to the manner in which the remand order was made.

In cases like this, the liability of the police post-court appearance should be determined on an application of the principles of legal causation, having regard to the applicable test and policy considerations. This may include a consideration of whether the post-appearance detention was unlawful. It is these public policy considerations that will serve as a measure of control to ensure that liability is not extended too far...In addition, every matter must be determined on its own facts-there is no general rule that can be applied dogmatically in order to determine liability.”

- [21] In ***Phoshoko v Minister of Police (1017/2023) [2022] ZALMPPHC 35(27 June 2022) (“Phoshoko”)*** at para 33 Kganyago J, anchoring on the sound footing of ***De Klerk*** remarked as follows on his way to finding the policy not liable for post court remand detention:

“It is therefore not automatic that the Minister of Police will be held liable for post-appearance detention, it must be shown that the magistrate who

had remanded the matter did not break the causation. Once an arrested person is handed to the court official, the arresting officer does no longer have control on how the judiciary handles the matter further. It must therefore be shown that the remand was a result of the unlawful conduct of the police officers, or what role the police officers played in the matter being remanded...In my view, no sufficient evidence has been placed before court to enable it to determine whether the defendant should be held liable for the detention of the plaintiff post-appearance in court.”

[22] On the facts in casu, not only are there no facts to prove liability of the police post first appearance at court as in ***Phoshoko***, but the court is left none the wiser even regarding how long the pre-first appearance detention was. No evidence has been led to prove when exactly it was that, post the plaintiff’s arrest on 20 March 2008, the plaintiff made his first appearance at court. And that is no fault of his as it may be unreasonable to expect him to remember all that after 17 years of grave and painful undue imprisonment. Much more could have been done by the plaintiff’s legal representatives by way of getting Regional Court charge sheets and trial records to address this and a multitude of other needlessly gaping holes in the plaintiff’s trial arsenal.

[23] Thus, although the plaintiff’s arrest was *prima facie* unlawful as already stated *supra*, the pre-first appearance period of detention is as unknown as the role the police may have played to attract liability to the first

defendant for the period of more than a year before the trial commenced upon or about 30 November 2009.

- [24] Similarly, this court has nothing to go by regarding even remotely thinking about imputing liability on the police and the second defendant on the period of about 16 years spent by the plaintiff as a sentenced prisoner. It was always going to be a herculean task to impute liability for the post-sentence detention of the plaintiff on the police and the prosecution. A magistrate sentenced him to life imprisonment, and it seems to me a high stretch of incredulity to can fathom liability for such detention on police and prosecutors as they did not order the sentence. In that regard, the failure to have the Minister responsible for magisterial work as one of the defendants, subject to whatever findings were made by the Full Bench in setting the conviction of the plaintiff aside, is accusingly glaring.

The law on malicious prosecution and its application in casu

- [25] Malicious prosecution has been defined by the Supreme Court of Appeal in **Relyant Trading (Pty) Ltd v Shongwe and Another [2006] ZASCA 162** at para 5 as comprising the wrongful and intentional assault on the dignity of a person encompassing his rights to *fama* and dignity.
- [26] Authority is legion from ***Minister of Justice and Constitutional Development and Others v Moleko [2008] 3 All SA 47 (SCA) (“Moleko”)*** at para 8 to ***Rudolph and Others v Minister of Safety***

and Security and Another [2009] (5) SA 94 (SCA) at para 16 and to Magwabeni v Lioma (198/2013)[2015] ZASCA 117(11 September 2015) at para 9 that a plaintiff who alleges malicious prosecution must prove the following:

- 26.1. That the defendant instigated criminal proceedings against the plaintiff,
- 26.2. That the defendant instigated those proceedings absent reasonable and probable cause,
- 26.3. That the defendant acted with malice, hence the claim being coined as “malicious” prosecution, and
- 26.4. That the prosecution failed.

[27] Applied to the facts of this case and the evidence led in this default judgement application it is self-evident that, but for proof that prosecution proceedings were instituted, none of the other requirements listed *supra* have been engaged. The pleadings merely state that the defendants acted with “malice” and beyond that, no evidence was led to unpack and prove the malice. They only go further to suggest, rather debatably, that the setting aside of the conviction meant fulfillment of the requirement that a prosecution must have failed. Most meagre and threadbare are the pleadings and evidence and thus not much needs to be said in this regard.

[28] Accordingly, a finding that the malicious prosecution evidence threshold has barely begun to be summited *in casu* is not difficult to arrive at.

To dismiss or not to dismissing

[29] In the introductory part of this judgement this court lamented the deplorable way our criminal justice system treated the plaintiff.

[30] Unfortunately, the less than elegant way his matter was pleaded and evidence collected did not help matters too.

[31] The question is whether this layman should be met with a dismissal of his claim in circumstances where no opposition was entered against his action and thus nobody prayed for dismissal. I am of the view that such an approach, on the facts, would not be in the interests of justice and would contribute to a further uncalled-for affront on the plaintiff's rights. My sense of justice does not permit me to dismiss his claims much as I cannot, for the reasons stated *supra*, grant them. Given the possible non-joinders of the Justice and Correctional Services ministries, possible none pleaded claims, possible neglected but probably still available evidence on claims pleaded *in casu* and the probable insulation from prescription still, I am disinclined to dismiss the plaintiff's action and so contribute to the continuance of the plaintiff's raw deal.

[32] If the defendants had been party to the litigation *in casu* I would not have expected them to take the stand and lead any evidence. I would have granted them absolution from the instance on account of a dearth of evidence calling for them to defend themselves, that is, if they would have not excepted to the pleadings.

[33] Alive to the fact that absolution is traditionally sought by defendants and where deserving, granted in defended actions, I am unaware of anything in our law which bars a court from washing its hands, akin the biblical Pontius Pilate, and ordering absolution in a default judgement application. I see nothing in Uniform rule 31 which prescribes that I can only grant or dismiss a claim. In fact, Uniform Rule 31(2)(a) empowers a court to grant default judgement against the defendant or “make such order as it deems fit”. In my view therefore, ordering absolution in this matter falls well within the test for absolution as long established in ***Claude Neon Lights (SA) Ltd v Daniel 1976 (4) SA 403(A)*** (“***Claude Neon Lights*”**) which remains whether there is evidence upon which a court, applying its mind reasonably to evidence before it, could or might find for the plaintiff.

[34] I also do not understand it to be the law that absolution can only be granted if first applied for, that is, as it is traditionally applied for by a defendant. That is notwithstanding that ***Claude Neon Lights*** at 409G-H spoke to and defined absolution from the point of it being sought or

applied for. Like a discharge in terms of section 174 of the Criminal Procedure Act 51 of 1977 in criminal proceedings, it ought to be within this court's inherent powers, infused with a constitutional ethic to, *mero motu*, wash its hands from a civil litigation dispute even where there was no opposition. I am enjoined by democratic constitutionalist ubuntu principles to grant a just and equitable order in these unique circumstances and dismissal is, in my view, not it. Justice demands that the plaintiff, given the facts of this case, get, at the very least, another chance to fight to vindicate his rights.

Order

[35] In all the above premises, the following order is made:

35.1. Absolution from the instance is granted in respect of all the plaintiff's claims with no order as to costs.




Malose Monene
ACTING JUDGE OF THE HIGH COURT
MPUMALANGA DIVISION, MBOMBELA
(MAIN SEAT)

APPEARANCES

Heard on : 28 April 2026

Judgment delivered on : 10 September 2026

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