IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO: **5293/2016**

Date heard: **04 to 09 December 2019**

Date delivered: **12 December 2019**

In the matter between:

LOYISO MAHLEZA Plaintiff

and

THE MINISTER OF POLICE First Defendant

THE DIRECTOR OF PUBLIC PROSECUTIONS Second Defendant

JUDGMENT

LOWE, J:

INTRODUCTION

[1] Plaintiff sues First and Second Defendants jointly and severally for damages in the sum of R990,000.00 arising from his allegedly unlawful arrest without a warrant on 24 December 2015, and subsequent detention until 26 January 2016 when he was released on bail.

[2] It is further alleged that Plaintiff's detention, subsequent to 12 January 2016, was *"at the instance of the Second Defendant".*

[3] Second Defendant's Special Plea was dismissed with costs, I giving reasons for such dismissal.

[4] The parties agreed that:

[4.1] Plaintiff was arrested on 24 December 2015 on a charge of Murder of M E Mahleza *("the deceased")*.

[4.2] His first Court appearance was on 24 December 2015 at 09h00.

[4.3] He remained in custody until 26 January 2016 when he was released on bail by a Court.

[4.4] He was charged with, and tried for, the murder of Mlondolozi Elliot Mahleza and found not guilty of murder but guilty of assault.

[4.5] He was employed as a Security Guard at the Tavern where the deceased died and was on duty at the time.

[4.6] He has a previous conviction for rape in 2004.

[5] Defendants deny that the arrest without a warrant was unlawful, Plaintiff being arrested on a charge of murder, a Schedule 1 offence in terms of Section 40(1)(b) of the Criminal Procedure Act 51 of 1977 *("the Act").*

[6] Defendants plead a reasonable suspicion defence.

[7] It is further pleaded that the subsequent detention was lawful and in terms of Sections 39 and 50 of the Act.

[8] It is pleaded that as Murder is also a Part II and Part III Schedule 2 offence (of the Act) and so Plaintiff could not be released on bail by the SAPS, and that his detention at and after his first appearance was by order of a Magistrate in due legal process.

[9] Section 42 of this National Prosecuting Authority Act 32 of 1998 is relied on in respect of Second Defendant but was not further referred to.

THE LAW AS TO ARREST AND DETENTION IN TERM OF SECTION 40(1)(b)

[10] In respect of Section 40(1)(b) of the Act the position is generally set out in ***Minister of Police v Dhali*** [1] as follows:

[1] ***Minister of Police v M D Sahalam Dhali*** (unreported ECD CA327/2017 delivered on 26 February 2019)

"[9] In ***Duncan v Minister of Law and Order*** [2], it was held that the jurisdictional facts for a Section 40(1)(b) defence are that (i) the arrestor must be a peace officer, (ii) the arrestor must entertain a suspicion; (iii) the suspicion must be that the suspect (the arrestee) committed an offence referred to in Schedule 1; and (iv) the suspicion must rest on reasonable grounds.[3]

[10] The suspicion that must be held must, in order to be a reasonable one, be objectively sustainable, in the sense that it must rest on reasonable grounds.[4]

[11] The jurisdictional fact for an arrest without warrant in terms of these provisions remains a suspicion. In ***Mabona & Another v Minister of Law and Order and Others***[5], the following was said in relation to how a reasonable suspicion is formed:

> "Would a reasonable man in the second defendant's position and possessed of the same information have considered that there were good and sufficient grounds for suspecting that the plaintiffs were guilty of conspiracy to commit robbery or possession of stolen property knowing it to have been stolen? It seems to me that in evaluating his information a reasonable man would bear in mind that the section authorises drastic police action. It authorises an arrest on the strength of a suspicion and without the need to swear out a warrant, ie something which otherwise would be an invasion of private rights and personal liberty. The reasonable man will therefore analyse and assess the quality of the information at his disposal critically, and he will not accept it lightly or without checking it where it can be checked. It is only after an examination of this kind that he will allow himself to entertain a suspicion which will justify an arrest. This is not to say that the information at his disposal must be of sufficiently high quality and cogency to engender in him a conviction that the suspect is in fact guilty. The section requires suspicion but not certainty. However, the suspicion must be based upon solid grounds. Otherwise, it will be flighty or arbitrary, and not a reasonable suspicion."[6]

[12] In ***Minister of Police and Another v Du Plessis***[7] Navsa ADP stated as follows:

> "[14] Police bear the onus to justify an arrest and detention. In *Minister of Law and Order and Others v Hurley and Another* 1986 (3) SA 568 (A) at 589E – F the following is stated:
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> > 'An arrest constitutes an interference with the liberty of the individual concerned, and it therefore seems to be fair and just to require that the person who arrested or caused the arrest of another person should bear the *onus* of proving that his action was justified in law.'

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[2] 1986 (2) SA 805 (A).
[3] At 818H-I; See also ***Minister of Safety and Security v Sekhoto and Another*** 2011 (5) SA 367 (SCA).
[4] ***Duncan v Minister of Law and Order*** 1986 (2) SA 805 (A) at 818H
[5] 1988 (2) SA 654 (SE)
[6] At 658 E-H.
[7] 2014 (1) SACR 217 (SCA) at paragraphs 14 – 17.

