IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE DIVISION, CAPE TOWN

REPORTABLE

CASE NO: 14205/2014

In the matter between:

G[...] C[...]	Plaintiff
And	
J[...] C[...] (born P[...])	First Defendant
THE MINISTER OF SAFETY AND SECURITY	Second Respondent
THE NATIONAL PROSECUTING AUTHORITY	Third Defendant

Bench: P.A.L.Gamble, J

Heard: 24, 25 July, 14 & 15 August 2023

Delivered: 6 November 2024

This judgment was handed down electronically by circulation to the parties' representatives via email and release to SAFLII. The date and time for hand-down is deemed to be 14h10 on 6 November 2024

JUDGMENT

GAMBLE, J:

INTRODUCTION

1. The plaintiff and the first defendant were married to each other in 2004 at Stellenbosch and lived thereafter in Ceres. Their marriage produced one child, who was born in 2006. The parties were divorced from each other in 2012 after a protracted trial and the first defendant was granted primary care of the child. Subsequent to their divorce the plaintiff experienced difficulty in exercising his rights of contact to the child and matters became acrimonious.

2. On 18 September 2012 the first defendant laid charges with the SA Police, Ceres against the plaintiff for housebreaking, assault and rape allegedly at her home on a farm in the Ceres district during the course of the preceding night/early morning. The plaintiff told the police that he had an alibi for the time of the alleged offence, namely that he was with his then girl-friend (and his now wife) at a casino in Worcester which is some 50km away.

3. Notwithstanding the fact that his alibi was provisionally verified by the investigating officer, the plaintiff was arrested on these charges on 19 September 2012 and detained for 17 days in the police cells before being released on bail on 5 October 2012. The criminal case against the plaintiff in the local magistrates' court dragged on for almost a year before all the charges were withdrawn on 11 September 2013.

THE CURRENT CLAIMS

4. On 8 August 2014 the plaintiff issued summons out of this court claiming damages against the first defendant for defamation and malicious prosecution. He also initiated claims against the second and third defendants for wrongful arrest and prosecution. The claims against all three defendants went ahead on the merits with the question of quantum directed to stand over for later determination.

5. The trial on the merits was heard by Baartman J who dismissed the plaintiff's claims in their entirety. The plaintiff successfully appealed that decision with the leave of the High Court and the Supreme Court of Appeal, by a majority, upheld his claims against the first and second defendants but dismissed the appeal in respect of the third defendant.[1]

6. The ruling of the Supreme Court of Appeal upholding the plaintiff's claims against the first defendant means he is entitled to pursue his claims against her for malicious prosecution and defamation. The matter thus proceeded before this Court on the question of quantum in respect of the first and second defendants, but before the trial commenced the second defendant settled the claims against it. For the sake of convenience I shall henceforth refer to the first defendant simply as the defendant.

7. When the matter commenced on 25 July 2023 the Court was not satisfied that the notice of set down had properly come to the attention of the defendant: it was apparent that she had clandestinely changed address and had steadfastly been avoiding service of any further process in the case. The matter was accordingly postponed to enable the plaintiff to address this issue.

8. The question of notice was clarified on 14 August 2023 when the plaintiff's counsel handed up email correspondence between his instructing attorneys and the defendant personally in which she acknowledged that she had received notice of the continuation of the proceedings on 14 August 2023. The defendant said that she did not intend opposing the matter further because she found any association with the

[1] The judgment of the Supreme Court of Appeal is reported as C v C and others [2021] ZASCA 12 (3 February 2021)

case emotionally distressing. The matter then proceeded in the absence of the defendant by way of a hearing for judgment by default.

9. The plaintiff gave evidence and called an expert industrial psychologist to testify on his claim for loss of earnings. The Court was not satisfied with certain of this witness's assumptions and the plaintiff sought a postponement *sine die* to address those concerns. The plaintiff also wished to secure an updated actuarial report quantifying the loss of earnings component of his claims. The matter was then protracted by the plaintiff's lead counsel's retirement from active practice.

10. Eventually, in April 2024, the plaintiff's counsel filed comprehensive heads of argument and supplemented those on 26 August 2024. The sum of the damages that the plaintiff now seeks against the defendant is R14 440 909.00, which is calculated as follows.

a. legal costs in relation to the criminal proceedings in the magistrates court in the sum of R165 000.00

b. general damages for iniuria, deprivation of freedom, humiliation and discomfort of R2 000 000.00;

c. damages for injury to Plaintiff's good name and reputation of R1 000 000.00; and

d. past and future loss of earnings of R11 275 909.00.

The plaintiff also asks for the costs of suit, including the costs of two counsel.

SUMMARY OF RELEVANT FACTS

11. The plaintiff, known colloquially as "P[...]", is an Italian citizen, born on 6 March 1956 in Sorrento. Like his father, he started working as a waiter on cruise liners while still a teenager.

12. From January 1995 until August 2004 the plaintiff was employed as a head waiter by Princess Cruises Lines Ltd, (Princess) a Bermuda registered company. He met the defendant when she came to work as a waitress on the ship where he was the head waiter. Their relationship started in 2001 and in 2004 they decided to get married and settle in South Africa. They bought two adjoining farms, Driefontein and Rietvallei, in the Ceres district and went to live on Driefontein. In 2006 their child was born.

13. The defendant left the plaintiff on 6 December 2009 with the child to stay with their neighbours, Lodewyk and Annemarie Prins, on the neighbouring farm Langfontein. When the plaintiff went there on 9 December 2009 and insisted on seeing the child, there was strife and the police were called. He was arrested and he spent the night in jail.

14. On 11 December 2009 the plaintiff received a letter from the defendant's attorney entitled '*Mrs. C[...]'s reasons for the irretrievable breakdown of the marriage*' with a draft consent paper of 7 pages attached. There is no mention of physical or sexual abuse among the reasons for the breakdown contained in this letter.

15. Over the next 2½ years divorce litigation proceeded in the High Court and there were four cases between the parties in the Ceres Magistrate's Court, two brought by the plaintiff and two against him. In one of these cases the defendant testified under oath that the plaintiff had never physically assaulted her during the time they were together.

