CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 183/22

In the matter between:

MMABASOTHO CHRISTINAH OLESITSE N.O. Applicant

and

MINISTER OF POLICE Respondent

Neutral citation:	*Mmabasotho Christinah Olesitse N.O. v Minister of Police* [2023] ZACC 35
Coram:	Zondo CJ, Maya DCJ, Kollapen J, Madlanga J, Majiedt J, Makgoka AJ, Mathopo J, Potterill AJ and Theron J
Judgments:	Makgoka AJ (majority): [01] to [74] Zondo CJ (concurring): [75] to [86]
Heard on:	16 February 2023
Decided on:	14 November 2023
Summary:	Application of the "once and for all" common law rule — applicable to only one cause of action and not to more than one cause of action — whether misapplication of the law or development of common law.

ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Gauteng Division, Pretoria):

1. Leave to appeal is granted.
2. The appeal is upheld with costs, including costs of two counsel.
3. The order granted by the Supreme Court of Appeal is set aside and replaced with the following:
   "1. The appeal is upheld with costs, including costs of two counsel.
   2. The order of the High Court is set aside and replaced with the following order:
   'The respondent's objection on the point of law is dismissed with costs.'"
4. The matter is remitted to the High Court to adjudicate the applicant's claim for malicious prosecution.

JUDGMENT

MAKGOKA AJ (Maya DCJ, Kollapen J, Madlanga J, Majiedt J, Mathopo J, Potterill AJ and Theron J concurring):

Introduction

[1] The issue in this application is whether the common law "once and for all" rule applies to two or more causes of action arising from the same facts. Both the High Court of South Africa, Gauteng Division, Pretoria (High Court) and the Supreme Court of Appeal answered the question in the affirmative. This is an application for leave to appeal against the judgment and order of the Supreme Court of Appeal. That Court dismissed the applicant's appeal against an order of the High Court, which upheld the respondent's objection that the applicant's claim

for malicious prosecution amounted to a duplication of an earlier claim for unlawful arrest and detention. The High Court, invoking the "once and for all" rule, held that the two claims should have been brought in a single action. Consequently, it dismissed the applicant's claim and made no order as to costs.

[2] The applicant is Mrs Mmabasotho Christinah Olesitse, who acts in her capacity as the executrix in the deceased estate of her late husband, Mr Tebogo Patrick Olesitse (deceased). The deceased died on 18 July 2019, a few months before the judgment of the High Court was delivered. The applicant was subsequently appointed the executrix in the deceased's estate, and a notice of substitution was filed.

[3] The respondent is the Minister of Police, cited in his official capacity. It is common cause that at all material times the members of the South African Police Service (SAPS), whose conduct was the subject of the two actions in the High Court, were acting within the scope and course of their employment with the respondent.

Factual background

[4] During his lifetime, the deceased was employed as a police officer in the SAPS. He was stationed at the Mafikeng Police Station, North West Province, in the vehicle identification section. In May 2008, a police task force conducted a large-scale operation in respect of vehicles and vehicle parts that had been stolen from police custody in the North West Province. The vehicles in question had been stored in a "SAP 13 yard"[1] under the control of the police in terms of various provisions of the Criminal Procedure Act.[2]

[5] Following this operation, several police officers, including the deceased, were arrested. The deceased was arrested without a warrant on 19 May 2008 and charged with theft and corruption. He was held in detention for ten days from 19 May 2008

[1] This emanates from the SAP 13 register in which goods seized and confiscated by members of the SAPS are recorded. The "SAP13 yard " refers to a yard where the confiscated vehicles were kept.

[2] 51 of 1977.

until 29 May 2008 when he was released on bail. On 19 February 2009, the Director of Public Prosecutions (DPP) provisionally withdrew the charges against the deceased, and finally withdrew the charges on 17 May 2011.

Litigation history

High Court

[6] On 26 May 2011, the deceased instituted action against the respondent in the High Court under case number 29788/2011 (first action) in which he claimed R400 000 for alleged wrongful arrest and detention based on his arrest on 19 May 2008 and the subsequent detention. In response, the respondent raised, among others, a special plea of prescription. It pleaded that the summons was served more than three years after the alleged unlawful arrest and detention, and had therefore prescribed in terms of section 11(d) of the Prescription Act,[3] in terms of which the period of prescription is three years.

[7] On 19 May 2012, the High Court upheld the respondent's special plea of prescription in respect of the unlawful arrest. With regard to the claim for unlawful detention, the High Court held that that claim had not yet prescribed for the period between 26 to 29 May 2008, and ordered that the deceased was entitled to pursue that claim in respect of that period.

[8] On 12 December 2012, and while the first action was pending, the deceased instituted another action against the respondent in the High Court under case number 71947/12 (second action), claiming R400 000 for alleged malicious prosecution, based on substantially the same facts which underpinned the claim for unlawful arrest and detention, and on the additional fact that, on 17 May 2011, the DPP finally withdrew the charges against him.

[3] 68 of 1969.

[9] On 11 May 2016, pursuant to the order of 19 May 2012, the High Court adjudicated the merits of what was left of the first claim and awarded the deceased R90 000 in damages for unlawful detention for the period 26 to 29 May 2008.

[10] The second claim was set down to be heard on 3 March 2020. Shortly before the hearing, the respondent served a notice of objection to the second claim, based on a point of law. The respondent contended that the second action was a duplication of the first action, and offended the "once and for all" rule, in terms of which a claimant is obliged to claim all damages arising from one cause of action in a single action. The notice of objection reads:

> "1. That the plaintiff's claim is a duplication of actions and offends the rule of common law that obliges the claimant/litigant to claim all damages arising from one cause of action on a single action ("*once and for all*" rule). Consequently, the plaintiff's [action] is legally incompetent.
>
> . . .
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> 3. The plaintiff seeks *solatium* or satisfaction for his wounded feelings allegedly caused by wrongful conduct of the defendant's employees.
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> 4. The plaintiff's action [is] arising from the same facts and circumstances for which compensation has been sought and awarded to the plaintiff by Mr. Justice Baqwa on 11 May 2016, under case No: 29788/2011.
>
> . . .
>
> 6. In these proceedings the plaintiff claims damages for the following injuries: *Contumelia,* deprivation of freedom and discomfort allegedly suffered as [a] result of the police's conduct.
>
> 7. Defendant contends that the plaintiff's action under these circumstances, constitute a duplication of actions. Consequently, it is legally incompetent."[4]

[4] *Olesitse N.O. v Minister of Police* [2022] ZASCA 90 at para 13 (SCA judgment).

