THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 1465/2024

In the matter between:

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES **FIRST APPELLANT**

NATIONAL COMMISSIONER OF CORRECTIONAL SERVICES **SECOND APPELLANT**

REGIONAL COMMISSIONER OF CORRECTIONAL SERVICES **THIRD APPELLANT**

and

NKOSANA THOMAS LESO **RESPONDENT**

Neutral citation: *Minister of Justice and Correctional Services and Others v Leso* (1465/2024) [2026] ZASCA 64 (05 May 2026)

Coram: KGOELE and KEIGHTLEY JJA and NORMAN AJA

Heard: 06 March 2026

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website, and release to SAFLII. The date and time for hand down is deemed to be 05 May 2026 at 11h00.

Summary: Law of Delict – Correctional Services Act 111 of 1998 – s 70 (2)(*b*) – damages claim arising out of unlawful detention – issue estoppel – whether the principle was applied correctly – issue estoppel not justified – issues remained alive for determination by trial court – no justification for remittal to the high court for adjudication of the merits and quantum – claim prescribed.

ORDER

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

1 The appeal is upheld with costs. Such costs to include the costs occasioned by the employment of two counsel where so applicable.

2 The order of the trial court is set aside and is substituted by the following order:

'The plaintiff's claim is dismissed with costs.'

JUDGMENT

Kgoele JA (Keightley JA and Norman AJA concurring)

[1] Mr Nkosana Thomas Leso, the respondent, was convicted of attempted rape, attempted murder, robbery with aggravating circumstances, and housebreaking by the Regional Court in Pretoria. He was sentenced to 28 years' imprisonment on 29 April 2002. His sentence will expire in 2029. The respondent was one of the parolees who participated in the Correctional Services Electronic Monitoring Pilot Project, a form of monitoring of persons who are subject to community corrections in terms of s 68 of the Correctional Services Act, 111 of 1998 (the CSA), as amended, read with regulation 28 of the CSA Regulations.[1]

[1] As published in Government Notice R914 in Government *Gazette* 26626 of 30 July 2004.

[2] The appeal stems from a civil claim instituted by the respondent in the Gauteng Division of the High Court, Pretoria (the high court) against the appellants. In his claim, the respondent sought damages for his unlawful detention by employees of the Minister of Justice and Correctional Services (the first appellant). The high court ruled in his favour and awarded R1 million as compensation for the aforementioned damages. The appeal is with leave of this Court.

[3] The facts underlying the claim can be briefly summarised as follows: The respondent commenced serving his sentence on 29 April 2002, the date of his sentencing. He was subsequently granted parole by the Correctional Supervision and Parole Board (the Parole Board) on 28 August 2013. His parole conditions required, amongst others, that he be tagged with an electronic monitoring device, allowing the Department of Correctional Services (the department) to track his movements. The electronic monitoring device consisted of two components: an anklet permanently attached to his ankle and a Global Positioning System (GPS) receiver.

[4] On 27 June 2014, he lost his GPS receiver and reported it to the department. Mr Sefako Sydney Magaga, the head of Community Correction, immediately issued a detention warrant under s 70 of the CSA and the respondent was arrested and detained on the same day. The details of how the respondent lost the GPS receiver are not necessary since the lawfulness of the arrest warrant was not challenged.

[5] After his arrest, the respondent was detained at Baviaanspoort Correctional Centre while an investigation into the missing GPS receiver was conducted. He was not brought before a court within 48 hours. In the meantime, the Correctional Supervision Committee (the committee) recommended to the Parole Board that his parole be revoked, which recommendation was approved and implemented by the

Parole Board on 6 October 2014. The respondent's continued detention after the lapse of 48 hours from the time of his arrest on 27 June 2014 until his release, because of the department's failure to bring him before a court, are the bone of contention in this appeal.

[6] Due to the respondent's parole revocation, he was expected to serve the rest of his sentence in prison. After serving two years, the respondent filed an urgent application (the application) on 25 May 2016 seeking a declaration that his detention from 27 June 2014 was unlawful and requesting his release. The application was struck from the roll for want of urgency. On 31 October 2016, the respondent was considered for parole placement for the second time and subsequently released.

[7] The merits of the application served before Mabuse J on 14 November 2016. Mabuse J only delivered his judgment on 28 September 2017, declaring the detention, which exceeded 48 hours after his initial arrest on 27 June 2014, unlawful. Leave to appeal against the said judgment, including a petition to this Court were unsuccessful. The respondent then instituted a civil action in the high court for damages arising from his detention which, he contended, was wrongful.

[8] The appellants opposed the action, denying that the detention was wrongful. They also raised a preliminary issue of prescription. The respondent disputed the prescription claim. He also invoked the defence of *res judicata* in the form of issue estoppel, arguing that Mabuse J had already decided the unlawfulness of the respondent's detention. He contended that this finding was binding on the appellants, and they could not deny that the respondent's detention was unlawful. Consequently, averred the respondent, the appellants had no defence to the merits of his claim.

[9] The matter came before Janse van Nieuwenhuizen J (the trial court), who upheld the issue estoppel defence and then directed that the proceedings continue only for the purpose of quantifying the claim. However, the trial court upheld the appellants' prescription point and ruled that the claim for damages for the period from 27 June 2014 to 1 November 2014 had become prescribed. It then granted damages in favour of the respondent in the amount of R1 million for the remaining period up until he was released. I pause to note that the respondent's claim was initially made up of two parts. Claim 1 sought damages for his unlawful detention from 48 hours after his arrest to his release. Claim 2 was for patrimonial damages in the form of his loss of income arising from his arrest and detention. The respondent abandoned the second claim during trial. Thus, only claim 1 is the subject of this appeal.

[10] Aggrieved by the order, the appellants launched this appeal. The appellants contend that the trial court's conclusion that Mabuse J determined the merits of the civil claim was wrong, including the fact that the application before Mabuse J's judgment involved the same issues of law and fact that would arise in the main action. Therefore, the argument continued, the trial court failed to sufficiently interrogate the issues Mabuse J dealt with and, as a result, incorrectly applied the principle of issue estoppel.

[11] The issues before this Court, therefore, are whether the trial court was correct in applying the principle of issue estoppel in favour of the respondent and, consequently, proceeding on the basis that the only issue remaining for consideration in the civil action was that of quantum. If not, whether this Court should remit the matter back to the high court to determine the merits of the matter.

The law

[12] The matter before Mabuse J was an application for a declaration of unlawfulness and a remedy. It was purely based on s 35(2)(*d*) of the Constitution. Section 35(2)*(d)* of the Constitution provides that:

'Everyone who is detained, including every sentenced prisoner, had the right-

. . . .

(d) to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released.'

[13] It is not in dispute that the respondent was still a sentenced parolee when he was arrested on 27 June 2014, on the strength of a warrant of arrest and detention issued by the first appellant's employees. It is also common cause that the said warrant of arrest and detention was issued in terms of s 70 of the CSA. Section 70(1)*(a)*(iii) provides as follows:

'(1) If the National Commissioner is satisfied that a person subject to community corrections has failed to comply with any aspect of the conditions imposed on him or her, or any duty placed upon him or her in terms of any section of this Chapter, the National Commissioner-

(a) may, depending on the nature and seriousness of the non-compliance-

. . . .

(iii) issue a warrant for the arrest of such person.'

[14] Section 70(2)*(b)* of the CSA provides that:

'A person detained in terms of paragraph *(a)* must be brought before a court within 48 hours after arrest, which court must make an order as to the further detention and referral of the person to the authority responsible to deal with the matter.'

[15] Therefore, an important aspect of the unlawfulness of his detention lay in that he was not brought before court within 48 hours of his arrest as enjoined by s 70(2)*(b)* of the CSA. Accordingly, the main issue before Mabuse J was that having

been lawfully arrested in terms of s 70(1)*(a)*(iii) of the CSA and properly detained upon his arrest in terms of the said section, his further detention in excess of 48 hours without being brought before the court was unlawful.

Issue estoppel

[16] As indicated earlier, the main issue in this appeal is whether the trial court correctly applied the principle of issue estoppel. In support of the trial court's order, the respondent argued that he did not rely on the principles of issue estoppel as his cause of action. Issue estoppel was raised only to bar or prevent the appellants from denying that the respondent's detention beyond 27 June 2014 was unlawful. According to the respondent, his claim was based on the *actio iniuriarum*, with the result that once unlawful detention has been proved (or, as in this case, is the subject of a final and binding finding in previous litigation), the appellants' liability for damages flowing from the deprivation of liberty is strict and arises automatically. Thus, according to the respondent, the trial court was correct to direct the trial to proceed only on the issue of quantum.

[17] In *Prinsloo NO & Others v Goldex 15 (Pty) Ltd & Another*,[2] Brand JA explained the principle as follows:

'In our common law the requirements for *res iudicata* are threefold: (a) same parties, (b) same cause of action, (c) same relief. The recognition of what has become known as issue estoppel did not dispense with this threefold requirement. But our courts have come to realise that rigid adherence to the requirements referred to in (b) and (c) may result in defeating the whole purpose of *res iudicata*. That purpose, so it has been stated, is to prevent the repetition of law suits between the same parties, the harassment of a defendant by a multiplicity of actions and the possibility of conflicting decisions by different courts on the same issue (see eg *Evins v Shield Insurance Co Ltd* 1980 (2) SA 815 (A) at 835G). Issue estoppel therefore allows a court to dispense with the two

[2] *Prinsloo NO & Others v Goldex 15 (Pty) Ltd and Another* [2012] ZASCA 28; 2014 (5) SA 297 (SCA) (*Prinsloo*).

requirements of same cause of action and same relief, where the same issue has been finally decided in previous litigation between the same parties.'[3]

[18] In *Democratic Alliance v Brummer*[4] this Court, dealing with the principle of issue estoppel, held:

'The first question is to determine whether, as a matter of fact, the same issue of fact or law which was determined by the judgment of the previous court is before another court for determination. This is so because if the same issue (*eadem quaestio*) was not determined by the earlier court, an essential requirement for a plea of *res judicata* in the form of issue estoppel is not met. There is then no scope for upholding the plea. It does not, however, necessarily follow, that once the inquiry establishes that the same issue was determined, the plea must be upheld. That is so because the court considering the plea of issue estoppel is, in every case, concerned with a relaxation of the requirements of *res judicata*. It must therefore, with reference to the facts of the case and considerations of fairness and equity, decide whether in that case, the defence should be upheld.[5]

[19] The Court further held:

'Where the judgment does not deal expressly with an issue of fact or law said to have been determined by it, the judgment and order must be considered against the background of the case as presented to the court and in the light of the import and effect of the order. Careful attention must be paid to what the court was called upon to determine and what must necessarily have been determined, in order to come to the result pronounced by the court. The exercise is not a mere mechanical comparison of what the two cases were about and what the court stated as its reasons for the order made. In *Boshoff*, for instance, the plaintiff had sued for damages arising from an unlawful cancellation of a lease and ejectment. The defendant raised a plea of res judicata on the basis that the defendant had, in a prior action, obtained a judgment for ejectment. The prior order was obtained by default judgment. The court found that an order for ejectment could not have been

[3] Ibid para 23. See also the comments made by Botha JA in *Kommissaris van Binneladse Inkomste v Absa Bank Bpk* 1995 (1) SA 653 (A) at 676B-E, referred to in para 22 of *Prinsloo*.
[4] *Democratic Alliance v Brummer* (793/2021) [2022] ZASCA 151 (3 November 2022).
[5] Ibid para 13.

granted unless the court had found that the cancellation of the lease was lawful. The order that was granted was read against the backdrop of the case as pleaded.'[6]

[20] The upshot of all the authorities quoted above, which is trite, is that, although both the doctrine of *res judicata* and issue estoppel aim to promote finality and judicial efficiency, *res judicata* in the form of issue estoppel has a broader application or wider reach. It may prevent a party from re-litigating an issue in subsequent proceedings even if the cause of action is different. Secondly, whilst *res judicata* applies to the same cause of action, issue estoppel applies directly to a particular issue within a claim, regardless of whether the cause of action differs. Issue estoppel therefore prevents a party from asserting something contrary to what was previously decided by a court on the same issue. It is therefore a defence derived from the principle of *res judicata* that can be raised when some issue has already been adjudicated.

[21] The difference between the two was aptly summarised in *Gold Circle (Pty) Ltd v Maharaj*,[7] as follows:

'It is trite that the expression *res judicata* means that the dispute raised for adjudication has already been finally decided. In terms of the common-law, the three requisites of *res judicata* are: that the dispute to be adjudicated relates to the same parties, for the same relief and in relation to the same cause. With time, the common law requirements were relaxed, giving rise to the expression issue estoppel, which describes instances where a party can successfully plead that the matter at issue has already been finally decided even though the common law requirements of *res judicata* have not all been met. The crux of the matter is whether the plea of *res judicata* in the form of issue estoppel was correctly upheld in relation to the 2016 claim. This requires a brief consideration of the applicable principles. In *Prinsloo NO & others v Goldex 15 (Pty) Ltd & another*, Brand JA

[6] Para 15.
[7] *Gold Circle (Pty) Ltd v Maharaj* [2019] ZASCA 93 (3 June 2019) para 19.

gave a detailed exposition of the development of our law pertaining to *res judicata*. Any attempt to do more than that in this judgment would be supererogatory.'[8] (Citations omitted.)

[22] It is important to note at the outset that the respondent did not plead *res judicata* before the trial court, but rather, issue estoppel. Therefore, a careful examination of Mabuse J's judgment and the order is required.

[23] Mabuse J granted an order that '[t]he detention of the applicant for a period exceeding 48 hours after his initial arrest and detention on [27 June 2014] is hereby declared to have been unlawful'. Mabuse J also reasoned that '[t]he fact of the unlawfulness of his detention lay in that he was not brought before Court within 48 hours of his arrest as enjoined by s 70(2)*(b)* of the CSA.' He also qualified the order he issued by stating 'having been properly detained upon his arrest…, his further detention in excess of 48 hours without being brought before the Court was unlawful'.

[24] It is important to preface the analysis of Mabuse J's judgment with the disclaimer that the correctness of the order of Mabuse J is not what this Court should consider. The question is whether that finding was dispositive of the merits of the respondent's claim for damages, based on the *actio iniuriarum*, for his wrongful detention.

[25] An analysis of Mabuse J's judgment reveals that all that was required to be determined was whether s 70(2)*(b)* applied to the respondent at all. The inquiry rested on whether the failure to bring the respondent, a parolee, before the court within 48 hours as required by s 70(2)*(b)* after his lawful arrest was lawful. This was

[8] Ibid para 19.

the only issue and nothing more as the failure was common cause. It appears, without saying so, that the respondent, in his heads of argument, also perceives this issue as part of or one of the issues to be determined in the respondent's claim. This is borne out by the averment made by the respondent as a reply to the appellants' argument, stating that:

'… It [Mabuse J's finding] simply, and correctly, estopped the State from denying Mr Leso's detention beyond 27 June 2014 was unlawful. That is a *component* of Mr Leso's claim, which once established, as set out above, gave rise to a form of liability without fault on the part of the State….' (Emphasis added).

[26] In my view, the only issue in respect of which issue estoppel may apply is the interpretation by Mabuse J of s 70(2)*(b)* as placing a legal obligation on the appellant to have brought the respondent to court within 48 hours. This is why the other prayer sought before Mabuse J was to release the respondent, which prayer was not granted. Obviously, the reason for that can be easily inferred from the common cause fact that the respondent was already released on the second parole when Mabuse J's order was delivered. However, a claim for damages arising from an unlawful detention has additional requirements that must be satisfied. A finding that the detention was unlawful because it breached a statutory provision is not sufficient per se to invoke liability.

[27] These additional requirements relevant to the respondent's civil action for damages that were never raised before, nor determined by, Mabuse J, stem from the facts which are common cause in this matter. It is common cause that the respondent launched his application on 25 May 2016, and Mabuse J's order and judgment were handed down on 18 September 2017. The respondent had by then already appeared before the committee on 1 October 2014, which recommended his parole, and the Parole Board had by 6 October 2014 revoked the respondent's parole placement.

What is clearly missing in Mabuse J's judgment and order is a reference to this set of facts. The question of whether they were considered remains unanswered before us, and the record is not helpful in this regard, as it is conspicuously silent on this aspect.

[28] The explanation for this must be that the scope of the inquiry before Mabuse J was limited to the question only of whether s 70(2)*(b)* applied. The court in the application was never called upon to, nor did it, consider whether the respondent's appearance before the parole board and its subsequent decision to revoke his parole legitimised his continued detention. Nor did the court in the application consider what effect these facts would have on any future claim for damages that the respondent might institute. It did not do so because these were never issues that it was required to consider and pronounce upon. What exacerbates the problem is that Mabuse J's order also notably lacks the specifics about the duration of the excess period it declared unlawful – in particular, when it began and when it ended.

[29] In my view, the above are important issues relevant to the respondent's claim for damages. They remained live issues for consideration by the trial court. By this assessment, this Court is not saying that Mabuse J's order is wrong, but simply that the appellant(s) are not debarred from disputing the merits of the respondent's claim, provided that it does not rely on the defence that s 70(2)*(b)* does not apply. Consequently, the principle of issue estoppel, as correctly argued by the appellants, was not correctly applied by the trial court.

[30] One further aspect pertains to the statement in the appellants' argument already referred to above, which describes the claimed damages as constitutional

and grounded in strict liability. On this aspect, the Constitutional Court said the following in *De Klerk v Minister of Police*:[9]

'In cases like this, the liability of the police for detention post-court appearance should be determined on an application of the principles of legal causation, having regard to the applicable tests and policy considerations. This may include a consideration of whether the post-appearance detention was lawful. It is these public policy considerations that will serve as a measure of control to ensure that liability is not extended too far. The conduct of the police after an unlawful arrest, especially if the police acted unlawfully after the unlawful arrest of the plaintiff, is to be evaluated and considered in determining legal causation. In addition, every matter must be determined on its own facts – there is no general rule that can be applied dogmatically in order to determine liability.'[10]

[31] Taking a cue from the trite principles espoused above, it appears that the public policy considerations relating to the evaluation of legal causation remained an open issue that the trial court had to consider and determine before finding that a case had been made out on the merits. This is another issue that was not raised before, nor considered by Mabuse J. Once more, the question at this stage is not whether the decision in *De Klerk* is relevant or distinguishable. Instead, the fundamental question is whether, in the application, Mabuse J was required to address and did address all the issues that the trial court ordinarily would have to determine before finding the appellant delictually liable. Further, whether there was a final, definitive resolution regarding them. In other words, whether the same issues before the trial court were finally disposed of in Mabuse J's judgment.

[32] The conclusion I reach on the arguments regarding issue estoppel is that it cannot be said that Mabuse J's judgment disposed of all the issues relating to the

[9] *De Klerk v Minister of Police* [2019] ZACC 32; 2019 (12) BCLR 1425 (CC); 2020 (1) SACR 1 (CC); 2021 (4) SA 585 (CC) (*De Klerk*).
[10] Ibid para 63.

merits of the respondent's claim for damages. Mabuse J's declaration of unlawfulness was limited in scope. For delictual liability to ensue, more was required to be proved by the respondent. The elements of causation (factual and legal) remained open, as did that of wrongfulness. Moreover, the period of unlawful detention also remained open. In my view, the issue that Mabuse J dealt with was inadequate to permit the trial court to apply the principles of issue estoppel to the facts of this case and to proceed exclusively to the determination of the quantum of damages.

[33] The trial court accordingly erred in upholding the plea of issue estoppel and directing that the trial proceed only on the issue of quantum. The non-pronouncement of the duration of the unlawful detention is key, as it will become clearer below when this Court analyses a further fundamental difficulty in the respondent's case: the issue of prescription.

Remittal to the trial court

[34] The upshot of the conclusion that issue estoppel was not correctly applied is a material misdirection by the trial court, which vitiates the proceedings before it. The conclusion prompts a further consideration of whether it is in the interests of justice for this Court to assume the role of a court of first instance to deal with the merits, or to refer the matter back to the trial court for further determination of the remaining issues. No evidence was led on the merits before the trial court. Ordinarily, this would weigh in favour of this Court remitting the matter back for a full trial on the merits. However, the preliminary point of prescription, raised by the appellants, which was considered by the trial court, and determined in the appellants' favour, significantly weighs, more than any other factor, against sending the matter back to the high court. I proceed to deal with the issue.

[35] First, it is important to note that the trial court did not deal with the merits of the claim at all. Instead, it focused on hearing evidence regarding quantum, and the appellants closed their case without calling witnesses. It is prudent to address the prescription issue because, besides being raised as a preliminary issue, it summarily disposes of the appeal before us.

[36] The parties do not dispute that the respondent's claim was brought on 31 October 2017, nor is there any dispute currently between the parties that the extant portion of the claim relates to the period between 1 November 2014 and 31 October 2016, with the period from 27 June 2014 to 1 November 2014 having prescribed. The respondent did not cross-appeal against the trial court's upholding of the appellants' prescription claim.

[37] Section 75(2)*(b)* of the CSA deals with the cancellation of parole. Counsel for the respondent, conceded that the department has the statutory power to revoke a parolee's parole. It is common cause that the respondent's parole was revoked on 6 October 2014. Once his parole was revoked, he had to serve the remaining portion of his sentence in custody. The revocation of the respondent's parole is not impugned in these proceedings.

[38] The trial court found that the period 27 June 2014 to 1 November 2014 had prescribed. The consequences of revocation are that, by operation of law, the offender must serve the remaining period of his sentence in custody. That was the position until the respondent was again considered for parole and released on 31 October 2016. It follows that from 6 October 2014, the respondent was lawfully detained. However, the respondent included the period from 6 October to the date of

his release in his claim. Because the trial court did not engage with the merits of the matter, and hence with the actual period of the respondent's unlawful detention, it simply assumed that the period from 6 October 2014 to 31 October 2016 ought to be included.

[39] With that period having prescribed in terms of the law, no liability could arise. Additionally, since the parole revocation was not challenged, the respondent's detention from 6 October 2014 until his release on parole on 31 October 2016 was lawful. In considering the prescribed period accurately calculated herein and the lawful detention consequent to the parole revocation, it seems to me that any possible claim that the respondent might have against the appellants has prescribed. A remittal for adjudication to the high court in these circumstances would be futile. The proper order to make is to uphold the appeal and to substitute the order of the high court with one dismissing the respondent's claim.

[40] There is no reason why costs should not follow the result.

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

1 The appeal is upheld with costs. Such costs to include costs occasioned by the employment of two counsel where so applicable.

2 The order of the trial court is set aside and is substituted by the following order:

'The plaintiff's claim is dismissed with costs.'

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A M KGOELE

JUDGE OF APPEAL

Appearances

For the appellant:	M S Phaswane (with M V Magagane)
Instructed by:	State Attorney, Pretoria
	State Attorney, Bloemfontein
For the respondents:	S W Burger (with S Mohammed)
Instructed by:	Bowman Gilfillan Inc., Pretoria
	Honey Attorneys, Bloemfontein.