

# "Cause of Action": How Could the Supreme Court of Appeal Get it so Wrong? *Olesitse v Minister of Police* (470/2021) [2022] ZASCA 90 (15 June 2022)

PR Msaule\*

Online ISSN  
1727-3781

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## Author

Phindile Raymond Msaule

## Affiliation

University of Limpopo,  
South Africa

## Email

Raymond.Msaule@ul.ac.za

## Date Submitted

27 October 2022

## Date Revised

13 November 2023

## Date Accepted

13 November 2023

## Date Published

10 July 2024

## Editor Prof W Erlank

## Journal Editor

Prof C Rautenbach

## How to cite this contribution

Msaule R "'Cause of Action': How Could the Supreme Court of Appeal Get it so Wrong? *Olesitse v Minister of Police* (470/2021) [2022] ZASCA 90 (15 June 2022)" *PER / PELJ* 2024(27) - DOI  
<http://dx.doi.org/10.17159/1727-3781/2024/v27i0a15055>

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## DOI

<http://dx.doi.org/10.17159/1727-3781/2024/v27i0a15055>

## Abstract

This contribution contends that in holding that the once-and-for-all rule was applicable in *Olesitse v Minister of Police* (470/2021) [2022] ZASCA 90 (15 June 2022), the SCA erred. The error was caused by the Supreme Court of Appeal (SCA) mischaracterising the cause of action in this matter. It is trite that the successful application of the once-and-for-all rule is dependent on the finding by the court that the current claim is based on the same cause of action as the previous claim. It is also trite that different causes of action may emanate from the same set of facts. In *Olesitse*, the SCA failed to appreciate this incontrovertible proposition of law. Although the SCA seems to suggest that the cause of action in this case was different from an earlier action, this submission is unmasked by the Court's conclusion that the difference between the causes of action in this case and the previous case "pales into insignificance having regard to the fact that the event that gave to rise to the deceased's claims is the same". This conclusion not only misstates the law, but it also ignores the significance of the differences between the constituent elements of the two causes of action (unlawful arrest and detention on the one hand and malicious prosecution on the other). To underscore the importance of this difference, it should be noted that the two causes of action do not arise at the same time, and therefore may be brought at different times. It is trite also that the prescription of these causes of action do not begin to run at the same time. How the court could have ignored these factors is incomprehensible. It is thus plain to see that the SCA came to the incorrect conclusion that the once-and-for-all rule was applicable in this case. Needless to say, had the SCA in its application of the "once-and-for-all" rule considered the central role played by the concept of "cause of action" in this regard it would not have come to the conclusion that it had.

## Keywords

Cause of action; damage(s); malicious prosecution; once-and-for-all rule; unlawful arrest.

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## 1 Introduction

The concept "cause of action" is deceptively simple. It is easy to state but difficult to grapple with in practice.<sup>1</sup> The recent Supreme Court of Appeal (SCA) case is testimony to this. In *Olesitse v Minister of Police*<sup>2</sup> the SCA upheld the special plea of the once-and-for-all rule in the case where two distinct causes of action were in issue. This occurred because the SCA blithely dismissed the appellant's contention that the same cause of action is a precondition for a finding that the once-and-for-all rule is applicable. This finding (that different causes of action may lead to the successful application of the once-and-for-all rule) is not in line with the Court's precedent.<sup>3</sup> That the SCA departed from its precedent will become apparent below. It has to be conceded at this earliest stage, however, that the SCA accurately describes the prerequisite entitling a court to uphold the once-and-for-all rule defence except that the court failed to grapple with the pivotal role played by the concept of cause of action in this exercise. It is trite that the gold standard when it comes to the determination of the once-and-for-all rule is whether the same cause of action is implicated. For this reason, it is imperative to consider the requirements of cause of action. At its simplest, the concept encompasses that the plaintiff must prove all the facts that underpin a legal claim. In *Evins v Shield Insurance Co Ltd*, the court defined "cause of action" as:

every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment of the Court. It does not compromise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.<sup>4</sup>

