THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

REPORTABLE
Case No: 92/2012

In the matter between:

VUYANI JULIUS WOJI **APPELLANT**

and

THE MINISTER OF POLICE **RESPONDENT**

Neutral citation: *Woji v The Minister of Police* (92/2012) [2014] ZASCA 108 (20 August 2014)

Coram: Maya, Tshiqi, Saldulker, Swain JJA and Gorven AJA

Heard: **20 August 2014**

Delivered: **11 September 2014**

Summary*:* Investigating officer negligently misrepresenting strength of State case against appellant at bail hearing – bail refused – subsequent detention of appellant in breach of right to freedom in terms of s 12(1)(*a*) of Constitution, unlawful and without just cause – breach by investigating officer of public law duty not to violate appellant's right to freedom – breach of appellant's private law right not to be unlawfully detained – order of magistrate not rendering detention lawful – respondent liable to compensate appellant.

ORDER

On appeal from: Eastern Cape High Court, Port Elizabeth (Dambuza J sitting as court of first instance):

1 The appeal is upheld with costs such costs to include the costs of two counsel.

2 The order of the court a quo is set aside and replaced with the following order:

'2.1 Judgment is granted in favour of the plaintiff for payment of the sum of R500 000 as against the defendant in respect of plaintiff's unlawful detention for the period 12 December 2007 to 13 January 2009.

2.2 The defendant is ordered to pay interest on the sum of R500 000 at the rate of 15.5 per cent per annum *a tempore morae* from date of demand to date of payment.

2.3 The defendant is ordered to pay the plaintiff's costs of suit together with interest thereon at the rate of 9 per cent per annum *a tempore morae* from 14 days after taxation of the plaintiff's costs to date of payment.'

JUDGMENT

Swain JA (**Maya, Tshiqi, Saldulker JJA and Gorven AJA** concurring):

[1] The Njoli Square Branch of Nedbank in Port Elizabeth was the scene of an armed robbery on 14 June 2007. Video footage of the robbery led to the arrest of four individuals, including the appellant, Mr Vuyani Woji.

[2] Mr Woji was arrested by Inspector Kuhn, a member of the South African Police Services (SAPS) on 20 November 2007. On the following day the appellant

appeared before the Magistrate's Court at Port Elizabeth. The case was adjourned to 6 December 2007 and then to 11 December 2007 to enable the appellant to obtain legal representation and apply for bail.

[3] On 11 and 12 December 2007 all four accused applied for bail, which was opposed by the State. As the charge was one of armed robbery, being a Schedule 6 offence in terms of s 60(11)(*a*) of the Criminal Procedure Act 51 of 1977 (the Act), the accused bore the onus of establishing on a balance of probabilities that exceptional circumstances existed, which in the interests of justice permitted their release.[1] Proof by an accused that he or she will probably be acquitted can serve as 'exceptional circumstances'.[2] The strength of the State case is accordingly relevant to the existence of 'exceptional circumstances'.[3]

[4] The record of the bail proceedings illustrates that the only evidence linking the four accused to the bank robbery, was the video footage. Inspector Kuhn was the only individual at the bail hearing who had viewed the video footage. He gave evidence on its clarity in identifying the accused as the bank robbers. Relying upon Inspector Kuhn's evidence the magistrate refused bail, finding that there was a prima facie case against the accused and there were no exceptional circumstances to justify their release.

[5] Mr Woji was thereafter detained in custody until 13 January 2009 when he was arraigned in the Regional Court on a charge of armed robbery together with his co-accused. The charge against Mr Woji was, however, withdrawn after the

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[1] *S v Rudolph* 2010 (1) SACR 262 (SCA) para 9.

[2] *S v Botha en 'n ander* 2002 (1) SACR 222 (SCA) para 21.

[3] *S v Kock* 2003 (2) SACR 5 (SCA) para 15.

prosecutor had viewed the video footage and decided that he could not be identified as one of the bank robbers.