16. During this time the child stayed with the defendant and regularly visited the plaintiff at his flat in Ceres, where the defendant would drop the child off driving Lodewyk Prins's (Prins) Toyota Fortuner with the eminently identifiable registration number – C[...]. The child also went on day trips to Cape Town with both parents. According to the relevant experts there was a loving relationship between the father and the child and there was no need for supervised contact between them. The plaintiff also testified to that effect.

17. The divorce trial ran for several days in May/June 2012 before Cloete AJ. The main issue was ownership of the farms and the father's contact with the child. The plaintiff's attorney and counsel withdrew the day before the trial started because he could not satisfy their financial demands.

18. When the plaintiff then asked the trial judge for a postponement to enable him to make new arrangements, it was refused. The matter stood down until the next day and plaintiff had to conduct his own defence. This included cross-examining the defendant over 2 days, during which she at times laughed at him and mocked him.

19. Judgment in the divorce trial was handed down on 24 July 2012. The farms were allocated to the defendant, and she was ordered to pay the plaintiff R2 097 000.00 within 60 days, i.e. by 24 September 2012.

20. The plaintiff was unhappy with the divorce order and addressed a letter to the former Judge President requesting a personal meeting. It was granted and scheduled for Tuesday, 18 September 2012. The plaintiff arranged with his girlfriend, Rowena Titus, (Rowena) a waitress at the Winelands Casino, Worcester, that they should spend the Monday night in the hotel at the casino before going through to Cape Town the next day to see the former Judge President**.**

21. The plaintiff and Rowena returned to Ceres from Cape Town on the Tuesday afternoon to overnight in his flat. Just before midnight they were awoken by four policemen who told the plaintiff that earlier that day the defendant had laid charges against him arising from allegations that he had broken into her house on Driefontein on the Monday night, assaulted her and raped her twice. The details were later repeated in the plea and counterclaim filed in this matter in October 2014.

22. The plaintiff and Rowena both confirmed to the police that they were in the hotel at the casino on the Monday night and that they had traveled to Cape Town from there. The plaintiff produced the receipt issued to him by the hotel. They were taken to the police station where the investigating officer, Capt. Boer, phoned the hotel and received confirmation that the plaintiff, a well-known customer due to his gambling habits, had been there the previous evening. Despite this confirmation the

plaintiff was arrested and kept in custody in the police cells for 17 days: the first night in Ceres and thereafter in nearby Prince Alfred Hamlet.

23. Earlier on the Tuesday the defendant had consulted a certain Dr Laubscher who completed the statutory J88 medical report and she had also reported the details to the police where an affidavit was taken down by Capt. Nadia Kriel. Boer and several colleagues then met the defendant and certain of her friends (including Prins) on Driefontein at about 16h30. Boer testified that the defendant repeated her allegations to him in detail and showed him around the house where, according to her, the crimes had been committed.

24. On the Wednesday the police first obtained an affidavit from the child who confirmed that the assailant was indeed the plaintiff. During the Wednesday afternoon Boer and his assistant, Const. Masiza, went to the casino to view video footage which depicted the plaintiff and Rowena in the hotel and casino on Monday night and early on the Tuesday morning. The plaintiff testified that when Boer saw him on his return from Worcester that day, he told the plaintiff that his alibi '*checked out*', adding that he had nothing to fear. It should be mentioned that Boer denied this in his evidence in the merits trial. The plaintiff was nevertheless kept in jail and brought before the Ceres court on the Thursday afternoon, when the matter was postponed for a week. The plaintiff was remanded in custody.

25. Notwithstanding Boer's earlier assurances, the plaintiff's bail application was then vigorously opposed by the State during two postponements and three days in court over the next two weeks. The charges of assault and rape resulted in Plaintiff being incarcerated in the police cells for 17 days. He testified about the duration and appalling conditions of his incarceration and produced photographic evidence of the sub-human jail conditions to which he was subjected.

26. The defendant did not testify in the bail application. The reason is self-evident. Although it was apparent that she was assaulted and injured, the defendant knew that she had lied to the doctor who completed the J88 medical report and to the police in her affidavit in identifying the plaintiff as her assailant and describing in detail in the affidavit how he assaulted and twice raped her, then tried a third time,

and eventually tied her to a table with wire. She was obviously not prepared to be cross-examined on such false statements.

27. Boer testified at the bail hearing and conceded that the plaintiff was not a flight risk. The State also called a certain Mr. Henk Jones, a private investigator, who was appointed by the defendant on the Thursday to assist her in the case. He testified that the defendant could not really talk about the incident nor answer questions. Nevertheless, he gave extensive and detailed evidence of what the defendant had told him about the plaintiff's alleged abusive behaviour towards her during the marriage. None of this hearsay evidence was put to the plaintiff in cross-examination at the bail hearing.

28. The defendant, Prins and Jones all went to view the casino video footage seen by Boer and Masiza. Jones testified that the man in the footage looked like the plaintiff, while the defendant and Prins made identically worded statements concluding that the person in the footage looked like the plaintiff, but that it was not him.

29. From the time that bail was eventually granted on 5 October 2012 until the charges were finally withdrawn on 11 September 2013, the plaintiff was subjected to strenuous bail conditions. He had to report twice a week to the Ceres police, could not leave the Western Cape, had his passport withdrawn and could not see his child unless a court so ordered. This never eventuated and the plaintiff has not seen the child since.

30. In a welfare report dated 22 November 2012 a probation officer of the Western Cape Department of Social Development, Mr. Hartley, reported that the defendant had told him she would do everything within her power to ensure that the plaintiff never had any contact with their child. Hartley concluded that the defendant harboured intense hatred towards the plaintiff and would do everything within her power to alienate the child from him.

31. A psychologist, Ms. Margot Malan, reported on 10 March 2014 that the plaintiff suffered from depression and needed intensive trauma treatment. He also

desperately sought contact with his child. Further, the plaintiff was diagnosed with Post-Traumatic Stress Disorder (PTSD) by Dr Chris George, a psychiatrist, late in 2016 and this diagnosis was confirmed in September 2022. Neither Malan nor George were called to testify in the quantum trial and it thus fair to assume that the condition has abated.