A valid cause of action is a prerequisite for the institution of any legal proceedings. Thus, in order to succeed in his or her claim, a plaintiff needs to set out material facts that establish the relief that he or she seeks from the court. A cause of action does not materialise unless and until the occurrence of the last fact that constitutes a cause of action.<sup>5</sup> A plaintiff who brings different claims based on a single cause of action may be met with the defence of *res judicata* or *les pendens* or that the plaintiff has failed to bring his claim in one action i.e. the once-and-for-all rule. These preliminary

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\* PR Msaule. LLB LLM. Lecturer, School of Law, University of Limpopo, South Africa. E-mail. Raymond.Msaule@ul.ac.za. ORCID 0000-0001-5625-8316.

<sup>1</sup> *Kruger v Thompson* (KZPHC) (10662/2009) [2012] ZAKZPHC 62 (26 September 2012) para 16.

<sup>2</sup> *Olesitse v Minister of Police* (470/2021) [2022] ZASCA 90 (15 June 2022) (hereafter *Olesitse v Minister of Police*).

<sup>3</sup> See *Evins v Shield Insurance Co Ltd* 1980 2 All SA 40 (A) (hereafter *Evins v Shield Insurance*).

<sup>4</sup> *Evins v Shield Insurance* 57 quoting *McKenzie v Farmers' Co-operative Meat Industries Ltd* 1922 AD 16.

<sup>5</sup> *Evins v Shield Insurance* 57.

defences must be squarely raised by the opposing party. In other words, the court cannot broach these defences *mero motu*. In the same breadth however, our law equally recognises that a single unlawful action is capable of giving rise to more than one cause of action.<sup>6</sup> The facts alleged by the plaintiff must prove each and every element of the delictual claim that has been instituted.<sup>7</sup> Although this principle has been part of our law for a considerable time, in *Olesitse v Minister of Police*, the SCA has disregarded the importance of the concept of cause of action in the determination of the once-and-for-all rule, leading to the court coming to a wrong conclusion that the plaintiff should have instituted the claim for the damage sustained from matters arising from different causes of action, once-and-for-all in single proceeding. Unlike the "single cause" theory, according to the "*facta probanda*" approach a cause of action exists if all the requirements (facts which the plaintiff needs to prove to succeed in his or her claim) are present.<sup>8</sup>

The rationale for prohibiting multiple claims based on the same cause of action is to, firstly, ensure finality in litigation lest the defendant be subjected to harassment by multiplicity of actions. Secondly, it is the avoidance of the ever-present risk of courts coming to different conclusion on the same matter.<sup>9</sup> In *Evins v Shield Insurance Co Ltd* the court held that:

The concept of a cause of action – and the question whether different claims constitute parts of a single cause of action or separate causes of action – are of particular significance in regard to the application of the so-called 'once and for all' rule and also in connection with the related questions of *res judicata* and prescription.<sup>10</sup>

Closely associated with once-and-for-all rule is the concept of *res judicata*. *Res judicata* provides that once a court has given a judgment between the same parties in regard to the same subject matter based upon the same cause of action, the plaintiff is barred from instituting another claim.<sup>11</sup> Another concept aligned to the two concepts, is the concept of prescription. Prescription refers to the fact that a claim that the plaintiff has instituted has been extinguished and cannot be revived. The three concepts (or special pleas) are dependent on whether the claims that have been instituted are based on the same cause of action.<sup>12</sup> In other words, for the court to correctly apply any of these special pleas to the case before it, the court

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<sup>6</sup> *Baloyi v Public Protector* 2022 3 SA 321 (CC) para 38.

<sup>7</sup> *Evins v Shield Insurance* 58.