[6] In the result Mr Woji instituted action in the Eastern Cape High Court (Port Elizabeth) against the respondent, the Minister of Safety and Security (the minister) alleging that his arrest and detention were unlawful and malicious and his prosecution malicious. His action was, however, dismissed by the court a quo (Dambuza J). An application for leave to appeal was only partially successful. Leave was granted by the court a quo to the full bench of the Eastern Cape Division against the dismissal of his claim for unlawful arrest and unlawful detention, but only for one day being the period from 20 November 2007 until 21 November 2007. This court subsequently granted leave to Mr Woji to appeal against the dismissal of all of the claims advanced.

Unlawful arrest

[7] Inspector Kuhn arrested Mr Woji in terms of s 40(1)(*b*) of the Act. The only issue was whether Inspector Kuhn entertained a reasonable suspicion that Mr Woji had committed the Schedule 1 offence of robbery.

[8] Whether Inspector Kuhn entertained a reasonable suspicion is objectively justiciable. The test 'is not whether a policeman believes that he has reason to suspect, but whether, on an objective approach, he in fact has reasonable grounds for his suspicion'. See *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) at 814D-E. The information available to Inspector Kuhn at the time he arrested Mr Woji must be examined objectively, to decide whether the suspicion he harboured as to Mr Woji's involvement in the robbery was reasonable.

[9] As pointed out, the only direct evidence available to Inspector Kuhn as to the identity of the robbers was the video footage. When Inspector Kuhn viewed the video he stated he was immediately able to identity two of the robbers, as he had previously had cases against them. The face of the third robber was familiar to him,

but he was unable at the time, to connect a name to the individual. The fourth robber, whom he subsequently suspected was Mr Woji, was unknown to him.

[10] There was, however, other information available to Inspector Kuhn which he says led to his suspicion that Mr Woji was the fourth robber. After the arrest of Mr Woji's co-accused, one of them, Mr Zalaba, told Inspector Kuhn that the name of the fourth robber was 'Vig' which is a commonly used nickname for Xhosa males with the name Vuyani. The co-accused also said that this individual stayed in New Brighton and had gold in his teeth, or a gold tooth. Although this evidence would be inadmissible against Mr Woji, it can be considered in determining whether Inspector Kuhn's suspicion was reasonable. See *Powell NO and others v Van der Merwe NO and others* 2005 (5) SA 62 (SCA) para 37.

[11] Immediately before Mr Woji was arrested by Inspector Kuhn he was found in the company of Mr Gadi and Mr Rubusana by Inspector Bezuidenhout who detained all of them for questioning. He gave evidence that he was busy with crime prevention patrols when he was contacted by radio control, that a security guard at a supermarket had spotted a suspicious looking vehicle. He travelled to the area where the security guard pointed out to him a BMW motor vehicle parked on the side walk without any occupants. The guard explained that he was suspicious of the occupants, because they would leave the vehicle but return to it, eventually walking down the road. The guard was concerned, because the Fidelity Guards van arrived daily at that time to collect large amounts of money from the supermarket. The guard gave them a brief description of the three occupants of the vehicle. They then travelled down the road in search of the occupants whose whereabouts at a café were then pointed out to them by another guard at the rear of the supermarket. The three individuals were standing on the pavement outside the café eating food. They questioned them and established their identities as Mr Gadi, Mr Rubusana and Mr Woji.

[12] Mr Gadi in the presence of Mr Woji and Mr Rubusana stated that they had travelled by taxi from New Brighton and were on their way to Korsten. He found in Mr

Gadi's possession a bunch of keys amongst which was a BMW key. He asked Mr Gadi where the vehicle was to which the keys belonged, to which he replied that it was in New Brighton at his house. This reply immediately aroused his suspicion, because he knew the BMW was parked down the road. Having previously established that the vehicle was not stolen, he suspected that the BMW vehicle was what he referred to as a 'safe vehicle'. He explained that there had been a lot of armed robberies in the area. In 80 per cent of these robberies the vehicle used in the robbery was found abandoned within a kilometre of the scene. Another vehicle which was not being sought by the police a 'safe vehicle', was then used to make good the escape of the robbers as it did not attract any attention from the police.