> [15] Our new constitutional order, conscious of our oppressive past, was designed to curb intrusions upon personal liberty which has always, even during the dark days of apartheid, been judicially valued, and to ensure that the excesses of the past would not recur. The right to liberty is inextricably linked to human dignity. Section 1 of the Constitution proclaims as founding values, human dignity, the achievement of equality and the advancement of human rights and freedoms. Put simply, we as a society place a premium on the right to liberty.
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> [16] In *Zealand v Minister of Justice and Constitutional Development and Another* 2008 (2) SACR 1 (CC) (2008 (4) SA 458; 2008 (6) BCLR 601) para 24 the following is said:
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> > 'The Constitution enshrines the right to freedom and security of the person, including the right not to be deprived of freedom arbitrarily or without just cause, as well as the founding value of freedom. Accordingly, it was sufficient in this case for the applicant simply to plead that he was unlawfully detained. This he did. The respondents then bore the burden to justify the deprivation of liberty, whatever form it may have taken.'
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> [17] Justification for the detention after an arrest until a first appearance in court continues to rest on the police. Counsel for the appellants rightly accepted this principle. So, for example, if shortly after an arrest it becomes irrefutably clear to the police that the detainee is innocent, there would be no justification for continued detention.""

[11] It is trite that police officers purporting to act in terms of Section 40(1)(b) of the Act should investigate exculpatory explanations offered by a suspect before they can form a reasonable suspicion for the purpose of lawful arrest.[8] It is expected of a reasonable person to analyse and weigh the quantity of information available critically and only thereafter, and having checked what can be checked, will he form a mature suspicion that will justify on arrest.[9]

[8] ***Louw & Another v Minister of Safety and Security & Others*** 2006 (2) SACR 178 (T); ***Liebenberg v Minister of Safety and Security*** [2009] ZAGPPHC 88 (18 June 2004).
[9] ***Mabona (Supra)***

[12] All the above is of course subject to the discretion to arrest as explained in ***MR v Minister of Safety & Security***[10]. In short police officers are never obliged to effect an arrest, when all the jurisdictional factors are present, in the conduct of their discretion whether to do so or not.[11]

[13] Once an arrest has been lawfully executed without a warrant the question arises as to an arrestee's rights thereafter.

[14] Generally this is governed by Section 50 of the Act, but must be read with Sections 59 and 59A thereof.

[15] The first portion of section 50, leading up to subsection (d)(i), provides as follows:

> "**Procedure after arrest**
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> 50(1)(a) Any person who is arrested with or without warrant for allegedly committing an offence, or for any other reason, shall as soon as possible be brought to a police station or, in the case of an arrest by warrant, to any other place which is expressly mentioned in the warrant.
>
> (b) A person who is in detention as contemplated in paragraph (a) shall, as soon as reasonably possible, be informed of his or her right to institute bail proceedings.
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> (c) Subject to paragraph (d), if such an arrested person is not released by reason that –
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> (i) no charge is to be brought against him or her; or
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> (ii) bail is not granted to him or her in terms of section 59 or 59A (my note: these sections do not apply for present purposes)
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> he or she shall be brought before a lower court as soon as reasonably possible, but not later than 48 hours after the arrest."

[10] 2016 (2) SACR 540 (CC) at [40] – [48]
[11] *Cf* ***Sekhoto supra*** [22] and ***MR supra*** at [57]-[65].

[16] Subsection 50(6) of the Act provides:

> "(6)(a) At his or her first appearance in court a person contemplated in subsection (1)(a) who –
> (i) was arrested for allegedly committing an offence shall, subject to this section and section 60 –
> (aa) be informed by the court of the reason for his or her further detention; or
> (bb) be charged and be entitled to apply to be released on bail; ..."

Section 60 deals with bail applications.

[17] After arrest then the arrestee is entitled to be informed as soon as reasonably possible of his right to institute bail proceedings (Section 50(1)(b)).

[18] Bail can be granted by the police, the Director of Public Prosecutions, a person authorized by the Director of Public Prosecutions, a Magistrate and the High Court, depending on the circumstances.

[19] Section 59A of the Act provides *inter alia* that an authorized prosecutor may, in respect of Schedule 7 offences, in consultation with the investigating officer authorise the release of the accused on bail. Section 59 applies to *"Police Bail"* before appearance before a Court other than in respect of an offence referred to in Part II or Part III of Schedule 2 – this being such an offence, not being relevant.

[20] In ***The Minister of Police & Another v Muller***[12], the Court commented as follows:

> "[20] Reverting to the provisions of s 40(1)(b) and (e) of the CPA, as recorded earlier, in order to carry out an arrest in terms of these provisions the arresting officer must harbour a reasonable suspicion that an offence had been committed. In *Mabona*9 Jones J considered what was required for a suspicion to be reasonable in the context of s 40(1)(b) of the CPA. He recorded:
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> > '. . . It authorises an arrest on the strength of a suspicion and without the need to swear out a warrant, ie something which otherwise would be an invasion of private rights and personal liberty. The reasonable man will therefore analyse and assess the quality of the information at his disposal critically, and he will not accept it lightly or without checking it where it can be checked. It is only after an examination of this kind that he will allow himself to entertain a suspicion which will justify an arrest. This is not to say that the information at his disposal must be of sufficiently high quality and cogency to engender in him a conviction that the suspect is in fact guilty. The section requires suspicion but not certainty. However, the suspicion must be based on solid grounds. Otherwise it will be flighty or arbitrary, and not a reasonable suspicion.'
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> The same considerations apply in respect of s 40(1)(e)."

[21] The Minister of Police bears the onus to justify the arrest and initial detention.

THE FACTS

[22] The facts can be shortly stated.

[23] From the evidence of Plaintiff it appears that:

[23.1] Plaintiff is a 34 year old male well known in Bedford where he lives. He worked as a security guard at Entrali Tavern on door duty for some two years prior to and on 29 August 2015.

