

SOUTH AFRICA / JUDGMENT

## Olesitse NO v Minister of Police (470/2021) [2022] ZASCA 90 (15 June 2022) [2022] ZASCA 90

COURT

Supreme Court of Appeal

BEFORE

Zondi, Dambuza, Nicholls, Makaula, Salie-Hlophe

CASE / FILE NUMBER

470/2021

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 470/2021

In the matter between:

MMABASOTHO CHRISTINAH OLESITSE NO

APPELLANT

and

THE MINISTER OF POLICE

RESPONDENT

Neutral citation: Olesitse NO v Minister of Police (470/2021) [2022] ZASCA 90 (15 June 2022)

Coram: ZONDI, DAMBUZA and NICHOLLS JJA and MAKAULA and SALIE-HLOPHE AJJA

Heard: 11 May 2022

Delivered: 15 June 2022

Summary: Delict – once and for all rule – claim for damages for malicious prosecution instituted after the institution of a claim for damages for unlawful arrest and detention – both claims arising from the same event – later claim offended the common law principle of ‘once and for all’ – appellant should have instituted all his claims for damages he suffered in one action – claim based on malicious prosecution was properly dismissed.

## ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Davis J, sitting as court of first instance):

1 The appeal against the dismissal of the application for condonation for the late filing of the application for leave to appeal is upheld with no order as to costs.

2 The order of the high court is set aside and replaced with the following order:

‘(a) Condonation for the late filing of the application for leave to appeal is granted;

(b) Leave to appeal is granted.’

3 The appeal is dismissed with no order as to costs.

Salie-Hlophe AJA (Zondi, Dambuza and Nicholls JJA and Makaula AJA concurring):

- [1] This is an appeal against the judgment and order of the Gauteng Division of the High Court, Pretoria (per Davis J) (the high court), dismissing the appellant’s application for condonation of the late filing of the leave to appeal against the judgment and order. In that order the high court upheld the respondent’s point of law to the effect that the appellant’s claim for malicious prosecution was a duplication of the first claim based on unlawful arrest and detention.
- [2] The appellant, Ms Mmabasotho Christinah Olesitse in her capacity as an executrix of the estate of her deceased husband, Mr Tebogo Patrick Olesitse (the deceased), petitioned this Court for leave to appeal against the dismissal of the application for condonation for the late filing of the application for leave. This Court granted the appellant leave to appeal against the order dismissing her condonation application. It directed the parties to be prepared, if called upon to do so, to address it on the merits of the appeal. Two issues therefore arise in this appeal, namely whether the high court should have condoned the lateness of the appellant’s application for leave to appeal, and whether it should have granted the appellant leave to appeal.
- [3] I consider the application for the late delivery of the application for leave to appeal first. The delay was about six months. The factors which a court considers when exercising its discretion whether to grant condonation include: the degree of non-compliance with the rules; the explanation for it; the importance of the case to the applicant; the respondent’s interest in the finality of the judgment of the court below; the convenience of the court; and the avoidance of unnecessary delay in the administration of justice (*Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining & Development Co Ltd* [2013] ZASCA 5; [2013]2 All SA 251 (SCA) para 11).