<sup>8</sup> According to the "single cause" theory, "every damage-causing event constitutes only one cause of action. Here the emphasis falls on the conduct which causes damage and not on the damage itself". Neethling and Potgieter *Visser Law of Delict* 236.

<sup>9</sup> *Evins v Shield Insurance* 53-54.

<sup>10</sup> *Evins v Shield Insurance* 53.

<sup>11</sup> *Evins v Shield Insurance* 53.

<sup>12</sup> Potgieter, Steynberg and Floyd *Visser and Potgieter Law of Damages* 154.

must first accurately identify the causes of action in those matters.<sup>13</sup> The correct characterisation of the cause of action in the matter is pivotal. Failure to do so will automatically lead to the wrong results as happened in *Olesitse v Minister of Police*.<sup>14</sup>

## 2 Facts of the case: *Olesitse v Minister of Police*

The deceased, the late husband to the appellant and the executrix of his estate, sued the respondent for unlawful arrest and detention that occurred on 19 May 2008. The deceased was released on bail on 29 May 2008. On 17 May 2011, the Director of Public Prosecutions declined to prosecute the deceased and charges against him were withdrawn.<sup>15</sup> On 26 May 2011, the deceased issued summons against the respondent for unlawful arrest and detention. The respondent pleaded that that part of the plaintiff's claim had prescribed. The respondent's plea was partially upheld to the extent that the unlawful arrest and detention for the period from 19 May 2008 to 26 May 2008 had prescribed. In other words, the extant cause of action was from 27 May 2008 to 29 May 2008, a period of three days. The matter proceeded to trial. Whilst the trial for unlawful arrest and detention was underway, the plaintiff instituted another claim for malicious prosecution. Subsequently, the claim for unlawful arrest and detention was settled whilst the new claim played itself out in court.<sup>16</sup>

The new claim arose from one and the same conduct as the claim for unlawful arrest and detention. The parties were also the same.<sup>17</sup> The respondent then served a notice objecting to the new claim on the basis that it was a duplication of the first claim. The respondent contended that the plaintiff should have claimed all the damages arising from the events that led to both claims in a single action because the two claims are based on one cause of action, the so called "once and for all" rule. The court *a quo* upheld the respondent's contention citing "public policy considerations, namely *res judicata*, *les pendens* and the 'once and for all' rule".<sup>18</sup> Despite the court's claim that it was aware that unlawful arrest and detention, on the one hand, and malicious prosecution on the other, are distinct causes of

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<sup>13</sup> In the case of the once-and-for-all rule the defendant must plead and prove that the plaintiff has failed to claim all the damage flowing from the *same cause of action* and in *res judicata* the plaintiff must plead and prove that the *same cause of action* has already been adjudicated by the court, and in relation to prescription the defendant must plead and prove that the *cause of action* arose at a particular time and at the time the claim was instituted it has been extinguished and the plaintiff is thus barred from instituting it. The thrust running through all these special pleas is cause of action.

<sup>14</sup> *Olesitse v Minister of Police*. This applies to all these special pleas.

<sup>15</sup> *Olesitse v Minister of Police* 8.

<sup>16</sup> *Olesitse v Minister of Police* paras 9-10.

<sup>17</sup> *Olesitse v Minister of Police* para 10.

<sup>18</sup> *Olesitse v Minister of Police* para 15.

action, the court nonetheless held that the appellant was non-suited because she had failed to bring the claim for malicious prosecution simultaneously with the claim for unlawful arrest and detention as the claim arose from the same unlawful conduct. The basis for this conclusion was that the two sets of pleadings in the two claims are, but for malice, identical.<sup>19</sup>

On appeal, the appellant contended that a single act is capable of giving rise to two distinct causes of action. Furthermore, so the appellant argued, in claims for malicious prosecution, the lawfulness or otherwise of the arrest is immaterial.<sup>20</sup> Although the SCA accepted the difference between the two claims, it reasoned that:

here, that difference pales into insignificance having regard to the fact that the event that gave rise to the deceased's claim is the same.<sup>21</sup>

Therefore, the once-and-for-all rule was applicable.<sup>22</sup> Thus, the appellant's contentions were found unpersuasive, and the appeal was dismissed.