THE TRIAL ON THE MERITS

32. Summons in this matter was issued on 8 August 2014. The defence to the claims was straight forward: the plaintiff was her attacker and her allegations were all true. On that basis the defendant also instituted a counterclaim running into several million Rands, for assault and rape.

33. The matter only came to trial on the merits on 25 May 2017, due mainly to delays caused by the defendant. In the run-up to the trial the defendant changed her defence significantly, making allegations in the alternative. She continued to maintain that the plaintiff was her attacker, but alleged in the alternative that if it proved not to have been him, she honestly believed that it was he. Her plea was not formally amended, but her counter-claim was withdrawn and she gave notice of three experts who would testify on the merits.

34. The first day of the trial – 25 May 2017 – was spent on arguing an objection to the purported expert evidence of the three expert witnesses in respect of whom notice was given by defendant: Ms. Mandy Thacker, a clinical psychologist, Ms. Tanya van der Spuy, her therapist, and Dr. Larissa Panieri-Peter, her psychiatrist. Thacker interviewed both the plaintiff and the defendant at length and in her report dated 2 April 2012 stated that she found nothing that indicated “either parent should discontinue the parenting functions they have been carrying up to now”. She was understandably not called as a witness by the defendant.

35. The opinions of the other two experts were said to be irrelevant and lacking in credulity, having been based solely on negative and false information supplied by the defendant: neither witness spoke to anyone but the defendant before compiling their reports. It was argued that permitting them to testify would simply be an

impermissible way of placing potentially damning hearsay evidence by the defendant before the court. In the result, Baartman J made no ruling, in the main because the defendant's counsel indicated that they were hopeful that they might still succeed in persuading the plaintiff to testify.

36. The trial proceeded and Van der Spuy and Panieri-Peter nevertheless testified at length. Their evidence was roundly rejected by the majority in the Supreme Court of Appeal. The defendant's younger sister, L[...] P[...], testified on behalf of the defence that she still believed that the plaintiff had assaulted and raped her sister. From her evidence it seemed clear that the whole of the defendant's family still believed this and that the defendant had never taken them into her confidence. Indeed, notwithstanding the withdrawal of her counterclaim, the defendant continued to maintain that the plaintiff was her attacker.

37. The promised attempt to have the defendant testify eventually amounted to a charade of short duration. Counsel observe in their heads of argument that it is significant, in retrospect, that the defendant had, within hours after the attack on her on 17/18 September 2012, given detailed versions of what had allegedly happened to at least three independent people: Dr Laubscher in completing the J88, Capt. Kriel in the affidavit filed in the police docket and Capt. Boer during the visit to the farm. Yet, years later she claimed to be unable to testify before the High Court in Cape Town, while by prior arrangement, her ex-husband remained in Ceres for the day so as to avoid her having to encounter him physically.

38. The events were described as follows in the majority judgment of Cachalia JA in the Supreme Court of Appeal.

> "[20] The plaintiff testified, and, in light of the defendant's plea that he had attacked her, was compelled to adduce evidence to prove his alibi. After closing his case and the defendant's witnesses, including the experts, had testified, the defendant's counsel informed the court, on 5 December 2017, following seven days of evidence that they would attempt to call her to testify. She arrived at court but, having spent less than two minutes on the witness

stand, informed the judge, on Dr Panieri-Peter's advice, that she was unable to continue. The matter then stood down.

[21] When the trial resumed on 20 March 2018, counsel informed the court that the defendant remained unable to testify. No attempt was made to provide her testimony on another date or in another manner, through an intermediary or from another venue, to obviate the need to testify in the plaintiff's presence. In the result, the defendant did not testify and the plaintiff was denied the right to cross-examine her on the central issues in the case: the false allegations giving rise to his prosecution and her state of mind at the time of the alleged incident."

39. As indicated earlier, Baartman J dismissed all of the plaintiff's claims. Although Cachalia JA expressed some considerable difficulty in understanding the reasoning behind the judgment of the High Court, it was evidently predicated on the fact that it was accepted that the defendant had not been assaulted and raped by the plaintiff as alleged but that the defendant had genuinely believed that the plaintiff was the perpetrator. The conclusion sought to be drawn by the trial court was that the defendant thus lacked the necessary *animus injuriandi* to render her liable for defamation.

40. The matter was argued in the Supreme Court of Appeal on 20 February 2020 but the judgments were only delivered a year later, on 3 February 2021: the plaintiff's claims against the defendant – defamation and malicious prosecution - were upheld by the majority. The determination of the quantum of the plaintiff's claims then fell to be determined by the High Court.

DEVELOPMENTS AFTER THE RULING ON APPEAL

41. The defendant's attorneys then withdrew from the case without providing the plaintiff's attorneys with her physical forwarding address. The plaintiff employed the services of a private investigator and was eventually traced to an address in Tokai, Cape Town, on 1 August 2021 after Prins' aforementioned Toyota Fortuner with registration number C[...] was tracked down. Papers relevant to the continuation of

the matter on the quantum were then served on the defendant. It transpired that the defendant and Prins are currently in a relationship.

42. The matter was eventually allocated for hearing on the quantum to Francis J, who issued a comprehensive order for substituted service on 17 October 2022, as the defendant had in the meantime moved from the Tokai address. Francis J also postponed the matter for hearing to 6 February 2023.

43. On receiving notice of this trial date the defendant at last reacted. She asked for a postponement to obtain legal representation and finance, pleading poverty, notwithstanding that according to the Deeds Office records, a close corporation of which she was the only member had sold Driefontein (in 2016) and Rietvallei (in 2018) for an aggregate of R12.5 million.

44. After receiving personal e-mails from the defendant and the parties' child – the latter claiming that they had undergone gender reassignment surgery – Francis J withdrew from the case. The e-mail from the child contained a vicious attack on the plaintiff with unsubstantiated allegations of 'abuse' leading to 'lifelong psychological scars and extensive trauma'. The e-mail referred extensively to the aforementioned incident in December 2009, when the child was only 3½ years old, but did not mention the 2012 incident and the subsequent false charges against the plaintiff at all. And this despite the fact that the child allegedly saw and helped the defendant immediately after the attack and, further, despite the fact that the defendant had told the child from the outset that her attacker was the plaintiff.