[12] (1037/18) [2019] ZASCA 165 (29 November 2019)

[23.2] On that day the deceased died at the tavern, shot twice through his left and right legs by one Thabiso Makawu, the tavern owner.

[23.3] The deceased arrived at about 10:00pm and found Plaintiff and Makawu at the door of the tavern. He stabbed Plaintiff in the left shoulder with a folding knife about 12cm long in all. The reason for the stabbing was, he said, a quarrel he had with deceased at deceased's home earlier in the day between 2:00pm and 5:00pm. They are family, being cousins.

[23.4] After stabbing Plaintiff Mr Makawu tried to intervene, falling at a high stoep, having first been stabbed by deceased. He lay kicking with his feet and seized his firearm which had fallen from a pocket using thus to shoot deceased twice, who was at that time close to him. Deceased was shot in both legs and fell bleeding. Plaintiff seized a kierie and hit deceased as he lay, once (so it is alleged) on the body, out of anger. He left the scene and was collected by the police from the gate of his parental home and taken to hospital where his wound was cleaned. On the following Monday the police fetched him, he deciding to make no statement until having consulted a lawyer. He left that employment thereafter.

[23.5] He lives in Bedford with his girlfriend and child, then a 1 year old.

[23.6] He was subsequently arrested months later on 24 December 2015 at his home at 4:00am – 4:30am, by police officers, many in number he says, amongst others Plaatjies, Ngumbela and Doloni. He was not told why he was arrested.

[23.7] He was charged at the Bedford Police Station with murder early in the morning of 24 December 2015 and held in the cells until he was taken to Adelaide to Court, also on the morning of 24 December 2015 at about 9:00am. He appeared in an *"office"* before a Mr Murphy (Magistrate), he was not given a chance to speak and was remanded to Fort Beaufort Prison. He says he was not told of his right to bail. He wanted to be released on bail. The short handwritten note relevant discloses that his release was opposed by the State and that he wanted Legal Aid.

[23.8] He was kept in shocking conditions with 32 others in a cell. The cell was dirty, had only one toilet and a bed. The other people in the cell he described as gangsters who threatened to assault him. He spent Christmas in prison away from his family.

[23.9] There were a number of other appearances – all at which he was represented, but only could get a bail hearing on 26 January 2016.

[23.10] It was put to him that Warrant Officer Mali had come to see him at the family farm on 22 December 2015 and asked him to come to the Police Station later that day. This he denied.

[23.11] Much was put to him in cross-examination but only some of this requires to be dealt with as only one witness was called by the State – Warrant Officer Mali.

[23.12] It was put that he was arrested on a charge of Murder having not appeared at the Police Station as asked (this to bring him to a Court). It was put that the reason for his arrest was explained and his rights were given. This he denied.

[23.13] It was put that after his arrest a bail form was completed which reflected that the Police would not oppose bail at R500.

[23.14] In essence little else was disputed which remains relevant.

[24] The evidence of Plaintiff's witness, Mr Makawa disclosed the following:

[24.1] He essentially supported the events at his tavern, as described by Plaintiff, and the shooting by him of the deceased. He confirmed that the deceased had stabbed him in the eye and arm before the shooting, this when he had fallen, deceased persisting in the attack.

[24.2] He said Plaintiff struck deceased with the kierie once on the chest. He was acquitted at a trial on Murder charge – this being no surprise.

[25] Both Plaintiff and Makawe were impressive, forthcoming witnesses of excellent demeanour. I have no reason to doubt the truth of their evidence and credibility as appear hereafter considering this in the light of all the evidence.

[26] The only witness called on behalf of Defendant was Warrant Officer Mali. He was placed in charge of the docket in this matter, at a very late stage, on 21 December 2015 having no prior knowledge of the matter at all. He says he read the docket and formed the view that Plaintiff was implicated in the murder of the deceased – essentially for the following reasons extracted from the statement:

[26.1] There was an altercation earlier in the day of the death of deceased at deceased's home when Plaintiff threw stones at deceased's house and threatened to and tried to slap deceased's young daughter – the deceased coming out to defend her.

[26.2] That Plaintiff having assaulted deceased with a kierie after the shooting, was implicated in the murder and ultimately that this could have contributed to the bleeding and death.

[26.3] That Plaintiff was asked by him, on 22 or 23 December 2015 at the farm (when visited by Warrant Officer Mali and others), to attend at the Police Station later that day and failed to do so.

[26.4] He was upset by this but had already decided to arrest Plaintiff (even when visiting Plaintiff on the farm).

[26.5] In the early morning of 24 December 2019 he and two others arrested Plaintiff at his home on a charge of Murder.

[26.6] In cross-examination, he prevaricated and on occasions avoided questions, when in difficulty, which was frequent. He also in my view changed his version frequently when it suited him in an attempt to get out of difficulty.

[26.7] It appeared from documents put to him that in fact in the investigation diary on 11 December 2015, a Captain Meyer had instructed attention to a letter from the Director of Public Prosecutions Grahamstown which said that an affidavit must be taken from Bulelwa Mahleza, the deceased's wife about the night in question, and that Plaintiff *"must be arrested"* to be joined in the trial, as soon as possible.

[26.8] This instruction was effectively repeated in the investigation diary on 21 December 2015 when he was appointed as investigating officer.

[26.9] He indeed took a statement from the deceased's wife but well after the arrest of Plaintiff (27 December 2015) – this contradicting his evidence in chief that he relied on this statement amongst others to justify the arrest itself.

[26.10] Importantly this was the only statement which even hinted at the fact that Plaintiff had assaulted the deceased with the kierie more than once or that this contributed to his death in any way.