[11] The respondent's objection was adjudicated separately as a point of law in terms of rule 33(4) of the Uniform Rules of Court.[5] The High Court delivered its judgment on 14 April 2020. It referred to the trite principle that courts seek to avoid a multiplicity of actions based on the same subject matter.[6] It alluded to the mechanisms in our law aimed to avoid this, namely the principles of *res judicata* (a thing adjudged), *lis pendens* (lawsuit pending), and the "once and for all" rule,[7] and to the well-known passage in *Evins*[8] where these principles were explained.

[12] The High Court accepted that the claim for unlawful arrest and detention and the claim for malicious prosecution were two separate and distinct causes of action. The High Court observed that, when regard is had to the pleadings in the first and the second actions, there was a significant overlap between what was alleged in both actions.[9] According to the High Court, the only distinguishing factor on the pleadings in both actions was the allegation of malice in the second action. The Court observed:

> "In respect of all other facts, save for the alleged malice, this Court has already given a final order. The damage-causing facts have already been determined, irrespective of the nature of the unlawfulness and the identity of the actual perpetrator.
>
> The second action was clearly launched in order to avoid the consequences of Murphy J having found that a portion of the period of detention could no longer form part of the plaintiff's claim due to the fact that it had already become prescribed. Had it not been for the fact that a final conclusion of a criminal case is necessary to complete a claim

[5] Rule 33(4) states that:

> "If, in any pending action, it appears to the court mero motu that there is a question of law or fact which may conveniently be decided either before any evidence is led or separately from any other question, the court may make an order directing the disposal of such question in such manner as it may deem fit and may order that all further proceedings be stayed until such question has been disposed of, and the court shall on the application of any party make such order unless it appears that the questions cannot conveniently be decided separately."

[6] *Olesitse N.O. v Minister of Police*, unreported judgment of the High Court, Case No: 71947/2012 at para 4.3 (13 April 2020) (High Court judgment).

[7] Id.

[8] *Evins v Shield Insurance* 1980 (2) SA 814 (A) at 835E-836A.

[9] High Court Judgment above n 6 at paras 5.2 and 5.9.

> based on malicious prosecution (which only occurred on 17 May 2011) the claim in the second action would have suffered the same fate."[10]

[13] The High Court went on to consider whether the second claim ought to be allowed to proceed where there was "a very technical distinction between the two causes of action, but all the other facts and matters to be decided on are materially the same".[11] Finally, the High Court considered other factors such as: (a) the possibility of double jeopardy against the respondent; (b) the potential loss of available witnesses due to effluxion of time; and (c) the possible inconvenience to the respondent for being put to the same expense it incurred in defending the first action.

[14] As a result, the High Court upheld the respondent's objection, dismissed the applicant's claim based on malicious prosecution, and ordered each party to pay its own costs.

[15] The applicant applied for leave to appeal against the judgment and order of the High Court. That application was brought late, and the applicant sought condonation. On 19 November 2020 the High Court refused condonation with costs. Aggrieved by that order, on 17 December 2020, the applicant applied to the Supreme Court of Appeal for leave to appeal.

[16] On 8 April 2021 the Supreme Court of Appeal granted the applicant leave to appeal to it against the High Court's order dismissing her application for condonation. The parties were notified, in terms of section 16 of the Superior Courts Act,[12] to be prepared, if called upon to do so, to address the Court on the merits of the appeal against the High Court's judgment and order of 14 April 2020.

[10] Id at paras 5.2-5.3.

[11] Id at para 5.4.

[12] 10 of 2013.

Supreme Court of Appeal

[17] The Supreme Court of Appeal heard the application on 11 May 2022 and delivered its judgment on 15 June 2022. With regard to condonation it held that, given the explanation by the applicant's attorney for the delay in filing the applicant's application for leave to appeal, the High Court ought to have condoned the late delivery of the application for leave to appeal. The Supreme Court of Appeal accordingly granted condonation, as well as leave to appeal, and considered the merits of the application.

[18] In deciding whether the second action was a duplication of the first, the Supreme Court of Appeal compared the allegations in both sets of particulars of claim. It placed much store on the fact that in both actions, the deceased had relied substantially on the same set of facts, and had, in respect of both actions, claimed R400 000 for "contumelia, deprivation of freedom and discomfort" as a result of the alleged conduct of members of the SAPS.

[19] Like the High Court, the Supreme Court of Appeal accepted that malicious prosecution on the one hand, and unlawful arrest and detention on the other, are two different and distinct causes of action. However, it held that on the facts of this case, arising as they did from the same set of facts, those differences were insignificant to allow different actions.

[20] The Court then considered the "once and for all" rule. With reference to authors Visser and Potgieter,[13] and the judgments in *Shembe*[14] and *Evins*,[15] the Court emphasised the essence of the rule, namely, that where the damage results from a single cause of action, a plaintiff must claim damages once for all damage already sustained or expected in future. It also emphasised the rationale behind the rule, namely, "to

[13] Potgieter et al *Visser and Potgieter: Law of Damages* 3 ed (Juta, 2012) at 153.

[14] *Custom Credit Corporation (Pty) Ltd v Shembe* 1972 (3) SA 462 (A) at 472A-D.

[15] *Evins* above n 8 at 835B-D.

prevent inextricable difficulties arising from discordant or conflicting decisions due to the same suit being aired more than once in different judicial proceedings or actions".[16]

[21] The Supreme Court of Appeal concluded that the High Court was correct in upholding the respondent's objection that the second action was a duplication of the first. It emphasised that despite there being two causes of action, the deceased was barred by the "once and for all" rule from instituting the second action. In the result, it dismissed the appeal with no order as to costs.

In this Court

The applicant's submissions

Jurisdiction and leave to appeal

[22] The applicant submits that by applying the "once and for all" rule to two causes of action, the High Court and the Supreme Court of Appeal have developed the common law, without considering whether the rule suffered any deficiency that is at odds with the Constitution and the Bill of Rights. This, according to the applicant, is a constitutional issue that engages this Court's jurisdiction. The applicant further argues that the matter raises an arguable point of law of general public importance. She contends that the question of whether the "once and for all" rule can be used to non-suit a subsequent claim, based on a separate cause of action, albeit arising from the same set of facts, raises a novel question of law that transcends the interests of the litigants.

[16] *Shembe* above n 14 at 472A-D.