- [4] The explanation proffered for the delay is that due to an administrative error on the part of the appellant's instructing attorney, the judgment dismissing the appellant's claim did not timeously come to his attention. The error came about in the following circumstances. The main judgment was delivered electronically in April 2020 while the country was placed under alert level 5 in terms of the regulations under the Disaster Management Act 57 of 2002 in an effort to curb the spread of the COVID-19 pandemic.
- [5] The appellant's correspondent attorney, Mr Joubert, who deposed to an affidavit in support of the condonation application, alleged that upon receipt of the judgment he forwarded it to the instructing attorney, Mr Coetzer of WJ Coetzer Attorneys Incorporated, on the same day. The email address which he used in the past when communicating with Mr Coetzer was used for the purpose of transmitting the judgment. After receiving no response from him, he sent the judgment again to Mr Coetzer's secretary on 10 June 2020, using the same email address. When he did not receive a response from Mr Coetzer, his secretary (on his instructions) again emailed it to Mr Coetzer. Approximately five months later, Mr Coetzer sent an email to Mr Joubert enquiring about the judgment. This surprised him, given that he had already sent it to Mr Coetzer on three prior occasions. It then came to light that the email addresses which both Mr Joubert and his secretary had used were no longer in use. No non-delivery notices were received by them which would have otherwise alerted him that the emails had not been delivered. They had no record of Mr Coetzer informing them that the email addresses they had on record had been discontinued. After providing Mr Coetzer with the judgment on 30 September 2020, matters progressed, such as consultations with counsel, and on 9 October 2020 the application for leave to appeal was prepared by counsel. Counsel instructed Mr Joubert to prepare a condonation application. The application was finally filed in court on 30 October 2020.
- [6] Mr Joubert further explained that the National State of Disaster and lockdown rules had caused a major disruption within many attorney firms and had a detrimental effect on his practice. He had switched over to a remote practice within a matter of days and with a huge staff compliment, the task had been a challenging one. Various areas of his practice, including access to the office server on which all documents are stored, were severely affected.
- [7] Notwithstanding the shortcomings in the appellant's attorney's explanation for the delay, I am of the view that the appellant should not suffer as a result of her legal representative's neglect. The case is important to her children who stand to benefit from the deceased estate. In my view the high court should have condoned the late delivery of the application for leave.
- [8] I turn now to consider the merits of the appeal. The events giving rise to these proceedings occurred in May 2008 when the deceased, then a police officer stationed at Mafikeng Police Station vehicle identification section, was arrested by police officers without a warrant and detained on a charge of theft and corruption. The arrest and detention occurred after the police conducted an investigation of theft and disappearance of motor vehicle parts and

accessories at the vehicle identification section of the South African Police Service (SAPS) at Mafikeng Police Station. He was detained at the police station on 19 May 2008 and released on bail on 29 May 2008. On 17 May 2011, the charges against him were formally withdrawn when the Director of Public Prosecutions (the DPP) declined to proceed with prosecution of the charges.

- [9] On 26 May 2011(nine days after his charges were formally withdrawn), the deceased instituted an action against the respondent for damages in respect of his alleged unlawful arrest and detention, seeking compensation in the amount of R400 000 for deprivation of freedom, contumelia and discomfort(the first action). In its special plea, the respondent contended that part of the claim had been extinguished by prescription as contemplated in s 11(d) of the Prescription Act 68 of 1969. The special plea was adjudicated on a separated basis before Murphy J. The learned judge partially upheld the special plea. He determined on 19 October 2012 that the claim for damages for unlawful arrest and detention sustained prior to 26 May 2008 had been extinguished by prescription and accordingly dismissed it. The matter subsequently came before Baqwa J on 11 May 2016 for the adjudication of the merits. He awarded the deceased R90 000 damages occasioned by the unlawful detention. The judgment by Baqwa J was not made available to this Court and, strangely enough, neither party could shed light as to how the proceedings before the learned

judge were conducted. They surmised that the award was made pursuant to a settlement agreement.

- [10] On 12 December 2012, and whilst the first action was still pending, the deceased instituted a new action for damages for malicious prosecution under case number 71947/2012 (the second action). This second action arose from the same set of facts or events which gave rise to his claim for unlawful arrest and detention. Citing the Minister of Police as the first defendant and one Colonel Mokgosi as the second defendant, acting within the course and scope of the employment of the first defendant, the deceased instituted action for damages for malicious prosecution.

- [11] The relevant parts of the particulars of claim in the second action read as follows:

‘4. On or about 19 May 2008, at Mmabatho, [the] Second Defendant wrongfully and maliciously set the law in motion by l[a]ying a false charge of theft against the Plaintiff with the Police at Mafikeng, by giving him false

information namely that the Plaintiff committed crimes of corruption and theft.

5. When l[a]ying this charge and giving this information, the Second Defendant had no reasonable or probable cause for doing so, nor did he have any reasonable [belief] in the truth of the information given.

...

