REPORTABLE
CASE NO: 17/2001

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter between:

S B LOMBO **APPELLANT**

and

AFRICAN NATIONAL CONGRESS **RESPONDENT**

CORAM: SMALBERGER ADP, OLIVIER, STREICHER, FARLAM and NAVSA JJA

DATE OF HEARING: 2 AND 3 MAY 2002

DELIVERY DATE: 30 MAY 2002

Summary: Claim for damages for assault and unlawful detention - related issues - prescription

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JUDGMENT

SMALBERGER ADP

SMALBERGER ADP:

[1] In November 1993 the appellant instituted an action for damages in the Durban and Coast Local Division against the respondent ("the ANC") and the South African Communist Party ("the SACP") as the first and second defendants respectively. In his particulars of claim he alleged that:

(a) he had been unlawfully detained in various countries in Africa over the period January 1986 to August 1991 by persons who were at all material times members of the ANC and the SACP acting in pursuance of the aims and objects of the two organizations;

(b) during the course of his detention he had been unlawfully assaulted, tortured and subjected to various forms of maltreatment;

(c) he had been unlawfully deprived of certain property belonging to him including his motor vehicle.

As a result of the aforegoing, and the consequences thereof, the appellant claimed damages from the ANC and the SACP in a total sum of R6 135 812,00.

[2] Apart from a main plea on the merits the ANC and SACP raised a number of special pleas to the appellant's particulars of claim. When the matter first came to trial two of them were disposed of separately in terms of Uniform Rule of Court 33(4) - see *African National Congress and Another v Lombo* 1997 (3) SA 187 (A). Some of the special pleas were later abandoned. All the remaining issues, including a special plea of prescription, eventually came before Hurt J. At the conclusion of a lengthy trial the learned judge absolved both the ANC and the SACP from the instance with costs. He subsequently granted the appellant leave to appeal, but only against the dismissal of his claim against the ANC, hence the fact that the ANC is the sole respondent.

[3] It is common cause that for a number of years prior to 1986, and over the period immediately thereafter when the events giving rise to the appellant's claim are alleged to have taken place, the ANC was engaged in an armed struggle against the then Government of the Republic of South Africa ("the Government"). The relevant facts have to be viewed against this background.

[4] The evidence of the appellant, succinctly stated, is as follows. In January or early February 1986 the appellant was persuaded by two friends to accompany them to Botswana to undergo training with a view to assisting the ANC in its armed struggle. They travelled together to Gaberone in the appellant's vehicle. There they met up with representatives of the ANC. After a few days the appellant was taken to be interviewed by Botswanan security officials. He was told that he would have to remain in their custody while he wrote his autobiography. It was standard ANC practice for recruits to be asked to write detailed autobiographies ("biographies") presumably for security reasons. According to the appellant this was where his detention, which was ultimately to endure until August 1991, commenced.

[5] After spending some three months in solitary confinement in Gaberone, except for odd occasions when he was taken out to be interrogated, the appellant was flown by military helicopter to Charleston in Zambia where he was imprisoned in a place known as RC which he described as "an ANC gaol". He was detained there for a period of three to four weeks during which time he was subjected to continual assaults and torture. (It was apparently there that he was given the code name "Poland Difa".) He was then transferred, again by air, to Dakawa in Tanzania, where he spent three weeks before being returned to RC. He was not assaulted while in Dakawa. After a day or two at RC he was taken to a transit camp in Angola called Vianna where he spent about ten days before being transferred to an Angolan prison, Nova Stallicao, where provision had been made for ANC detainees. He was not ill-treated in Vianna, but he claimed to have been assaulted by certain high ranking ANC officials at Nova Stallicao.

[6] Two or three months later, in November 1986, the appellant was taken to Quatro, an ANC detention camp in northern Angola, where he was detained until November 1988. There he was subjected to assaults and gross maltreatment in the form of threats, degrading and dehumanising conduct, lack of decent facilities and deprivation, *inter alia*, of proper food, medical treatment and clothing. (Any future reference to maltreatment includes one or more of these forms of conduct.)

[7] In November 1988 the appellant was transferred to Nokala camp outside Luanda. He was not assaulted or maltreated there. In his own words, it was "the first place we existed normally". In March 1989 he was taken to Bokoloda in Uganda where he was detained until his release and subsequent return to South Africa in August 1991. At Bokoloda he was "well treated".

[8] The appellant further testified that when he was detained certain property belonging to him, including his motor vehicle, was taken from him and never returned-hence his claim for the value of the property misappropriated.