### **3 Does the reasoning of the SCA withstand scrutiny?**

Although the SCA expressly acknowledged the differences between the causes of action for unlawful arrest and detention on the one hand and malicious prosecution on the other that claim does not bear scrutiny. By holding that the two causes of action at play in this case were different but at the same time find that the once-and-for-all rule was applicable is contradictory at worst and at best the SCA implicitly overturned established precedent on this aspect.<sup>23</sup> However, it would seem that, although not expressly articulated, the SCA was concerned with the desire for the optimum utilisation of the courts' scarce resources and the parties' convenience.

In this regard the SCA endorsed the reasoning of the high court in the following words:

In addition, in arriving at its decision the high court weighed up, on the one hand (the appellant's side), the possible claim for damages, additional to those already awarded, in favour of the deceased estate against, on the other hand (the respondent's side), the prejudice of double jeopardy, loss of available witnesses due to the 'huge effluxion of time' and the expense of being put to trial in respect of something which has already come before the court.<sup>24</sup>

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<sup>19</sup> *Olesitse v Minister of Police* para 15.

<sup>20</sup> *Olesitse v Minister of Police* para 16.

<sup>21</sup> *Olesitse v Minister of Police* para 17.

<sup>22</sup> *Olesitse v Minister of Police* para 17.

<sup>23</sup> See for instance *Evins v Shield Insurance*.

<sup>24</sup> *Olesitse v Minister of Police* para 15.

All these considerations, perhaps bar double jeopardy and that the matter has already come to court, are not reflective of the requirements to be considered in the determination of the once-and-for-all rule. If the SCA's concession that the matter that came before it was underpinned by a different cause of action is something to go by, then the assumption that the SCA was primarily concerned with the proliferation of litigation arising from the same facts is not misplaced. In *Socratous v Grindstone Investments 134 (Pty) Ltd*, the SCA lamented the court's *a quo*'s failure to uphold the defence of *lis alibi pendens* where it was merited in the following words:

Courts are public institutions under severe pressure. The last thing that already congested court rolls require is further congestion by an unwarranted proliferation of litigation.<sup>25</sup>

This sentiment becomes apparent in this case when one takes into consideration the fact that the SCA held that the two claims arose from same set of facts and involved the same witnesses, thus they should have been litigated at the same time despite not arising from the same cause of action.<sup>26</sup> It is correct, as the SCA held, that "[t]here was therefore nothing that prevented [the plaintiff] from instituting his claim in one action".<sup>27</sup> However, it is incorrect to contend, as the SCA does, that failure to institute both claims in a single action flouted the once-and-for-all rule.<sup>28</sup> This contention by the SCA, as already indicated, was brought about by the mischaracterisation of the two causes of action in the two claims. Had the SCA analysed the constituent elements of the two causes of action carefully it would have been clear to the SCA that the once-and-for-all rule did not apply as this concept applies to claims where there is the same cause of action. In this regard, the SCA ignores that the unlawful detention came to an end on 29 May 2008 whilst the deceased was subjected to malicious prosecution until 17 May 2011 when the matter was withdrawn. Neethling and Potgieter defines unlawful arrest and detention in the following terms: "wrongful deprivation of liberty consists in a person being deprived of his physical freedom without justification".<sup>29</sup> Whilst on the other hand these authors submit that in order to succeed with the claim for malicious prosecution the plaintiff must prove that:

(a) the defendant must have instigated the proceedings; (b) the defendant must have acted without reasonable and probable cause; (c) the defendant must have acted *animo iniuriandi*; and (d) the prosecution must have failed.<sup>30</sup>

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<sup>25</sup> *Socratous v Grindstone Investments 134 (Pty) Ltd* 2011 6 SA 325 (SCA) para 16.