7. As a result of the Second Defendant's conduct, [the] Plaintiff was arrested and held in custody for 9 days. The Plaintiff was then prosecuted for theft in the Magistrate's Court Mmabatho.
  8. All charges were provisionally withdrawn against the Plaintiff on 19 February 2009.
  9. On 17 May 2011 the Plaintiff was informed by the office of the Director of Public Prosecution that they declined to prosecute the Plaintiff.
  10. The Plaintiff suffered damages as a result of [the] Defendant's conduct in the amount of R400 000.00, being for contumelia, deprivation of freedom and discomfortsuffered by the Plaintiff.' (Own emphasis.)
- [12] By way of comparison, the particulars of claim in the first action, under case number 29788/2011, in respect of the claim for unlawful arrest and detention reads as follows in relevant parts:
- '3. On or about 19 May 2008 the Plaintiff was arrested without a warrant by member/members of the South African Police Services.
4. At the time of the arrest, the member/members of the South African Police Service had no reasonable and/or probable cause for doing so or did he/she/they have any reasonable belief in the proof of the information given. Alternative to the above the member/members of the South African Police Services did not exercise his/her/their discretion properly and should not have arrested the Plaintiff under the circumstances.
7. As a result of the foregoing wrongful arrest and detention, the plaintiff has suffered damages in the amount of R400 000.00 which amount is the broad amount claimed for unlawful arrest on 19 May 2008, being damages for deprivation of freedom, contumelia and discomfort suffered by the Plaintiff.' (Own emphasis.)
- [13] On 3 March 2020, the respondent served a notice in which he raised a point of law. In his notice of objection, the respondent contended that the appellant's second claim was a duplication of the first claim. The relevant portions extracted from the 'Notice of Objection on Point of Law' read as follows:
- '1. That the plaintiff's claim is a duplication of actions and offends the rule of common law that obliges the claimant/litigant to claim all damages arising from one cause of action on a single action ("once and for all" rule). Consequently, the plaintiff's [action] is legally incompetent.
  3. The plaintiff seeks solatium or satisfaction for his wounded feeling allegedly caused by wrongful conduct of the defendant's employees.
  4. The plaintiff's action [is] arising from the same facts and circumstances for which compensation has been sought and awarded to the plaintiff by Mr. Justice Baqwa on 11 May 2016, under case No: 29788/2011.

6. In these proceedings the plaintiff claims damages for the following injuries: Contumelia, deprivation of freedom and discomfort allegedly suffered as [a] result of the police's conduct.

7. Defendant contends that the plaintiff's action under these circumstances, constitute duplication of actions. Consequently, it is legally incompetent.'

[14] At the commencement of the hearing of the second action, by agreement between the parties, the high court (per Davis J) made an order in terms of which the point of law was separately adjudicated pursuant to rule 33(4) of the Uniform Rules of Court.

[15] The high court upheld the respondent's point of law and dismissed the appellant's claim based on public policy considerations, namely *res judicata*, *lis pendens* and the 'once and for all' rule. In addition, in arriving at its decision the high court weighed up, on the one hand (the appellant's side), the possible claim for damages, additional to those already awarded, in favour of the deceased estate against, on the other hand (the respondent's side), the prejudice of double jeopardy, loss of available witnesses due to the 'huge effluxion of time' and the expense of being put to trial in respect of something which has already come before court. The high court accepted that the causes of action of malicious prosecution and unlawful arrest and detention are two separate causes of action. But, it stated that, if regard is had to the appellant's two sets of pleadings of the facts relied on in the two cases, it was clear that the police officer who was the second defendant in the trial court set the law in motion against the deceased as a result of which he was arrested on 19 May 2008. The deceased, proceeded the high court, was released from detention on 29 May 2008 and the charges were withdrawn against him on 17 May 2011. The high court further stated that the only distinguishing fact between the two cases was the alleged malice. It further stated that in respect of all the other facts, save for the alleged malice, the court had already given a final order. The damage-causing facts had already been determined irrespective of the nature of the unlawfulness and the identity of the actual perpetrator.

[16] It was submitted on behalf of the appellant that the high court conflated a single deed that infringes upon different personality rights with two separate deeds constituting separate causes of action, causing overlapping damages. It was further submitted on behalf of the appellant that the high court overlooked the fact that the lawfulness of an arrest is irrelevant when one deals with a case of malicious prosecution. In support of its submission, the appellant argued that in a case of unlawful arrest and detention, the manner in which the law was set in motion is relevant, and in the case of malicious prosecution, the lawfulness or not of the arrest is irrelevant.