[13] Inspector Bezuidenhout accordingly decided to investigate. All three individuals were loaded into the police van and driven to where the BMW was parked. He then took the BMW keys from Mr Gadi and unlocked the door of the BMW. When he asked Mr Gadi why he had said the vehicle was in New Brighton, Mr Gadi offered no explanation. It indicated to him that for some reason all three of them wished to hide the fact that the vehicle was standing nearby. They then asked Mr Gadi to drive the BMW to the Algoa Park Police Station where he contacted the Organised Crime Unit to assist them to ascertain whether any of these individuals were suspects in any on-going investigations. As a result, several members of the unit arrived including Inspector Kuhn. He told Inspector Kuhn how he had found the three individuals, what led him to become suspicious and why they had brought them to the police station. These detectives knew both Mr Gadi and Mr Rubusana. Mr Gadi told the detectives that he was out on bail for a robbery in Kimberley. What he noticed immediately about Mr Woji's appearance was a piece of gold in one of his teeth protruding from his lip.

[14] Inspector Kuhn gave evidence that when he was called to the Algoa Police Station, he and some of the other detectives from the Organised Crime Unit had viewed the video footage several times. He knew both Mr Gadi and Mr Rubusana who had been arrested for robbery cases by members of his unit. However, because

there were no warrants of arrest outstanding against either of them, they were released.

[15] When Mr Woji got out of the police van, he told Inspector Kuhn that he was Vuyani Woji of New Brighton. As Mr Woji climbed out of the police van, Inspector Kuhn immediately noticed a 'gold piece in his tooth' and he believed he had found the outstanding suspect who fitted the description given to him by Mr Zalaba. He then arrested Mr Woji.

[16] Inspector Kuhn stated he believed the video footage was very clear and when considered together with the description of the suspect, was sufficient to identify Mr Woji as the fourth suspect. Inspector Kuhn also stated that he believed the general appearance of Mr Woji matched that of the individual in the video, in that he was stoutly or stockily built and had a 'roundish' face. The circumstances under which Mr Woji was found in the company of Mr Gadi and Mr Rubusana he said also played a role in his belief that Mr Woji was the fourth suspect. When he returned to his office he again looked at the video footage and was satisfied Mr Woji was the wanted suspect.

[17] When the video footage is viewed, it is quite clear that the facial features of the fourth robber are not clearly seen. On the occasions when this individual looks directly at the camera, his face is partially covered by what appears to be a stocking. He is also wearing a hat and when seen in profile it is extremely difficult to clearly see his facial features. Indeed, when giving evidence Inspector Kuhn conceded that Mr Woji was not the individual seen in the video. However, the video footage must not be considered in isolation. The additional information available to Inspector Kuhn at the time he arrested Mr Woji must also be objectively considered to decide whether the suspicion he harboured as to Mr Woji's involvement in the robbery was reasonable. As stated by Lord Devlin in *Shabaan Bin Hussein and others v Chong Fook Kam and another* [1969] 3 All ER 1627 (PC) at 1630:

'Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking; "I suspect but I cannot prove". Suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is the end.'[4]

[18] The very distinctive attributes of the remaining suspect, namely that his name was Vig, that he came from New Brighton and had a gold tooth as described by one of the co-accused, were all attributes of Mr Woji. These features, coupled with the extremely suspicious circumstances under which he was discovered, together with the broadly similar bodily appearance to the fourth suspect in the video possessed by Mr Woji, cumulatively results in Inspector Kuhn's suspicion being adjudged as objectively reasonable. The minister accordingly discharged the onus of justifying the arrest of Mr Woji. See *Minister of Law and Order v Hurley and another* 1986 (3) SA 568 (A) at 589 E-F.

Unlawful detention

[19] The basis for Mr Woji's claim was that the magistrate in refusing to grant bail acted upon the information supplied by Inspector Kuhn. It was alleged that Inspector Kuhn owed a duty to Mr Woji to properly investigate the crime and bring to the attention of the prosecutor and the magistrate at the bail hearing, information which was relevant to the exercise by the magistrate of his discretion. It was alleged that Inspector Kuhn had failed to discharge this duty which resulted in the magistrate ordering the continued detention of Mr Woji. His detention was accordingly unlawful. The minister, whilst conceding that this duty rested upon Inspector Kuhn, denied its breach. The minister alleged that Inspector Kuhn had made it clear to the magistrate what the nature and strength of the prosecution's case against Mr Woji was and that he could identify Mr Woji in the video footage.

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[4] As endorsed and adopted by this court in *Powell NO and others v Van der Merwe NO and others* 2005 (5) SA 62 (SCA) para 36.