[9] The appellant's evidence with regard to how he travelled to Botswana and when he arrived there is not in issue. What is disputed is the reason given by him for going there and when, where and in what circumstances he was first detained. In effect the ANC contends that the appellant was recruited by the South African National

Intelligence Services ("the NIS") and sent to Botswana with a view to gathering information about the ANC's activities. The ANC denies that the appellant was detained in Botswana. It claims that he was first detained in Dakawa in April 1988 on suspicion of being a spy. There are disputes concerning the appellant's precise movements after his arrival in Botswana, and the alleged treatment meted out to him, prior to his being taken to Quatro. It is common cause that he was detained in Quatro until November 1988, and thereafter at Nokala and Bokoloda prior to his release and return to South Africa.

[10] The ANC called a number of witnesses to refute the appellant's evidence relating to his alleged assaults and maltreatment in Quatro and the adverse conditions that existed there. While these witnesses sought to deny or explain away the appellant's evidence, they were unable seriously to contend that there had been no incidents of assault or abuse involving detainees at Quatro. The ANC did not seek to defend or justify such incidents. Rather it contended that any ill-treatment of detainees was contrary to ANC policy and it denied legal responsibility for any such conduct on the part of rogue or disgruntled elements in its ranks. Furthermore, the ANC disputed any misappropriation of the appellant's property, particularly his vehicle, which it claimed had been donated to it by the appellant.

[11] What has been set out above represents, in very broad outline, the essential factual issues that emerged at the trial. A great deal of evidence and cross-examination was devoted to these issues. For reasons that will became apparent in due course there is no need to traverse the evidence relating to all these issues in detail. Where necessary certain aspects of the evidence will be considered in greater depth.

[12] Before proceeding to outline and consider the essential issues on appeal there are two further matters that require mention. It is common cause that after his arrival in Botswana, and during the course of his detention up to and including his time in Quatro, the appellant was frequently interrogated and was required to write numerous biographies. At the trial the ANC produced the personal file of the appellant kept by it.

It contains various biographies handwritten by the appellant, as well as notes of interviews conducted with him, and statements made by him, during his detention. It became Exhibit C at the trial, and I shall refer to it as such. The appellant was not prepared to accept that Exhibit C was complete. He claimed to have drawn up many more biographies than appear in it. Furthermore, when confronted with the contents of various documents in Exhibit C he contended that they were the result of threats, assaults and torture to which he had been subjected until he succumbed by writing biographical statements which were in fact false in order to satisfy his tormentors. In this regard Hurt J came to the conclusion that

> "even if certain documents created by the plaintiff [the appellant] have been omitted from the file, there is no reason to suspect that the documents which are in it have been craftily contrived to concoct a false picture of what occurred between the plaintiff and the defendant [the ANC] during 1986. On the contrary, the documents in Exhibit C have all the appearance of being authentic and, as such, they constitute that most useful item of evidence, a contemporary documentary record of events which occurred so long ago that the mere recollection by witnesses cannot be regarded as sufficiently reliable for the purpose of drawing confident conclusions".

[13] The second matter is this. It appears from the evidence of certain of the ANC's witnesses that the conditions in the detention camps in Angola, of which Quatro was one, had become a cause of concern to the ANC for a number of years before 1986. Despite the appointment of the Stuart Commission by the ANC in 1984 to investigate and report upon the conditions in these camps, and a special conference held at Kabwe to consider what could be done to improve the existing conditions which had been reported upon adversely by the Stuart Commission, little if anything had been done in this regard. Subsequently the ANC mandated first the Skweyiya Commission in 1992, and then the Motsuenyane Commission in 1993, to investigate allegations of inhumane treatment meted out to detainees by ANC members at these camps, including the period that the appellant was detained in Quatro. The reports of these Commissions generally condemned the conditions and practices at camps like Quatro and the way detainees were treated. The appellant sought to have these reports admitted in evidence on the basis, *inter alia*, that they provided similar fact evidence supportive of his case. Although he made no specific finding as to their admissibility Hurt J appears to have disregarded these reports when adjudicating the matter.

[14] In paragraph 12 of the appellant's particulars of claim, possibly in anticipation of a plea of prescription, it was pleaded that upon his release, on or about 19 and 20 August 1991, and at Johannesburg, an ANC delegation, duly authorised, "acknowledged liability for the abduction, unlawful imprisonment, assaults and torture perpetrated on [the appellant]". Such acknowledgment, if proved, would have interrupted prescription in terms of sec 14(1) of the Prescription Act 68 of 1969 ("the Act").

[15] In its second special plea the ANC duly pleaded that "to the extent that the plaintiff's [appellant's] claim arises from events which occurred more than three years prior to 22 November 1993, the plaintiff's claim arising therefrom is prescribed by reason of the provisions of sec 11(d) of [the Act]". Section 11(d) of the Act provides for a prescriptive period of three years in respect of the causes of action relied upon by the appellant. It is common cause that 22 November 1993 is the date on which summons was served on the ANC. The appellant did not file a replication to the ANC's special plea. On the pleadings, therefore, the appellant's only defence to the plea of prescription lay in the alleged acknowledgment of liability referred to in paragraph 12 of the particulars of claim.

