IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)

CASE NO. 118/2020

In the matter between:

LADUMA NOMATYE **PLAINTIFF**

and

THE MINISTER OF JUSTICE AND
CORRECTIONAL SERVICES **FIRST DEFENDANT**

THE HONOURABLE MAGISTRATE:
VAN PAPENDORP **SECOND DEFENDANT**

JUDGMENT

Rugunanan J

[1] On 11 April 2024, I granted an application for absolution from the instance with costs. What follows are the reasons for the order.

[2] This is a civil action in which damages claimed by the plaintiff against the defendants, jointly and severally, are set out in the particulars of claim as follows:

'35.1 Unconstitutional deprivation of freedom and security of the plaintiff for approximately 2½ years at Goedemoed and Middeldrift Correction facilities – R10 000 000;

35.2 Unconstitutional deprivation of freedom and security and freedom of movement as parolee at the plaintiff's house for approximately 2 years – R7 500 000;

35.3 Breach of the plaintiff's constitutional rights, inclusive of the right to a fair trial, the impairment of human dignity and associated rights set out in the Bill of Rights and associated *contumelia* – R2 500 000.'

[3] Formulated as they are and flowing from the manner in which the plaintiff's cause of action has been pleaded, it appears at first glance that damages are sourced directly from the Constitution. In heads of argument the legal basis for the claim the plaintiff advances is for constitutional damages as a remedy in delict.[1] I will approach the matter on that basis seeing as it appears from the particulars of claim/pleading that the plaintiff's claim is couched as one under the *actio iniuriarum* in the light of the allegation that the second defendant acted with malice.

[4] A feature of applications of this sort is that they are usually brought at the close of the plaintiff's case without the defendant having given any evidence. There is no evaluation or weighing up of the evidence hence the conventional approach[2] to determining the facts in a civil trial once the parties have placed all their evidence before court does not factor. The power to grant absolution at the end of a plaintiff's case is therefore one that should be granted sparingly and in the interests of justice.[3]

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[1] *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) paras 67 and 74; *Mankayi v Anglo Gold Ashanti Limited* 2011(5) BCLR 453 (CC) para 17; *Law Society of South Africa v Minister of Transport* 2011 (1) SA 400 (CC) para 73.

[2] As laid down in *National Employers' General Insurance Co Ltd v Jagers* 1984 (4) SA 437 (E) at 440D-G. See too *Mabona & another v Minister of Law and Order & others* 1988 (2) SA 654 (SE) at 662C-F; *Stellenbosch Farmers' Winery Group Ltd & another v Martell et Cie & others* 2003 (1) SA 11 (SCA) para 5; *Dreyer & another NNO v AXZS Industries (Pty) Ltd* 2006 (5) SA 548 (SCA) para 30.

[3] *Gordon Lloyd Page and Associates v Rivera and Another* 2001 (1) SA 88 (SCA) 88 at 93A.

[5] In *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A) at 409G-H the test has been formulated in these terms:

'. . . When absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by the plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff. (*Gascoyne v Paul and Hunter* 1917 TPD 170 at 173; *Ruto Flour Mills (Pty) Ltd v Adelson* (2) SA 307 (T))'

[6] The practical approach to applying the test is that it requires the court to establish whether there is sufficient evidence that *prima facie* relates to all the elements of the claim. In its evaluation to this end Harms JA in *Gordon Lloyd & Associates v Rivera*[4] held that it is not necessarily correct for the court to require 'evidence upon which a reasonable man might find for the plaintiff' (*Gascoyne (loc cit)*)[5]. The formulation in those terms tends to cloud the issue as the court ought not to be concerned with what someone else might think; it should rather be concerned with its own judgment and not that of a reasonable person or court.[6]

[7] Broadly stated, the plaintiff, a former employee and member of the National Prosecuting Authority advances a case arising from the conduct and decision of the second defendant as presiding magistrate in the course of the plaintiff's prosecution in the Regional Court, Aliwal North allegedly for corrupt activities in contravention the Prevention and Combatting of Corrupt Activities Act[7]. The plaintiff alleges *inter alia* that the second defendant's refusal to accede to a request for a postponement to obtain the services of an alternative legal representative resulted in the criminal trial against him being tainted by unfairness occasioning his unlawful conviction and sentence. On the basis that the second defendant is alleged to be an employee of the first defendant (i.e. the Minister of Justice and Constitutional Development), and that she acted in the course and scope of her employment, the plaintiff imputes

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[4] 2001 (1) SA 88 (SCA).
[5] This is how the test was formulated in *Gascoyne v Paul and Hunter* 1917 TPD 170 at 173; *Ruto Flour Mills (Pty) Ltd v Adelson* (2) SA 307 (T)
[6] *Gordon Lloyd Page and Associates v Rivera and Another supra* para 2.
[7] Act 12 of 2004.

vicarious liability to the first defendant as head of the Department of Justice who is liable for the conduct of its employees.

[8] In so far as the issue of the liability of the second defendant in her capacity as a judicial officer is concerned, and its implications for the first defendant, this is dealt with much later in this judgment in the discussion pertaining to vicarious liability.

[9] Repeating only where necessary, the following allegations in the particulars of claim gives context to the matter:

'10. On the 9th of July 2014, the plaintiff indicated to his legal representative, Mr Scheun, that he no longer requires his services, due to a breakdown in trust between the plaintiff and Mr Scheun, whereafter the plaintiff requested an alternative legal representative. The aforementioned request was communicated to the second defendant in open court.

11. On the date mentioned in paragraph 10 *supra*, the plaintiff's legal representative, Mr Scheun, was excused by the second defendant, and as a result, ceased to act on behalf of the plaintiff.

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13. The plaintiff communicated to the second defendant, in open court, that he is unable to conduct his own defence and requires legal representation.

14. In response to the plaintiff's request for a postponement to secure an alternative legal representative, the second defendant uttered the following statements which statements were uttered with malice:

14.1 "Are you in a position to proceed today? Because I'm not going to grant any further postponement for you for a legal advisor."

14.2 “I’m not going to grant any further postponement for you to get other legal representation. We will proceed today. This was an informed choice you made yourself.”

14.3 “So if you want to a postponement today for a further legal application, sir, it is refused.”

14.4 “You are finished, sir, you sit down.”

14.5 “Sir, are you now going to be – I can hold you in contempt of court. I’ve told you to sit down, I’ve made my ruling.”