45. The child's email also states that 'an entire panel of psychologists' decided unanimously that the plaintiff should have no contact with his child, which is manifestly untrue. According to the email the panel could also see how 'utterly terrified' the child was in the presence of the plaintiff, who was described as 'a monster' and 'the primary source of everything that has gone wrong in my life'. There is no evidence or suggestion of any such 'panel decision' anywhere in the Court papers or in the oral evidence. The plaintiff's counsel submit that the 'panel' is probably a misguided reference to the three experts of whom notice was given in the merits trial.

46. Counsel further submitted that the child had not seen the plaintiff nor had any contact with him since the false criminal charges were laid against him on 18 September 2012 – more than a decade earlier. Before that incident, by all accounts, the relationship between the plaintiff and the child was loving and affectionate, even after the parties separated in December 2009. This appears from the plaintiff's uncontested evidence in both the divorce and merits trials, supported by the welfare report of a certain Ms. Bea de Klerk, which was accepted by the Family Advocate.

47. I therefore agree with counsel that the only logical inference is that the email to Francis J was instigated and produced by the defendant and reflected what she had been telling the child for the previous decade: that the plaintiff was a monster who was responsible for everything that had gone wrong in their lives. Counsel ask that the Court conclude that the baseless allegations in the email come from the defendant and must be taken into account when the plaintiff's non-patrimonial damages are determined. The submission is further that more than a decade after the event, and despite her withdrawal of her counterclaim in the merits trial, the defendant persists with her defamatory allegations, and this notwithstanding the findings by Baartman J and all the judges in the Supreme Court of Appeal, that it was not the plaintiff who attacked her that night

48. Eventually the Acting Judge President set the matter down for 24 July 2023 and this Court was allocated to hear the matter. Thereafter the defendant advised the plaintiff's attorneys that she had no money, would not attend the trial on the fixed date or any other date, but would respect any decision of the Court. As I have said the defendant has at all times been fully aware of the continuation of this matter to determine the quantum of the plaintiff's claims and has declined to participate further in the litigation. The plaintiff's counsel also note that throughout this process their attorney has invited and encouraged the defendant to enter into negotiations to settle the matter, which would be to everyone's benefit and in everyone's interest – all to no avail.

THE PLAINTIFF'S CLAIM AS FINALLY PLEADED

49. In July 2023, the plaintiff amended his particulars of claim with the purpose of focusing the claim solely on the defendant, the other claims having been resolved by agreement through settlement (in the case of the police) and withdrawal (in the case of the prosecuting authorities). The aggregate of the claim is said to be R11 525 909.00 and the material parts of the amended claim (in which the defendant was the only defendant cited) advanced in support of that amount now read as follows:

"**THE FACTS**

3. On 18 September 2012 at Ceres the Defendant led false charges of rape, housebreaking and assault ("the charges") against Plaintiff with the South African Police Service ("SAPS") at Ceres to officials of SAPS whose identities are to Plaintiff unknown ("the police officials").

4. Defendant gave the police officials the following false information:

4.1 That Plaintiff had forcibly broken into Defendant's residence on the farm Driefontein, Ceres, on the night of 17/18 September 2012;

4.2 That Plaintiff then forcibly and without Defendant consent had sexual intercourse with her in the said house; and

4.3 That Plaintiff had physically assaulted her and tied her to a table…

16. While the charges against him were pending and Plaintiff was subject to the bail conditions

16.1 he could not return to his previous work as a head waiter on Princess Cruise Lines Ltd., a Bermuda company, where he had worked in this capacity from 28 January 1995 to 30 August 2004…

THE CLAIMS AGAINST DEFENDANT

Malicious Prosecution

18. By laying the charges against Plaintiff Defendant wrongfully and maliciously intended to instigate criminal proceedings against Plaintiff, and in fact caused such proceedings to be instituted.

19. Defendant had no reasonable or probable cause for doing so, nor did she have any reasonable belief in the truth of the information given to the police officials.

20. As a result of the Defendant's actions as aforesaid Plaintiff was arrested, detained and prosecuted.

21. The prosecution has failed.

Defamation

22. The statements in paragraph 4 above conveyed to the members of SAPS Ceres by the Plaintiff, are wrongful and defamatory of the Plaintiff.

23. By making the statements in paragraph 4 above to the members of SAPS Ceres Defendant

23.1 intended to injure Plaintiff in his good name and reputation;

23.2. Intended that the false allegations become known to the general public through court proceedings and publication in the press; and

23.3 succeeded in having the false allegations become known to the general public through Plaintiff's court appearances and the press coverage of such appearances, examples of which are annexed hereto as "A", "B" and "C".

24. As a result of the defamation Plaintiff has been damaged in his reputation and good name and has suffered damages as set out hereunder.

DAMAGES

25. Plaintiff suffered the following damages as a result of the conduct of the Defendant:

25.1 Legal costs

Plaintiff incurred legal costs in the total amount of R165 000.00 in defending himself against the false criminal charges and applying for bail.

25.2 *Iniuria, deprivation of freedom, humiliation and discomfort*

Plaintiff claims an amount of R 2,000,000.00 under this heading.

25.3 Injury to his good name and reputation

Plaintiff claims an amount of R 1,000,000.00 under this heading.

25.4 Loss of earnings

Plaintiff was unable to return to his previous work - as set out in paragraph 16.1 above - and consequently lost R8 110 909.00 in income as set out in the report dated 27 January 2023 by Arch Actuarial Consulting, filed of record.

25.5 Past and future medical costs

Plaintiff has undergone psychological treatment and used medication and will have to do so in future and claims a lump sum of R 250,000.00 in this regard."

The Court was informed during argument that the Plaintiff had abandoned his claim for medical costs.

50. In light of her refusal to participate further in the proceedings after the ruling by the Supreme Court of Appeal, the defence of the defendant to any of these allegations is unknown.

APPLICABLE PRINCIPLES

51. The plaintiff claims damages for both non-patrimonial and patrimonial loss caused by the defendant's false accusations made against him and the direct consequences of those accusations.[2] The causes of action relied upon by the plaintiff are, firstly, malicious prosecution, and secondly, defamation, each of which has specific criteria for the assessment of damages. I shall thus deal with each head of damage separately, preferring to commence with the claim for defamation.