[26.11] This statement clearly can have nothing to do with the arrest and exposed Warrant Officer Mali as not being candid in his evidence in chief.

[26.12] He got into terrible difficulty in attempting to avoid the suggestion that it was the instruction he received in the investigating diary which precipitated the arrest and not his own assessment.

[26.13] His attempt to avoid the clear findings in the post-mortem report that the deceased's death was due to gunshot wounds to the legs and exsanguination therefrom and had nothing to do with any other injury, failed miserably.

[26.14] His evidence failed entirely on a careful examination thereof, and against the docket, to establish an independent reasonable suspicion justifying the decision to arrest.

[26.15] He clearly, it would seem, may simply have acted on the Meyer instruction though he denied this vigorously.

[26.16] Notably his version collapsed on his conceding that the statement of deceased's wife was taken after the arrest and that the version of the kierie having been used to assault deceased more than once has been established on his having interviewed the witness Antony to establish this as the statement did not say as much. This was not even mentioned in chief. This was not referred to in the investigating diary and he said he did not record or take a further statement as this could be dealt with orally in court – a clear fabrication without any doubt at all. This had also not been put to Plaintiff or his witness.

THE ANALYSIS

[27] This is again simply dealt with. The death of the deceased was, by virtue of the J88, established to be the two gunshot wounds and their consequence as to exsanguination. Nothing in the statements established any more than one

blow on the abdomen with the kierie which had no consequence as to death or bleeding, nor has it linked to or connected therewith.

[28] There was certainly no basis set out for the suspicion on reasonable grounds that Plaintiff was part of the murder of the deceased in any culpable way at all.

[29] The arrest was it seems clearly premised on the instruction of Captain Meyer and the prior instruction of the Director of Public Prosecutions. This arrest was unwarranted, unjustified and unlawful. Warrant Officer Mali failed to properly analyse and assess the quality of the information at his disposal critically and a reasonable man doing so would not have considered that there were good and sufficient grounds for suspecting that Plaintiff was guilty of Murder.

WHICH OF DEFENDANTS IS LIABLE HEREFOR

[30] I have concluded that Plaintiff's arrest was clearly unlawful.

[31] This was an arrest on a charge of murder as set out in Schedule 5 of the Act.

[32] At the stage of his first appearance before a Magistrate all involved knew or ought to have known the relevant procedures and onus[13].

[13] ***Minister of Police and NDPP v R Muller*** (1037/18) [2019] ZASCA 165 (29 November 2019) at [36]

> "Section 60(11)(*b*) of the CPA provides that where an accused person has been charged with an offence referred to in schedule 5 (but not in schedule 6) he or she shall be detained in custody until he or she is dealt with in accordance with law unless he/she, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that the interest of justice permit his release. In the circumstances it placed an onus on Muller to adduce evidence to satisfy the court, on a balance of probability, that the interests of justice permitted his release."

[33] This was in any event clearly a Reception Court only.

[34] The police knew or ought to have known that at the first appearance the case would inevitably be remanded as a routine *"Mechanical Act"* rather than on considered judicial decision and further that being at the least a Schedule 5 offence, Section 60(11)(b) of the Act applied and that there would have to be a bail hearing with evidence tendered – to satisfy the Court that the interests of justice permitted release on bail – this notwithstanding the Investigating Officer's view that bail should not be opposed at R500.00.

[35] This would most certainly not have been facilitated on 24 December 2015 and it was most certainly foreseeable that there would be a remand in custody and a postponement for sufficient time to facilitate a bail hearing with or without legal representation.

[36] This in fact resulted in a remand to 12 January 2016 (some 19 days post arrest) and through the Christmas period.

[37] As I have found that the initial arrest was unlawful, it is clear that First Defendant is liable for at least the period of detention from arrest at say 5:00am to appearance at say 9:30am on the same day (24 December 2015).

[38] The question is whether First and/or Second Defendants may be held liable for the further detention for the period thereafter and if so, for how long.

[39] It seems to me that Plaintiff's request for Legal Aid, at his first appearance on 24 December 2015, is irrelevant in the above scenario as either way the matter could and would not have proceeded that day.

[40] The pleaded case against First Defendant is the unlawful arrest. It is not particularly clear that Plaintiff's claim is against First Defendant from his first appearance to 12 January 2016 – but it seems to me that this is sufficiently before me to require resolution. From 12 January 2016 to 26 January 2016 the claim is most certainly only against Second Defendant, the detention being said to be *"at the instance of Second Defendant".*

[41] It is not the case for Plaintiff that First Defendant's employer failed to secure his release when it was in their power to do so.

[42] As to liability of First Defendant for the period of arrest, post appearance to 12 January 2016, not every remand order by a Magistrate necessarily renders the further detention lawful[14].

[14] ***Minister of Police and NDPP v R Muller*** (1037/18) [2019] ZASCA 165 (29 November 2019)

[43] In ***Minister of Police and NDPP v R Muller*** [15] the Court held as follows:

> "[26] Section 12(1)(a) of the Constitution guarantees the right of security and freedom of a person, which includes the right 'not to be deprived of freedom arbitrarily and without just cause'. Section 35(1) of the Constitution provides that anyone who is arrested for allegedly committing an offence has the right, amongst others—
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> > '(d) to be brought before a court as soon as reasonably possibly, but not later than—
> > (i) 48 hours after the arrest; or
> > (ii) the end of the first court day after the expiry of the 48 hours, if the 48 hours expires outside ordinary court hours or on a day that is not an ordinary court day;
> > (e) at the first court appearance after being arrested, to be charged or to be informed of the reasons for the detention to continue, or to be released; and
> > (f) to be released from detention if the interest of justice permit, subject to reasonable conditions.'
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> The rights enshrined in s 35 of the Constitution are echoed in s 50 of the CPA.
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> [27] Even before the Constitution this court held in *Kader*[16] that:
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> > '[I]t is the function of the judicial officer to guard against the accused being detained on insubstantial proper grounds, in any event, to ensure that his detention is not unduly extended.'
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> [28] This principle was further expounded by Harms DP in *Sekhoto*[17] where he stated:
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> > 'While the purpose of arrest is to bring the suspect to trial, the arrestor has a limited role in that process. He or she is not called upon to determine whether the suspect ought to be detained pending a trial. That is the role of the court (or in some cases a senior officer). The purpose of the arrest is no more than to bring the suspect before the court (or the senior officer) so as to enable that role to be performed.'
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> [29] In Isaacs [18], this court was called upon to decide whether the unlawfulness of the arrest of the appellant had the result that his further detention after a remand by a magistrate was also unlawful. They answered this question in the negative. It does not follow that every remand order by a magistrate necessarily renders the further detention lawful. Where a magistrate exceeds his authority or fails to discharge his duties the Minister of Justice would ordinarily be liable for damages ensuing from his failure.[19]
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> [30] In *De Klerk*[20], however, the Constitutional Court were divided on the effect of the order of remand on the liability of the police where the magistrate had failed to discharge his duty to the accused before him. De Klerk was unlawfully arrested on a charge of assault with intent to do grievous bodily harm. He was promptly brought before a court and the investigating officer

[15] (1037/18) [2019] ZASCA 165 (29 November 2019)
[16] *Minister of Law and Order v Kader* [1990] ZASCA 111; 1991 (1) SA 41 (A) at 51A-C.
[17] *Minister of Safety and Security v Sekhoto* [2010] ZACC 141; 2011 (5) SA 367 at 383G-384A.
[18] *Isaacs v Minister of Law and Order* 1996 (1) SACR 314 (A).
[19] Compare Zealand.
[20] *De Klerk v Minister of Police* [2019] [ZACC] 32 (CC).

recorded in the docket that she recommended that he be released on bail of R1 000. The court was, however, a 'reception court' only. She knew that at the first appearance the remand would be a routine or mechanical act rather than a considered judicial decision. De Klerk was accordingly not afforded an opportunity to apply for bail and was remanded in custody.

[31] Froneman J, writing the second judgment (with whom two other judges concurred) resonated the principles set out earlier herein and explained the effect of s 35 of the Constitution thus:

> 'Subsections 35 (1)(d) - (f) impose constitutional obligations on three different institutions of government: the police services, the National Prosecuting Authority and the Judiciary. The police carry the responsibility to ensure a criminal suspect is brought before a court as required by section 35(1)(d). This is an administrative function to be exercised within the broader executive authority of government. The decision to charge a suspect under section 35(1)(e) is one that falls under the authority and competence of the National Prosecuting Authority, an independent institution under the Constitution. The decision to release or detain a suspect falls within the independent judicial authority or competence of the Judiciary.'[21]

He considered therefore that the only constitutional responsibility which rested upon the arresting officer was to bring the arrestee to court timeously. Once this has been done the arresting officer had no further direct legal competence or authority to charge the applicant or decide on his release or further detention. He accordingly concluded that the Minister could not be held liable for De Klerk's further court ordered detention.

[32] Theron J, writing the main judgment (with whom 4 judges concurred) considered that the correct inquiry related not to the wrongfulness of the further detention, but to the causation of the harm (the further detention) flowing from the wrongful act (the arrest). She acknowledged that there is no reason why a deliberative judicial decision (in contra distinction to merely a failure to apply the mind) could not constitute a break in the chain of causation, however, she considered that the exercise of a proper judicial discretion should not always be considered sufficient to break the chain of causation.[22] On the particular facts of De Klerk the arresting officer had actual, subjective foresight that the proceedings in the 'reception court' would occur as they did, that De Klerk would not be considered for bail at all and that he would accordingly suffer the harm that he did. She held that a remand does not necessarily break the causal chain where it was subjectively foreseen even though it is otherwise considered abnormal. The subjective foresight of the arrestor weighed heavily with her in reaching the conclusion which she did.[23]

[33] Mogoeng CJ (writing the third judgment), concurred in the judgment of Froneman J. He, however, responded to the reasoning in the main judgment and at para [154] he stated:

> '. . . a constitutionally-prescribed first court appearance does constitute a new intervening act that must disrupt legal causation, and considerations of public policy and justice render it unreasonable to impute liability to the Police for a court's failure to fulfil its exclusive constitutional obligations.'

Finally, Cameron J (writing the second judgement) concurred in the result of the main judgment 'on the very particular facts of De Klerk's case'. He

[21] *De Klerk* para 132.
[22] *De Klerk* para 74.
[23] *De Klerk* para 79 - 81.

considered that where a court has given judicial consideration to whether to remand an arrestee, the police, as instigators of the detention, could not be liable.[24] On the particular facts of the case, however, he opined that no such evaluation had occurred."