[16] At the commencement of the trial before Hurt J the ANC sought to have the prescription issue determined separately from the remaining issues, but its application in this regard was refused. One of the reasons for refusing the application was that evidence would have be led to determine whether prescription had been interrupted in consequence of an acknowledgment of liability, and a piecemeal disposal of the matter was undesirable.

[17] The question of whether there had been acknowledgment of liability was fully canvassed in evidence and comprehensively dealt with by Hurt J in his judgment. He held that no such acknowledgment had been established by the appellant. His finding in that regard was not challenged on appeal. Accordingly no interruption of prescription was established.

[18] The appellant contends that his unlawful detention, the assaults perpetrated upon him and the maltreatment to which he was subjected constituted one continuous and continuing wrong which extended from the time he was first detained in February 1986 (as alleged by him) until his release in August 1991. His cause of action, so it is argued, only arose upon his release in August 1991 and had accordingly not yet prescribed when summons was served on 22 November 1993 i.e. within the three year prescriptive period.

[19] This contention runs contrary to well-established authority. Every assault and every actionable form of maltreatment on which the appellant relies constitutes a separate cause of action arising from the time of its commission or infliction and each is independently subject to extinctive prescription from that time (*Slomowitz v*

Vereeniging Town Council 1966 (3) SA 317 (A) at 331 C - E; *Montsisi v Minister of Police* 1984 (1) SA 619 (A) at 633 A - D). Accordingly, any cause of action relied upon by the appellant relating to assaults or maltreatment which arose more than three years before the service of summons (i e prior to 22 November 1990) would have prescribed by the time his action was instituted, allowing for the application of the normal prescriptive period of three years.

[20] It is common cause that the appellant was not assaulted or maltreated from the time he was transferred to Nokala in November 1988 until his release in August 1991. Any claims arising from earlier assaults or maltreatment (i e before November 1988), as well as any claim based on the earlier misappropriation of his property, would therefore, subject to the provisions of sec 13(1) of the Act, have prescribed by the time summons was served.

[21] Because the appellant was effectively precluded from pursuing any claims he might have had against the ANC while he was detained his counsel, Mr *Jefferys*, sought to invoke the common law maxim *lex non cogit ad impossibilia* ("the law does not compel the performance of impossibilities"). The maxim was applied in the *Montsisi* case (*supra*). In that case it was impossible for the plaintiff to comply with the requirements regarding written notice of a contemplated action as prescribed by sec 32(1) of the Police Act 7 of 1958 by virtue of his being a detainee in terms of the Terrorism Act 83 of 1967 at the relevant time. It was held, in the circumstances, applying the maxim, that the period in sec 32(1) did not run against him for so long as he was being detained. In the course of his judgment Rabie CJ remarked (at 634 E - 635 A):

> "Dit behoef geen betoog dat dit onbillik sou wees indien iemand, vir wie dit vanweë sy aanhouding ingevolge art 6 van die Wet of Terrorisme onmoontlik was om aan die vereistes van art 32(1) te voldoen, sy reg om vergoeding te eis weens onregmatige dade wat tydens sy aanhouding teenoor hom gepleeg is, ontsê sou word omdat hy nie aan die vereistes van art 32(1) voldoen het nie. . . .
>
> Die vraag ontstaan nou of daar bevind kan word dat, . . . die appellant in die onderhawige geval wel kan sê dat sy eis [nie] deur die artikel belet word nie.
>
> Ek het tot die gevolgtrekking gekom dat wel so bevind kan word, en wel in die lig van die algemene oorwegings wat die spreuk *lex non cogit ad*

> *impossibilia* ten grondslag lê (D 50.17.185: *impossibilium nulla obligatio est*) en wat inhou dat iemand se versuim om 'n verpligting na te kom wanneer dit vir hom onmoontlik was om dit na te kom, hom nie tot sy nadeel toegereken word nie."

[22] The maxim has no application in the present instance as the appellant was not by virtue of his detention legally precluded after his release from pursuing a claim for damages for the alleged assaults and maltreatment to which he was subjected. His remedy lay in the provisions of sec 13(1) of the Act. The Act constitutes a partial codification of our law of prescription. Common law rules only apply where the Act is silent about matters to which they relate and they are not inconsistent with the Act's provisions. The previous Prescription Act (Act 18 of 1943) specifically provided that "[a]ny rule of the common law which is inconsistent with the provisions of this Act, is hereby repealed" (sec 15(1)). Although the same words are not to be found in the (current) Act the effect thereof is clearly the same.

[23] Section 13(1) of the Act provides for various circumstances or impediments which, if applicable, will delay the completion of prescription. The relevant portion of sec 13(1), for the purposes of the present appeal, provides as follows:

> "If -
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> (a) the creditor . . . . is prevented by superior force . . . . from interrupting the running of prescription as contemplated in section 15(1); or
>
> (b) . . . .
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> (c) . . . .
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> (d) . . . .
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> (e) . . . .
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> (f) . . . .
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> (g) . . . .
>
> (h) . . . .; and
>
> (i) the relevant period of prescription would, but for the provisions of this subsection, be completed before or on, or within one year after, the day on which the relevant impediment referred to in paragraph (a) . . . . has ceased to exist,
>
> the period of prescription shall not be completed before a year has elapsed after the day referred to in paragraph (i)."

[24] The effect of sec 13(1) is that a creditor has one year after the date on which the relevant impediment has ceased to exist within which to bring his or her action. The fundamental import, meaning and application of, *inter alia*, sec 13(1) was considered by this Court in *ABP 4X4 Motor Dealers (Pty) Ltd v IGI Insurance Co Ltd* 1999 (3) SA 924 (SCA) at 930 B - 932 F (paras [8] to [16]).

[25] The physical detention of the appellant outside the Republic of South Africa in circumstances in which he was prevented from personally pursuing any action arising from the alleged assaults and maltreatment inflicted upon him, and totally denied access to anyone who could do so on his behalf, amounted to his being prevented by a superior force from interrupting the running of prescription as contemplated by sec 13(1)(a). Consequently, he had one year from the time this impediment ceased to exist (his release from detention and return to this country) within which to institute action in respect of all causes of action arising from the alleged assaults and maltreatment to which he was subjected during his detention, and his property that was allegedly misappropriated. The Act therefore made provision for his situation to the exclusion of the common law and the maxim invoked accordingly finds no application. Unfortunately for the appellant he failed to institute action within the one year period prescribed by s 13(1) and any claims he might have had in respect of the causes of action referred to have consequently been extinguished by prescription.

[26] The appellant's position is somewhat different in regard to his claim for unlawful detention. His cause of action in this respect did not arise once and for all on the day he was first detained, nor did it first arise on the day of his release from detention. His continuing unlawful detention (if such it was) would notionally have given rise to a separate cause of action for each day he was so detained (*Ngcobo v Minister of Police* 1978 (4) SA 930 (D & CLD) following *Slomowitz*'s case (*supra*)). The decision in *Ramphele v Minister of Police* 1979 (4) SA 902 (W), if not distinguishable on the facts, must be taken to have been wrongly decided.

[27] On his release in August 1991 the provisions of s 13(1) would have entitled the appellant to claim damages for wrongful detention for the full period of his detention provided he instituted action within the prescribed one year period, something he failed to do. However, the three year prescriptive period provided in sec 11(d) of the Act preserved any claim for unlawful detention arising within the period of three years preceding the service of summons on 22 November 1993. His claim for unlawful detention for the period 23 November 1990 until his release in August 1991 would therefore still be extant. Any claim for wrongful detention arising before 23 November 1990 will have been extinguished by prescription in accordance with the principles enunciated above.

[28] To sum up on the question of prescription. The ANC's special plea of prescription:

(a) succeeds in relation to the appellant's claims for unlawful assault, maltreatment and deprivation of property, all of which have prescribed;

(b) succeeds in relation to the appellant's claim based on his alleged unlawful detention for the period preceding 23 November 1990, but not for the period from that date to the time of his release in August 1991.

[29] Hurt J, despite his adverse credibility findings in respect of the appellant, was of the view "that the probabilities of the case are that, during the period while the [appellant] was in Quatro camp, he was assaulted on occasions". The evidence and probabilities support such a finding and, I would add, that he was probably also maltreated while in detention there. However, the conclusion reached on the prescription issue renders it unnecessary to resolve the myriad factual disputes with regard to whether the appellant was unlawfully assaulted and maltreated to the extent (i e the frequency and severity) alleged by him and in circumstances which would have rendered the ANC liable to him for damages. Nor is it necessary to decide whether the reports of the Skweyiya and Motsuenyane Commissions are admissible for the reasons advanced on behalf of the appellant. All that remains to be determined, for the reasons given above, is whether the appellant was unlawfully detained over the period 23 November 1990 to August 1991.

[30] Before proceeding to the unlawful detention issue it is necessary to deal with the argument Mr *Jefferys* initially sought to raise that the provisions of sec 13(1) of the Act are unconstitutional, despite the fact that the point (apart from a cursory reference in the appellant's counsel's opening address) was never pleaded, never put in issue or adjudicated upon in the court below nor raised in the notice of appeal. Ultimately Mr *Jefferys* fairly conceded that it was not open to him, in the circumstances, to pursue the point, particularly as the ANC had never been given the opportunity to raise matters relative to whether, the Act being one of general application, the time limitation imposed by sec 13(1) was reasonable and justifiable. In any event, the short answer to the constitutional point would appear to be (I express no definite opinion) that having regard to the case of *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC), and subsequent decisions, on the non-retrospectivity of the interim Constitution, and the provisions of Item 17 of Schedule 6 of the (final) Constitution, it was not open to the appellant to rely upon any constitutional provisions in relation to proceedings commenced on 22 November 1993 before either of the interim or final Constitutions came into effect.

[31] With regard to the appellant's claim for unlawful detention three issues arise. They are:

(a) When and where was the appellant first detained;

(b) Was his initial detention lawful or unlawful;

(c) If it was lawful, did it remain so, more particularly was it so over the period in respect of which the appellant's claim has not prescribed.

I shall deal with each of these *seriatim*.

[32] It will be recalled that the appellant claims that he was first detained in Gaberone in Botswana in January or early February 1986; the ANC in turn contends that he was first detained in Dakawa in Tanzania in April 1986. It is common cause that the appellant was detained by the ANC at least from the latter date to August 1991. The appellant's admitted detention over that period constituted a deprivation of his liberty and the onus rested on the ANC to prove that his detention was justified in law (*Minister of Law and Order and Others v Hurley and Another* 1986 (3) SA 568 (A) at

589 D - G; *Kabinet van die Tussentydse Regering vir Suidwes-Afrika en 'n Ander v Katofa* 1987 (1) SA 695 (A) at 739 G - I). However, to the extent that there is a dispute as to when and where the appellant was first detained the onus, applying well recognised principles, would have been on the appellant to establish when and where that occurred.

[33] By way of elaboration on the earlier outline of the appellant's evidence in this regard, the appellant testified that he had travelled to Gaberone in the company of a Mr Shandu (also known as Mbatha) ("Shandu") and a Mr Mandla. There they were met by two ANC representatives, Mr Lieta (also known as Mtswale) ("Lieta") and Mr Zulu. After a few days he was detained in solitary confinement, and in essence remained so confined until May 1986. From there he was taken first to Zambia and then to Dakawa in Tanzania. On the appellant's evidence it is fair to say (as Hurt J found) that he could not have been in Dakawa before June 1986.

[34] Shandu's evidence was to the effect that he and the appellant were together for most of the time after their arrival in Botswana until the appellant disappeared abruptly from Dakawa in April 1986. He denied that the appellant had been detained before then. His evidence that the appellant was not detained while in Gaberone is supported by the evidence of Lieta and the witness Mr Mathebula who claimed to have been in Gaberone at the same time as the appellant and Shandu and to have had regular contact with them. A further witness Mr Watson (also known as Stuart or Stewart) ("Watson"), to whose evidence I shall refer in more detail later, confirmed that the appellant (contrary to the latter's evidence) was in Dakawa in April 1986 and was detained for the first time there shortly after, and in consequence of, interviews conducted by him with the appellant. Exhibit C contains documents, some dated and signed by the appellant, which point to their having originated in Dakawa in April 1986.

[35] It is apparent from Hurt J's judgment that he entertained considerable doubts about the appellant's veracity on this and other issues. He stated, in general, that he "would have been inclined to reject the [appellant's] evidence wherever it is not corroborated by reliable evidence from other witnesses or by relevant documentary evidence". In relation to the events up to and including his stay in Dakawa the appellant's evidence stands alone and uncorroborated against that of the other witnesses to whom I have referred, whose evidence appears to have found favour with Hurt J. I am unpersuaded that Hurt J erred in finding that the probabilities (and the evidence) were overwhelmingly in favour of the ANC's version that the appellant had not been detained in Botswana and was first detained in Dakawa. No plausible reason exists why the appellant should have been detained in Botswana as it was too early for any suspicion to have formed as to the real reason for his being there. The appellant therefore failed to prove that he had first been detained in Botswana.

[36] I proceed to consider whether the ANC established that the initial detention of the appellant was lawful. As correctly pointed out by Hurt J, the fact that the appellant may have been assaulted and maltreated while in detention is not relevant to this issue.

Unlawful, intentional assaults and maltreatment of a person lawfully detained give rise to a separate delictual action (*Whittaker v Roos and Bateman* 1912 AD 92). They do not impinge on the question of whether the detention as such is lawful or not, a matter to which different principles apply.

[37] It appears from Watson's evidence that the appellant's detention probably commenced when, on instructions from Lusaka, he was sent there from Dakawa. This followed on the dispatch of a report by Watson to his superiors, after an interview with the appellant, in which it was recommended "that the subject [the appellant] be placed under the group of potential suspects for further observation . . .".