<sup>26</sup> *Olesitse v Minister of Police* para 17.

<sup>27</sup> *Olesitse v Minister of Police* para 17.

<sup>28</sup> See *Olesitse v Minister of Police* para 17.

<sup>29</sup> Neethling and Potgieter *Visser Law of Delict* 349.

<sup>30</sup> Neethling and Potgieter *Visser Law of Delict* 366; see *Minister of Justice and Constitutional Development v Moleko* 2009 2 SACR 585 (SCA) para 8 ff.

Writing in the context where a single cause of action afforded a litigant a choice between two competent *fora* (in this case the labour court and the high court) the Constitutional Court held:<sup>31</sup>

Crucially, however, where a litigant is required to bring a certain cause of action before a specifically competent forum, it does not follow that they are bound to pursue a claim under that cause of action simply because it is possible to do so.

Similarly that there was nothing precluding the plaintiff from instituting the two claims at once did not mean that is the course the plaintiff was bound to take. The once-and-for-all rule does not prohibit a litigant from instituting separately claims with different causes of action despite them arising from the same set of facts. In this case, moreover, the causes of action did not arise at the same time and therefore the once-and-for-all rule could not be applicable.<sup>32</sup> Mukheibir posits that there seems to be a misunderstanding for the rationale of the existence of the once-and-for-all rule. This rule, she points out, is not intended to operate as a rule of quantification of damages.<sup>33</sup> She contends that this notion is flawed.<sup>34</sup> The purpose of the once-and-for-all rule is to protect the defendant against further actions. She concludes that given this fact, the rule operates as a defence rather than a rule of quantification.<sup>35</sup> The SCA seems to have laboured under the wrong impression that damages is a determinative factor whether the once-and-for-all rule was applicable as opposed to damage.<sup>36</sup> This factor is illustrated by the SCA's acceptance that one of the factors that the court *a quo* took into consideration was the "decision the high court weighed up, on the one hand (the appellant's side), *the possible claim for damages, additional to those already awarded [to the plaintiff]*".<sup>37</sup> This factor is irrelevant as Christie has elucidated:

The test whether a previous action is a bar is not whether the damages sought to be recovered are different, but whether the cause of action is the same.<sup>38</sup>

A closer reading of *Olesitse* suggests the exact opposite of what Christie postulates.<sup>39</sup> Christie's postulation is in line with our law. This is so because it is part of our law that the question whether a cause of action has arisen is determined by "*facta probanda*" as opposed to the "single-cause"

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<sup>31</sup> *Baloyi v Public Protector* 2022 3 SA 321 (CC) para 39.

<sup>32</sup> See *Evins v Shield Insurance* 58 ff.

<sup>33</sup> To underscore this thesis Mukheibir points out that in major textbooks on the law of delict and damages this subject is discussed under the quantification of damages section. Mukheibir 2019 *Obiter* 260.

<sup>34</sup> Mukheibir 2019 *Obiter* 260-261.

<sup>35</sup> Mukheibir 2019 *Obiter* 257.

<sup>36</sup> *Olesitse v Minister of Police* para 17. See Scott 2016 *THRHR* 562.

<sup>37</sup> *Olesitse v Minister of Police* para 15 (emphasis added).

<sup>38</sup> Christie 2003 *SALJ* 447.