NON-PATRIMONIAL DAMAGES FOR DEFAMATION

52. The principles applicable to the quantification of non-patrimonial damages for defamation were restated as follows in the judgment of Mokgoro J in the Constitutional Court in Dikoko[3].

> "[62] The law of defamation is based on the *actio injuriarum*, a flexible Roman law remedy which afforded the right to claim damages to a person whose personality rights had been impaired by another. The action is designed to afford personal satisfaction for an impairment of a personality right and became a general remedy for any vexatious violation of a person's right to his dignity and reputation. A number of factors arising from the facts and

[2] See, generally, in this regard: Lawsa (3rd ed) Lexis Nexis 2018 Vol 14(1): *sub nom* Damages at paras 14-21; Lawsa, (3rd ed) Lexis Nexis 2020 Vol 15: *sub nom* Delict at paras 100-108; Lawsa, (3rd ed) Lexis Nexis 2016 Vol 28(1): *sub nom* Malicious Proceedings at paras 19 and 22-25; Neethling *et al*: Neethling on Personality Rights, Lexis Nexis 2019 at 100-104, 168-170

[3] Dikoko v Mokhatla 2006 (6) SA 235 (CC). In her judgment Mokgoro J dissented on the merits of the claim but the principles enunciated by her are not contentious.

circumstances of the case are taken into account in assessing the amount of damages…

[71] When assessing damages for defamation, courts have in the past considered a range of factors arising from the circumstances and facts of the case: the nature and gravity of the defamatory words; falseness of the statement; malice on the part of the defendant; rank or social status of the parties; the absence or nature of an apology; the nature and extent of the publication and the general conduct of the defendant. The court must therefore have regard to all the circumstances of a case where the assessment is always context specific. The list is non-exhaustive. Although earlier cases of a similar nature give guidance, they must always be applied with the necessary circumspection…

[76] In our law a damages award therefore does not serve to punish for the act of defamation. It principally aims to serve as compensation for damage caused by the defamation, vindicating the victim's dignity, reputation and integrity. Alternatively, it serves to console." (Internal references omitted)

53. In the same matter, Moseneke DCJ (for the majority on the merits) discussed the application of the common law in the constitutional context.

"[90] It seems to me that the delict of defamation implicates human dignity (which includes reputation) on the one side and freedom of expression on the other. Both are protected in our Bill of Rights. It may be that it is a constitutional matter because although the remedy of sentimental damages is located within the common law, it is nonetheless "appropriate relief" within the meaning of section 38 of the Constitution. In Fose v Minister of Safety and Security [1997 (3) SA 786 (CC) at [61]] this Court assumed but stopped short of deciding whether "appropriate relief" in section 7(4)(a) 9 of the interim Constitution includes an award for damages where the award is required to enforce or protect rights in the Bill of Rights. The Court however made it clear that

> *"[T]here is no reason in principle why 'appropriate relief' should not include an award of damages, where such an award is necessary to protect and enforce [Chapter] 3 rights. Such awards are made to compensate persons who have suffered loss as a result of the breach of a statutory right if, on a proper construction of the statute in question, it was the Legislature's intention that such damages should be payable, and it would be strange if damages could not be claimed for, at least, loss occasioned by the breach of a right vested in the claimant by the supreme law. When it would be appropriate to do so, and what the measure of damages should be will depend on the circumstances of each case and the particular right which has been infringed." (Footnotes omitted)*

[91] Although these remarks in *Fose* were directed at the remedy provision of the interim Constitution, it seems to me that the same considerations apply to the "appropriate relief" envisaged in section 38 of the Constitution when an award of damages is necessary to vindicate, that is to protect and enforce rights, which aside their common law pedigree are also enshrined in the Bill of Rights. There appears to be no sound reason why common law remedies, which vindicate constitutionally entrenched rights, should not pass for appropriate relief within the reach of section 38. If anything, the Constitution is explicit that subject to its supremacy, it does not deny the existence of any other rights that are recognised and conferred by the common law.

[92] The extent of sentimental damages for defamation has implications for the properly mediated connection between dignity and free expression. It is plainly so that overly excessive amounts of damages will deter free speech and foster intolerance to it. As it is often said, robust awards will have a "*chilling effect*" on free expression, which is the lifeblood of an open and democratic society cherished by our Constitution. On the other hand, as Smalberger JA observed in Van der Berg v Cooper and Lybrand Trust (Pty) Ltd and Others "*a person whose dignity has unlawfully been impugned deserves appropriate financial recompence to assuage his or her wounded feelings."* I therefore think there is a very strong argument to be made that the

assessment of damages in a defamation suit is a constitutional matter and I will assume in favour of the applicant that it is. However, as will appear from the reasoning below, it is not necessary to finally decide the issue in this case." (Internal references omitted)

54. In Media 24 (1)[4] Nugent JA summarized the approach to a non-patrimonial claim for damages for defamation as follows.

> [79] Damages in our law are meant to compensate for loss. Humans suffer loss from defamation because humans experience feeling, and they experience feeling because they are alive. They experience the feeling of pleasure and they experience the feeling of pain. A human experiences the feeling of joy and the feeling of grief. And amongst the desires of humans is to enjoy the feeling that comes with a dignified life. That desired feeling waxes when they are held in esteem and it wanes when they are not. The loss that is compensated for when a human is defamed is the diminution in the desired feeling that comes with living a dignified human life. What is compensated for is harm to feelings."

55. As the judgment of Smalberger JA in Van der Berg[5] (referred to by Moseneke DCJ in the passage cited above in Dikoko) makes plain, the assessment of claims for non-patrimonial loss is in the discretion of the trial court and there is theoretically no limit to such damages. At the end of the day this Court must make an order that is fair and equitable in the circumstances – a sum of money that is considered *ex aequo et bono* (according to what is right and fair) both to the plaintiff and the defendant.

56. Earlier judgments may serve as a guide in assessing such damages but these days they must be applied with a degree of circumspection. This is because previously damages awards for defamation were relatively conservative. However, more recently, awards have been more generous, due regard being had to the fact

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[4] Media 24 Ltd and others v SA Taxi Securitisation (Pty) Ltd and others 2011 (5) SA 329 (SCA) ("Media 24 (1)")
[5] 2001 (2) SA 242 (SCA)

that the personal rights under which a plaintiff seeks to recover damages are now constitutionally protected on the basis set forth above.

NON-PATRIMONIAL DAMAGES FOR MALICIOUS PROSECUTION

57. Because malicious prosecution is also an *iniuria*, as with defamation non-patrimonial damages are claimed for the infringement of a plaintiff's personality. Primarily this will relate to the impairment of a plaintiff's good name ('*fama*'), but may also include the restriction of bodily freedom, physical integrity and dignity. Factors which the court will consider include the seriousness of the crime alleged to have been committed and the absence of an apology on the part of the defendant. As with defamation, the court's order is calculated *ex aequo et bono* and regard may be had to previous awards.

58. In this matter, the plaintiff advanced a separate claim against the police for wrongful arrest and detention, which has now been settled. In the circumstances, the period of detention, and the conditions of such detention, which the plaintiff endured are no longer in issue. In determining the extent of non-patrimonial damages in a case like the present, the Court must perforce have regard to the fact that the plaintiff has settled with the police (the first defendant) and accepted payment of damages in that regard, albeit in a relatively limited amount. The defendant is therefore not to be penalized for the fact that the plaintiff was detained in abhorrent conditions in the police cells nor for the fact that the prosecuting authorities (the third defendant) took almost a year to drop the charges against him.

59. In my respectful view, it is appropriate to consider the award of non-patrimonial damages for the claims for defamation and malicious prosecution in this matter jointly. I do so firstly because of the limited way in which the claims have been pleaded – there is a manifest failure to distinguish the heads of damage individually – but more importantly because the facts are interwoven: the defamatory allegations made against the plaintiff by the defendant led directly to his arrest, detention and subsequent prosecution and it is difficult to separate out the consequences of one unlawful act from the other.

60. That having been said, the Court cannot ignore that it was the defendant's false claims laid with the police that set the machinery of the State in action. On that score the Court should collectively take into account -

(i) the seriousness of the crime of which the plaintiff was accused;

(ii) that there has never been any apology forthcoming or any sign of repentance by the defendant at any stage;

(iii) that the defendant's behaviour was malicious, insulting and vindictive;

(iv) the publicity which was given to the plaintiff's arrest and prosecution;

(v) that the defendant persisted with her allegations throughout;

(vi) that very recently the defendant placed before the court, without any apology, the most hurtful of allegations made about the plaintiff - ostensibly by the parties' child. On that score it must be said that even if it be established that these are indeed the words of the child, the defendant endorsed and ventilated them by placing them before Francis J.

(vii) the indignity and embarrassment which the plaintiff was put through; and

(viii) the psychological trauma suffered by the plaintiff.

61. In my view there is very little to say by way of mitigation of the harm occasioned to the plaintiff by the defendant. In a society which is wracked by extraordinarily high levels of gender based violence, the defendant chose to accuse the plaintiff of the most unspeakable of crimes – rape in the domestic setting. A crime for which sentences ranging between 10 years and life imprisonment are prescribed. These are allegations, which once made, are difficult to erase from the public perception when the perpetrator is acquitted or when the State declines to press ahead with a prosecution. The award of damages in such a situation will

invariably be high, especially where the defamation is aggravated by persistence, malice and intense hatred, as is the case here.

62. Turning to the plaintiff's reputation and standing in the community, I note the following. After the case against him was withdrawn, the plaintiff and Rowena (who have since married) opened a B&B establishment in Ceres wistfully called "L[...] D[...] V[...]" - t[...]. The establishment continues to operate today and advertises its accommodation on various online platforms. And, while the plaintiff holds no particular position of prominence in his community, Ceres is a relatively small farming town and it is likely that people are familiar with their fellow townsfolk. Indeed, in evidence the plaintiff testified that many people he encounters still harbour the view that he is guilty of what he was charged with more than 12 years ago. The plaintiff also produced evidence of the coverage that the case received at the time in the local media.

63. The plaintiff testified that he suffered psychological injury as a consequence of the defendant's false allegations and the ensuing prosecution and that he was treated at the time by a psychologist and a psychiatrist for PTSD. It would appear that he has made a complete recovery from the PTSD because no expert evidence was led in this regard, notwithstanding the filing of an expert summary in respect of Dr George. The plaintiff adduced no evidence of his expenditure on the treatment of this condition and, as I have said, the claim for medical expenses was abandoned.

64. The Court enquired of the plaintiff in the witness box what he hoped to achieve by persisting in this litigation in circumstances where there is the possibility that he will not recover his damages from the defendant who claims penury. While he disputed the defendant's allegations, the plaintiff said it was important for him to clear his name. He said he remains passionate about returning to the high seas and the world of ocean liners where he wishes to work again as a chief steward. But, he said, he has to clear his name because he will not be considered for such employment with such an allegation hanging over his head.

EARLIER AWARDS

65. In their heads of argument, counsel for the plaintiff referred to certain cases in support of their bold submission that the plaintiff's claim for R1 500 000.00 for non-patrimonial damages for malicious prosecution was "fair". The awards in these cases (Tyulu[6], Mahlangu[7] and Motladile[8]) do not, by a long chalk, approximate the quantum claimed here. But, more importantly, those matters were all claims against the police for wrongful arrest and detention, which is no longer in issue in this case. In the result, no cases have been placed before the Court highlighting earlier awards to enable it arrive at any comparative award in respect of the non-pecuniary damages for malicious prosecution.

66. Turning to defamation awards, in Van der Berg the Supreme Court of Appeal made an award of R30 000 in November 2000 in respect of a defamatory remark directed at an advocate. The circumstances, which alleged dishonesty on the part of the advocate were, in my respectful view, not as serious as the present case. Applying an online inflation calculator[9], by my calculation that award would now be worth approximately R70 000.

67. In Dikoko Mokgoro J considered an amount of R50 000 fair in the circumstances of that matter – regarded as a fairly serious case of defamation involving allegations of dishonesty against a municipal councilor. The current value thereof is about R135 000.