[44] In ***Muller*** [25] the position was summarised by Eksteen AJA, as follows:

> "[34] What emerges from the various judgments in *De Klerk* is that one half of the court considered that a deliberative judicial decision in respect of the further detention of the arrestee constitutes an intervening act which truncates the liability of the police for the wrongful arrest and detention. The remainder considered that it may do so, but not necessarily. Theron J summarised the applicable principles thus:
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> > 'The principles emerging from our jurisprudence can then be summarised as follows. The deprivation of liberty, through arrest and detention, is per se prima facie unlawful. Every deprivation of liberty must not only be effected in a procedurally fair manner but must also be substantively justified by acceptable reasons. Since Zealand, a remand order by a Magistrate does not necessarily render subsequent detention lawful. What matters is whether, substantively, there was just cause for the later deprivation of liberty. In determining whether the deprivation of liberty pursuant to a remand order is lawful, regard can be had to the manner in which the remand order was made.'[26] "

[45] In ***De Klerk v Minister of Police*** [27], in the Constitutional Court, the following was said by the majority judgment:

> "[63] In cases like this, the liability of the police for detention post-court appearance should be determined on an application of the principles of legal causation, having regard to the applicable tests and policy considerations. This may include a consideration of whether the post-appearance detention was lawful.[28] It is these public policy considerations that will serve as a measure of control to ensure that liability is not extended too far. The conduct of the police after an unlawful arrest, especially if the police acted unlawfully after the unlawful arrest of the plaintiff,[29] is to be evaluated and considered in determining legal causation. In addition, every matter must be determined on its own facts – there is no general rule that can be applied dogmatically in order to determine liability.

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[24] *De Klerk* para 106.
[25] *supra* at paragraph [34]
[26] *De Klerk* para 62.
[27] CCT 95/18 [2019] ZACC 32
[28] Importantly, this relationship between lawfulness of the decision to remand and legal causation of the unlawful arrest is distinct from the relationship between wrongfulness and legal causation of the same delict. I make no pronouncements on the latter.
[29] In all the cases discussed above this was the case. Examples include misleading a court or presenting false evidence.

[64] With these principles in mind, I now consider the facts of this case.

Should the Minister of Police be held liable?

[65] Did the wrongful act of Constable Ndala in arresting the applicant legally cause the harm arising from his detention for a further seven days after his first court appearance? The determination of legal causation is based on the consideration of the various traditional factors already discussed, including direct consequences, reasonable foreseeability, and the presence of a *novus actus interveniens*. The implications of these factors must then be tested against constitutionally-infused considerations of public policy.[30]

...

[72] The reliance on *Sekhoto* is in my view, misplaced. I agree with the minority that *Sekhoto* "was not concerned with the question whether the [respondent] could be held liable for detention following judicial remand, but with whether the arrest itself was unlawful".104 *Sekhoto* did not deal with the role of a police officer in the context of delictual liability for post-court appearance detention. It merely delineated the functions of the police vis-à-vis the court in the judicial process, in particular the bringing a suspect to court to stand trial. Anyhow, the statements were obiter. The appeal in *Sekhoto* was upheld because the Court held that the arrest was lawful.

[73] The minority reasoned that liability of the Minister of Police should be limited only by the genuine exercise of a judicial discretion, constituting a *novus actus interveniens*. Where a Magistrate fails to apply their mind to the question of bail, and thus unlawfully remands an arrested person to detention, there is sufficient reason to hold the Minister of Police liable for the ensuing detention.[31] The minority cited English authority to support this proposition[32] and sought justification on grounds of public policy. Treating an exercise of judicial discretion as an intervening act strikes a balance between, on the one hand, there being no need for *an arrestor* to be aware of the unlawfulness of an arrest for delictual liability to be imposed, and on the other hand, the requirement for a defendant who is *not an arrestor* to have full *animus iniuriandi* (including awareness of wrongfulness) for delictual liability to be imposed.[33] This approach attempted to mitigate the apparent greater risk of incurring delictual liability faced by an arrestor than that faced by third parties who otherwise unlawfully and factually cause harm to an accused.

[74] This argument, however, may cut both ways. Unlawful positive conduct (as opposed to a mere failure to exercise a genuine discretion) on the part of a Magistrate is also capable of mitigating the increased risk faced by arrestors if it is considered as an intervening event. There is no reason why deliberative juridical decisions (in contradistinction to merely a failure to apply the mind) should not constitute a break in the chain of causation. The

[30] 94 See [28] above.
[31] A Magistrate failing to apply their mind to the question of bail and remanding the arrested person is necessarily an unlawful remand.
[32] *Lock v Ashton* [1848] EngR 878; (1848) 12 QB 871; [1848] ER 878; *Harnett v Bond* [1924] 2 KB 517 (CA); [1925] AC 669 (HL); and *Diamond v Minister* [1941] 1 All ER 390.
[33] Supreme Court of Appeal judgment above n 1 at para 44.

balance sought by the minority in the Supreme Court of Appeal may also be struck by finding that unlawful positive conduct on the part of a Magistrate may break the chain of causation. In any event, and this point must be emphasised, the exercise of a proper judicial discretion should not always be considered sufficient to break the chain of causation, lest the elasticity of legal causation established in *Mokgethi* be compromised.

[75] While there are strong public policy reasons to only find the Minister of Police delictually liable in this case, there are, in my view, stronger public policy reasons for finding fully for the applicant on these facts. This is where I part ways with the third judgment. Ultimately, the test for legal causation, while infused with constitutional considerations, must remain flexible and fact-sensitive. I disagree with the third judgment to the extent that it finds that the separation of powers invariably means that the police cannot be liable for detention after a remand order.109 All relevant factors must be considered on a case-by-case basis. There may be times, as in this case, where the police must be liable notwithstanding the persuasive separation of power considerations expressed in the third judgment.

Foresight

[76] A reasonable arresting officer in the circumstances may well have foreseen the possibility that, pursuant to an unlawful arrest, the arrested person would routinely be remanded in custody after their first appearance.110 Here, however, the arresting officer had actual, subjective foresight that the proceedings in the "reception court" would occur as they did and that the applicant would not be considered for bail at all and accordingly suffer the harm that he did.[34]

...

[84] This matter is similar. There are potential concurrent wrongdoers: the Minister of Justice, the Minister of Police and the relevant Director of Public Prosecutions. Each of these actors may have committed independent delicts resulting in harm to the applicant. This would render them jointly and severally liable. So, while Mr de Klerk may successfully sue only one wrongdoer, it does not follow that the others did not commit a delict."

[46] In my view, notwithstanding Warrant Officer Mili's assertion that he did not really realise that the first appearance would not exclude the possibility of bail and had no knowledge of the impact of Section 60(1)(b) of the Act – I cannot accept that this is a credible response for a policeman of 30 years experience. This also in the light of my assessment above of the credibility of his evidence.

[34] See also [81]

[47] In my view, the arrest at the instance of Warrant Officer Mili was in the circumstances of the acceptable evidence clearly a consequence, he in fact subjectively foresaw arising from an inevitable mechanical remand of Plaintiff at his first Court appearance and further no prospect of bail being granted until a formal Bail Application had been heard, this delaying things inevitably to at least 12 January 2016. In short Warrant Officer Mili clearly knew (or ought to have known) that the further detention would ensue as a consequence of the arrest and that the docket note in respect of bail would be meaningless at Plaintiff's first appearance.

[48] In my view, public policy considerations based on the norms and values of the Constitution and the principles set out in ***De Klerk*** *(supra)* point to Defendant being liable for a period of detention from 24 December 2015 to 12 January 2016, but not beyond.

[49] The same cannot be said for the subsequent detention from 12 January 2016. By that time that a Bail Application would be entertained was perfectly foreseeable. Plaintiff was legally represented and parties were not ready, postponing same by agreement.

[50] On the next appearance on 19 January 2016, Plaintiff's attorney was not available (amongst other things) and again the matter was postponed by agreement.

[51] On 25 January 2016 the matter was again postponed by agreement to 26 January 2016 when bail was granted.

[52] The only remaining issue is the question of concurrent wrongdoers, the First and Second Defendants being potentially concurrent wrongdoers rendering them jointly and severally liable, thus the issue of the liability of the Director of Public Prosecutions for the period 12 January 2016 to 26 January 2016 (or even before 12 January 2016).

[53] I fail to see any delictual wrongdoing in the hands of Second Defendant as to the period of 24 December 2015 to 12 January 2016. The matter was judicially remanded by the Magistrate, as was inevitable, and a Bail Application and further remand date set for 12 January 2016, about which period there is no further complaint, and I do not see that anything in the pleaded case conveys otherwise. Section 60(11)(b) of the Act operated accordingly.

[54] As from 12 January 2016 onwards the delays were by agreement and unless the charge was withdrawn, which it was not, there had to be a Bail Application as set out above – the delay of which was due to no fault of Second Defendant or Second Defendant's employees.

[55] There is no claim pleaded based on the negligent or intentional failure to withdraw the charge.

[56] The only remaining issue is whether the Director of Public Prosecution's instruction to arrest Plaintiff is a basis for liability beyond the above.

[57] The *"instruction"* to the Police was, it seems to me of no consequence and had no statutory basis.

[58] If this influenced Warrant Officer Mili, as I have concluded it did, although he denied this completely, he nevertheless read the docket and on his evidence made his own decision, albeit a wrong decision, as to reasonable suspicion discussed above.

[59] The only legitimate input of the Director of Public Prosecution or State Prosecutor would have been to seek a warrant of arrest in terms of section 45 of the Act. This did not happen.

[60] In short, I can find no basis in delict for the liability of Second Defendant, on the case as pleaded.

[61] For these reasons it is not necessary to consider whether the failure to name the National Director of Public Prosecution as opposed to the Director of Public Prosecution is fatal to the claim.

DAMAGES

[62] Plaintiff claims R990 000.00 in respect of loss of liberty, impairment of dignity and contumelia.

[63] The culpable detention was for a period of some 19 days and a few hours incorporating the Christmas period.

[64] I have set out the poor condition of Plaintiff's detention and the deprivation of family Christmas time.

[65] It is true that he had a Rape conviction (and 6 years prison sentence) by this time – this well known to the community, thus a relevant consideration.

[66] He was arrested however without lawful cause at his home in front of his live in long term girlfriend and small child.

[67] In ***Minister of Safety & Security v Tyulu*** [35] the guidelines are set out as follows:

> "[26] In the assessment of damages for unlawful arrest and detention, it is important to bear in mind that the primary purpose is not to enrich the aggrieved party but to offer him or her some much-needed solatium for his or her injured feelings. It is therefore crucial that serious attempts be made to ensure that the damages awarded are commensurate with the injury inflicted. However, our courts should be astute to ensure that the awards they make for such infractions reflect the importance of the right to personal liberty and the seriousness with which any arbitrary deprivation of personal liberty is viewed in our law. I readily concede that it is impossible to determine an award of damages for this kind of *injuria* with any kind of mathematical accuracy. Although it is always helpful to have regard to awards made in previous cases to serve as a guide, such an approach if slavishly followed can prove to be

[35] 2009 (5) SA 85 (SCA) at para [26]

> treacherous. The correct approach is to have regard to all the facts of the particular case and to determine the quantum of damages on such facts."

[68] After his detention in the police cells for a few hours he remained in the Fort Beaufort Prison.

[69] Once the wrongfulness of the arrest or imprisonment has been established, Plaintiff can claim satisfaction, which is estimated *ex aequo et bono*, under the *actio iniuriarum*. Factors which may have an influence on the amount of satisfaction awarded are the circumstances under which the interference with liberty took place, the absence or presence of malice or an improper motive on the part of Defendant, the duration of the restriction of liberty, the social status and age of Plaintiff, the fact that Plaintiff was the author of his or her own misfortune, the degree of publicity afforded the deprivation of liberty, and whether Defendant apologised for or gave a satisfactory explanation as to what took place. In addition, awards in previous cases, allowing for inflation, must be considered. If, there is also an infringement of other personality interests, such as dignity and especially good name or reputation, the amount of satisfaction is increased.

[70] In ***Barnard v Minister of Police and Another*** [36] the Court considers a number of cases where Plaintiff was unlawfully detained for a period ranging from a few hours up to four days and awarded Plaintiff damages of R58,000.00 for deprivation of his liberty for a period of 21 and a half hours.

[36] [2019] ZAECGHC 58; [2019] 3 All SA 481 (ECG); 2019 (2) SACR 362 (ECG) (31 May 2019) from paragraph 60

[71] In ***Madze v Minister of Police*** [37] the Court awarded damages to Plaintiff in the sum of R120,000.00 for unlawful arrest and detention for a period just short of four days. No evidence whatsoever was led concerning the conditions of Plaintiff's detention and the effect it may have had on him. The Court nevertheless took into account that the conditions in police cells anywhere in the Eastern Cape are generally unsavoury and far from comfortable or clean. More recently in ***Schoombee and Others v Minister of Police and Another*** [38] the Court awarded damages of between R180,000.00 and R230,000.00 for unlawful arrest and detention of approximately 24 hours. The social and economic background and previous periods in prison of Plaintiffs in this matter varied greatly with the Court, placing very little emphasis on this for the purpose of determining their damages.

[72] In ***Schoombee***, the Court analysed previous awards as follows:

> "Arrest and Detention: Stoltz v Minister of Safety and Security (Unreported SCELD 3114/2004) R211 000; Peterson v Minister of Safety and Security (Corbett & Honey Vol VI, K6-1) R83 185; Thlaganyane v Minister of Safety and Security (North West High Court, Mafeking 2267/2012) R140 000; Nqweniso v Minister of Safety and Security (ECD 2267/2010) R106 000; Majaca v Minister of Safety and Security 2012 JDR 2384 (ECG) 1721/2012 R126 000; Van der Merwe v Minister of Safety and Security (Corbett & Honey Vol VI, K6-35) R120 000; Rowan v Minister of Safety and Security 2011 QOD 6 (K6-44) R63 000; Sandlo v Minister of Police (Corbett & Honey Vol VI, K6-138) R59 900; Mbotya v Minister of Police C&H Vol VI K6-143 R65 930; Letlalo v Minister of Police (28575/12) [2014] ZAGPJHC (28 March 2014) R110 000; Gobuamang v Minister of Police 2011 (6K6) QOD 85 (ZAGPJHC) R103 000; Minister of Safety and Security v Scott and Another 2014 QOD (7K6) 22 (SCA) R40 000; Prince v Minister of Safety and Security 2014 (7K6) QOD 56 (ECG)R30 000; Khumalo v Minister of Safety and Security 2015

[37] 2016 (7K6) QOD 229 (ECG)
[38] [2019] ZAECGHC 94 (1 October 2019)

(7K6) QOD 157 (KZD) R60 000; Kruger v Minister of Police 2016 (7K6) QOD 233 (GNP); Burford v Minister of Police (ECD) CA128/2015 R147 000); Assault: Groenewald v Ravenscroft 1978 (3) QOD 34 (C) punched in face and losing a tooth R23 000; Van Der Merwe v Minister of Safety and Security 2011 (6K6) QOD 34 (ECD) for a kick R5 000; Mhlambeli v Minister of Safety and Security 2012 (6K6) QOD 124 (ECG) for a punch in the face R12 000; Malicious Prosecution: M v Minister of Police (High Court Limpopo 1002/2012) R20 000; Minister of Safety and Security v Schubatch (437/2013) [2014] ZASCA (216) (01 December 2014) R120 000 reduced to R10 000; Singatha v Minister of Police (284, 285/2012) [2015] ZAECBHC 19 (26 March 2015) R50 000."

[73] I have considered all relevant factors and the cases, and consider that an award in total in respect of General Damages for a period of some 19 days detention should be the sum of R600,000.00.

[74] As to interest this must be paid at the prescribed rate from date of judgment to date of payment.

[75] Costs should follow the result as against First Defendant. It seems to me to be unwarranted to make any costs order in respect of Second Defendant which was represented by the same legal team and which occasioned little if any extra Court time.

ORDER

[76] In the result, the following order issues:

1. First Defendant is to pay Plaintiff the sum of R600,000.00 as for damages.

2. First Defendant is to pay interest on such damages, at the prescribed rate of interest, from date of judgment to date of payment.

3. First Defendant is to pay Plaintiff's costs of suit.

4. The claim against Second Defendant is dismissed.

5. There is no order as to costs in respect of Second Defendant.

_____

M.J. LOWE
JUDGE OF THE HIGH COURT

Obo Plaintiff:	Adv S Sephton
Instructed by:	Huxtable Attorneys, Grahamstown
Obo 1st & 2nd Defendants:	Adv V Madokwe
Instructed by:	Mabece Tilana Inc, Grahamstown