<sup>39</sup> See *Olesitse v Minister of Police* paras 17-18.

approach.<sup>40</sup> Once the SCA has held that there is a difference between the two causes of action, it is mind boggling how the SCA came to its conclusion. In addition to malice not being an element in unlawful arrest and detention claims, the SCA reasoning is further undermined by the fact that although the claim for unlawful arrest and detention would have prescribed on 29 May 2011 the last occurrence giving rise to the malicious prosecution claim took place some three years after the claim for unlawful arrest had arisen. The claim for malicious prosecution would have prescribed on 17 May 2014.<sup>41</sup>

In *Evins v Shield Insurance Co Ltd* Corbett JA held that the once-and-for-all rule, although distinguishable, exists side by side with concepts of *res judicata* and prescription. The once-and-for-all rule encompasses that the plaintiff must claim damage (both already sustained or expected) arising from the same cause of action whereas *res judicata* entails that once a competent court has granted a final judgement the plaintiff is barred from approaching the court again on the same matter.<sup>42</sup> It is beyond contention that there was nothing barring the plaintiff from instituting his unlawful arrest and detention claim in 2008, as is proven by the fact that part of his unlawful arrest and detention claim had prescribed whilst the malicious prosecution suit would have prescribed sometime in the future. A rhetorical question that may be asked is this: had the unlawful arrest and detention claim been instituted in 2008 at the same time with the malicious prosecution claim before the Director of Public Prosecutions had taken the decision declining to prosecute the plaintiff, would the court not have dismissed the latter claim on the basis that the particulars of claim did not disclose the cause of action? The SCA completely ignored the relationship between the cause of action and once-and-for-all rule on the one hand and prescription on the other. A misdirection of great proportions.

Does the SCA emphasis that nothing precluded the plaintiff from instituting the two claims together in one action justify its conclusion? It is indeed correct that nothing precluded the plaintiff from launching these claims together in one claim once each of them had ripened. It is common cause that the claim for unlawful arrest and detention on the one hand and the claim for malicious prosecution are separate and distinguishable even if they are based on the same facts. Of importance is that the causes of action in these claims arise at different times and therefore do not prescribe at the

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<sup>40</sup> *Evins v Shield Insurance* 58; see Mukheibir 2019 *Obiter* 258.

<sup>41</sup> This depends on whether one accepts that the provisional withdrawal of the charges amounts to the failure of prosecution or that the prosecution failed when the Director of Public Prosecutor declined to prosecute.

<sup>42</sup> *Evins v Shield Insurance* 53; *Caesarstone Sdot-Yam Ltd v The World of Marble and Granite* 2013 6 SA 499 (SCA) para 28; *National Sorghum Breweries v International Liquor Distributors (Pty) Ltd* 2001 2 SA 232 (SCA) para 2; *Royal Sechaba Holdings v Coote* 2014 5 SA 562 (SCA) para 11.



same time. Therefore, the fact that the two claims arose from a single unlawful conduct does not in any manner overcome the difficulty that had been acknowledged by the SCA that the requirements for the two claims are different. The fallacy in the SCA reasoning is underlined by the following passage:<sup>43</sup>

The investigations conducted by the police formed part of the basis on which the decisions were taken to arrest 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.*

By holding that nothing prevented the plaintiff from instituting the two claims in one action and thus discounting that the two claims involved separate causes of action, the SCA was bound to apply the once-and-for-all rule where it was not applicable. As already indicated, the once-and-for-all rule could only be applied where the plaintiff sought to claim further damages in the subsequent matter when the claim based on the same cause of action has already been determined by the court. In this matter, the subsequent claim was not based on the same cause of action as the first claim. In the second claim, the appellant did not seek to prove the lawfulness of his arrest and detention but instead to prove that there was malice on the part of the respondent's employees to have him prosecuted as distinct from being arrested and detained; a separate cause of action in which the same facts ought to be traversed to prove different elements of the respective claims in order to succeed. As the Appellate Division held in *Evins v Shield Insurance Co Ltd*:

[t]he material facts which must be proved [in order to enable the plaintiff to sue (or facta probanda) would relate to these ... basic ingredients [of the delictual claim in issue] and upon the concurrence of these facts the cause of action arise.<sup>44</sup>

In *National Sorghum Breweries v International Liquor Distributors (Pty) Ltd*, the SCA confirmed that the mere fact that there are identical elements in separate claims is not enough to find the presence of *res judicata*, the same is true in relation to the once-and-for-all rule. Instead, the court determining whether the same cause of action is present in separate claims must have regard to the "claim in its entirety and compare it to the first claim in its entirety".<sup>45</sup> In *Yellow Star Properties 1020 (Pty) Ltd v MEC: Department of*

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<sup>43</sup> *Olesitse v Minister of Police* para 17 (my emphasis).