[38] Dakawa was a transit centre where new recruits were received and processed to determine whether they should go for military training or further education. Watson was involved in their screening. According to him he recalled the appellant because he stood out in dress and manner above the other recruits. Each recruit was interviewed individually. The recruits were required to write biographies. These were scrutinised to see if they revealed any discrepancies when compared with previously written biographies. The appellant was interviewed on a number of occasions. A serial number used only by the ANC's office in Tanzania was applied to the first page of various biographies, interviews and reports by and relating to the appellant, thereby identifying them as emanating from Tanzania. A number of these appear in Exhibit C.

[39] Watson testified that a material discrepancy was discovered in the appellant's biographies. This led to an interview being conducted with him on 14 April 1996 by Watson and one Sam. Details of the interview are recorded in a contemporaneous document forming part of Exhibit C. The appellant signed a statement in which he confirmed the correctness of the information disclosed in the document. In the interview the appellant, according to Watson, revealed that he had been recruited in 1979 to work for the Security Branch in South Africa ("the Security Branch"). He also revealed how in 1983 he had been approached to work for the "South African Intelligence Services", presumably the NIS, but claimed he had no special interest in working for them. This resulted in the report by Watson, to which reference has been made, which was probably written on 16 April 1986. Watson's evidence was accepted by Hurt J; no grounds exist to hold that he erred in doing so.

[40] Subsequently further biographical information was provided by the appellant. Exhibit C contains certain documents that were compiled in Vianna during the first two weeks of June 1986. One relates to an interview with the appellant; two were written by the appellant, one of them in part being a response to what was noted at the interview. In these documents earlier references to the appellant's contact with, and activities on behalf of, the Security Branch are elaborated upon. Significantly, various discrepancies and false statements began to emerge from the biographical details. Amongst these were a number of different, irreconcilable versions of why and in what circumstances the appellant left South Africa, the details of which need not be gone into. In a report purporting to be by one of the appellant's interrogators (compiled at Vianna on 22 July 1986) it was stated:

> "We are convinced that the person was sent here and also agreed to work for the NIS when Themba recruited him . . . .
>
> Our recommendation is that he should be taken for interrogation at a correct place. We are fully convinced that this man is an enemy agent."

The report reflects the subjective view of its author, who was not called as a witness. It is accordingly strictly hearsay, but its relevance and significance lies in the fact that shortly thereafter the appellant was moved to Quatro which was, *inter alia*, a place where spies or suspected spies were detained and interrogated - presumably what the author of the report had in mind when he referred to "a correct place".

[41] Throughout his evidence the appellant denied that he had had any previous connections with either the Security Branch or the NIS, or that he had voluntarily admitted to or disclosed anything to that effect. He contended that he had been subjected to various forms of assault and torture which had caused him to incorporate false material into his biographies in order to satisfy his interrogators. Hurt J found his evidence in this regard to be "rather vague and inconclusive". Whatever the position might have been in regard to later written biographies or statements made, this could not have been the case while he was in Dakawa or Vianna. The appellant specifically disavowed in his evidence that he had been maltreated in either of those places. There would therefore have been no reason or incentive for him to have provided false information. And there would appear to be no plausible reason why the ANC, at that stage, would have required him to record false information which could have served no purpose as far as it was concerned. In the result, and having regard to his credibility findings, I see no reason to differ from Hurt J's conclusion that the appellant's evidence suggesting that the documents referred to contain false information provided by the ANC interrogators was "highly improbable".

[42] Mr *Jeffereys* accepted, in my view correctly, that if there existed on the part of the ANC a reasonable suspicion or a reasonable belief founded upon a factual basis (cf *Hurley and Another v Minister of Law and Order and Another* 1985 (4) SA 709 (D & CLD) at 716 J - 717 A) that the appellant had presented himself as a recruit with an ulterior motive, in other words, that he was spying for the Government, the ANC was lawfully entitled to detain him, having regard to the fact that the lawfulness of the appellant's detention had to be judged by the *lex loci* and the undisputed evidence concerning the recognition and powers afforded the ANC in the countries concerned, the circumstances that pertained in them and the ANC's involvement in the armed struggle against the Government. The ANC's power to detain having been conceded, all that remains to be decided is whether the requisite reasonable suspicion existed.

[43] In my view, having regard to the evidence of Watson, the contents of the relevant documents in Exhibit C and the probabilities, a reasonable suspicion as to the appellant's genuineness, i e that he was a spy and not a normal recruit, arose while he was being interviewed in Dakawa, a suspicion which was reinforced, or at the very least confirmed, by the events in Vianna. Consequently I agree with the conclusion of Hurt J that the initial detention of the appellant was lawful.