Merits

[23] The applicant submits that there is a clear distinction between unlawful arrest and detention, on the one hand, and malicious prosecution, on the other. She further submits that the material facts and the legal issues involved in each case are different and do not overlap. The applicant contends that the High Court and the Supreme Court of Appeal extended the application of the "once and for all" rule to two causes of action that arose from the same set of events, and therefore gave rise to overlapping damages.

[24] The applicant further contends that both Courts erred in holding that the deceased should have instituted his claims in one action. She submits that the Supreme Court of Appeal erred in its holding that, because the two causes of action arose from the same set of facts, the differences between the two causes of action were insignificant.

[25] The applicant also asserts that the factual material that was available before the Supreme Court of Appeal was insufficient for an assessment of whether the common law should be developed. Finally, the applicant contends that the Supreme Court of Appeal's holding constitutes a new rule of general application which has never formed part of our common law and accordingly, creates uncertainty.

The respondent's submissions

Jurisdiction and leave to appeal

[26] The respondent contends that the judgments and orders of the High Court and the Supreme Court of Appeal are fact-specific and have no general application. As such, neither of the Courts developed the "once and for all" rule as argued by the applicant. The respondent also submits that the applicant's argument on the development of the common law was raised for the first time in this Court, and should therefore, not be considered by this Court.

[27] The respondent further argues that even if the Supreme Court of Appeal's reasoning was incorrect, it would amount to a misapplication of the law to the facts of the case, which does not raise a constitutional issue. Lastly, the respondent submits that even if the matter did engage this Court's jurisdiction within the meaning of section 167(3)(b), it is not in the interest of justice for this Court to engage in what would be a reappraisal of the issues already decided in respect of the first action.

Merits

[28] The respondent argues that when the deceased filed the first action on 26 May 2011, he had all the necessary facts to institute a single action to recover damages and compensation for both the unlawful arrest and detention, and malicious prosecution. By then the charges against the deceased had been withdrawn. The deceased simply opted not to pursue the two actions simultaneously. Consequently, the deceased was barred from pursuing the second action separately, considering the public policy considerations that underpin the "once and for all" rule as articulated in the judgments of the High Court and the Supreme Court of Appeal. This is more so, argues the respondent, when considering the Supreme Court of Appeal's conclusion that in this case, the differences between the claims for unlawful arrest and detention, and for malicious prosecution, were insignificant because they arose from the same set of facts.

Issues

[29] The issues before this Court are whether:

(a) this Court has jurisdiction to hear this matter;

(b) the applicant should be granted leave to appeal;

(c) the applicant's argument on the development of the common law should be entertained; and

(d) the High Court and the Supreme Court of Appeal misapplied the "once and for all" rule or developed the common law.

I consider these, in turn.

Jurisdiction

Constitutional issue raised for the first time in this Court

[30] The issue of constitutional jurisdiction raises a couple of sub-issues. The first is whether the applicant should be permitted to raise a constitutional issue for the first time in this Court. The constitutional issue asserted for the first time before this Court is the alleged development of the common law.

[31] In my view, the submission by the respondent on this issue can be disposed of summarily. It is now settled that the mere fact that a point of law is raised for the first time on appeal is not in itself sufficient reason for refusing to consider it. The proviso is that a party will not be permitted to raise a point that was not covered in the pleadings if its consideration will result in unfairness to the other party.[17] In the present case, it is so that the issue was not pertinently raised in either the High Court or the Supreme Court of Appeal. But what is unique here is that the applicant's point of law is largely predicated on the holding by the Supreme Court of Appeal that the "once and for all" rule can be applied to two causes of action if they arise from the same facts. Also, there is neither unfairness nor prejudice to the respondent as he has had the fullest opportunity to deal with the issue and does not contend otherwise. It is thus in the interests of justice that this point be considered by this Court.

Misapplication of the law or development of the common law?

[32] The question is whether by applying the "once and for all" rule to two causes of action, the Supreme Court of Appeal merely misapplied the law or whether it developed the common law. It is now trite that, ordinarily, the mere misapplication of an accepted

[17] *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) at para 39.

common law rule by a High Court or the Supreme Court of Appeal does not raise a constitutional matter, and thus does not engage this Court's jurisdiction.[18]

Misapplication of law

[33] In *Villa Crop*,[19] this Court held that the misapplication of law ordinarily occurs when a legal standard that is correctly stated and adopted is then applied to the facts so as to derive a conclusion that cannot be sustained.[20] But the adoption of an incorrect legal standard to decide a matter is not a misapplication of law but an error of law.[21] It is not a misapplication of the law because the decision does not proceed from a correct legal premise to an incorrect conclusion as a result of a failure to properly apply the law to the relevant facts.[22]

[34] In the present matter, both the High Court and the Supreme Court of Appeal adopted an incorrect "legal standard" by applying the "once and for all" rule to facts to which the rule does not apply. In my view, that does not amount to a misapplication of law, but an error of law. In *Villa Crop*, it was held that an error of law which infringes upon the rights of litigants to enjoy access to the courts, contrary to section 34 of the Constitution,[23] raises a constitutional issue which engages the jurisdiction of this Court.[24] By parity of reasoning, a misapplication of the law which has the same effect,

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[18] *Booysen v Minister of Safety and Security* [2018] ZACC 18; 2018 (6) SA 1 (CC); 2018 (9) BCLR 1029 (CC) at para 50; *Loureiro v Imvula Quality Protection (Pty) Ltd* [2014] ZACC 4; 2014 (3) SA 394 (CC); 2014 (5) BCLR 511 (CC) at para 33; *Mankayi v AngloGold Ashanti Ltd* [2011] ZACC 3; 2011 (3) SA 237 (CC); 2011 (5) BCLR 453 (CC) at paras 10-12 and; *Phoebus Apollo Aviation CC v Minister of Safety and Security* [2002] ZACC 26; 2003 (2) SA 34 (CC); 2003 (1) BCLR 14 (CC) at para 9.

[19] *Villa Crop Protection (Pty) Ltd v Bayer Intellectual Property GmbH* [2022] ZACC 42; 2023 (4) BCLR 461 (CC).

[20] Id at para 64.

[21] Id at para 65.

[22] Id.

[23] Section 34 states the following:

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

[24] *Villa Crop* above n 19 at para 68.

must perforce raise a constitutional issue which engages the jurisdiction of this Court. In *Boesak*[25] this Court held that the application of a legal rule by the Supreme Court of Appeal may constitute a constitutional matter, if such application is inconsistent with some right or principle of the Constitution.[26]

[35] O'Regan points out that a constitutional issue is raised where "an individual's rights have been infringed because a legal norm has been applied to a set of facts in a manner oblivious or careless of constitutional rights".[27] To my mind, this is what the High Court and the Supreme Court of Appeal did in this case. The manner in which those Courts applied the "once and for all" rule disregarded the applicant's right of access to courts entrenched in section 34 of the Constitution.

[36] The upshot of the above is that even if what happened in this case amounts to a misapplication of the law (which ordinarily does not engage this Court's jurisdiction), such misapplication has impacted on the applicant's constitutional right of access to courts. Both the High Court and the Supreme Court of Appeal appear to have applied the "once and for all" rule oblivious to this right. By doing so, those Courts permanently prevented the applicant from having the deceased's claim based on malicious prosecution resolved by the application of law before a court as provided in section 34 of the Constitution. That, without doubt, engages this Court's jurisdiction.

[25] *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC).

[26] Id at para 15.

[27] O'Regan "On the Reach of the Constitution and the Nature of Constitutional Jurisdiction: A Reply to Frank Michelman" in Woolman and Bishop (eds) *Constitutional Conversations* (Pretoria University Law Press, Pretoria 2008) at 77-78.

Development of the common law

[37] Our Constitution requires a court when developing the common law to promote the spirit, purport and objects of the Constitution.[28] In *Thebus*,[29] this Court noted that there were at least two instances in which the need to develop the common law under section 39(2) of the Constitution could arise. First, when a rule of the common law is inconsistent with a constitutional provision. Second, when a rule of the common law is not inconsistent with a specific constitutional provision but may fall short of its spirit, purport and objects.[30]

What constitutes "development" of the common law?

[38] Rautenbach[31] posits that:

> "The extension or restriction of the scope of an existing rule may happen by implication. It could occur that an existing rule is formally repeated in a court judgment without any reference to any changes in its text, but that it is applied to undisputed facts in a way that clearly indicates that the rule was understood by the court in a different way than the way it had been understood previously."[32]

[39] Davis and Klare assert that "'[d]evelopment' plainly includes instances when courts expressly change a rule or introduce a new one."[33] In *K v Minister of Safety and Security*,[34] this Court considered what it referred to as "the difficult question" of what constitutes "development" of the common law for the purposes of section 39(2). O'Regan explained:

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[28] Section 39(2) of the Constitution reads:

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

[29] *S v Thebus* [2003] ZACC 12; 2003 (6) SA 505 (CC); 2003 (10) BCLR 1100 (CC).

[30] Id at para 28.

[31] Rautenbach "Does the Misapplication of a Legal Rule Raise a Constitutional Matter: A Fifty-Fifty Encounter with Common-Purpose Criminal Liability" (2019) 4 *SALJ* 757.

[32] Id at 759.

[33] Davis and Klare "Transformative Constitutionalism and the Common Law and Customary Law" (2010) 26 *SAJHR* 403 at 427.

[34] *K v Minister of Safety and Security* [2005] ZACC 8; 2005 (6) SA 419 (CC); 2005 (9) BCLR 835 (CC).

> "In considering this, we need to bear in mind that the common law develops incrementally through the rules of precedent. The rules of precedent enshrine a fundamental principle of justice: that like cases should be determined alike. From time to time, a common-law rule is changed altogether, or a new rule is introduced, and this clearly constitutes the development of the common law. More commonly, however, courts decide cases within the framework of an existing rule. There are at least two possibilities in such cases: *firstly, a court may merely have to apply the rule to a set of facts which it is clear fall within the terms of the rule or existing authority.* The rule is then not developed but merely applied to facts bound by the rule. Secondly, however, a court may have to determine whether a new set of facts falls within or beyond the scope of an existing rule. The precise ambit of each rule is therefore clarified in relation to each new set of facts. A court faced with a new set of facts, not on all fours with any set of facts previously adjudicated, must decide whether a common-law rule applies to this new factual situation or not. *If it holds that the new set of facts falls within the rule, the ambit of the rule is extended.* If it holds that it does not, the ambit of the rule is restricted, not extended."[35] (Emphasis added.)

[40] As to whether an existing common law rule has been changed, it indubitably has. I elaborate on this later when I deal with the question whether the Supreme Court of Appeal applied the "once and for all" rule to a single cause of action or to more than one cause of action, and the implications of what that Court did. For present purposes, it suffices to conclude that the change to the common law rule constituted a development of the common law. And because its effect was to bar the applicant from instituting a claim for malicious prosecution, that – as I said – implicates the section 34 right.

[41] I distill the following possible instances of the development of the common law from the exposition in *K v Minister of Safety and Security*:

(a) where an existing common law rule is changed;

(b) where a new common law rule is introduced; or

[35] Id at para 16.

(c) whether a court decides that an existing common law rule is applicable or not applicable to a new set of facts to which it has never been applied before, the former being an extension of the rule and the latter being a restriction of the rule.

[42] I consider these to determine whether the development of the common law has occurred in the present case. As to the introduction of a new rule, prior to the judgment and order of the Supreme Court of Appeal (endorsing that of the High Court), the "once and for all" rule had always been applied to a single cause of action. By holding that the rule can be applied to two causes of action, the Supreme Court of Appeal has clearly introduced a new rule, hitherto unknown. For reasons similar to those I give in respect of a change to an existing common law rule, this too engages our constitutional jurisdiction.

[43] Did the High Court and the Supreme Court of Appeal apply an existing common law rule to a new set of facts? Yes, they did. They have determined that a new set of facts (two causes of action) fall within the existing rule ("once and for all" rule). This also engages this Court's constitutional jurisdiction.

[44] Furthermore, it appears that public policy considerations influenced the decision of both Courts to apply the "once and for all" rule to two causes of action. To that extent, this Court is required to consider whether this development is in line with the spirit, purport and objects of the Bill of Rights. On these considerations, too, this Court's constitutional jurisdiction is undoubtedly engaged.

[45] Lastly, the question as to whether the "once and for all" rule can be applied to two causes of action is an arguable point of law of general public importance that transcends the interests of the parties. As will become clear later, the merits of this argument are good. Thus, this Court's extended jurisdiction in terms of section 167(3)(b)(ii) is also engaged.

[46] Thus, on each of the above bases, either severally or cumulatively, the jurisdiction of this Court is engaged.

[47] I have read the judgment prepared by the Chief Justice. The Chief Justice accepts that the development of the common law may well have occurred. However, he prefers to found jurisdiction and dispose of the matter on a narrower basis, which is that the judgment of the Supreme Court of Appeal implicates the section 34 right. In my view, it is not only appropriate for us to consider whether the common law has been developed. We are duty-bound to do so, for two reasons.

[48] The first is that the development of the common law point was pertinently raised by the applicant in this Court, and was exhaustively debated during the hearing. The second is what is commanded in *K v Minister of Safety and Security*:

> "The obligation imposed upon courts by section 39(2) of the Constitution is thus extensive, requiring courts to be alert to the normative framework of the Constitution not only when some startling new development of the common law is in issue, but in all cases where the incremental development of the rule is in issue."[36]

[49] The development of the common law can occur unintentionally. Thus, it is irrelevant that neither the High Court nor the Supreme Court of Appeal consciously set out to develop the common law. In my view, both Courts "startlingly" decided that the "once and for all" rule is applicable to more than one cause of action, contrary to how the rule has always been applied. The Supreme Court of Appeal was not only wrong in doing so. It created an exception to the rule. This it did without either laying a proper basis or delineating the contours of such an exception.

[36] Id at para 17.

Leave to appeal

[50] The determination of whether to grant leave to appeal is distinct from the consideration of jurisdiction and entails a discretionary exercise that necessitates assessing whether the interests of justice favour granting leave.[37] An important consideration in this regard is that of prospects of success.[38] In my view, the legal issue raised in this matter points to good prospects in that both the High Court and the Supreme Court of Appeal developed the common law but failed to align such development with the Constitution. In all the circumstances, it is in the interests of justice for this Court to grant leave to appeal and determine the appeal.

Merits

[51] What is in issue here is the ambit and application of the "once and for all" rule. The rule is derived from English law, and requires that all claims generated by the same cause of action be instituted in one action. In *Shembe*, the Appellate Division explained the essence of the rule, stating that "the law requires a party with a single cause of action to claim in one and the same action whatever remedies the law accords him or her upon such cause".[39] The Court explained the ratio underlying the rule: if a cause of action has previously been finally litigated between the parties, then a subsequent attempt by the one to proceed against the other on the same cause for the same relief can be met by a defence of *res judicata*.[40] The rationale is to prevent inextricable difficulties arising from discordant or conflicting decisions due to the same suit being aired more than once in different judicial proceedings or actions.[41] Furthermore, the rule has its origin in considerations of public policy, which require that there should be a term set to litigation and that a party should not be twice harassed in respect of the same cause of action.[42]

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[37] *Paulsen v Slip Knot Investments 777 (Pty) Ltd* [2015] ZACC 5; 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 (CC) (*Paulsen*) at para 18.

[38] *S v Pennington* [1997] ZACC 10; 1997 (4) SA 1076 (CC); 1997 (10) BCLR 1413 (CC) at para 52.

[39] *Shembe* above n 14 at 472A.

[40] Id.

[41] Id at 472B.

[42] Id at 472B-D.

[52] In *Evins*, Corbett JA, in an oft-quoted passage, restated the principles enunciated in *Shembe*, as follows:

> "[I]ts purpose is to prevent a multiplicity of actions based upon a single cause of action and to ensure that there is an end to litigation. Closely allied to the 'once and for all' rule is the principle of *res judicata* which establishes that, where a final judgment has been given in a matter by a competent court, then subsequent litigation between the same parties, or their privies, in regard to the same subject-matter and based upon the same cause of action is not permissible and, if attempted by one of them, can be met by the *exceptio rei judicatae vel litis finitae*. The object of this principle is to prevent the repetition of lawsuits, the harassment of a defendant by a multiplicity of actions and the possibility of conflicting decisions . . . The principle of *res judicata*, taken together with the 'once and for all' rule, means that a claimant for Aquilian damages who has litigated finally is precluded from subsequently claiming from the same defendant upon the same cause of action additional damages in respect of further loss suffered by him (i.e., loss not taken into account in the award of damages in the original action), even though such further loss manifests itself or becomes capable of assessment only after the conclusion of the original action."[43]

[53] As mentioned, both the High Court and the Supreme Court of Appeal recognised that there was not one cause of action in respect of the applicant's claims, but two. In spite of this, they held that, because they arose from the same set of facts, the claims based on the two causes of action should have been instituted in one action. The High Court reasoned that a single act can give rise to two causes of action. It gave this example: while an assault on a person infringes upon a victim's right to bodily integrity, a damages claim for physical injuries may arise. The High Court held that damages based on the various causes of action in that factual setting, must be claimed in a single action. For this proposition, the High Court sought reliance on a passage in *Dey*[44] where this Court said:

[43] *Evins* above n 8 at 835E-H.

[44] *Le Roux v Dey* [2011] ZACC 4; 2011 (3) SA 274 (CC); 2011 (6) BCLR 577 (CC).

> "In view of this constant overlapping of manifestations of *iniuria*, duplication of *actiones* would therefore have been expected as a matter of common occurrence, if it were allowed in principle. Yet, like Harms DP, I am unaware of a single case where two actions for *iniuria* were allowed on the same facts. On the contrary, as pointed out by the majority in the Supreme Court of Appeal, it is recognised that an award of damages for defamation should compensate the victim for both wounded feelings and the loss of reputation. I see that as an implicit endorsement of the principle that the plaintiff will not be able to succeed in separate claims for both defamation and infringement of dignity, arising from the same facts. In the same way as the majority of the Supreme Court of Appeal did, I therefore conclude that the corollary of Dr Dey's success in his defamation claim is that his claim based on dignity must fail."[45]

[54] The High Court quoted this passage out of context. The issue in *Dey* was whether facets of a single cause of action arising from the same act or conduct, should each be separately compensated – defamation and impairment of dignity, in that case. This Court held that these were not separate causes of action, but merely facets of a single cause of action, which could not both be compensated. There, the applicants, then school children, had published a computer-created image in which the face of the respondent, then a deputy principal of their school, was super-imposed alongside that of the school principal on an image of two naked men sitting in a sexually suggestive posture. The school crests were super-imposed over the genital areas of the two men. The High Court upheld both claims (for defamation and for the injury to feelings) and granted a composite award in damages. On appeal to it, the majority of the Supreme Court of Appeal held that the two claims entailed an impermissible duplication of actions. It accordingly upheld the defamation claim, and found that the additional claim based on an affront to dignity was ill-founded and required no further consideration.

[45] Id at para 142.

[55] In this Court, Brand AJ endorsed the principle that "the same conduct should not render a defendant liable by dint of more than one *actio iniuriarum*",[46] and explained that:

> "Traditional learning generally defines *iniuria* as the wrongful and intentional impairment of a person's physical integrity (*corpus*), dignity (*dignitas*), or reputation (*fama*). Academic authors are in agreement, however, that although the time-honoured three-fold distinction is a useful classificatory device to highlight the different interests involved, these interests often overlap. Thus, for example, although assault is classified as an infringement of physical integrity it will also often infringe the victim's sense of dignity; malicious attachment of property will frequently carry with it an infringement of the plaintiff's reputation or dignity or both while the infringement of reputation will almost always be accompanied by an affront to dignity."[47]

[56] Thus, *Dey* is no authority for the proposition that claims based on two causes of action arising from the same facts should be instituted in one action. That case concerned a different issue, namely whether two facets of a single cause of action should both be compensated. On the contrary, in the present case, we are concerned with two distinct causes of action. The High Court failed to appreciate this conceptual difference, and its reliance on *Dey*, was therefore misconceived.

[57] The Supreme Court of Appeal endorsed the holding of the High Court that where two or more causes of action arise from the same facts, a claimant is obliged to institute one action in respect of both. It too, considered the facts of this case to be closely related in respect of both causes of action and that the deceased was barred by the "once and for all" rule from instituting the second claim separately. The Supreme Court of Appeal reasoned:

> "[H]ere, that difference pales into insignificance having regard to the fact that the event that gave rise to the deceased's claims is the same. The investigations conducted by the police formed the basis on which the decisions were taken to arrest

[46] Id at para 140.

[47] Id at para 141.

> and detain, and to prosecute the deceased. In accordance with the once and for all rule, the deceased should have instituted his claim for all of his damages in one action, so that the lawfulness or otherwise of the respondent's employees' actions, who were involved in taking the challenged decisions, could be adjudicated in one action. Moreover, in this case the deceased had all the facts on which to formulate his claims when he instituted his first action. He had the facts to sustain the claims that his arrest and detention was unlawful and that his prosecution was malicious after the DPP had declined to prosecute him. All that had already happened when he instituted the first action. There was therefore nothing that prevented him from instituting his claims in one action. The once and for all rule is part of our common law."[48]

[58] The premise of the Supreme Court of Appeal's reasoning is erroneous. The issue is not whether there are differences in how the two causes of action were pleaded in the respective particulars of claim. It is whether the two actions, as a matter of law, are based on two different causes of action, and whether those causes of action have different elements. The comparison between the respective particulars of claim seems to have largely influenced the finding by the High Court and the Supreme Court of Appeal that the two claims should have been brought in a single action. For that reason, I find it necessary to consider the elements of causes of action based on unlawful arrest and detention, and malicious prosecution, respectively. Although the two causes of action are both based on the *actio iniuriarum,* their elements are different.

[59] The elements of unlawful arrest and detention are: (a) arrest without lawful cause and (b) unlawful deprivation of liberty in the form of detention.[49] In respect of arrest without a warrant, as was the case with the deceased, the arrest is presumed to be unlawful, and it is for a defendant to allege and prove the lawfulness of the arrest.[50] In spite of the fact that the cause of action is the *actio iniuriarum*, a claimant need not

[48] SCA judgment above n 4 at para 17.

[49] *Zealand v Minister for Justice and Constitutional Development* [2008] ZACC 3; 2008 (4) SA 458 (CC); 2008 (6) BCLR 601 (CC) at paras 24, 29 and 33.

[50] See, for example, *Minister of Law and Order v Hurley* 1986 (3) SA 568 (A) at 589E; and *Brand v Minister of Justice* 1959 (4) SA 712 (A) at 714F-H.

allege and prove the presence of *animus iniuriandi* (an intention to injure or consciousness of unlawfulness).[51]

[60] On the other hand, malicious prosecution is constituted by: (a) setting the law in motion against a claimant; (b) lack of reasonable and probable cause on the part of the defendant; (c) malice or *animus iniuriandi*; and (d) termination of criminal proceedings in the claimant's favour.[52] As far as the onus is concerned, here, unlike a claim based on unlawful arrest and detention, it rests on the claimant in respect of all the elements of the delict, including that of malice or *animus iniuriandi*.[53]

[61] Although in its judgment the High Court referred to these different elements of the two causes of action, it underplayed them. The Supreme Court of Appeal did not consider them at all. Instead, both Courts compared the allegations in the respective particulars of claim in the first and second actions. They considered the apparent similarities in the respective particulars of claim, and the fact that in both actions R400 000 was claimed, to be key in determining whether the two actions ought to have been brought in a single action. This is what led the two Courts into error. This was compounded by poor draftsmanship of the particulars of claim, especially in the second action. Most of the averments made are irrelevant for a cause of action based on malicious prosecution. For example, damages were claimed for "*contumelia*, deprivation of freedom and discomfort", which are the same averments made in respect of the first action. Instead of comparing the allegations in the respective particulars of claim, and looking for similarities in them, the two Courts should have considered whether, as a matter of law, the elements of the two causes of action are different.

[51] Harms *Amler's Precedents of Pleadings* 9 ed (Butterworths 2018) at 55.

[52] *Minister of Justice and Constitutional Development v Moleko* [2008] ZASCA 43; [2008] 3 All SA 47 (SCA) at para 8.

[53] *Beckenstrater v Rottcher & Theunissen* 1955 (1) SA 129 (A) at 133H-135E. See also *Van der Merwe v Strydom* 1967 (3) SA (A) at 467C-E.

[62] A cause of action is not determined by how a party frames his or her particulars of claim, but by the constitutive elements of a particular cause of action.[54] Therefore, the deceased's averments about *contumelia*, deprivation of freedom and discomfort, amounted to irrelevant allegations which do not apply to the matter in hand and do not contribute one way or the other to a decision of such matter. The High Court and the Supreme Court of Appeal should not have placed emphasis on those averments as they were irrelevant, amounted to a mere surplusage, and were not necessary to sustain a cause of action based on malicious prosecution. In a related context, in *Bruma*, dealing with the superflouness of a prayer for "alternative relief", the Full Court said:

> "The prayer for alternative relief is to my mind, in modern practice, redundant and mere verbiage. Whatever the Court can validly be asked to order on [the] papers as framed, can still be asked without its presence. *It does not enlarge in any way 'the terms of the express claim'*".[55] (Emphasis added)

[63] Given these considerations, the finding by the High Court and the Supreme Court of Appeal that the two claims should have been brought in a single action because of the apparent similarities in the respective particulars of claim, is unsustainable. Furthermore, contrary to what the Supreme Court of Appeal held, it is irrelevant that the deceased had all the facts on which to formulate both his claims when he instituted the first action. The question is one of principle and law. If the deceased was, as a matter of law, entitled to bring the two actions separately, he cannot be deprived of that right merely because when he instituted the first action, he had all the facts enabling him to also institute the second action.

[64] The other consideration is that two or more causes of action, although arising from the same set of facts, may not arise at the same time. For example, in the present case, the first action for unlawful arrest and detention arose immediately after the

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[54] *Stephens v De Wet* 1920 AD 279 at 282.

[55] *Johannesburg City Council v Bruma Thirty-Two (Pty) Ltd* 1984 (4) SA 87 (T) at 93E-F. See also *National Stadium South Africa (Pty) Ltd v Firstrand Bank Ltd* [2010] ZASCA 164; 2011 (2) SA 157 (SCA); [2011] All SA 29 (SCA) at para 45.

deceased was arrested and detained. From the beginning the arrest and detention were either lawful or unlawful. But the second action based on malicious prosecution had not arisen then, and could not be instituted at that stage, as the criminal charges against the deceased had not yet been withdrawn. This occurred almost two years later, on 17 May 2011. There would also have been the risk of prescription of the first claim, if the deceased was to wait for the termination of the criminal charges in order to combine the two claims in a single action.

[65] On the reasoning of the High Court and the Supreme Court of Appeal, in the above scenario, the deceased would be barred from instituting the second action after the charges against him were withdrawn. Clearly that would be absurd, as the second action could only competently be instituted once the charges were withdrawn. This is further demonstrated by reference to the facts in *Evins* and *National Sorghum*.[56]

[66] In *Evins*, the plaintiff instituted two claims against the defendant, arising from the same motor vehicle accident. The plaintiff and her husband had both suffered bodily injuries as a result of the accident. The plaintiff instituted a claim for damages for bodily injuries. Five years later, her bread-winner husband died as a result of the bodily injuries sustained in the same accident. When she claimed for loss of support due to the death of her husband, under a different case number, the defendant put up a defence that the second claim was impermissible. The issue was whether at common law the two claims represented separate causes of action or simply facets of a single cause of action.

[67] The Court concluded that even though the two claims may flow from the same event or accident, the cause of action in each may arise at different times.[57] In respect of the bodily injuries, this would normally arise at the time of the accident, whereas in

[56] *National Sorghum Breweries (Pty) Ltd (t/a) Vivo Africa Breweries v International Liquor Distributors (Pty) Ltd* [2000] ZASCA 70; 2001 (2) SA 232 (SCA); [2001] 1 All SA 417 (SCA).

[57] *Evins* above n 8 at 839D.

the case of death, the cause of action for loss of support will arise only upon the death of the deceased, which may be different from the date of the accident.[58] The two claims were held to constitute separate causes of action, which could be brought separately from each other. In my view, a claim for wrongful arrest and detention, and one for malicious prosecution also constitute separate causes of action.

[68] In *National Sorghum*, the respondent had obtained default judgment against the appellant for restitution flowing from breaches of three written agreements between the parties.[59] Later, in a second action, the respondent claimed damages suffered as a result of the breach of contract. The appellant's special plea of *res judicata* was dismissed on the basis that the claims were not based on the same grounds or cause of action. In the first suit, the cause of action was a claim for repayment of the purchase price, whereas the second was a claim for damages consisting of expenses which the respondent had incurred in carrying out its obligations under the agreements, and for loss of income. The Appellate Division held that the "once and for all" rule did not require that contractual claims and claims for damages be brought in the same action.[60] It followed that neither the *exceptio res judicatae* nor the "once and for all" rule could be relied on to thwart the respondent's claim.[61]

[69] As mentioned, the other basis on which both the High Court and the Supreme Court of Appeal rested their findings, is the consideration of public policy factors, namely: (a) the possibility of double jeopardy against the respondent; (b) the potential loss of available witnesses due to the effluxion of time; and (c) the potential inconvenience to the respondent for putting him to the same expense incurred in defending the claim for unlawful arrest and detention. While these may well be legitimate concerns on the unique facts of this case, they should not be elevated to a general principle by which a litigant's right of access to courts is adversely affected.

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[58] Id.

[59] *National Sorghum* above n 56 at para 10.

[60] Id at para 10.

[61] Id at para 11.

[70] There are other procedural mechanisms in our law to address these concerns. For example, a court could deny a successful claimant their costs of the action.

Conclusion

[71] The reasoning in the judgments of the High Court and the Supreme Court of Appeal marked a departure from how the "once and for all" rule has always been applied. Once both Courts accepted that there were two causes of action, irrespective of the imperfections in the pleadings, that should have been the end of the enquiry, and the respondent's objection should have been dismissed on that basis. What the Courts did was to apply the "once and for all" rule to the facts to which the rule did not apply, and thereby created an exception to the rule for cases where two or more actions arose from the same facts. This departure from how the rule had always been applied, as mentioned, amounts to a development of the common law.

[72] However, such development was not undertaken in accordance with the Constitution. Neither of the Courts embarked on an enquiry as to whether the common law rule suffered any sort of deficiency at odds with the Bill of Rights, and thus necessitated its development. This Court in *DZ obo WZ*[62] set out the general approach to the development of the common law under section 39(2) of the Constitution. In terms of that approach, a court must: (a) determine what the existing common law position is; (b) consider its underlying rationale; (c) enquire whether the rule offends section 39(2) of the Constitution; (d) if it does so offend, consider how development in accordance with section 39(2) ought to take place; and (e) consider the wider consequences of the proposed change on the relevant area of the law.[63] The Supreme Court of Appeal considered none of these factors, nor the applicant's right in terms of section 34 of the Constitution.

[62] *Member of the Executive Council for Health and Social Development, Gauteng v DZ obo WZ* [2017] ZACC 37; 2018 (1) SA 335 (CC); 2017 (12) BCLR 1528 (CC).

[63] Id at para 31.

[73] For all of the above reasons, I conclude that leave to appeal should be granted and the appeal must succeed. Costs should follow the result, including costs of two counsel. The order of the Supreme Court of Appeal ought to be set aside and replaced with one upholding the appeal with costs, setting aside the order of the High Court, and remitting the matter back to the High Court to adjudicate the applicant's claim for malicious prosecution.

Order

[74] In the result the following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld with costs, including costs of two counsel.
3. The order granted by the Supreme Court of Appeal is set aside and replaced with the following:
   "1. The appeal is upheld with costs, including costs of two counsel.
   2. The order of the High Court is set aside and replaced with the following order:
   'The respondent's objection on the point of law is dismissed with costs.'"
4. The matter is remitted to the High Court to adjudicate the applicant's claim for malicious prosecution.

ZONDO CJ

Introduction

[75] I have had the opportunity of reading the judgment (first judgment) by my Colleague, Makgoka AJ, in this matter. I agree with his conclusions that this Court has jurisdiction and with the order that he grants.

Why I write

[76] Owing to the increased caseload that the Justices of this Court carry since the expansion of its jurisdiction to include non-constitutional matters that raise arguable points of law of general public importance which ought to be considered by this Court, it is, in my view, becoming clear that, where possible, one should adopt a shorter and maybe, simpler, approach or route to the determination of some of the matters that come before us. That is the reason why we have decided that in some cases where we have heard oral argument in a matter we will not write a judgment because the judgment will do nothing more than to record the same facts which have been recorded in previous judgments of other courts and state the law as already stated in those judgments and uphold the appeal. We have decided that in such cases we could issue a statement containing a paragraph or two in which we dismiss the appeal for substantially the same reasons as those given by, for example, the Supreme Court of Appeal or the High Court. The present case is not such a case. Nevertheless, it is a case in which I prefer a shorter and, in my view, simpler approach to dispose of the matter.

Brief background

[77] The background has been set out in the first judgment. I do not propose to repeat it but will mention those features of the background which are necessary for a proper understanding of this judgment. The issue in this matter is whether, if a person was arrested and detained by the police and charged with criminal charges and initially institutes an action for damages for unlawful arrest and detention, he or she may later institute a separate action for malicious prosecution or whether he or she is obliged to include his or her claim for malicious prosecution in the same action in which he or she claims damages for unlawful arrest and detention. In this case Mr Olesitse instituted an action in the High Court for unlawful arrest and detention first and later instituted, while the first action was pending, a separate action for malicious prosecution.

High Court

[78] In the High Court the Minister objected to the claim for malicious prosecution on the basis that, since it was based on the same events as the first action, he was obliged to have included it in the first action and could not institute a separate action for it. In support of this objection, the Minister relied on the "once and for all" rule. I shall explain this rule shortly. The High Court upheld this objection by the Minister of Police. It did so despite the fact that it referred to authorities which made it clear that the "once and for all" rule applies where the claims are based on the same cause of action and in this case the two claims were based on separate causes of action.

Supreme Court of Appeal

[79] Mr Olesitse appealed to the Supreme Court of Appeal against the judgment and order of the High Court. The Supreme Court of Appeal referred to authorities which made it clear that the "once and for all" rule applies only where there is a single cause of action and not where the claims are based on separate causes of action. Notwithstanding the fact that it accepted that in this case there were two separate causes of action, the Supreme Court of Appeal upheld the judgment of the High Court and dismissed the appeal.

In this Court

[80] The applicant, the executrix of the estate of the late Mr Olesitse, applied to this Court for leave to appeal against the judgment and order of the Supreme Court of Appeal.

Jurisdiction

[81] The first judgment relies on the proposition that in deciding the matter in the way it did, the Supreme Court of Appeal developed the common law on the "once and for all" rule. That may be so but the basis for jurisdiction that I prefer is section 34 of the Constitution. The point is that the High Court refused to adjudicate the applicant's claim for malicious prosecution on the basis that it should have been included in the

first action. The result is that the applicant's deceased husband's right to have the dispute between himself and the Minister of Police adjudicated in a fair public hearing which is entrenched in section 34 of the Constitution is implicated in this matter. That is a constitutional issue. Accordingly, this Court has jurisdiction in this matter.

[82] Just as a court may mero motu raise a point which suggests that it may not have jurisdiction or which limits its jurisdiction, it may also mero motu raise a point that suggests that it has jurisdiction. During the hearing of this matter I raised with the parties the question whether it could not be said that this Court had jurisdiction because the Supreme Court of Appeal's decision implicated the applicant's section 34 right. Counsel did not challenge this proposition. There is no unfairness in deciding the issue of jurisdiction on this basis because the issue was put to Counsel and the point did not require any evidence or further affidavits.

Leave to appeal

[83] It is in the interests of justice that leave to appeal be granted. If the Supreme Court of Appeal's decision stands, it will result in many claims being dismissed on the basis of the "once and for all" rule in circumstances where there are two or more causes of action. If the decision of the Supreme Court of Appeal were to stand, many claims which traditionally would not have been dismissed on the basis of the "once and for all" rule will be dismissed on the basis that they offend that rule. Furthermore, there are reasonable prospects of success. Accordingly, leave to appeal should be granted.

The appeal

[84] As far as the merits of the appeal are concerned, both the Supreme Court of Appeal and the High Court referred to and quoted authorities that stated the "once and for all" rule applies where the same cause of action applies to both claims. In this regard Davis J of the Gauteng Division of the High Court referred among others to

Shembe,[64]*Green*,[65] *Evins*[66] and *African Farms*[67]. These cases made it clear that the "once and for all" rule applies only to those cases where there is a single cause of action. Despite the fact that the High Court was aware that a single cause was the requirement for the application of the "once and for all" rule, it went on to hold that the rule applies to this case.

[85] The Supreme Court of Appeal, through Salie-Hlophe AJA, reached the conclusion that the rule applies to this matter. It reached this conclusion after referring to *Shembe*[68] and *Evins*[69] all of which made it clear that the "once and for all" rule applies where there is a single cause of action. The Supreme Court of Appeal acknowledged that there were two causes of action involved here. Nevertheless, the Supreme Court of Appeal dismissed the appeal on the basis that the "once and for all" rule applied to this case.

[86] There is no doubt that both the High Court and the Supreme Court of Appeal failed to apply the authorities to which they referred and which were binding on them. They both erred in concluding that the "once and for all" rule applied to this present case.

[64] *Shembe* above n 14.

[65] *Green v Coetzer* 1958 (2) SA 697 (W).

[66] *Evins* above n 8.

[67] *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A).

[68] *Shembe* above n 14 at 472.

[69] *Evins* above n 8.

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