<sup>44</sup> *Evins v Shield Insurance* 58.

<sup>45</sup> *National Sorghum Breweries v International Liquor Distributors (Pty) Ltd* 2001 2 SA 232 (SCA) para 5.

*Development Planning and Local Government (Gauteng)* the court held that:<sup>46</sup>

[I]t is necessary to stress not only that the parties must be the same but that the same issue of fact or law which was an essential element of the judgment on which reliance is placed must have arisen and must be regarded as having been determined in the earlier judgment.

This, the Supreme Court of Appeal has failed to do in the case under discussion. It is common cause that the issue of law to be determined was not the same. As noted already, the elements which the plaintiff needed to satisfy in the first claim are starkly different from what she needed to prove in the second case. In any event, malicious prosecution may arise without an arrest. For instance, a plaintiff who has been caused to appear in court via a written notice to appear or summons is able to successfully institute a claim for malicious prosecution against the instigator. The question of arrest is *per se* immaterial in the claim for malicious prosecution. In other words, arrest is not a prerequisite or an element for a malicious prosecution claim. This is because the arrestor may not be the same person who has instigated the proceedings.

To underscore its primary thesis that the once-and-for-all rule was applicable, the SCA quotes the particulars of claim in the two matters to illustrate their similarities and that both claims arose from the single unlawful conduct,<sup>47</sup> and to prove that:

the damage-causing facts had already been determined irrespective of the nature of the unlawfulness and the identity of the actual perpetrator.<sup>48</sup>

That there are patent similarities between the two sets of the particulars of claim is beyond contention. Nonetheless, this does not detract from the fact that the two causes of action are different. Perhaps poor drafting may be blamed for the confusion that beset the SCA. For instance, in the first summons it is claimed that the police falsely laid a charge against the plaintiff without reasonable or probable cause. The plaintiff need not prove this fact in an unlawful arrest and detention claim but rather this is a requirement in a malicious prosecution claim. This was superfluous and the SCA ought to have ignored it in its comparison exercise. Similarly, the arrest of the plaintiff could also be ignored in the adjudication of a malicious prosecution case as, strictly speaking, arrest is not a prerequisite for a malicious prosecution claim. Also, that charges had been withdrawn against the deceased was of no significance in the claim for an unlawful arrest and detention claim but is a precondition in the malicious prosecution claim. The

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<sup>46</sup> *Yellow Star Properties 1020 (Pty) Ltd v MEC: Department of Development Planning and Local Government (Gauteng)* 2009 3 SA 577 (SCA) para 22.

<sup>47</sup> *Olesitse v Minister of Police* paras 11-12.

<sup>48</sup> *Olesitse v Minister of Police* para 15.

court also ignored that the cause of action in the two matters arose at different times. In this regard, Corbett JA found that the precise time when the cause of action arose is of critical importance in determining whether a claim has prescribed or not.<sup>49</sup> "A cause of action arises at the earliest date when all the requirements for delictual liability are present."<sup>50</sup> Therefore, it is inconceivable that the same cause of action may prescribe at different times. This would bring about anomalies of untold proportions.<sup>51</sup> That the appellant's claim for unlawful arrest and detention partly prescribed is because the nature of detention is continuous and until it has come to a stop the wrongful act is perpetuated. Strictly speaking, the appellant was successful in the claim for wrongful detention rather than unlawful arrest. The unlawful arrest claim had prescribed.<sup>52</sup> The cause of action for unlawful arrest and detention is complete upon arrest and detention of the plaintiff thus prescription starts to run.<sup>53</sup> At this stage, the plaintiff's claim for malicious prosecution has not arisen yet, let alone ripened. It will arise only after the plaintiff is acquitted, which might be sometime after the unlawful arrest and detention and even after the detention claim had prescribed.