[44] The ANC led evidence of subsequent events which it claimed not only heightened its suspicions that the appellant was a spy, but positively established that he was. Included was evidence of a recorded confession by the appellant detailing his activities as a NIS agent, allegedly made by him at Quatro on 2 September 1986 to, *inter alia*, the then commander of Quatro, Mr Masango. The amount of personal and other detail contained in the document points to its authenticity, but having regard to the conditions at Quatro and the probability that the appellant was assaulted there the reliability of the confession is open to sufficient doubt to justify, and indeed compel, its exclusion from consideration. There was also evidence by Mr Mhlanga that the appellant had admitted to him (at Quatro) his involvement with the NIS. The witnesses, Ms Mtintso and Mr Rosho testified that the appellant had also admitted this to them at Bokoloda and had claimed prisoner of war status. Hurt J was inclined to accept their evidence. However, in the face of the appellant's denial thereof (even allowing for the fact that he was not a credible witness in material respects) and the lapse of time since the events took place, it would probably be safer to disregard their testimony in that regard. What can confidently be asserted is that there is nothing arising from the later events that would have allayed or negated the reasonable suspicion that existed when the appellant was first detained. At the very least that suspicion existed throughout.

[45] The next question that arises is whether the appellant's detention continued to be lawful, more particularly whether it was still so between November 1990 and August 1991, the period in respect of which any claim the appellant may have for unlawful detention is still extant. The parties accepted that the provisions of the Geneva Conventions of 1949 and Additional Protocol I of 1977 ("the Protocol") were applicable to the conflict between the ANC and the South African Government and regulated the appellant's detention, despite the doubts expressed in this regard in *Azanian Peoples Organisation (AZAPO) & Others v President of the Republic of South Africa & Others* 1996 (4) SA 671 (CC) at 689 C - D. (I express no view on the matter.) It is common cause that the ANC in 1980 publicly subscribed to their provisions. The only existing issue in this respect is whether they entitled the ANC, without anything further being done, to detain the appellant as a suspected spy until the cessation of hostilities (as the ANC claimed) or whether it was obliged to afford him the benefit of a trial within a reasonable period. In this respect the appellant sought to rely upon art 75 of the Protocol while the ANC invoked articles 43 to 46 of the Geneva Conventions.

[46] I do not consider it necessary or advisable to attempt an interpretation of the relevant provisions of the Geneva Conventions and the Protocol, which are complex and, in some respects, obscure. The argument before us on the point was limited and not supported by authority. I shall accept in the appellant's favour that, having lawfully detained him on suspicion of being a spy, the ANC was obliged to afford him the benefit of a trial within a reasonable time. The purpose of a trial would have been to establish whether he was a spy, in which case he could, at best for him, have been detained until hostilities had ceased or, failing proof that he was a spy, to oblige his release.

[47] Was the appellant afforded or offered a trial within a reasonable time? What is reasonable depends upon the facts and circumstances of each particular case. Hurt J held that it appeared, having regard to the evidence and the probabilities, that the ANC always intended to comply with the obligations it had undertaken, in terms of the Geneva Conventions and the Protocol, to give persons detained by it a hearing. A tribunal for this purpose was set up in Luanda in March 1988. This was done, according to Mhlanga, in accordance with resolutions taken at the Kabwe conference and the moral dilemma with which the ANC was confronted because of the prolonged incarceration of detainees. The tribunal, comprising five members under the chairmanship of Mr Stuart (who had previously headed the Stuart Commission), proceeded to try detainees. Mhlanga testified that the priority by which detainees were selected for trial was the length of time they had spent in detention. There is no evidence that the appellant ever insisted on being tried while at Quatro. The detainees who appeared before the tribunal were defended by Mr Maduna (the current Minister of Justice), a number of them successfully, as a result of which they were released. The tribunal was unable to complete its work in 1988 because of various complications that arose. These were, according to Mhlanga, the problems relating to the transportation of detainees from northern Angola to Luanda for trial in the face of an escalation of UNITA attacks on the ANC; conditions in northern Angola were not conducive to moving the tribunal there; and pressure by the Government on Angola to close down all foreign military camps in Angola. It was because of the latter development that the detainees were eventually moved to Bokoloda in Uganda in November 1988, at which time the appellant had not yet been afforded a hearing. Mhlanga's evidence in the above regard was not seriously challenged.

[48] It is common cause that the appellant was offered a hearing at Bokoloda, but that he turned it down. It does not appear from the appellant's evidence when this occurred. According to Mhlanga the appellant voiced various complaints about his personal situation and wanted to be released. At that time there were plans afoot to set up another tribunal in Uganda. The appellant intimated that he would not be prepared to participate in a hearing before the proposed tribunal. This must have occurred, at the latest, before October 1989, because that is when Mhlangu left Bokoloda. It appears that the tribunal was set up in Uganda in late 1989 or early 1990 under the chairmanship of Mr P Jordan. In the light of the appellant's complaints, and the length of his detention, it seems likely that he would have been offered a hearing fairly early on. The appellant never suggested that he was only offered a hearing long after his arrival at Bokoloda. On the evidence the probabilities are that the appellant was offered, and refused, a trial before November 1990.