68. In Manuel[10] the Gauteng Local Division awarded R500 000 in 2019 in damages for defamation in favour of a former minister of finance who had been accused of dishonesty and corruption on social media by the leaders of another political party and who sought a declaratory order and damages on motion. On appeal[11] the Supreme Court of Appeal upheld the declaratory order but declined to confirm the quantum, holding that it was necessary in cases of defamation for a

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[6] Minister of Safety and Security v Tyulu 2009 (5) SA 85 (SCA)
[7] Mahlangu and another v Minister of Police 2021 (3) SACR 595 (CC)
[8] Motladile v Minister of Police 2023 (2) SACR 274 (SCA)
[9] www.inflationtool.com
[10] Manuel v Economic Freedom Fighters and others 2019 (5) SA 210 (GJ)
[11] Economic Freedom Front and others v Manuel 2021 (3) SA 425 (SCA)

court to hear oral testimony before such an award could be made. The matter was thus referred for the hearing of oral evidence.

69. On the other hand in 2017 in Media 24 (2)[12] the Supreme Court of Appeal reduced an award of R80 000 to R40 000 in a defamation action less serious than the present. The present value of that amount is now just over R55 000.

70. in Tsedu[13], the Supreme Court of Appeal held that an award of R100 000 was justified in respect of an allegation by a political opponent that the other was an apartheid spy – a matter that I do not consider as serious as the present. That award (made in 2009) has a present value of almost R215 000.

71. In supplementary heads filed in September 2024, counsel for the plaintiff referred the Court to the recent decision in this Division in Becker[14] in which an amount of R350 000 was awarded for defamatory allegations of alcohol abuse in the midst of divorce proceedings. I regard the defamation in the present case as more serious than Becker. Counsel also referred to Adams[15] (which relied heavily on Becker) a matter involving an email containing allegations of infidelity in which the court awarded R230 000.00. I also consider this matter to be less serious than the present.

72. Lastly, in relation to damages for malicious prosecution, as I have already noted, the initial act of defamation by the defendant set the ball rolling and lead to the arrest and prosecution of the plaintiff. What followed was a year of distress, embarrassment and treatment as a common criminal facing very serious charges. At no stage did the defendant take any steps to withdraw the charges – on the contrary she heaped fuel on the fire. Undoubtedly, the plaintiff must have suffered much distress and embarrassment while enduring this ordeal.

CONCLUSION – NON-PATRIMONIAL DAMAGES

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[12] Media 24 Ltd and another v Du Plessis [2017] ZASCA 33 (29 March 2017) ("Media 24 (2)")
[13] Tsedu and others v Lekota and others 2009 (4) SA 372 (SCA)
[14] Becker v Brits [2022] ZAWCHC 44 (23 March 2022)
[15] Adams v Makhoye [2023] ZANWHC 142 (17 August 2023)

73. Having considered these previous awards and having regard to the facts which I consider to be relevant to this case, I am of the view that an award of R500 000, 00 for the plaintiff's non-patrimonial damages for both defamation and malicious prosecution would be fair in the circumstances.

PATRIMONIAL DAMAGES

74. The law permits parties who have suffered direct loss to their patrimony (also sometimes referred to as "special damages") as a consequence of either an act of defamation or malicious prosecution to recover damages under the Aquilian action, not under the *actio iniuriarum.* Accordingly, in Law[16] the court held that the victims of a malicious prosecution were entitled to recover the costs of defending themselves on the criminal charges, while in Heyns[17] the Court granted an award for loss of earnings flowing from a malicious prosecution.

75. In Reeva Forman[18] the Appellate Division upheld a claim for loss of profits suffered by a company as a consequence of defamatory remarks made of it and its sole shareholder and director. Corbett CJ held that it was not necessary in that matter to determine whether the damages were recoverable under the *actio iniuriarum* or the Aquilian action.

76. However, the position was settled in Media 24 (1)[19] when the Supreme Court of Appeal expressly determined that special damages are only recoverable under the Aquilian action. However, the court observed that it was not necessary to institute separate actions to recover both general and special damages for defamation and both claims can be advanced in one action, provided that the criteria for each cause of action have been pleaded and established. Finally, said the court, it mattered not whether the claimant for special damages was a corporate entity or

[16] Law and others v Kin and another 1966 (3) SA (W)
[17] Heyns v Venter 2004 (3) SA 200 (T) at [22] – [26]
[18] Caxton Ltd and others v Reeva Forman (Pty) Ltd and another 1990 (3) SA 547 (A)
[19] At [8] to [9]

an individual. I shall cite the full extent of the *ratio* because I believe it has a direct bearing on the plaintiff's case.

> "[8] Despite the absence of any pertinent decision by this court in favour of the appellants, the respondent conceded that its claim for special damages can only succeed if it satisfies the requirements of the actio legis Aquiliae. I believe the concession was rightly made. As was explained by De Villiers JA in Matthews v Young 1922 AD 492 at 503-505, the rule of our law, in principle, is that patrimonial damages must be claimed under the actio legis Aquiliae, while the actio iniuriarum and its derivative actions, including the action for defamation, are only available for sentimental damages. In theory, the person injured by a defamatory publication would therefore have to institute two actions: a defamation action for general damages and the actio legis Aquiliae for special damages. But, as further explained by De Villiers JA, even at the time when Matthews was decided, two actions were no longer required by our practice. Accordingly, so De Villiers JA held, if one suffers an injury to your reputation, you can claim both kinds of redress in the same action, provided, of course, that the requirements of both actions are satisfied.
>
> [9] The decision in Matthews was followed in a number of older provincial judgments (see e.g. Bredell v Pienaar 1924 CPD 203 at 213; Van Zyl v African Theatres Ltd 1931 CPD 61 at 64-65). These decisions have been supported by most of our academic writers on the subject (see e.g. Burchell The Law of Defamation in South Africa (1984) 40-41; Neethling, Potgieter and Visser Law of Delict 5 ed (2006) 298 and the authorities there cited). More recently, Magid J considered – in Minister of Finance v EBN Trading (Pty) Ltd 1998 (2) SA 319 (N) at 325G – whether the fundamental legal position had changed since Matthews. The conclusion he arrived at is that it had not. I find no reason to disagree with that conclusion. What this means, of course, is that a plaintiff who seeks to recover special damages resulting from a defamatory statement, must allege and prove the elements of the Aquilian action. And, I may add, it matters not in this regard whether the plaintiff is a corporation or a natural person."

77. The plaintiff's claim for special damages has 2 components. First, there is the sum of R165 000.00 he spent on legal fees during his bail application and in repeated appearances in the magistrates' court prior to the charges being withdrawn. The amount claimed is not in dispute and it is a direct expense which the plaintiff has incurred. On the strength of Law, I am satisfied that the plaintiff is entitled to recover these damages.

78. The second component is the massive claim of R11 070 330, 00 for the plaintiff's alleged future loss of earnings. The amount has been actuarially calculated with reference to documents subsequently provided by Princess to the plaintiff and is intended to replace the sum of R8 110 909,00 referred to in para 25.4 of the amended particulars of claim.

79. In Media 24 (1) Brand JA stressed that a claim for loss of future earnings under the Aquilian action such as that in the present matter was a claim for pure economic loss and that in such event a claimant had to go further and establish the criteria which our law now requires in such a claim. Once again I shall cite the relevant passage *in extenso.*

> "[10] The respondent's contention was that, although its claims for both special and general damages were couched in the form of a defamation action, its claim for special damages contains the four well-known elements of an Aquilian action, namely, (a) a wrongful act or omission, (b) fault (in the form of either dolus or culpa), (c) causation and (d) patrimonial loss. In support of this contention, which found favour with the court a quo, the respondent referred to allegations in its particulars of claim that the publication of the professed defamatory article was intentional and wrongful and that the respondent suffered the damages claimed as the result of that publication.
>
> [11] However, unlike the court a quo, I agree with the appellants' contention that the respondent's argument is flawed and that the flaw lies with the allegation of 'wrongfulness'. Since we are dealing with a claim for pure economic loss, it has by now become settled law that wrongfulness depends

on the existence of a legal duty and that the imposition of that duty is a matter for judicial determination involving criteria of public and legal policy. In the result, conduct causing pure economic loss will only be regarded as wrongful – and therefore actionable – if public or legal policy considerations require that such conduct should attract legal liability for the resulting damages (see e.g. Minister of Safety and Security v Van Duivenboden 2002 (6) SA 431 (SCA) paras 12 and 22; Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd 2009 (2) SA 150 (SCA) para 12). As a matter of pleading, a plaintiff claiming for pure economic loss must allege wrongfulness and plead the facts in support of that allegation (see e.g. Telematrix (Pty) Ltd t/a Matrix Tracking v Advertising Standards Authority SA 2006 (1) SA 461 (SCA) para 2). It does not follow that because a defamatory publication is wrongful for purposes of a defamation action, that policy considerations will automatically indicate the imposition of liability for pure economic loss resulting from that publication. Consequently, the respondent's allegation in its particulars of claim that the statement was 'wrongful' for purposes of its defamation action may not be adequate in the present context. Whether it is adequate or not will depend on judicial determination as to what is wrongful in the context of a claim for actual loss resulting from a defamatory publication.

[12] Public and legal policy sometime require that a plaintiff be compensated for pure economic loss in some cases, only in the event of an intentional wrong. In that event, fault in the form of negligence on the part of the defendant will not suffice. Intent will then be an integral part of the element of wrongfulness."

80. In this matter there can be no doubt that the plaintiff has established that the defendant's conduct in falsely accusing the plaintiff of raping and assaulting her was intentional and that it was designed to cause him harm. I shall thus assume, even though it has not been pleaded as such, that the plaintiff's claim for the future loss of earnings is to be classified as a claim for pure economic loss. And, I shall assume further that the element of wrongfulness required for such a claim has been established in that the defendant has been found by the Supreme Court of Appeal to have acted intentionally and with malice.

81. In my view, the plaintiff's claim for pure economic loss falls down at the hurdle of causation. The case as pleaded (and supported by the plaintiff's evidence) is that the plaintiff worked for Princess until 2004. By September 2012, and despite the breakdown of his marriage, he had not returned to that employment. He suggested that he and Rowena were thinking of taking up employment with Princess once his divorce was finalized but before they could do so the false allegations of rape and assault and the consequences thereof intervened.

82. In para 16.1 of the amended particulars of claim the plaintiff alleges that he could not take up employment with Princess because the bail conditions imposed on him restricted his movement. But that was not a factor attributable to the defendant: it was a condition imposed on the plaintiff by the magistrate for his release on bail. In the circumstances the factual causation for the plaintiff's alleged loss is lacking.

83. But there is a further problem with the causation of the claim for future loss of earnings. The charges against the plaintiff were withdrawn in September 2013, more than 11 years ago. That development meant that the plaintiff was no longer bound by his bail conditions and was free to travel as before. And yet when he gave evidence more than 10 years later, the plaintiff was unable to furnish a proper explanation as to why he had not attempted to seek employment again with Princess. Clearly, no causal *nexus* has been established in relation to the claim for the future loss of earnings.

84. In the result I am driven to conclude that the plaintiff has failed to establish the claim for a future loss of earnings.

CONCLUSION

85. In the result I am satisfied that plaintiff is entitled to the following relief –

(i) **Non-patrimonial damages** for defamation and malicious prosecution – **R500 000**

(ii) **Patrimonial damages** arising from his malicious prosecution, to wit, the legal fees incurred in applying for bail and attending court in relation to the charges brought against him - **R165 000**

(iii) **Costs of suit**, including the costs of 2 counsel.

In that regard, I record that the plaintiff enjoyed the services of 2 counsel during the merits stage of this litigation and the order of the Supreme Court of Appeal granted the costs thereof. It was thus reasonable for the plaintiff to retain the services of those counsel for the quantum stage of the litigation.

ORDER OF COURT

Accordingly it is ordered that:

A. The defendant shall pay the plaintiff the sum of R665 000.00, as and for damages;

B. The said sum of R665 000.00 shall attract interest at the prescribed rate from date of judgment to date of payment;

C. The defendant shall pay the plaintiff's taxed costs of suit in relation to the quantum stage of this case, such costs to include the costs of 2 counsel where so employed.

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GAMBLE, J

APPEARANCES

For the Plaintiff Advs T Potgieter SC et D Filand

Instructed By	Michalowsky Geldenhuys & Humphries Cape Town