14.6 “Now without any good cause, you fired him. So you have negated any right you have to further to apply to this court for legal representation.”

15 As a result of the second defendant’s refusal of the plaintiff’s request for a postponement to secure alternative legal representation, the trial against the plaintiff proceeded without the plaintiff being legally represented.

16. The refusal by second defendant of plaintiff’s request for a postponement to secure alternative legal representation, and the decision by second defendant to continue with the trial without plaintiff being legally represented, resulted in an unfair trial which [was] unfair, unreasonable, tainted and unjust trial [and] continued unabated throughout the hearing, conviction and sentencing. The whole trial, conviction and sentence was tainted with this aforesaid unfairness.

17 - 21 …

22. The plaintiff, in terms of section 35(3)*(f)* and *(g)* of the Constitution of the Republic of South Africa, has the right to a fair trial, which *inter alia* entitles the plaintiff to:

22.1 choose and to be represented by a legal practitioner and to be informed of this right promptly;

22.2 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.

23. The plaintiff furthermore has, in terms of section 73 (2) of the Criminal Procedure Act 51 of 1977 (CPA), the right to be represented by his legal adviser at criminal proceedings, if such legal adviser is not in terms of any law prohibited from appearing at the proceedings in question.

24 - 26…

27. The first and second defendant owed the plaintiffs a duty of care to consider the substantial injustice to the plaintiff, in limiting the plaintiff's statutory right to legal representation in terms of section 73(2) of the CPA, as set out in paragraph 23 *supra*.

28. The first and second defendants, by virtue of the malicious conduct of the second defendant… breached the plaintiff's constitutional rights enshrined in section 35 of the Constitution of the Republic of South Africa and the plaintiff's statutory right enshrined in section 73(2) of the CPA.

29. The limitation, and subsequent breach of the plaintiff's constitutional rights as set out above was not reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

30 - 31…

32. The refusal of legal representation for the plaintiff by the second defendant breached the plaintiff's constitutional rights as enshrined in the Bill of Rights, constituting a constitutional and statutory breach of their duty of care towards the plaintiff … and resulted in a trial that was unfair, unreasonable, tainted, and unjust, which said trial wrongfully unlawfully and unfairly continued unabated throughout the hearing, conviction and sentencing …

33. Due to the first and second defendants breach of their constitutional and statutory duty of care towards the plaintiff, resulting in the unfair, unreasonable, tainted, and tarnished trial which continued and resulted in the unlawful, wrongful, and unjustified conviction and sentence past (sic) upon the plaintiff, the plaintiff suffered impairment to his freedom of movement, dignity, bodily integrity and reputation as well as associated contumelia'.

[10] The trial culminated in the plaintiff's conviction for fraud on 30 September 2014 for which he was sentenced on 28 April 2015 to 5 years' imprisonment, part of which he served directly at Goedemoed and at Middledrift with the remainder served as a parolee effective from 31 October 2017. On 11 September 2019 and following an appeal granted on petition against his conviction (by then a substantial portion of the sentence already served), the conviction and sentence were set aside by an appeal court of this division in the exercise of its inherent power of review. Subsequent to the present action being instituted by summons issued on 24 January 2020, the criminal prosecution against the plaintiff has been reinstated and is pending.

[11] For present purposes it is unnecessary to traverse an all-inclusive analysis of the plaintiff's testimony. He is not an unsophisticated individual. Despite adversities in life, he obtained a law degree (LLB) and charted his career in the legal profession earning a livelihood initially as a candidate attorney, then as a Legal Aid employee, and later as a member of the prosecutorial authority in Aliwal North after completing an aspirant programme. He has a wife with whom he has three children.

[12] In the main, he testified about his experience of his direct incarceration, the hardy conditions which he endured, the constraints on his freedom of movement and challenges in communicating with the outside world as a sentenced offender including challenges imposed by parole restrictions, as also the undesirable effect of his incarceration on himself, its effect on his family and his isolation from the community. He testified that the community perceives him as a criminal and as someone who cannot be trusted. Parenthetically, and in response to questions about his current occupation and place of employment the plaintiff supplied trial particulars

on 25 October 2022 in which he expressly indicated that he was a PR Councillor employed at the Ngqushwa Municipality.

[13] Following his dismissal from the prosecutorial ranks in 2013 he lost everything and at some stage engaged in alcohol and drug abuse. He is presently unemployed. In the course of his criminal prosecution he was warned by the second defendant one of the conditions of section 342A of the Criminal Procedure Act[8] was that he should stick to his choice of legal representation and not change his mind. He testified there is no such condition contained in the section and asserted that the second defendant failed to hold an enquiry under the section because she was of the opinion that he was wasting time. It may fairly be presumed that the plaintiff has a working knowledge of what the section entails. While referring to the transcript/record of the trial proceedings and testifying about his request for legal representation following the withdrawal of Mr Scheun and the second defendant's refusal to grant him a postponement, he stated that he was not in a position to continue with the trial but that the second defendant 'can proceed' and that he would not be taking notes or asking questions.

[14] While testifying in chief, evidence of the plaintiff's loss of employment was elicited and the effect it had on his family obligations, particularly having necessitated that his children change schools and that he and his family became dependant on his mother and sisters for support. Plaintiff's counsel indicated that sight could not be lost of the fact that the loss of income flowed from the unfair trial which contributed to the additional suffering of the plaintiff. Since this appeared to be an attempt to elicit evidence of patrimonial damages it is not surprising that an objection was raised considering that a claim in the order of R20 million may conceivably secret a claim for patrimonial loss where this has not been specifically pleaded. The Plaintiff further testified about how the multiple series of postponements of the criminal trial had been procured in the period between its inception and the date of the second defendant's refusal. The postponements are recapitulated elsewhere in this judgment.

[8] Act 51 of 1977.

[15] Cross-examination of the plaintiff was directed at establishing that his legal experience rendered him subjectively aware that he would probably be found guilty of a corrupt activity associated with receipt of gratification, that by terminating the mandate of his legal representative he sought to enforce a delay by seeking a postponement of the proceedings, that there is no absolute right to legal representation, that the unavailability of a legal representative is not necessarily a basis for seeking a postponement which the second defendant refused in the exercise of her judicial functions, that he suffered loss through his own conduct, and that as a legally trained person he was aware of his rights of appeal and review in terms of the Criminal Procedure Act[9]. On being confronted by material emanating from the record of the trial before the second defendant (the record), the plaintiff consistently refrained from making admissions of fact and concessions by asserting his right against self-incrimination. He also effectively insulated himself from admissions sought from video footage.

[16] The footage indicates two male persons interacting with each other – the one handing over Rand notes to the other. The footage forms part of the criminal trial record and was viewed following a ruling that it constitutes real evidence[10] and may be used during cross-examination. The quality of the replay was flawless and it is startling that the plaintiff refused to identify himself notwithstanding it being obvious that he featured therein. In making this remark, I constrain it to the identity of the plaintiff and it is by no means intended to express a finding related to the alleged illegal activity forming the substance of the charge/s against him in the reinstated prosecution. I think defendants' counsel is correct when he contends in his heads of argument that the plaintiff's refusal 'bordered on the ludicrous'.

[17] The ruling permitting the use of the footage flows from the minutes of the parties' rule 37 conference. The minutes reflect agreement that the record and other specified documents such as the audio from the recording of the proceedings can be referred to and used during trial without the need to prove authenticity. As expected, and understandably with each party seeking leverage to advance its own case, there

[9] Act 51 of 1977.
[10] *S v Mdlongwa* 2010 (2) SACR 419 (SCA) para 22; *S v Mpumlo and Others* 1986 (3) SA 485 € at 490H-I.

were differing contentions about what this meant. The bottom line is that there is no explicit agreement that the record itself correctly constitutes evidence of the matters therein, nor is there a caveat that same may not be used during cross-examination.

[18] Apart from leaning on constitutional grounds to avoid self-incrimination, the so-called *Hollington* rule[11] also lent support for the plaintiff's refrain. The rule is authority for the view that a finding in a criminal case cannot in a subsequent civil case serve as evidence of a fact that the criminal court had considered to be proved.[12] The inverse of the *Hollington* rule is to the effect that the findings in a civil court are inadmissible in subsequent criminal proceedings.[13]

[19] Whatever the purport of cross-examination and the concessions that were attempted to have been elicited from the plaintiff, the State would nonetheless be required to prove them in the pending criminal proceedings on a standard higher than a civil trial. It seems to me that the premise of the plaintiff's refrain may be that the court in the criminal trial would be influenced by the pronouncements in the present matter.

[20] There is no basis for this.

[21] Nor is there a basis for the argument that plaintiff's refrain finds support in section 2 and section 14 of the Civil Proceedings Evidence Act[14]. Section 2 provides that no evidence as to any fact, matter or thing which is irrelevant or immaterial and cannot conduce to prove or disprove any point or fact in issue should be admissible. Section 14 prevents a witness in a civil action from refusing to answer a question where the answer might expose them to civil liability, but it reaffirms the right not to be compelled to give self-incriminating evidence in the context of a civil trial.[15] Seen in the light of the plaintiff's insistence to proceed to trial in this matter – having been

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[11] *Hollington v F Hewthorn & Company Ltd* [1943] KB 587 (CA) ([1943] 2 All ER 35.
[12] See generally Schwikkard Mosaka, *Principles of Evidence*, Juta 5th ed at pp106-108
[13] *R v Lechudi* 1945 AD 796; *Pelser v Director of Public Prosecutions (Transvaal Provincial Division) and Others* [2008] ZAGPHC 426 paras 8-9; *Institute for Accountability in Southern Africa v Public Protector and Others* [2020] ZAGPPHC 64; [2020] 2 All SA 469 (GP; 2020 (5) SA 179 (GP) para 22.
[14] 25 of 1965.
[15] *MTN (Pty) Ltd v Madzonga and Others* [2023] ZAGPJHC 188; 2023 (5) SA 548 (GJ) para 25.

fully advised by his legal representatives of the risks, his refrain during cross-examination was criticised by the defendants as obstructive.

[22] It would be edifying for the plaintiff to grasp that the institution of cross-examination constitutes a right and it imposes certain obligations. When it is aimed to suggest that a witness is not speaking the truth on a certain point, or perhaps intended to put a proposition to the witness, it is essential to direct their attention thereto so that the witness is given the opportunity of putting up an explanation or defending their character.[16] This is consistent with the elementary and standard practice for a party to put to an opposing witness so much of its own case or defence to avoid the assumption that if left unchallenged the witness's evidence may be accepted as correct[17].

[23] What emerges from the discourse in the preceding paragraphs is that there is, at this stage of the proceedings, no evidence before this Court suggesting that the plaintiff was involved in corrupt activities. Nor can factual conclusions be drawn from the video footage to implicate him, other than the patent indication that the person who received money is the plaintiff himself.

[24] A delict is defined as the act of a person that in a wrongful and culpable way causes harm to another.[18] A remedy in delict requires the plaintiff to establish all its elements, namely, conduct, wrongfulness, fault, causation, and harm or loss.

[25] In what follows hereafter is an assessment of these elements to establish whether on the appropriate test for absolution this Court could or might reasonably find for the plaintiff. The exercise is undertaken having regard to the general approach to pleadings that their intended purpose is to define the issues between the parties and to enable the court to adjudicate those issues based on the evidence adduced by the parties.[19]

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[16] Compare *President of the Republic of South Africa v South African Rugby Federation Union* 2000 (1) SA 1 CC para 61; *Swanevelder v Road Accident Fund* [2007] ZAGPHC 201 para 19 and authorities cited in the footnote thereto.
[17] *Small v Smith* 1954 (3) SA 434 (SWA) at 438E-G.
[18] Neethling et al, *Law of Delict*, 7th ed p4; LAWSA Volume 15 (third edition) p3 para 2.
[19] See generally *Jowell v Bramwell-Jones and Others* 1998 (1) SA 836 (W) at 897F-I.

[26] In the preparation of this judgment I have, in addition, had regard to the oral submissions and written arguments prepared by the parties' counsel to whom I express my gratitude.

Conduct

[27] This requirement presents no difficulty. It is a positive act. It is not disputed that following the second defendant's refusal of the postponement request the trial against the plaintiff proceeded without the plaintiff having been legally represented.

Wrongfulness

[28] To establish liability in delict, a defendant's conduct must be wrongful.

[29] Wrongfulness necessitates a distinct and separate enquiry from the other elements for delictual liability.[20] It is not to be conflated with the requirement of fault (dealt with later in this judgment). The enquiry into wrongfulness is conceptually anterior to the fault enquiry[21] assuming all the other elements for delictual liability are present[22]. When enquiring into wrongfulness, one can either focus on the infringement of a right or the breach of a legal duty. In the final analysis, the decision involves an assessment of reasonableness and public policy[23] underlying which there is an explicitly normative approach rooted in the Constitution.

[30] In *Le Roux v Dey*[24] Brand JA described wrongfulness as follows:

'In the more recent past our courts have come to recognise, however, that in the context of the law of delict: (a) the criterion of wrongfulness ultimately depends on a judicial determination of whether – assuming all the other elements of delictual liability to be present – it would be reasonable to impose liability on a defendant for the damages flowing from specific conduct; and (b) that the judicial determination of that reasonableness would in turn depend on considerations of public and legal policy in accordance with constitutional norms. Incidentally, to avoid confusion it

[20] *Stedall and Another v Aspeling and Another* 2018 (2) SA 75 (SCA) para 11 and the authorities cited.
[21] *Minister of Safety and Security v Van Duiwenboden* 2002 (6) SA 431 (SCA) at 442A.
[22] Van Der Walt and Midgley, *Principles of Delict*, LexisNexis 4th ed at 99 para 75.
[23] Loubser and Midgley et al, *The Law of Delict in South Africa*, Oxford 2nd ed p145
[24] 2011 (3) SA 274 (CC) para 122 (footnotes omitted).

should be borne in mind that, what is meant by reasonableness in the context of wrongfulness has nothing to do with the reasonableness of the defendant's conduct, but it concerns the reasonableness of imposing liability on the defendant for the harm resulting from that conduct.'

[31] Wrongfulness is a matter of law. Courts usually do not hear evidence on the issue. It is incumbent on the plaintiff to make and prove factual allegations substantiating the relevant policy considerations from which wrongfulness, which is a matter for judicial determination, can be deduced.[25] As will be seen from the ensuing discussion the manner in which the plaintiff's cause of action has been pleaded was described in argument by the defendants as 'problematic' – an epithet which they submit, is not without merit.

[32] For that reason it will do well to digress somewhat and say something about the purpose of pleadings. A general rule is that pleadings must be lucid, logical and intelligible[26]. Pleadings serve the purpose of bringing clarity, to the notice of the court and to the parties in an action, the issues upon which reliance is to be placed. This objective can only be attained when parties state their cases with precision, the degree of which depends on the circumstances of each case[27].

[33] Uniform rule 18(4) serves as a guideline for the careful drafting of a pleading. In brief, the rule requires that every pleading shall contain a clear and concise statement of the material facts upon which a pleader relies and that such facts be set out with sufficient particularity to enable the opposite party to reply thereto. The clarity and precision required of a pleading is explained in *Jowell v Bramwell-Jones and Others*[28]*:*

'[T]he plaintiff is required to furnish an outline of its case. That does not mean that the defendant is entitled to a framework like a crossword puzzle in which every gap can be filled by logical deduction. The outline may be asymmetrical and possess

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[25] Loubser and Midgley ibid p143; *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 (2) SA 150 (SCA) paras 13-15.
[26] *Trope v South African Reserve Bank and Another* 1992 (3) SA 208 (T) at 210H.
[27] *Imprefed (Pty) Ltd v National Transport Commission* 1993 (3) SA 94 (AD) at 107C-E.
[28] 1998 (1) SA 836 (W).

rough edges not obvious until actually explored by evidence. Provided the defendant is given a clear idea of the material facts which are necessary to make the cause of action intelligible, the plaintiff will have satisfied the requirements [of the rule].'[29]

[34] In that regard it is of importance to be mindful of the distinction between *facta probanda* or primary factual allegations (i.e. material facts) which a pleader must make and *facta probantia* which are secondary allegations or evidence upon which the pleader will rely to prove the primary allegations.[30]

[35] In heads of argument the plaintiff approaches the wrongfulness issue from the perspective of the infringement of a right and the breach of a legal duty.

[36] On the pleadings a case is advanced that the plaintiff's rights under section 35 of the Constitution have been maliciously infringed.

[37] He argues in the first instance that the appeal court set aside his conviction and sentence based on the infringement of his right to a fair trial and because the judgment has not been appealed against, it stands. By way of a brief excurses the plaintiff's allegation that his section 35 rights (which includes the right to a fair trial) have been infringed is plainly disputed in the defendants' plea. Their denial is coupled with a pleaded form of justification (clarified later).

[38] In the second instance the plaintiff argues that:

'[T]he factual infringement of a right contained in the Bill of Rights is prima facie unlawful. The right of an accused to a fair trial places a correlative duty on the presiding officer, to have a legal duty to respect and to prevent infringement thereof.'

As will become apparent from what follows below the short shrift approach to this leg of the argument is that the plaintiff's pleaded case does not to properly identify the right/s infringed to accentuate the correlative duty contended for.

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[29] at 913F-G.

[30] *Nasionale Aartappel Korporasie Beperk v Price Waterhouse Coopers Ing en andere* 2001 (2) SA 790 (T) at 797G-I and 798C-E; *Jowell v Bramwell-Jones and Others* 1998 (1) SA 836 (W) at 903A-B; and *Makgae v Sentraboer (Koöperatief) Bpk* 1981 (4) SA 239 (T) at 245D-E.

[39] Turning to the judgment of the appeal court, it is noteworthy to make a few observations. To start with, the appeal court made the finding that the second defendant's refusal of the postponement *'is not consistent with the constitutionally* (sic) *imperative that assures accused persons of the entitlement to legal representation'*. This finding is distinct from the infringement of the right to a fair trial which is now argued in these proceedings. Moreover, the appeal court did not make a specific finding in terms of section 22 of the Superior Courts Act[31], and it tempered its order *'with no aspersions cast on* [the] *magistrate'*.

[40] Aside from these remarks, I have reservations about whether the finding in the appeal court judgment assumes relevance in these proceedings. I was not referred to a decision in support of the contention that a finding of a court on review can be used to prove a disputed fact(s) in a subsequent civil trial. Without intending criticism, the appeal court judgment merely represents the opinion of another court and is inadmissible in these proceedings.

[41] Adverting once again to the alleged infringement of plaintiff's section 35 rights, the question of a legal remedy for a particular consequence can only arise once the relevant right alleged to have been infringed has been properly identified and pleaded. The plaintiff relies on two provisions: the right to choose a legal practitioner and to be represented by that person (section 35(3)*(f)*), and the right to have a legal practitioner assigned by the State and at State expense if substantial injustice would otherwise result (section 35(3)*(g)*). Underlying section 73(2) of the Criminal Procedure Act is that an accused person shall be entitled to be represented by his legal adviser at criminal proceedings.

[42] Foundational to sections 35(3)*(f)* and *(g)* is that they ensure fulfilment of the right to legal representation. But the right in each instance, is discrete. The principle underlying each right is affected by different factual considerations which suggests that each right is capable of being fulfilled or realised in different ways. This is unheeded in paragraph 28 of the particulars of claim in which it is baldly asserted

[31] Act 10 of 2013.

that the defendants have breached the plaintiff's rights in section 35 of the Constitution and his right under section 73(2) of the Criminal Procedure Act. Whether it is intended to suggest that section 73(2) is a self-standing right or a fusion of the rights in section 35(3)*(f)* and *(g)* of the Constitution is indeterminate – but that is not the issue to be decided (nor has it been pleaded). One merely notes that section 73(2) refers to the right to a 'legal adviser', whereas sections 35(3)*(f)* and *(g)* refers to a 'legal practitioner'. The expressions are not defined in the Criminal Procedure Act or in the Constitution. The lack of definitions for these terms may, presumably, not be of much significance in the context of a criminal trial, but in the context of a civil action for damages for an alleged breach of right(s), the distinction may conceivably be of importance in assessing exactly what right is asserted and (on the plaintiff's case) how it ought to have been given effect by the second defendant when she refused the postponement.

[43] Accordingly, and considering that each right in section 35(3)*(f)* and section 35(3)*(g)* can be fulfilled by different means it is not clear which of them has been breached.

[44] The pleaded reference to section 73(2) lends no clarity either.

[45] Differently stated, the particulars of claim neither indicates exactly what right to legal representation was breached nor does it reveal the factual considerations underlying each right which the second defendant may either have regarded or disregarded upon refusal of the requested postponement. No attempt to seek clarification on these aspects was elicited from the plaintiff when he testified save that he stated that upon requesting the postponement he wished to obtain the services of a 'legal aid' attorney. Because the record has not been admitted as evidence and is precluded by the *Hollington* rule, it was incumbent on the plaintiff to have pleaded, as a material fact, his choice of representation in anticipation of his testimony (the *facta probantia*). In evaluating delay one can conceive that there may be numerous and varying factual considerations that come into play when a judicial officer is required to exercise a discretion in deciding whether to grant a postponement to enable an accused either the right to exercise his own choice of appointing a legal practitioner or to have a legal practitioner assigned at State

expense. These considerations ultimately affect how the exercise of the discretion of the presiding officer conduces to the interests of the administration of justice. Moreover, to have pleaded that which the plaintiff intended to testify would have identified the issue on which the Court would be required to make a finding. Since the record is not admitted into evidence and the plaintiff's pleading not formulated with clarity, the Court and the defendants are deprived of a more complete picture of the plaintiff's case.

[46] Another problematic feature of the pleading is that it discernibly indicates that the plaintiff's cause of action appears to be founded on the second defendant's refusal of his request for a postponement. Read in context, indications are that the plaintiff's right to legal representation entitled him to a postponement as of right – the refusal of the latter constituting wrongfulness. A postponement of a criminal trial lies within the discretion of the presiding judicial officer.[32] (This features in the context of section 342A which is dealt with below).

[47] The plaintiff's pleading refers to section 342A[33] and once regard is had to his knowledge of what the section entails, one may well observe that there is, in addition, an absence of pleaded facts indicating that the second defendant erred in exercising her discretion, or that she did not properly apply her mind to the plaintiff's request when she failed to hold an enquiry. In my view such facts would inform the policy considerations in determining wrongfulness, particularly in the light of the fact that a postponement cannot be claimed as of right[34] unless it is in the interest of justice grant it[35] – and especially in recognition of the fact that judicial officers have a duty to the court system, their colleagues, the public and the parties to ensure that a postponement is not deliberately engineered to undermine the administration of justice.[36] It must be appreciated that the policy considerations underlying wrongfulness are of paramount importance in a setting involving the conduct of a judicial officer whilst presiding. Judicial officers (be they judges or magistrates) are human and not infallible – they will make mistakes and sometimes err especially

[32] *R v Zackey* 1945 AD 505.
[33] Paragraph 25.
[34] *Pangarkar v Botha* [2014] ZASCA 78; 2015 (1) SA 503 (SCA) paras 22-33.
[35] *Lekolwane and another v Minister of Justice and Constitutional Development* 2007 (3) BCLR 280 (CC) para 17.
[36] *Compare Take and Save Trading CC v Standard Bank of SA Ltd* 2004 (4) SA 1 (SCA) para 3.

when matters of discretion are involved. In the circumstances – and as pleaded by the defendants – even if the second defendant might have erred in exercising her discretion as the presiding judicial officer in refusing the postponement, such conduct was not wrongful.

[48] A postponement is a matter of judicial discretion and the facts underlying the improper exercise thereof ought to have been pleaded. That said, and as a result of the plaintiff's failure to properly identify the right infringed neither the policy considerations relevant to the question of wrongfulness nor the factual basis underlying such considerations were identified and investigated when he testified. Cross-examination of the plaintiff on these aspects was either objected to or met by the refrain that he did not wish to incriminate himself. I have already proffered comment on this. The proposition that facts that substantiate policy considerations, should be pleaded is in principle well founded.[37] In point, the absence of the necessary factual substrate may render the particulars of claim excipiable on the basis that no cause of action is disclosed.[38]

[49] While it would be futile to investigate whether an exception if taken would have been successful, it bears mentioning that the matter already gave rise to an exception prior to the involvement of counsel presently appearing for the defendants. Some amendments ensued but the presently formulated particulars of claim remain problematic, if not convoluted. The lack of a sufficiently detailed and structured factual matrix (which by contrast is essential for determining causation) detracts from finding that it would be reasonable to impose liability and from recognising the public policy considerations underlying that determination (*Le Roux v Dey supra*). Inferential reasoning does not assist. The high water mark of the plaintiff's case on wrongfulness is that his own pleading has placed a brake on liability. The upshot is that the appeal court judgment does not come to his assistance and his pleading precludes finding that it would be reasonable to impose liability in the circumstances. As such, the issue of the defendants' being put to the task of discharging the onus to prove justification does not arise.

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[37] See for example *Sampson v Legal Aid South Africa* [2022] ZANCHC 49; (2023) 44 ILJ 422 (NCK).
[38] *Trope v SA Reserve Bank* 1992 (3) SA 208 (T) art 214A-G; *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd* 1992 (1) SA 783 (A) at 797E; *Telematrix (Pty) Ltd v Advertising Standards Authority SA* 2006 (1) SA 462 (SCA) para 2; *Sampson supra*.

[50] In *F v Minister of Safety and Security*[39], Froneman J noted[40] that where positive conduct infringes recognised interests of persons or property, a conclusion of wrongfulness in respect of such invasion:

'… can be avoided only by pleading some form of justification for the breach of the duty or, put differently, the infringement of the recognised right or interest.'

[51] In admitting the refusal of the postponement the defendants plead that the second defendant had the authority as a judicial officer to decide the causes or issues that arose in the criminal trial, having to render a decision in a judicial capacity. Reliance therefor is placed on the Criminal Procedure Act. Section 73(2C) permits that a court may in certain circumstances order that a trial proceeds without legal representation unless the court is of the opinion that it would result in substantial injustice. Section 342A permits discretionary orders that may be made to obviate unreasonable delays in trials.

[52] In raising these provisions the defendants maintain in their amended plea that the postponement could not be claimed by the plaintiff as of right but amounted to a request for an indulgence which could be granted in terms of a discretion which had to be judicially exercised having regard to the circumstances of the matter and the interests of justice.

Fault

[53] Malice is attributed to the second defendant. In the context of the *actio iniuriarum*, the concept means *animus iniuriandi*[41] (i.e. the intention to injure). The onus to prove intent is on the plaintiff. Due to its subjective nature its existence is determined by having regard to each particular situation and to the external facts and circumstances from which an inference as to the state of mind of the defendant can be drawn.[42] In drawing inferences a court must guard against subtly applying an

[39] 2012 (1) SA 536 (CC).
[40] Para 118.
[41] *Relyant Trading (Pty) Limited v Shongwe and Another* [2007] All SA 375 (SCA) para 4.
[42] *Maisel v Van Naeren* 1960 (4) SA 836 (C) at 840G.

objective instead of a subjective test.[43] Armchair reasoning must be guarded against.[44]

[54] With regard to external facts and circumstances it was mentioned in plaintiff's opening address that evidence will be led regarding the tone of voice and body language of the second defendant – such evidence indicating that she was indisposed towards the plaintiff and acted with malice and *mala fides*.

[55] The plaintiff's heads of argument conceives the following submission:

'We venture to suggest that where a right guaranteed in the Bill of Rights is infringed, that the Court should follow the presumption of *animus iniuriandi* when the wrongful conduct is proved. This development took place in defamation cases.'

[56] Intention is not anything to be presumed – it must be affirmatively established.[45] While courts are duty bound to ensure that the values of the Constitution underlie all law, the existing common law is undoubtedly adequate in providing a remedy for the protection of the plaintiff's fundamental rights. But, it is not every infringement of a constitutional right or obligation that can be visited with unlawfulness in a delictual sense[46]. And where it is contended that intention to injure should be presumed when a right is infringed, then the anticipated development ought to have been pleaded[47].

[57] This does not feature in the particulars of claim.

[58] In attempting to establish malice, an audio clip from the trial proceedings was heard in open court. Its intended purpose was to confirm the excerpts in paragraph 14 of the particulars of claim and to contextualise the interaction between the plaintiff and the second defendant as also to set the scene for drawing inferences against the second defendant. The selectively quoted excerpts are not denied by the

[43] C R Snyman, *Criminal Law*, LexisNexis 6th ed at 185.
[44] Snyman ibid at 185.
[45] *Maisel supra* at 840H.
[46] *Minister of Police v Mboweni* 2014 (6) SA 256 (SCA) at 265G.
[47] Compare for example *H v Fetal Assessment Cen*tre 2015 (2) BCLR 127 (CC); also Amler's Precedents of Pleading, 9th ed at 95.

defendants in so far as they accord with the transcript. The defendants deny however, that the second defendant's utterances were made with malice or with *animus iniuriandi*.

[59] Testifying on how he felt about the second defendant's utterances the plaintiff stated that he was afraid of her. She leaned towards the bench pointing her finger at him. He went on to testify that her tone changed, her face turned red; she was angry and he felt that she was out to kill him. By this he stated that he believed that she was determined to convict him.

[60] During examination in chief it was put by way of a leading question to the plaintiff that the second defendant failed to hold an enquiry under section 342A of the Criminal Procedure Act[48] since she was of the opinion that he was wasting time. The section deals with unreasonable delays in criminal trials. It is framed in peremptory terms. It provides that the court shall investigate any delay in the completion of proceedings (section 342A(1)), and it directs the court to consider several jurisdictional factors (section 342A(2)*(a-i)*). My sense is that the discretion to grant or refuse the postponement (section 342A(3)*(a)* and *(b)*), or to make any other order in circumstances specified (section 342A)(3)*(c-f)*), only arises once the jurisdictional factors have been considered.

[61] In heads of argument the plaintiff makes the following submissions (amongst others) with reference to the second defendant:

'She knowingly failed to hold an enquiry under section 342A;

Without any investigation she stated the plaintiff has forfeited any right to legal representation;

After deciding to refuse the postponement, she belatedly gave false reasons inter alia: the plaintiff voluntarily made a decision to represent himself; that he had 'how

[48] Act 51 of 1977. See also the particulars of claim at paragraph 25.

many' attorneys in the course of the matter; and 'how many' people have had to step down;

She knew the plaintiff required an attorney to represent him and that he could not handle his own case;

She knew that the plaintiff would not take any notes as he needed the assistance of an attorney;

She knew the plaintiff would not ask any questions as he needed an attorney to represent him; and

She enforced the trial knowing that it will be spurious and a pretence.'

[62] Emerging from the aforegoing is a combination of legal and factual material which, on the issue of malice, is not foreshadowed in the plaintiff's pleading especially as regards those submissions where knowledge of circumstance is imputed to the second defendant.

[63] On what has been pleaded and what has been placed before Court, there is no scope for an inferential finding that the second defendant acted with malice or *animus iniuriandi*. In *Janse van der Walt v Minister of Safety and Security and Ohers*[49] the court had this to say about malice and bad faith:

'Since the existence of malice or bad faith is not an issue which can be observed in the abstract, it is by necessity an issue which must be determined by drawing an inference from established factual circumstances. In the absence of rebutting evidence or a plausible explanation by the magistrate in question, such an inference is justifiable and the most probable and the most plausible inference which can be drawn from the testimony of the plaintiffs regarding the conduct of the magistrate.'

[49] [2011] ZAGPJHC 15 paras 48-49.

[64] To draw inferences wholly and/or collectively from the material in the plaintiff's heads of argument or from the second defendant's tone in the audio playback or from the self-serving description of her demeanour as testified by the plaintiff, is a speculative exercise and one that is not marked by infallible accuracy. Gauging from what is before this Court it is doubtful whether malice is the most probable and the most plausible inference that can be drawn for the reason that it is also open to infer that the second defendant might have been overly annoyed by the plaintiff. This does not equate to malice. Even if mistaken in expressing these sentiments this Court is in any event not gifted with the psychological or intuitive perception of drawing inferences from the tone of a recorded human voice.

[65] I turn briefly to the history of the delays and postponements of the criminal trial.[50] It demonstrates that the proceedings against the plaintiff as accused had been postponed time and again. The timeline of events indicate that the commencement of the criminal trial had been postponed time and again (10 July to 6 August 2012; 6 August 2012 to 27 September 2012; 27 September 2012 to 26 November 2012; 26 November 2012 to 17 April 2013; 17 April 2023 to 18 April 2013; 18 April to 16 May 2013; 16 May 2013 to 10 June 2013; 10 June 2013 to 26 June 2013; 28 June 2013 to 10 July 2013; 10 July 2013 to 28 August 2013; 28 August 2013 to 23 October 2013; 23 October 2013 to 26 February 2014; 26 February 2014 to 27 February 2014; 27 February 2014 to 28 February 2014; 28 February 2014 to 9 July 2014). The reasons for the postponements relate primarily to direct arrangements between plaintiff's erstwhile legal representative, (an attorney in private practice whose costs were funded by the plaintiff until such time as the plaintiff's resources were depleted) and the prosecutor, as well as the plaintiff being sick on one occasion and on another for being in default of appearance. The fact of the matter is that these postponements were not at the instance of the State.

[66] Whether on its own or viewed in the light of what has been discussed above the second defendant's refusal of the postponement remains vital to the inference the plaintiff wishes the Court to draw from her refusal of the further postponement sought on termination of the mandate of Mr Scheun. In so far as reliance is placed

[50] Defendants' bundle – History of Postponements.

on the appeal court judgment to support the inference for which he contends, the plaintiff's approach appears to be that he was entitled to a postponement as of right and that its refusal either tantamounts to malice or wrongfulness.

[67] This is incorrect.

[68] A postponement is and has always been an indulgence which can only be granted as a matter of judicial discretion[51].

[69] Even if it is assumed that the second defendant erred in exercising her discretion to refuse the requested postponement, this by no means permits an inference that she acted with the malice.

[70] The aforegoing presents mixed matters of fact and law which have not been forecasted in the plaintiff's pleading. He steers away from dealing with the jurisdictional facts and the principles governing the discretion to grant a postponement, and proceeds on the assumption that a mere refusal by the second respondent somehow translates to wrongfulness and establishes malice. Neither the Court nor the defendant has been given a clear idea of the material facts underlying the plaintiff's case as would offer an indication of what would be explored in evidence.

Causation

[71] By reason of the findings in the preceding paragraphs of this judgment, it is unnecessary to deal with this aspect in any significant detail.

[72] Causation is an element of delictual liability. The broad question to be asked is what would have happened if the defendant's conduct is mentally eliminated and hypothetically replaced with lawful conduct. If a plaintiff establishes that in such an event the detrimental consequences suffered by him would not have happened, he

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[51] *Lekolwane and another v Minister of Justice and Constitutional Development* 2007 (3) BCLR 280 (CC) para 7.

would be entitled to recover his damages because causation will be regarded as having been established.[52]

[73] Causation involves a consideration of two issues: Whether a factual relationship exists between the defendant's conduct and the resultant harm. If not, then no legal liability arises and *caedit quaestio* – but if it does exist, then the second issue becomes relevant; *viz* whether or to what extent the defendant should be held legally responsible for the consequences factually induced by his or her conduct. The second issue is a juridical problem and involves considerations of legal policy.[53]

[74] In heads of argument, the plaintiff makes the following submission:

'The trial has already been set aside and declared a nullity because of the conduct of the second defendant on 9 July 2014. Her decision resulted in an unfair trial depriving the plaintiff of and infringing on his constitutional right to a fair trial.'

[75] The argument is unsustainable.

[76] For reasons already dealt with, the judgment of the appeal court represents the opinion of another court and is not binding on this Court. Furthermore no obvious indication emerges from the particulars of claim and/or the plaintiff's evidence in explicitly identifying what infringement of right and/or decision of the second defendant resulted in an unfair trial.

[77] The plaintiff fails on first leg of the causation enquiry.

Vicarious liability

[78] It is trite that a judicial officer whilst serving in a judicial capacity can only be held liable in delict for ill-judging due to *mala fides*, malice or fraud[54] but is immune if

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[52] *International Shipping Company (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) 700F-701G.
[53] Van Der Walt and Midgley, *Principles of Delict*, LexisNexis 4th ed at 275 para 175.
[54] *Penrice v Dickinson* 1945 AD at 6; *Moeketsi v Minister van Justisie en in ander* 1988 (4) SA 707 (T) at 713G; *Telematrix (Pty) Ltd tla Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA); *Claassen v Minister of Justice and Constitutional Development & another* 2010 (6) SA 399 (WCC) para 22.

their judgment is occasioned by negligence[55], mistake, lack of knowledge or lack of skill[56]. Underlying such immunity are policy considerations favouring the protection of the independence of the judiciary to enable it to adjudicate fearlessly. For that reason litigants are not entitled to a process of adjudication free from innocent (i.e. non *mala fide*) errors.[57]

[79] Vicarious liability is generally described as the strict liability of one person for the delict of another. The former is indirectly liable for the damage caused by the latter. This liability applies where there is a particular relationship between the two persons such as, for example; employer and employee, principal and agent, and motor vehicle owner – motor vehicle driver.[58] Since liability is closely linked to the wrongful conduct of the primary wrongdoer it is inconceivable that there could be vicarious or secondary liability where there is no primary delictual liability.[59]

[80] In heads of argument the plaintiff placed significant store on the judgment of the full bench in *Minister of Justice and Constitutional Development and Another v Masia*[60]*.* In that matter a magistrate's order for the summary arrest and detention of the respondent (for proposing what the magistrate felt was an inadequate offer for child maintenance) was found to be *mala fide*.

[81] In attributing vicarious liability to the first appellant (the Minister of Justice and Constitutional Development) the appeal court reasoned that the magistrate acted as employee of the first appellant in the exercise of his judicial duties and since the magistrate acted maliciously he did not enjoy judicial immunity. The court accordingly held that the magistrate committed a delict against the respondent whilst acting in the course and scope of his (i.e. the magistrate's) employment.[61]

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[55] *Telematrix supra* para 14; *Minister of Safety and Security v Van der Walt* para 21.
[56] *Telematrix supra* para 17 wherein reference is made to Gane's translation of Voet's Commentary on the Pandects.
[57] *Telematrix supra* para at 471B.
[58] *Fongoqa v Passenger Rail Agency of South Africa and Another* [2022] ZAGPJHC 183 para 62.
[59] *Minister of Safety and Security v Van der Walt* [2015] 1 All SA 658 (SCA) at 668*c.*
[60] [2021] ZAGPPHC 428; 2021 (2) SACR 425 (GP).
[61] *Minister of Justice and Constitutional Development and Another v Masia* [2021] ZAGPPHC 428; 2021 (2) SACR 425 (GP) para 48.

[82] Having anxiously considered the judgment in *Masia*, it does not assist the plaintiff for the following reasons.

[83] At the outset the findings in the preceding paragraphs of this judgment demonstrate that no primary liability against the second defendant has been established and thus no secondary liability can be attributed to first defendant.

[84] In addition, the facts in *Masia* are not aligned with those in the present matter, more particularly *Masia* did not deal with a circumstance in which a discretionary power was exercised in refusing a request for a postponement.

[85] Vicarious liability in *Masia* was grounded in the finding by the appeal court that the magistrate acted in the course and scope of his employment as an employee of the first appellant. It is with respect not clear from the judgment what analysis was undertaken by the appeal court in concluding that the magistrate acted as an employee. The judgment inferentially assumes that as an employee the magistrate was subject to the control of the first appellant.

[86] This brings me to the final aspect that calls for comment.

[87] The legislative framework dealing with the appointment of magistrates was pertinently dealt with by a full bench of the Eastern Cape Division, Bhisho in *Makaphela and Others v Acting Regional Court Magistrate and Others*[62].

[88] It is worth quoting in full from the analysis undertaken in the judgment:

'[23] The applicants seem to rely on the unreported case of *Tsotetsi v The Honourable Magistrate Delize Smith and Another* (23969/2015) [2016] ZAGPJHC 329 (29 November 2016) for the contention that liability for costs on the part of the fourth respondent can be based on vicarious liability. In that matter Van der Linde J approved a finding by Van Der Merwe AJ in *Minister of Safety and Security and*

[62] [2019] ZAECBHC 22; 2020 (2) SACR 427 (ECB) para 23.

Others v Van der Walt and Another[63] where it was held that magistrates are employees of the Minister of Justice. This aspect was left open on appeal in *Minister of Safety and Security and Others v Van der Walt and Another*[64] save to mention that the Appeal Court reiterated that a conclusion that the Minister is vicariously liable based on a finding that magistrates are "employed" by the Minister, ignores the well-established principle that magistrates, when they act in the course and scope of their judicial functions, enjoy, like all judicial officers, a status of judicial independence when they perform these judicial functions and in so doing, form part of the judicial branch of government.

[24] Lest we be understood to agree with the finding by Van der Linde J, let us clarify: We do not agree that magistrates are employees of the State. Magistrates do not fall within the category of public servants employed in terms of the Public Service Act Proclamation No. 103 of 1993. They do not fall under the Department of Justice and Correctional Services. The fact that they are appointed by the Minister of Justice by virtue of the provisions of section 9 of the Magistrates' Courts Act 32 of 1944, does not detract from the fact they are not his employees. In terms of section 10 of the Act, the Minister can only appoint them on the recommendation of the Magistrates' Commission just like the President who appoints judges on the recommendation of the Judicial Service Commission. The Minister does not have control and supervisory powers over magistrates. He cannot direct and control them in the execution of their judicial duties. The Constitution provides that: '*The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.'*[65] Consequently the control element by the Minister over magistrates is lacking.

[25] Furthermore, the Constitutional court has ruled that magistrates are not employees but they are judicial officers.[66] We are accordingly of the respectful view that the cases relied upon by the applicants defining magistrates as employees of the Minister of Justice are, to that extent, incorrect.'

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[63] [2011] ZAGPJHC 15 (25 January 2011).
[64] [2015] 1 All SA 658 (SCA).
[65] Section 165(2) of the Constitution Act, 1996.
[66] *Van Rooyen & Others v The State & others (General Council of the Bar intervening)* 2002 (5) SA 246 (CC) para 139.

[89] In *President of the Republic of South Africa v Reinecke*[67], the Supreme Court of Appeal made it clear[68] in its pronouncement that a finding that magistrates are employed does not impact upon their constitutionally guaranteed independence, and further that nothing in its judgment affects the constitutional position of magistrates as part of the judiciary.

[90] I consider that *Reinecke* has settled the legal position on judicial immunity and that *Makaphela* has dispelled the notion that magistrates are in the exercise of their judicial powers subject to the control of the Minister of Justice which renders them employees

[91] Both decisions are binding on this Court.

Conclusion

[92] It is in the context of the assessment undertaken in this judgment that the application by the defendants to be absolved from the instance is evaluated.

[93] From that perspective the case presented by the plaintiff, reasonably assessed by this Court, renders absolution an appropriate order. In the circumstances no finding could or might reasonably be made in favour of the plaintiff on what is presently before Court.

[94] At the conclusion of argument counsel for the plaintiff sought attorney and client costs including the costs of two counsel against the defendants in the event that absolution is refused.

[95] No motivation was given for a cost order on this scale, nor was any prior notice given to the defendants.

[96] The order of 11 April 2024 remains extant.

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[67] 2014 (3) SA 205 (SCA) para 17.
[68] In dealing with the position of magistrates appointed in the period 1996 to 2002.

M. S. RUGUNANAN

JUDGE OF THE HIGH COURT

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Reasons: 30 April 2024 (circulated by email).