[17] While I accept that there is a difference between a claim for malicious prosecution and a claim for unlawful arrest and detention, here, that difference pales into insignificance having regard to the fact that the event that gave rise to the deceased's claims is the same. The investigations conducted by the police formed the basis on which the decisions were taken to arrest and detain, and to prosecute the deceased. In accordance with the once and

for all rule, the deceased should have instituted his claim for all of his damages in one action, so that the lawfulness or otherwise of the respondent's employees' actions, who were involved in taking the challenged decisions, could be adjudicated in one action. Moreover, in this case the deceased had all the facts on which to formulate his claims when he instituted his first action. He had the

## facts

to sustain the claims that his arrest and detention was unlawful and that his prosecution was malicious after the DPP had declined to prosecute him. All that had already happened when he instituted the first action. There was therefore nothing that prevented him from instituting his claims in one action. The once and for all rule is part of our common law (MEC for Health and Social Development, Gauteng v DZ obo WZ [2017] ZACC 37; 2017 (12) BCLR 1528 (CC); 2018 (1) SA 335 (CC) para 15).

[18] Visser and Potgieter's Law of Damages,[1]explains the operation of the rule as follows:

'In claims for compensation or satisfaction arising out of a delict, breach of contract or other cause, the plaintiff must claim damages once for all damage already sustained or expected in future insofar as it is based on a single cause of action.'

[19] In Custom Credit Corporation (Pty) Ltd v Shembe [1972] 3 All SA 489 (A); 1972

(3) SA 462 (A) at 472A-D, the once and for all rule was considered and the court held that the law requires a party with a single cause of action to claim in one and the same action whatever remedies the law accords him upon such cause. The court explained the ratio underlying the rule is that, if a cause of action has previously been finally litigated between the parties, then a subsequent attempt by the one to proceed against the other on the same cause for the same relief can be met by an exceptio rei judicatae vel litis finitae. The rationale in our law is to prevent inextricable difficulties arising from discordant or conflicting decisions due to the same suit being aired more than once in different judicial proceedings or actions. Furthermore, the rule has its origin in considerations of public policy, which require that there should be a term set to litigation and that an accused or a defendant should not be twice harassed in respect of the same cause.

[20] In Evins v Shield Insurance

[1980] 2 All SA 40 (A); 1980

(2) SA 814 (AD), this Court restated the once and for all rule as enunciated in Custom Credit as follows(at 835B-D):

'[The once and for all rule] is a well-entrenched rule. Its purpose is to prevent a multiplicity of actions based upon a single cause of action and to ensure that there is an end to litigation.

Closely allied to the "once and for all" rule is the principle of *res judicata* which establishes that where a final judgment has been given in a matter by a competent court, then subsequent litigation between the same parties, or their privies, in regard to the same subject-matter and based upon the same cause of action is not permissible and, if attempted by one of them, can be met by the *exceptio rei judicatae vel litis finitae*. The object of this principle is to prevent the repetition of lawsuits, the harassment of a defendant by a multiplicity of actions and the possibility of conflicting decisions. . . Similarly, the defence of *lis alibi pendens* is designed to prevent the institution of a second action between the same parties in respect of the same subject-matter and based upon the same cause of action while another such action is already pending (see *Wolff NO v Solomon*, (1898) 15 SC 298).’

[21] The high court was therefore correct in upholding the respondent’s objection that the claim for malicious prosecution was a duplication of the first claim of unlawful arrest and detention. In the result, the appeal should be dismissed.

[22] As regards the costs, the appellant has succeeded in her appeal against the dismissal of the application to condone the late delivery of the application for leave to appeal, and the respondent was equally successful in relation to the merits of the appeal. In the circumstances, it will be appropriate not to make any order as to costs.

[23] In the result, the following order is made:

‘(a) Condonation for the late filing of the application for leave to appeal is granted;

(b) Leave to appeal is granted.’

G SALIE-HLOPHE

ACTING JUDGE OF APPEAL

APPEARANCES

For the appellant: A B Rossouw SC (with M Louw)

Instructed by: VZLR Attorneys, Pretoria

Honey Attorneys, Bloemfontein

For the respondent: M S Phaswane

Instructed by: State Attorney, Pretoria

State Attorney, Bloemfontein

[1]J M Potgieter et al Visser and Potgieter Law of Damages 3 ed (2012) at 153.

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