In the similar vein, a lawful arrest may lead to a claim for malicious prosecution.<sup>54</sup> It is thus contrary to the principles underlying the concept of cause of action to hold that the cause of action for claims for unlawful arrest and detention on the one hand and malicious prosecution on the other is the same as the SCA did. In *Evins v Shield Insurance Co Ltd*<sup>55</sup> a case which is referenced by the SCA, the majority of the Appellate Division (as it then was) held that there is nothing antithetical about same facts giving rise to different causes of action which, as a matter of principle, may be brought at different times. The Court held that it does not automatically follow that the mere fact that the different claims brought by the plaintiff arose from the same occurrence, but what is of importance to determine is whether these different claims "are traceable back to a single wrongful act".<sup>56</sup> It is beyond

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<sup>49</sup> *Evins v Shield Insurance* 54.

<sup>50</sup> Neethling and Potgieter *Visser Law of Delict* 237.

<sup>51</sup> See *Evins v Shield Insurance* 58-58(2).

<sup>52</sup> *Evins v Shield Insurance* 54. The concept unlawful arrest and unlawful detention are not synonymous. See s 35(1) and (2) of the *Constitution of the Republic of South Africa, 1996*.

<sup>53</sup> *Evins v Shield Insurance* 54.

<sup>54</sup> In *Minister of Police v Du Plessis* 2014 1 SACR 217 (SCA) the court held that despite the respondent (plaintiff) being initially arrested lawfully, once facts that pointed to his innocence became apparent, he ought to have been released and from that moment his detention became unlawful. *A priori* the same principle applies to prosecution.

<sup>55</sup> *Evins v Shield Insurance* 56 *et seq.*

<sup>56</sup> *Evins v Shield Insurance* 57.

doubt that an unlawful arrest and detention on the one hand and malicious prosecution on the other cannot be traceable back to a single wrongful act.<sup>57</sup>

This case is distinguishable from *Kruger v Thompson*.<sup>58</sup> In this case, the plaintiff had been involved in a jet-ski accident which was caused by the negligence of the defendant. He sued the defendant in 2007 in the magistrates' court for the damage to his jet-ski, which action was successful. In 2009 the plaintiff instituted another claim for damages for bodily injury in the high court arising from the same collision. The defendant pleaded *res judicata*. In upholding the plea, the court held that the damages that the plaintiff claimed for the jet-ski and the damages the plaintiff sought to claim for bodily injury arose from a single cause of action. Damages do not constitute a cause of action as the plaintiff sought to convey that the damages to the jet-ski on the one hand and bodily injuries on the other were different and thus constituting different causes of action.

#### 4 Conclusion

There is a yawning gap in the application of the principle of cause of action on the one hand and the notions of once-and-for-all rule and *res judicata* on the other. The court did not undertake any analysis of these concepts. This is borne out by the fact that the differences between the three concepts were not investigated. Had such an exercise been undertaken it would have been abundantly clear to the court that the once-and-for-all rule was not implicated in this case. The conclusion by the court that the difference between the claim for unlawful arrest and detention claim and the malicious prosecution suit was not of any significance is not underpinned by any legal basis and was the Achilles heels of the court's conclusion.

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<sup>57</sup> This much is recognised by the SCA. See *Olesitse v Minister of Police* para 17.

<sup>58</sup> *Kruger v Thompson* (10662/2009) [2012] ZAKZPHC 62 (26 September 2012) para 16.

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### **Legislation**

*Constitution of the Republic of South Africa*, 1996

## List of Abbreviations

SALJ	South African Law Journal	
SCA	Supreme Court of Appeal	
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg	