IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case No:AR259/2022

In the matter between:

THE MINISTER OF POLICE **APPELLANT**

and

CYNTHIA NOBUHLE KHEDAMA **RESPONDENT**

This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand down is deemed to be 10h00 on 18 March 2024.

ORDER

On appeal from: the High Court of South Africa, KwaZulu-Natal Local Division, Durban (Lopes J sitting as a court of first instance):

1. The appeal is upheld with each party to pay its own costs;
2. The order of the court *a quo* is set aside and substituted with the following order:

   (a) the defendant is directed to pay the plaintiff the sum of R350 000;

   (b) the defendant is directed to pay to the plaintiff interest on the sum of R350 000 at the rate of 15.5% per annum calculated from the date of judgment, being 17 January 2022 to the date of final payment.

   (c) the defendant is to pay the plaintiff's taxed or agreed costs of the action.

JUDGMENT

Delivered on: 18 March 2024

Poyo Dlwati JP (Henriques J and Gounden AJ concurring)

[1] This appeal concerns the quantum of damages awarded to the respondent, Ms Khedama, in a claim for damages arising from an unlawful arrest and detention by the members of the appellant. The issue of liability was settled by consent between the parties in terms of a court order dated 23 April 2018.

[2] The facts upon which this appeal is premised are largely taken from the judgment of the court *a quo* and are as follows: Ms Khedama, was arrested by members of the South African Police Services (SAPS) at King Shaka International Airport in Durban on 3 December 2011. She was *en route* to Turkey with her employer and his wife. Whilst at the international departures lounge, she was approached by two uniformed members of the SAPS, one black male and a black female. They took her to a room where they questioned her for about two hours about her journey, its purpose and who she was going with. They asked her if she had any fraud matters pending against her.

[3] The police officers told her that she had to be searched and they also needed to search her suitcase. They told her that she was going to be arrested. They took her suitcase and opened it in full view of the public and her belongings were scattered on the floor. This, to her, was very embarrassing. They took her to the charge office where she was searched with her suitcase. Nothing untoward was found in her suitcase. Ms Khedama told the officers to phone a police officer in Cape Town who had spoken to her about some fraud allegations against her. This happened after she had lost her identity document and apparently some people were using it to commit fraud.

[4] Indeed the police officers phoned one Captain Barnard in Cape Town. He seemed to have confirmed what Ms Khedama had told the police officers. Nevertheless, she was thereafter instructed to phone her boyfriend as she was

being arrested and her suitcase needed to be removed. Her boyfriend, accompanied by one of her friends, arrived at the airport. They tried to reason with the police officers, unsuccessfully. Instead some insults were hurled at her for having an affair with a 'kwerekwere'. From the airport charge office, she was taken to Tongaat Police Station in the back of a police van. According to Ms Khedama, the police officers did not want to listen to anything she was saying but were harsh towards her instead.

[5] On arrival at Tongaat Police Station, she was told to remove her jewellery which was placed in safe keeping as she was taken into detention. She was taken to a small cell where she was kept for days. The toilet in the cell was very dirty with faeces and it smelt terrible. There was also a filthy grey blanket on the floor. She had no blanket to cover herself. She was also unable to sleep as she was traumatised by the events. She was not offered any food that evening. She developed an intense headache. The next morning her fingerprints were taken. She asked the police officer attending to her to ask her boyfriend to bring her a jacket, socks, and pain tablets for the headache. Tea and bread were thrown at her through a hole in the door as her breakfast. She, however, did not eat her breakfast as she had no appetite due to her circumstances and the conditions in the cell.

[6] Later, she was brought some headache tablets as well as a jacket, socks and some food. She still could not eat. She was kept at the Tongaat Police Station from 3 to 9 December 2011. At some point, whilst in police custody, she considered taking her own life with the headache tablets as she could not cope with her arrest. When she appeared in the Verulam Magistrates' Court on 5 December 2011, she was simply told that she would be transferred to Cape Town. During her detention in Tongaat, she was not able to bath or clean herself nor was she given an opportunity to exercise.

[7] On 9 December 2011 two police officers from Cape Town arrived at Tongaat Police Station. They handcuffed Ms Khedama and removed her from her cell. She was placed in a police vehicle and travelled to Cape Town. She told those officers what had happened to her. They told her that her ordeal would be

over soon if she was innocent. The car stopped at a garage and she was asked if she wanted something to eat. Even though she refused she was brought soft porridge and water. When they arrived in Mthatha, she was detained in a cell overnight. The roof of the cell was leaking as it was raining and it was very windy. There was a filthy grey blanket hanging down from the roof but she could not use it. Again, she could not sleep and stayed awake the whole night in the cell crying.

[8] The police officers came to fetch her the following morning so that they could continue with their journey. They asked if anything had happened to her as they could see that she was distressed. She told them she could not sleep due to the conditions of the cell. They continued with their journey and she had to spend another night at a cell in Monti with other female prisoners. She had to share a blanket with another prisoner who was a complete stranger to her. Early the following morning she was fetched by the police officers and they continued with their journey to Cape Town. At a petrol station, they stopped and the police officers offered her a face cloth, toothbrush and toothpaste so that she could freshen up in the petrol station's washroom. That was the first time in the 7 days since the start of her detention where she attempted to freshen up. She, however, could not change her clothing. They arrived in Cape Town during the evening of 11 December 2011.

[9] A female police officer took her fingerprints to verify whether she was the person sought. According to Ms Khedama, the fingerprints showed that she was not the person that the police were searching for. She was still kept for a further night in a cell, again with other female prisoners. The following day she was taken to the Philippi Magistrates' Court where she was granted bail after her pleas to the magistrate. She was eventually released on bail on 12 December 2011. It was only after being released that she managed to properly freshen and clean up herself. Shortly thereafter she managed to return to Durban as her case was remanded to March 2012.

[10] On Ms Khedama's return to Cape Town in March 2012, there seemed to be an acceptance that she was not the person sought and the matter was finalised.

She recovered the bail money and returned to Durban. She told the court that it took time for her employer to trust her again and for him to agree to allow her to travel with him overseas to purchase stock for the shop. She was at King Shaka International Airport, for a second time similar to the first occasion, namely with her employer to travel overseas to buy stock, when she was again approached by two police officers who took her to the same room she was in on the first occasion for questioning. On this second occasion she explained to them what had happened to her in Cape Town and that the matter was finalised. Even though the police officers eventually told her that they were joking and just wanted to know what happened, she told the court that she was scared as she feared that the same fate, as had happened on the first occasion, would befall her. However, after just less than an hour, they let her go.

[11] Ms Khedama told the court how traumatic the whole experience of her arrest was and the effects it had on her. She lost trust in herself and faith in the police. She began to fear members of the police. The first time she consulted a doctor, she could not explain to the doctor what happened to her as she was still traumatised. She was treated for blisters on her face and chest. Later she had to consult a doctor again as she was experiencing severe constipation and stomach problems. This was when she eventually explained to the doctor the ordeal of her arrest and detention. The relationship with her employer was badly affected as a result of her arrest and detention as he mistrusted her. He required her to pay for the flight costs of the first trip and on her return to work she was demoted from being a sales manager to a sales lady. Despite her demotion and her employer's mistrust of her, due to her work experience and ability, she accompanied him on the second buying trip.

[12] Dr Ebrahim Ajee Chohan, a practising clinical and educational psychologist, was called, on behalf of Ms Khedama, and testified about the effects the arrest had on her. Even though he consulted with her nine years after her experience, he was convinced after his consultation that Ms Khedama would have had symptoms of anxiety, flashbacks, hypervigilance, sleep deprivation and reduced libido after the incident and concluded that she had probably suffered from post-traumatic

stress disorder. He opined that it was probable that she behaved in the way she did during her arrest and incarceration and that she could have attempted to commit suicide.

[13] Dr Chohan testified that even though the incident would have caused a shift in Ms Khedama's day to day activities, she would eventually stabilize. He was confident, guided by the score to an assessment he had conducted on Ms Khedama, that there was no malingering effects present on her part. This opinion differed from the appellant's expert, Ms Amina Bhayat, who found that Ms Khedama had malingering effects present. Dr Chohan scored Ms Khedama 12 out of 15 and testified that a score of seven would point to the possibility of a malingering effect.

[14] The evidence tendered by the appellant did not contradict much of Ms Khedama's testimony regarding her arrest and detention. In particular, Sergeant Pather, who testified on behalf of the appellant, did not recall whether Ms Khedama's suitcase had been opened at the airport in full view of the public and he did not have any further dealings with her after the day of her arrest. So, he did not know the conditions of the police cells in Tongaat, Mthatha, Monti and Cape Town. He could not dispute that Ms Khedama had a traumatic experience about her arrest and how the arrest affected her. His evidence did not take the matter further.

[15] The only evidence that was in contradiction with that of Ms Khedama's expert was that of Ms Bhayat. After her consultation with Ms Khedama, she believed, that she had malingering effects and had exaggerated her symptoms. Despite this belief, she, ultimately agreed with Dr Chohan's diagnosis that although Ms Khedama showed residual symptoms of post-traumatic stress disorder, she would eventually recover. The main difference in their reports was whether Ms Khedama exaggerated her experience or not.

[16] After analysing the evidence and comparing previous damages awarded in similar cases, the court *a quo* found that Ms Khedama suffered from a terrible

experience and that the emotions she expressed during her testimony were heartfelt and genuine. The court *a quo* found that there was no explanation whatsoever that was given as to why it was necessary to continue to detain Ms Khedama at the Tongaat Police Station after it was ascertained from Captain Barnard that she was not the person sought. The learned judge found that the manner in which Ms Khedama was treated was appalling and should not have been endured by an arrested person. He held that pre-trial detention was in no way, shape or form designed to be a form of punishment. He opined that Ms Khedama had the most humiliating experience of being taken away by the police in front of her employer, and accused of fraud, a fact which must have become known to all who knew her. This fact manifested itself in her being mistrusted at work.

[17] The learned judge further found that both Dr Chohan and Ms Bhayat were agreed that Ms Khedama would probably have suffered post-traumatic stress disorder and would have required professional assistance. The learned judge was satisfied that several of Ms Khedama's constitutional rights were ignored and that she suffered cruel treatment at the hands of the members of the police services in both her arrest and subsequent detention. According to the learned judge, her detention and questioning the second time was clearly malicious. Even though the learned judge was alive to the fact that malice was not pleaded by Ms Khedama, he, however, found that it was clearly demonstrated in the evidence presented to him.

[18] The learned judge then computed Ms Khedama's damages as follows:

'(a) wrongful arrest – R100 000

(b) wrongful detention, including the deprivation of her liberty and her loss of amenities of life – R80 000 per day for a period of 12 days – R960 000;

(c) defamation of character, including her embarrassment and humiliation before her employer on two occasions, the loss of her reputation and her loss of her employment – including the insulting treatment by members of the police in suggesting that she was carrying drugs because her employer was a foreigner, and similar insults with regard to her then boyfriend on the same basis – R500

000; and

(d) general damages for pain and suffering, which included the psychological shock and trauma as the result of the appalling conditions to which she was subjected, and the repeated behaviour of the police members in detaining her and questioning her for a second time – R200 000'.

The learned judge felt constrained to award R1 million as that was the maximum amount claimed by Ms Khedama on the pleadings.

[19] With regard to interest, the learned judge held that interest on the amount of damages awarded should run from the date of the service of the summons, and not, as claimed in the amendment to Ms Khedama's particulars of claim delivered on the 2 August 2018, being from the date of Ms Khedama's imprisonment. The summons was served on the appellant on 20 December 2013, and interest was then sought 'a tempore morae to date of payment.' It is these orders that are being appealed pursuant to the Supreme Court of Appeal granting leave to this court.

[20] The issues to be determined by this court are whether the learned judge erred in awarding Ms Khedama an amount of R 1 million; and whether interest on the award should be altered to run from date of service of summons, being 20 December 2013, or from the date of judgment being 17 January 2022.

[21] It was argued on behalf of the appellant that the court *a quo* erred in computing the damages under separate headings as Ms Khedama did not plead separate causes of action in respect of each category of the damages. It was further argued that an acceptable approach by our courts was to award a globular amount for all the *sequelae* arising from an unlawful arrest and detention. As a result, the amount awarded was inflated and thus made it extravagant and this was contrary to the principle stated by the Supreme Court of Appeal that the primary purpose of an award for unlawful arrest and detention was not to enrich the aggrieved party but to offer him or her some *solatium* for injured feelings.

[22] Also the daily rate tariff for the detention seemingly used by the learned judge was argued to be irregular by the appellants. It was further argued on behalf

of the appellant that the interest should have been awarded to start running from the date of judgment and not from the date of summons. The appellant submitted that at the very least one needed to take into account the monetary value at the time of the award, so as not to over compensate a plaintiff, depending on the circumstances of the matter before the court.

[23] It was submitted on behalf of Ms Khedama that the learned judge was mindful of the various categories of damages, but nevertheless made a globular award of R1 million. Therefore, the award was just and equitable if due regard was had to the harsh and inhumane conditions that Ms Khedama was made to endure. It was argued that all this could have been avoided if the appellant's employees were diligent in their work. With regard to the interest, it was argued that the respondent ought to have been compensated for the decrease in buying power of money in a period between the notional trial date and the date of demand or summons. Therefore, it was submitted that there was nothing wrong with the manner in which the interest was awarded.

[24] It is trite that a court of appeal will only interfere with the wide discretion of a trial judge in determining an appropriate award if the award is 'palpably excessive, and is clearly disproportionate to the circumstances of the case'.[1] The court of appeal can also interfere if it is shown that the damages were grossly extravagant or unreasonable[2] or the 'damages are so high as to be manifestly unreasonable'.[3] Innes CJ, however, in *Hulley v Cox*[4] stated that '[a]n appellate tribunal is naturally slow to interfere with the discretion of a trial judge in the matter of damages . . . and we are bound to intervene if we think that due effect has not been given to all the factors which properly enter into the calculation; or if the final award is in our opinion excessive'.

[25] The Constitutional Court in *Dikoko v Mokhathla*[5] held that

[1] See: Salzmann v Holmes 1914 AD 471 at 480, Sandler v Wholesale Coal Suppliers Ltd 1941 AD 194 at 200 and
Bee v Road Accident Fund [2018] ZASCA 52; 2018 (4) SA 366 (SCA) para 47.
[2] See: Versfeld v South African Fruit Farms Ltd 1930 AD 452 at 462.
[3] Black and others v Joseph 1931 AD 132 at 150.
[4] Hulley v Cox 1923 AD 234 at 246.
[5] Dikoko v Mokhathla [2006] ZACC 10; 2006 (6) SA 235 (CC); 2007 (1) BCLR 1 (CC) paras 57-60.

'should an appellate court find that the trial court had misdirected itself with regard to material facts or in its approach to the assessment, or having considered all the facts and circumstances of the case, the trial court's assessment of damages is markedly different to that of the appellate court, it not only has the discretion but is obliged to substitute its own assessment for that of the trial court. In its determination, the Court considers whether the amount of damages which the trial court had awarded was so palpably inadequate as to be out of proportion to the injury inflicted.' (references omitted)

[26] As correctly referred to by the trial court, 'it is important to bear in mind', when assessing the quantum of damages, 'that the primary purpose behind fixing and awarding damages is not to enrich the aggrieved party but to award him compensation in the form of a *solatium* for his injured feelings.'[6] In *Minister of Safety and Security v Tyulu*,[7] Bosielo AJA held that '[i]n the assessment of damages for unlawful arrest and detention, it is important to bear in mind that the primary purpose is not to enrich the aggrieved party but to offer him or her some much-needed solatium for his or her injured feelings. It is therefore crucial that serious attempts be made to ensure that the damages awarded are commensurate with the injury inflicted. However our courts should be astute to ensure that the awards they make for such infractions reflect the importance of the right to personal liberty and the seriousness with which any arbitrary deprivation of personal liberty is viewed in our law. I readily concede that it is impossible to determine an award of damages for this kind of injuria with any kind of mathematical accuracy. Although it is always helpful to have regard to awards made in previous cases to serve as a guide, such an approach if slavishly followed can prove to be treacherous. The correct approach is to have regard to all the facts of the particular case and to determine the quantum of damages on such facts'. (references omitted)

[27] One also has to be mindful of what was said in *Diljan v Minister of Police*[8]

[6] See: Mtolo v Minister of Police [2023] ZAKZPHC 86; 2024 (1) SACR 317 (KZP) para 18.
[7] Minister of Safety and Security v Tyulu [2009] ZASCA 55; 2009 (5) SA 85 (SCA);[2009] 4 All SA 38 (SCA)para 26 and reaffirmed in Mahlangu v Minister of Police [2021] ZACC 10; 2021 (2) SACR 595 (CC); 2021 (7) BCLR 698 (CC)para 51 (Mahlangu).
[8] Diljan v Minister of Police [2022] ZASCA 103 para 20.

that

'[a] word has to be said about the progressively exorbitant amounts that are claimed by litigants lately in comparable cases and sometimes awarded lavishly by our courts. Legal practitioners should exercise caution not to lend credence to the incredible practice of claiming unsubstantiated and excessive amounts in the particulars of claim. Amounts in monetary claims in the particulars of claim should not be "thumb-sucked" without due regard to the facts and circumstances of a particular case. Practitioners ought to know the reasonable measure of previous awards, which serve as a barometer in quantifying their clients' claims even at the stage of the issue of summons. They are aware, or ought to be, of what can reasonably be claimed based on the principles enunciated above.'

[28] The court a quo also erred when determining an appropriate award by considering a daily rate. Lamminga AJ in *Phillip v Minister of Police and another*[9] stated in relation to 'whether the court should calculate the award on a daily tariff or a single all-inclusive award, that the nature of the compensation and the inherent variables applicable in each would be maintained by trying to place an average daily tariff on such a determination. The court went on to state that "the fact that each case must be considered on its own merits militates against a so-called average flat rate per day" and that "a single all- inclusive award would appropriately address and express all the factors to be considered."'

[29] This was reconfirmed and expanded upon in *Motladile v Minister of Police*[10] where the court held '[t]he assessment of the amount of damages to award a plaintiff who was unlawfully arrested and detained, is not a mechanical exercise that has regard only to the number of days that a plaintiff had spent in detention. Significantly, the duration of the detention is not the only factor that a court must consider in determining what would be fair and reasonable compensation to award. Other factors that a court must take into account would include (a) the

[9] Phillip v Minister of Police and another (Limpopo) unreported case nos. 457 and 676/2012, as discussed in Mkwati v Minister of Police [2018] ZAECMHC 2 para 18, and cited in Latha and another v Minister of Police and others 2019 (1) SACR 328 (KZP) para 61.4, and C Okpaluba 'Damages for injuries arising from the infringement of the rights of persons in police or prison custody: South Africa in comparative perspective (part 1)' (2020) 34(1) Speculum Juris 74 at 84-85, fn 64.

[10] Motladile v Minister of Police [2023] ZASCA 94; 2023 (2) SACR 274 (SCA) para 17.

circumstances under which the arrest and detention occurred; (b) the presence or absence of improper motive or malice on the part of the defendant; (c) the conduct of the defendant; (d) the nature of the deprivation; (e) the status and standing of the plaintiff; (f) the presence or absence of an apology or satisfactory explanation of the events by the defendant; (g) awards in comparable cases; (h) publicity given to the arrest; (i) the simultaneous invasion of other personality and constitutional rights; and (j) the contributory action or inaction of the plaintiff'.
I align myself with the sentiments expressed that to do so would disregard the particular facts and other relevant circumstances peculiar to various matters, hence the court *a quo's* indication of attaching a daily rate to determine the respondent's damages was not appropriate.

[30] Whilst I appreciate that the court *a quo* analysed various cases and did a comparison of previous awards, it does not seem to have taken heed of what was said in *Tyulu* and also in *Minister of Safety and Security v Seymour*[11] where the court held that 'money can never be more than a crude *solatium* for the deprivation of what, in truth, can never be restored and there is no empirical measure for the loss.' Furthermore, the court *a quo* seemed to have sought to award an amount for each day of the detention and the unlawful arrest yet there is one unlawful arrest and thereafter the number of days spent in custody. In other words, there must be a distinction, in my view, between the arrest itself and the detention.

[31] There is no doubt in my mind that Ms Khedama's experience was traumatic. This was made worse by the appalling conditions of the cells at the various places of detention and the manner of her arrest. There was also malice on the part of the officers involved when they detained and questioned Ms Khedama for the second time at the airport even though it was for less than an hour. If they wanted to enquire about what became of the previous arrest, they could have done so without taking her to the room that they had previously taken her and only for them to say that they were joking. The learned judge also

[11] Minister of Safety and Security v Seymour [2006] ZASCA 71, 2006 (6) SA 320 (SCA), [2007] 1 All SA (SCA)
para 20.

misconstrued the evidence in finding there was some untoward conduct on the part of the police when they stopped at Monti, where Ms Khedama spent a night in a prison cell *en route* to Cape Town. He seemed to be of the opinion that as this was a detour, it required some explanation from the police. However, one can take judicial notice that Monti (East London) is actually in the direction of Cape Town if one is travelling from Durban and that the stopover at Monti was not a detour.

[32] Also, I do not believe that the fact that she was driven to Cape Town should be aggravating in any way as one cannot dictate how the members of the appellant transport detainees. It must be obvious that various factors are taken into account before such a decision is taken, including the security of other people. Furthermore, there was no evidence before the court *a quo* that Ms Khedama's arrest was publicised. Her employer learnt of her arrest because he was present when she was arrested. The award for defamation therefore was another misdirection.

[33] Mindful of the traumatic experience of Ms Khedama and in no way attempting to diminish or detract therefrom, one must, in my view, when considering the appropriateness of the award of the court *a quo* have regard to the awards of our courts in even more horrific circumstances. For instance, in *Mahlangu*,[12] several police officers tortured the first plaintiff to make a confession. Subsequently, he and his supposed co-perpetrator were placed in 'solitary confinement for two months in order to protect them from attack and taunting by fellow detainees who believed that they killed their relatives.' They were detained for eight months and 10 days and were awarded R500 000 by the Constitutional Court in May 2021. Also in *W[...] v Minister of Police*[13] the court took into account the appalling conditions of the cells in which Mr W[...] had been kept, he was subjected to being controlled by a gang who raped other prisoners and he was raped on two occasions. Mr W[...] later had his own cell, with a bed, but was then in isolation. He was detained for 13 months, and was awarded R500 000 in 2014.

[12] Mahlangu paras 2-8 and 56.
[13] Woji v Minister of Police [2014] ZASCA 108; 2015 (1) SACR 409 (SCA); [2015] 1 All SA 68 (SCA).

[34] In my view, the amount awarded by the court *a quo* and its assessment of the damages is markedly different to that which this court would award. Taking into account awards in comparative cases, the various factors alluded to in *Motladile*, and the specific facts of this matter, the amount awarded is out of proportion to the injury inflicted, short of being lavish and extravagant.

[35] One must have regard to the particular facts of a case to arrive at an appropriate award. Previous awards merely provide a comparative guide in arriving at an award which is fair and reasonable in the circumstances. In arriving at the award, I have considered the unlawfulness of the time spent in detention and the conditions experienced by Ms Khedama in the cells, the impairment of her dignity, good name and reputation and that her arrest in front of her employer and subsequent demotion would have been a humiliating experience for her. Rather than award her individual amounts, I deem it appropriate to award a globular sum in damages. The appropriate amount which I believe is fair and reasonable compensation for the damages arising from Ms Khedama's unlawful arrest and detention is R350 000.

[36] The next issue to be determined is from when the interest should start running, is it from the date of judgment or from date of summons. The learned judge only stated that interest on the amount of damages should run from the date of service of the summons, and not, as claimed in the amendment of Ms Khedama's particulars of claim, delivered on 2 August 2018, from the date of Ms Khedama's imprisonment. The summons was served on the appellant on 20 December 2013, and interest was then sought a tempore morae to date of payment. It was argued on behalf of the appellant that the learned judge erred in this regard as he ought to have followed the principle laid in *Takawira*[14] which is that the starting point is the date upon which damages are assessed, which was held to be the date of judgment.

[37] It was argued that if one had regard to the amount of damages awarded by the learned judge and the date upon which interest was to run, then Ms Khedama

[14] Takawira v Minister of Police [2013] ZAGPJHC 138; 2013 JDR 1405 (GSJ).

was over-compensated and this could not have been the purpose of the Prescribed Rate of Interest Act 55 of 1975 ('the PRI Act'). It was argued, on the other hand, on behalf of Ms Khedama that the trial court had not committed any misdirection in this regard as our law reports were replete with cases where interest was ordered to run from the date of demand or summons.

[38] The relevant portions of s 2A of the PRI Act provide as follows:

"(2)*(a)* Subject to any other agreement between the parties and the provisions of the National Credit Act, 2005 (Act 34 of 2005) the interest contemplated in subsection (1) shall run from the date on which payment of the debt is claimed by the service on the debtor of a demand or summons, whichever date is the earlier.

. . .

(5) Notwithstanding the provisions of this Act but subject to any other law or an agreement between the parties, a court of law, or an arbitrator or an arbitration tribunal may make such order as appears just in respect of the payment of interest on an unliquidated debt, the rate at which interest shall accrue and the date from which interest shall run.'

[39] The PRI Act, as amended in April 1997, provides that interest on illiquid claims, like this one, runs from the date of service of a demand or summons whichever date is the earlier. Prior to this amendment, interest ran from date of judgment.[15] The amendment altered the common law position laid down in *Victoria Falls & Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd*,[16] as follows:

'The civil law did not attribute *mora* to a debtor who did not know and could not ascertain the amount which he had to pay. "*Non potest improbus videri, qui ignorat, quantum solvere debeat."* (Dig., 50, 17, 99.) And that rule was adopted by the Courts of Vriesland. (See Sande, Dec., 3, 14, 9.) It has also been followed in our own practice. No South African decision was quoted to us, nor have I been able to find any, in which interest before judgment has been awarded upon unliquidated damages. I do not think, therefore, that they can be given here. I do

[15] SA Eagle Insurance Co Ltd v Hartley 1990 (4) SA 833 (A) at 841C-842B, and General Accident Versekeringsmaatskappy Suid-Afrika Bpk v Bailey NO 1988 (4) SA 353 (A) (Bailey).

[16] Victoria Falls & Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd 1915 AD 1 at 32-33.

not say that under no circumstances whatever could such damages carry interest. Cases may possibly arise in which though the claim is unliquidated the amount payable might have been ascertainable upon an inquiry which it was reasonable the debtor should have made. Such cases, should they occur, may be left open. But the present matter stands in a different position. It was not possible for the defendant to know or ascertain what damage its breach of contract had caused, and it cannot therefore on the principles of our law be held liable for interest prior to judgment upon the amount of the damage.'

[40] The common law principle was rendered obsolete by section 2A of the PRI Act which states that interest runs from date on which payment of the debt is claimed by service of demand or summons, which ever date is earlier, subject to the court's discretion.[17] Section 2A(5) of the PRI Act provides the court with a discretion to 'make such order as appears just in respect of the payment of interest on an unliquidated debt, the rate at which interest shall accrue and the date from which interest shall run'.

[41] In *Adel Builders (Pty) Ltd v Thompson*,[18] the Supreme Court of Appeal said: 'Acting in terms of ss (5), it was open to the Court, in fixing the date from which interest was to run, to give effect to its own view of what was just in all the circumstances. No question of *onus* was raised then or in the notice of appeal. Nor could it have been. The discretion afforded by s 2A(5) was of the nature referred to in a long line of cases in this Court from *Ex parte Neethling and Others* 1951 (4) SA 331 (A) onwards. Plainly, if parties wish certain facts and circumstances to be weighed in the exercise of such a discretion they must establish them. But there are no *facta probanda*. No enquiry arises as to whether a necessary fact has been successfully proved. Similarly, absence of proof does not result in failure on any issue. Indeed, there are no evidential issues to attract any *onus*.'

[42] In *Drake Flemmer & Orsmond Inc and another v Gajjar NO*,[19] the Supreme

[17] Griffiths v Janse van Rensburg NO [2015] ZASCA 158; 2016 (3) SA 389 (SCA); [2016] 1 All SA 643 (SCA) para 35.
[18] Adel Builders (Pty) Ltd v Thompson 2000 (4) SA 1027 (SCA) para 15 (Adel Builders).
[19] Drake Flemmer and Orsmond Inc and another v Gajjar NO [2017] ZASCA 169; 2018 (3) SA 353 (SCA);[2018] 1 All SA 344 (SCA) (Drake Flemmer).

Court of Appeal stated that section 2A(5) provides the means by which a court in this country can apply the interest rate solution. There is no question of onus in relation to section 2A(5). The court, having regard to all the facts of the case, gives effect to its own view as to what would be just (*Adel Builders*) and went on to say:[20]

'In summary, where an attorney's negligence results in the loss by a client of a claim which, but for such negligence, would have been contested, the court trying the claim against the attorney must assess the amount the client would probably have recovered at the time of the notional trial against the original debtor. Where the original claim is one for personal injuries, the evidence available and the law applicable at the notional trial date would determine the recoverable amount. The nominal amount in rands which the client would have recovered against the original debtor represents the client's capital damages against the negligent attorney. If justice requires that the client be compensated for the decrease in the buying power of money in the period between the notional trial date and the date of demand or summons against the attorney, the remedy lies in s 2A(5) of the Interest Act. If s 2A(5) were invoked, the court would not necessarily apply the prescribed rate but might choose instead to adopt a rate which would neutralise the effect of inflation.'

[43] In *De Klerk v Minister of Police*,[21] the Supreme Court of Appeal observed that 'since the general damages and medical expenses have been in the value of money as at the date of court *a quo's* judgment, mora interest should not run from an earlier date'. In the matter in casu, the learned judge did not explain why he awarded the interest to run from an earlier date than the date of judgment. However, from the amount awarded it is clear that the value of money awarded was as at the date of the court *a quo's* judgment. I do not see a reason why interest should not start running from the date of judgment as, in my view, this is the date when the claim was quantified. The learned judge did not make reference to the erosion in currency value or anything of the sort.

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[20] Drake Flemmer para 88.

[21] De Klerk v Minister of Police [2018] ZASCA 45; 2018 (2) SACR 28 (SCA); [2018] 2 All SA 597 (SCA) para 55 of Roger AJA's judgment (minority in which Leach JA, concurred). See also the discussion in Intramed (Pty) Ltd (in liquidation) and another v Standard Bank of South Africa Ltd and others[2007] ZASCA 141; 2008 (2) SA 466 (SCA); [2008] 2 All SA 394 (SCA) paras 13-17, and the headnote in Bailey.

[44] The further misdirection in the court *a quo's* judgment, in my view, is that the interest awarded far exceeds even the amount claimed by Ms Khedama as at date of demand or summons. The legislature could not have intended for this to be the case when s 2A of the PRI Act was enacted[22] given that in a case of unlawful detention, damages are assessed at current values at the date when judgment is delivered. In my view, a just and fair order would have been for interest to run as at the date of judgment which accords with the discretion envisaged in s 2A(5) of the PRI Act.

[45] Turning now to the aspect of costs, whilst I appreciate that the appellant has been substantially successful in the appeal, I am of the view that it would be appropriate for each party to bear their own costs occasioned by the appeal. Given the nature of the issues on appeal and the clarity which was sought by the appellant in relation to the daily rate, the respondent ought not to be burdened with having to pay the costs relating to the appeal.

[46] Accordingly, the following order is made:

1. The appeal is upheld with each party to pay its own costs;

2. The order of the court *a quo* is set aside and substituted with the following order:

(a) the defendant is directed to pay the plaintiff the sum of R350 000;

(b) the defendant is directed to pay to the plaintiff interest on the sum of R350 000 at the rate of 15.5% per annum calculated from the date of judgment, being 17 January 2022 to the date of final payment.

(c) the defendant is to pay the plaintiff's taxed or agreed costs of the action.

POYO DLWATI JP

APPEARANCES

[22] S2A of the Interest Rate Act provides that

Date of Hearing: 8 September 2023

Date of Judgment: 18 March 2024

Counsel for Appellant: Adv Govindasamy SC

Instructed by: The State Attorney KwaZulu-Natal Counsel for First

Respondent: Adv Maharaj

Instructed by: Abdul Shaikjee Attorneys Inc