[49] More than two and a half years elapsed between the time the appellant was first detained and the evacuation of detainees (including the appellant) from Quatro and their eventual transferal to Bokoloda. *Prima facie* a delay of that magnitude in bringing the appellant, a suspected spy, to trial would be excessive and accordingly unreasonable, thus rendering his continued detention unlawful. But, as Hurt J correctly pointed out, in judging the reasonableness of the delay it would be wrong to adopt an "armchair approach". Due allowance must be made for the precarious situation in which the ANC found itself in Angola both from a funding and logistic point of view. It was not operating or functioning in normal circumstances. In 1988 it eventually succeeded in setting up a tribunal which commenced to try detaineees, the longest detained being tried first. Had it not been for the disruption caused by the need to leave Angola and move to Uganda the tribunal would probably have completed its work. In the nature of things the move would have resulted in an inevitable and excusable delay in the resumption of trials. Hurt J held, in the circumstances, that the failure to try the appellant did not give rise to a claim for damages for wrongful detention. His underlying reasoning was that

> "the delict of wrongful detention is founded on *animus injuriandi* and I consider that the [ANC] has established that the failure to try the [appellant], formally, before camp 32 [Quatro] was evacuated, was neither malicious nor reckless".

[50] There is much to be said for Hurt J's point of view. On the other hand, even given the considerations mentioned by him, the period involved would seem to go beyond what might reasonably have been expected, particularly in view of the fact that the ANC had taken upon itself the obligations imposed by the Geneva Conventions and the Protocol. It is, however, unnecessary to come to a firm conclusion in this regard. I shall accept, in favour of the appellant, that at some stage before he left Quatro his detention had became unlawful by reason of the unreasonable delay in bringing him to trial.

[51] The situation in my view reverted to what it had been before when the appellant was offered a trial in Bokoloda, which he refused. At that time there still existed a reasonable suspicion that the appellant was a spy. If he had submitted to a trial and been found to be a spy, the ANC would once again lawfully have been entitled to detain him; had a trial been proceeded with in his absence upon his refusal to participate the probabilities are that he would have been found guilty of spying, thus justifying his detention. By the same token, if he refused a trial without reasonable grounds for doing so, his further detention, because of the suspicion that still existed, would have been justified, making his detention once again reasonable in the circumstances, and accordingly lawful. It is trite law that whether conduct is lawful or wrongful is determined according to the general criterion of reasonableness.

[52] In response to a question by Hurt J as to why he had refused to participate in a hearing (the purpose of which he claimed he was unaware) the appellant replied:

> "The main reason, M'Lord, was that I had been detained for many years without being afforded the opportunity of a trial. Secondly, I would not have access to my own legal representation. So I thought it wouldn't be fair."

One can readily understand the appellant's chagrin because of his long detention without a hearing. But that in itself does not provide an acceptable reason for refusing to be tried. Nor could he reasonably have expected, given the circumstances which prevailed at the time, a legal representative of his own choice. Detainees had previously been provided with adequate legal representation and some had been freed.

There was no evidence concerning the composition of the new tribunal, but it is reasonable to assume that it would have been constituted along the same lines as the previous one. It was never suggested that the earlier tribunal had not permitted a fair defence or provided a fair hearing; and there appears to have been no reason to believe that the newly constituted tribunal would be any different in that respect. The reasons advanced by the appellant for refusing a hearing were subjective, speculative and not compelling. In my view he did not advance, nor on the evidence did he have, any reasonable and well-founded grounds for refusing a hearing. In the circumstances, by refusing to be tried he became the author of his own predicament.

[53] Consequently, the appellant's detention over the period November 1990 to August 1991 was lawful. To the extent that any detention before that was unlawful, any claim he might have had in respect thereof has prescribed, for the reasons already given. In the result Hurt J correctly dismissed his claims in the court below, and his appeal must fail.

[54] The result is an unfortunate one for the appellant. One cannot help but feel sympathy for him. On the probabilities he was assaulted and maltreated while in captivity although perhaps not to the extent he claimed. Regrettably any claims he might have had were extinguished by prescription.

[55] The appeal is dismissed with costs, including the costs of two counsel up to and including the stage of preparation of the respondent's heads of argument.

J W SMALBERGER
ACTING DEPUTY PRESIDENT

OLIVIER JA)Concur
STREICHER JA)
FARLAM JA)
NAVSA JA)