[20] This claim was dismissed by the court a quo relying upon the decision in *Isaacs v Minister van Wet en Orde* 1996 (1) SACR 314 (A) on the basis that after his first appearance in court, the decision that he should remain in custody pending the trial was never Inspector Kuhn's. It was the decision of the magistrate which rendered Mr Woji's continued detention lawful. Counsel for the minister submitted that this finding of the court a quo, based as it was upon the authority of *Isaacs,* was unassailable.

[21] The central issue this court had to deal with in *Isaacs* was whether as a consequence of the unlawful arrest of the plaintiff, the provisions of s 50(1) of the Act were inapplicable. It was held that the purpose of the section was twofold; to ensure that an arrested person appeared before court as soon as possible after the arrest and to allow the court to order the further detention of the arrested person for the purposes of trial (at 321I-322C). The challenge was directed at the jurisdiction of the magistrate to order the further detention of the accused. Reference was made to *Abrahams v Minister of Justice and others* 1963 (4) SA 542 (C) at 545G-H where the following dictum appears '. . . once there is a lawful detention, the circumstances of the arrest and capture are irrelevant'. This court in *Isaacs* concluded that by the phrase 'lawful detention' was meant detention as a result of a magistrate's order, regardless of whether the arrest was lawful or not. The magistrate had jurisdiction to order the further detention of the plaintiff. The provisions of s 50(1) of the Act were accordingly applicable and the detention was lawful. See also *Grootboom en andere v Minister van Justisie en andere* [1997] 3 All SA 51 (SE).

[22] In *Minister of Justice and Constitutional Development and another v Zealand* 2007 (2) SACR 401 (SCA) para 17, the majority of this court in reliance upon the decisions in *Abrahams* and *Isaacs* concluded that 'a decision by a court to remand an accused person in custody results in lawful detention of that person. Such a decision needs to be set aside before lawful detention in terms thereof ceases'. In *Zealand* the complaint of the plaintiff was that due to the negligence of the registrar of the high court, his successful appeal to the full court against his conviction and sentence for murder was not brought to the attention of the prison authorities. As a

result, he continued to be detained as a sentenced prisoner. During this period he was also detained in another case where he was charged with rape, murder and assault. In this case the plaintiff was remanded in custody on several occasions. The plaintiff alleged that he had been unlawfully detained as a sentenced prisoner, whereas he should have been detained as an awaiting trial prisoner after the success of his appeal. The majority rejected this argument holding in para 19 that 'to detain someone contrary to his or her status does not, however, affect the lawfulness of the detention, which arises from the court order and not from the place or manner of detention'. In other words the successive remand orders issued by the magistrate's court had the effect of rendering his detention lawful albeit that his correct status as a detainee was not recognised during this detention.

[23] Ponnan JA writing for the minority concluded that the validity of the remand orders was irrelevant, as the plaintiff's continuing confinement as a sentenced prisoner was illegal. An action accordingly lay against those who subjected him to this treatment. The action was not a claim for unlawful imprisonment, or deprivation of all liberty, within the context of the *actio injuriarum*.

[24] On appeal to the Constitutional Court in *Zealand v Minister of Justice and Constitutional Development and another* 2008 (4) SA 458 (CC) the single issue which that court determined should be decided, was whether the appellant's detention between the date of his successful appeal and the date of his release, as a sentenced prisoner was unlawful for the purpose of delictual damages. The Constitutional Court held that the claim advanced by the appellant was that his detention as a sentenced prisoner and not merely his detention in itself was unlawful.

[25] The Constitutional Court disagreed with the conclusion of the majority of this court at para 43 that the applicant's detention was justified by the series of magistrate's court orders remanding him in custody. The Constitutional Court disagreed with the majority view that to detain someone contrary to his or her status does not affect the lawfulness of the detention, which arises from the court order and not from the place or manner of detention. The Constitutional Court held at para 43

that this reasoning ignored the substantive protection afforded by the right not to be deprived of freedom arbitrarily or without just cause contained in s 12(1)(*a*) of the Constitution. This right required not only that every encroachment on physical freedom be carried out in a procedurally fair manner, but also that it be substantively justified by acceptable reasons. The mere fact that a series of magistrates issued orders remanding the appellant in detention was not sufficient to establish that the detention was not arbitrary or without just cause. The Constitutional Court then concluded at para 45 that the majority wrongly held that the magistrate's remand orders justified the appellant's deprivation of freedom. The breach of s 12(1)(*a*) of the Constitution was sufficient in the circumstances of the case to render the appellant's detention unlawful for the purposes of a delictual claim for damages, based upon the action for unlawful detention (para 53).

[26] The effect of the Constitutional Court's decision is that the remand orders issued by successive magistrates, did not render lawful, the unlawful detention of the appellant as a sentenced prisoner, when his status should have been that of an awaiting trial prisoner.[5]

[27] In the present case the challenge raised to the lawfulness of Mr Woji's detention is directed at the manner in which the magistrate's discretion was exercised, influenced as it was by the erroneous view of Inspector Kuhn that Mr Woji was the fourth robber in the video. In *Isaacs* and *Zealand* this court was concerned solely with the legal consequences of the detention orders issued by the respective magistrates and not the manner in which the magistrate's discretion was exercised

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[5] In *Minister of Safety and Security v Sekhoto* 2011 (5) SA 367 (SCA) which dealt with the legality of an arrest and the exercise of the discretion to arrest, this court in paras 42-44 stated that once the arrestee is brought before court, the authority to detain, which is inherent in the power to arrest is exhausted. Further detention of the suspect is 'then within the discretion of the court' and entails a 'judicial evaluation to determine whether it is in the interest of justice to grant bail'. The role of the court was to determine whether the suspect ought to be detained pending a trial. The appeal, however, only concerned the lawfulness of the respondents' arrest and not their subsequent detention.

prior to the grant of these orders. In the context of s 12(1)(*a*) of the Constitution and the decision by the Constitutional Court in *Zealand*, an examination of the legality of the manner in which the magistrate's discretion to further detain Mr Woji was exercised, cannot be precluded simply by the existence of the magistrate's order. The Constitutional Court in *Zealand* did not require the decisions of the respective magistrates to be set aside, before the lawfulness of the appellant's detention could be determined. Once it is clear that the detention is not justified by acceptable reasons and is without just cause in terms of s 12(1)(*a*) of the Constitution, the individual's right not to be deprived of his or her freedom is established. This would render the individual's detention unlawful for the purposes of a delictual claim for damages.

[28] The Constitution imposes a duty on the state and all of its organs not to perform any act that infringes the entrenched rights such as the right to life, human dignity and freedom and security of the person. This is termed a public law duty. See *Carmichele v Minister of Safety and Security and another (Centre of Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC) para 44. On the facts of this case Inspector Kuhn, a policeman in the employ of the state, had a public law duty not to violate Mr Woji's right to freedom, either by not opposing his application for bail, or by placing all relevant and readily available facts before the magistrate. A breach of this public law duty gives rise to a private law breach of Mr Woji's right not to be unlawfully detained which may be compensated by an award of damages. There can be no reason to depart from the general law of accountability that the state is liable for the failure to perform the duties imposed upon it by the constitution, unless there is a compelling reason to deviate from the norm. Mr Woji was entitled to have his right to freedom protected by the state. In consequence, Inspector Kuhn's omission to perform his public duty was wrongful in private law terms. See *Minister of Safety and Security and another v Carmichele* 2004 (3) SA 305 (SCA) paras 34-38 and 43.

[29] It will be recalled that the minister admitted that Inspector Kuhn had a legal duty to place before the magistrate all information relevant to the exercise by the magistrate of his discretion, but denied that he had failed to do so. Inspector Kuhn,

however, told the magistrate that Mr Woji appeared on the video and that the video material in respect of all of the accused 'is soos ek en u met mekaar praat, so duidelik is dit' and 'dit is baie sterk, dit is goeie kwaliteit beeldmateriaal'. When asked by the magistrate whether he could see all four accused in the bank on the video, he replied 'dit is korrek, U Edele, al vier was in die bank'.

[30] As pointed out above, Mr Woji was not clearly depicted on the video. Inspector Kuhn accordingly should not have opposed Mr Woji's application for bail, or should at least have told the magistrate that in the case of Mr Woji, he was not clearly depicted on the video. Inspector Kuhn clearly failed in his duty in this regard. Having concluded that Inspector Kuhn's conduct was wrongful, it has to be determined whether his conduct was also negligent. It is clear that a reasonable policeman in the position of Inspector Kuhn with only the video material to implicate Mr Woji, would not have opposed bail, or would at the very least advised the magistrate that he was not clearly depicted on the video. This Inspector Kuhn did not do. See *Carmichele* (SCA) paras 46 and 50.

[31] From the evidence led at the bail hearing it is also clear that a reasonable policeman in the position of Inspector Kuhn would have foreseen the reasonable possibility that his evidence would lead to the refusal of Mr Woji's application for bail. The magistrate sought the assurance of Inspector Kuhn that all four accused were visible on the video inside the bank before refusing bail. In his judgment refusing bail, the magistrate stated that 'there is evidence from the Investigating Officer Inspector Kuhn that he viewed the video himself and it is clear to him that all four of the accused are implicated in this offence'.

[32] The detention of Mr Woji, however, resulted from the order granted by the magistrate. In order to determine whether the conduct of Inspector Kuhn was a *sine qua non* and therefore the factual cause of Mr Woji's detention, it has to be determined 'what the relevant magistrate on the probabilities would have done' had the application for bail not been opposed, or Inspector Kuhn had revealed that Mr Woji was not clearly depicted on the video. See *Carmichele* (SCA) para 60. Because

the video was the only evidence ostensibly linking Mr Woji to the crime, the magistrate more probably than not would have released him on bail. It is also clear that Inspector Kuhn's wrongful conduct was sufficiently closely connected to the loss for liability to follow, hence it also constituted the legal cause of that loss. See *Carmichele* (SCA) para 71. The court a quo therefore erred in dismissing the appellant's claim for unlawful detention. The duration of his unlawful detention was accordingly from 12 December 2007 when bail was refused, until his release on 13 January 2009, a period of 13 months.

Malicious prosecution

[33] Mr Woji had to allege and prove that Inspector Kuhn:

(a) Set the law in motion (instituted or instigated the proceedings)

(b) Acted without reasonable and probable cause

(c) Acted with malice (*animo injuriandi*) and

(d) The prosecution failed.

See *Minister of Justice and Constitutional Development v Moleko* [2008] 3 All SA 47 (SCA) para 8.

[34] The minister admitted that Inspector Kuhn had set the law in motion against Mr Woji on a charge of armed robbery, but alleged that he acted lawfully and reasonably in doing so. The minister further alleged that prosecutors employed by the National Prosecuting Authority correctly decided to prosecute Mr Woji on a charge of armed robbery. With regard to the liability of the SAPS, the question is whether Inspector Kuhn did anything more than one would expect from a police officer in the circumstances, namely to give a fair and honest statement of the relevant facts to the prosecutor, leaving it to the latter to decide whether to prosecute or not. See *Moleko* para 11. Whether Inspector Kuhn did so, will be determined in conjunction with an examination of whether Mr Woji proved the necessary element of malice on Inspector Kuhn's part.

[35] In *Moleko* para 64 this court dealt with what had to be proved in order to establish malice:

'The defendant must thus not only have been aware of what he or she was doing in instituting or initiating the prosecution, but must at least have foreseen the possibility that he or she was acting wrongfully, but nevertheless continued to act, reckless as to the consequences of his or her conduct (*dolus eventualis*). Negligence on the part of the defendant (or, I would say, even gross negligence) will not suffice.' [Citations left out.]

[36] It has been found that Inspector Kuhn acted negligently in opposing bail or at the least in failing to tell the magistrate that Mr Woji was not clearly depicted on the video. However, it is clear on the evidence that until he was presented with the reports of the identification experts to be called by Mr Woji and the minister at the hearing before the court a quo, which he conceded he had to accept, he believed that Mr Woji was the fourth robber in the video. He said he found it strange that they said it was not Mr Woji, because he felt the individual was Mr Woji. He added that 'inside me' he still thought the individual looked like Mr Woji.

[37] When regard is had to all of the evidence including the additional information that Inspector Kuhn had as to the identity of the fourth robber, this engendered a reasonable suspicion in him that this person was Mr Woji. This suspicion clearly coloured his perception of the video material to such a degree that he genuinely believed it depicted Mr Woji. In this he acted negligently, even grossly negligently. The consequence is that he gave an honest but unfair statement of the facts implicating Mr Woji, to the prosecutor and magistrate. However, this does not establish that he subjectively foresaw the possibility that this individual was not Mr Woji and recklessly continued to assert that he was. Mr Woji accordingly failed to establish an essential element of the claim for malicious prosecution. This conclusion applies equally to the alternative claims advanced by Mr Woji for malicious arrest and detention which must accordingly fail.

Quantum

[38] In *Minister of Safety and Security v Seymour* 2006 (6) SA 320 (SCA) para 20, this court having reviewed a number of previous awards for unlawful detention concluded that there was no discernible pattern other than that the courts were not extravagant in compensating the loss. It was pointed out at para 17 that the award of general damages with reference to awards made in previous cases was fraught with difficulty. The facts of a particular case needed to be looked at as a whole and few cases were directly comparable.

[39] In *Seymour*, the respondent was detained for five days at a police station, during which time he had free access to his family and medical advisor. He suffered no degradation beyond that which was inherent in being arrested and detained. After the first period of 24 hours the remainder of the detention was in a hospital bed at the Rand Clinic. This court reduced the award of damages from R500 000 to R90 000.

[40] Mr Woji described what can only be regarded as appalling conditions he was forced to endure whilst in detention. Cells were overcrowded, dirty and with insufficient beds to sleep on. He was subject to the control of a gang, whom he said sodomised other prisoners. As a result, he suffered the appalling, humiliating and traumatic indignity of being raped on two occasions, which he did not report to the prison authorities, because he feared retaliation from gang members. As a consequence, he has difficulty in enjoying sexual relations with his girlfriend. He also witnessed another prisoner being stabbed which made him fearful for his safety. After eight months he was allocated a single cell. His situation then improved, because he had a bed to sleep on but he was isolated and lonely.

[41] Mr Woji's description of his experiences and the conditions he endured whilst in detention were not disputed by the minister's legal representative when he was cross-examined. No evidence was led by the minister to contradict any of his

allegations. Mr Woji was detained for 13 months and suffered humiliating and degrading experiences. A suitable award of damages is the sum of R500 000.[6]

[42] The following order is made:

1 The appeal is upheld with costs such costs to include the costs of two counsel.

2 The order of the court a quo is set aside and replaced with the following order:

'2.1 Judgment is granted in favour of the plaintiff for payment of the sum of R500 000 as against the defendant in respect of plaintiff's unlawful detention for the period 12 December 2007 to 13 January 2009.

2.2 The defendant is ordered to pay interest on the sum of R500 000 at the rate of 15.5 per cent per annum *a tempore morae* from date of demand to date of payment.

2.3 The defendant is ordered to pay the plaintiff's costs of suit together with interest thereon at the rate of 9 per cent per annum *a tempore morae* from 14 days after taxation of the plaintiff's costs to date of payment.'

K G B SWAIN

JUDGE OF APPEAL

[6] The disparity between the mora rate of interest awarded in paras 2.2 and 2.3 of the order is occasioned by the variation in the prescribed rate of interest from 15.5 per cent per annum to 9 per cent per annum as from 1 August 2014 (Government Gazette No 37831 dated 18 July 2014). The rate prescribed at the time when interest begins to run (ie. 15.5 per cent in para 2.2) governs the calculation of interest and does not vary if the prescribed rate is adjusted in the interim. *Davehill (Pty) Ltd v Community Development Board* 1988 (1) SA 290 (A) at 300G-302A. However, interest on a costs order, only begins to run from the date of the taxing master's allocatur (ie. 9 per cent in para 2.3). *Administrateur, Transvaal v JD Van Niekerk en Genote Bpk* 1995 (2) SA 241 (A).

Appearances:

For the Appellant:	B J Pienaar SC (with him M F Horn)
	Instructed by:
	O'Brien Inc Attorneys, Port Elizabeth
	Honey Attorneys, Bloemfontein
For the Respondent:	C J Mouton SC (with him M Simoyi)
	Instructed by:
	The State Attorney, Port Elizabeth
	The State Attorney, Bloemfontein