THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 1393/2018

In the matter between:

J E MAHLANGU **FIRST APPELLANT**

I T MAILELA NO **SECOND APPELLANT**

and

MINISTER OF POLICE **RESPONDENT**

Neutral citation: *Mahlangu & Another v Minister of Police* (1393/2018) [2020] ZASCA 44 (21 April 2020)

Coram: PETSE DP, CACHALIA and VAN DER MERWE JJA and KOEN and DOLAMO AJJA

Heard: 18 November 2019

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 21 April 2020.

Summary: Delict – judicial detention – damages – inadmissible confession induced by assault extracted by police from accused – whether police liable for the appellants' incarceration subsequent to first court appearance.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Kollapen J, Molopa-Sethosa and Ranchod JJ concurring) sitting as a full court:

1 The appeal is upheld with costs, such costs to include the costs consequent upon the employment of two counsel where employed.

2 The order of the full court is set aside and substituted with the following:

> '(a) The appeal succeeds with costs, including the costs of two counsel where employed;
>
> (b) The order of the trial court is set aside and replaced with the following:
>
> "The first defendant is ordered to pay:
>
> (i) The amount of R190 000 to the first plaintiff;
>
> (ii) The amount of R150 000 to the second plaintiff;
>
> (iii) Costs of suit, including the costs of two counsel where employed."'

JUDGMENT

Koen AJA (Cachalia JA and Dolamo AJA concurring)

[1] The issue in this appeal is whether the respondent, the Minister of Police (the Minister), should be held liable for damages to Mr Johannes Eugen Mahlangu (Mr Mahlangu) and the second appellant, the representative

of the deceased estate of Mr Phanie Johannes Mtsweni (Mr Mtsweni),[1] for the period that Mr Mahlangu and Mr Mtsweni (the plaintiffs) were detained pursuant to various court orders, from the time of their first appearance in court after their arrest, until the charges against them were withdrawn and they were released. No relief[2] is sought in this appeal against Inspector Sikheto Emson Mthombeni (Lieutenant Mthombeni),[3] who arrested the plaintiffs.

Background

[2] The plaintiffs were arrested without a warrant on four counts of murder by Lieutenant Mthombeni on Sunday 29 May 2005. Mr Mahlangu was arrested at around 10h00 and Mr Mtsweni around 16h30. They were brought before a magistrate's court, for their first court appearance, on the morning of 31 May 2005. Their rights to apply for bail were explained and the magistrate recorded that 'both wish to apply for bail'. The magistrate recorded that the prosecutor requested a remand for further investigation and for the bail hearing and that 'the state intended opposing bail'. They were accordingly remanded in custody until 14 June 2005.

[3] Subsequent appearances before the magistrate's court on numerous remand dates[4] resulted in their further detention. A third accused, Mr Dumisani Dingani Makhubela, and later two further accused, Mr Buti Johannes van Rooyen and Mr Penuel Mkhonto, and an additional charge of

[1] Mr Mtsweni died before the trial was finalized. He was substituted by the second appellant, the representative of his estate in terms of s 18(3) of the Administration of Estates Act 66 of 1965.
[2] See footnote 11 below.
[3] At the time he testified before the trial court, Inspector Mthombeni had been promoted to the rank of lieutenant.
[4] A perusal of the magistrate's notes reveal that the plaintiffs were detained pursuant to 13 separate court orders, granted on 31 May 2005, 14 June 2005, 21 June 2005, 15 July 2005, 10 August 2005, 30 August 2005, 27 September 2005, 19 October 2005, 7 November 2005, 24 November 2005, 8 December 2005, 10 January 2006, and 7 February 2006 until they were released on 10 February 2006.

rape, were added. The plaintiffs remained in custody until 10 February 2006, when they were released after the Director of Public Prosecutions had decided to withdraw the charges against them.[5]

The proceedings before the trial court

[4] Arising from their arrest, subsequent detention until their first appearance in court (the police detention), an alleged assault by the police on Mr Mahlangu, and their detention in terms of various court orders from the time of their first appearance in court until their release (the judicial detention), the plaintiffs claimed damages for infringement of their '*dignitas, fama*, bodily integrity and their right to freedom.' They each claimed R85 000 for loss of income and earning capacity and R2 700 000 in respect of general damages.[6] The general damages were alleged to be in respect of 'severe emotional and psychological trauma, *contumelia*, (and) the loss of enjoyment of life'.

[5] Lieutenant Mthombeni testified that Mr Mahlangu told him, after his arrest, that 'he knows about the murder of these people' and that 'during the murder of these people, he was not alone, but was with Mr Mtsweni'. That communication caused him to arrest Mr Mtsweni. Mr Mahlangu testified that he was assaulted by Lieutenant Mthombeni and other unidentified policemen, which, he said, resulted in him doing a pointing out to Senior Superintendent DS Mabunda at 16h20 on 29 May 2005,[7] and deposing to a confession before Captain Mokgopodi Justice Mogayane (Captain

[5] Mr Makhubela and Mr van Rooyen were subsequently convicted on the charges as they were linked to the crime scene by DNA evidence.
[6] In their original particulars of claim each claimed R585 000 in respect of unlawful and wrongful arrest, R 1 700 000 in respect of unlawful and wrongful detention and R500 000 in respect of the assault.
[7] These details appear from the documents in the police docket which formed part of the trial bundle of documents. At the pre-trial conference it was agreed that the documents in the trial bundle are what they purport to be, without admitting the contents thereof.

Mogayane) the next morning. In this confession he admitted his role in the murders and also implicated Mr Mtsweni. Lieutenant Mthombeni disputed the allegations of assault, but confirmed that after Captain Mogayane recorded the confession, he took possession thereof. When the plaintiffs appeared in court at their first appearance, the prosecutor was given the entire docket with all the statements, including the confession. Lieutenant Mthombeni confirmed that '[he] knew that the state prosecutor or whoever was going to deal with this matter at the Department of Justice would rely on this statement for the continued detention of [the plaintiffs]'. He was asked by the court whether it was correct that 'apart from the [confession] that [Mr Mahlangu] had made there was no other evidence which incriminated him', to which he replied, 'No, except a statement . . . that I had at my disposal that (Mr Mahlangu) had a relationship with the female deceased and the possibility was that it was him'.

[6] The action for the recovery of the non-patrimonial damages claimed by the appellants for the infringement of the plaintiffs' '*dignitas, fama*, bodily integrity and (the) right to freedom', is the *actio injuriarum*.[8] In respect of an unlawful arrest, the *actio iniuriarum* is subject to special features, namely that liability for wrongful arrest is strict. Neither fault nor awareness of the wrongfulness of the arrestor's conduct is required.[9] The onus of proving that the deprivation of liberty was not wrongful was on the police.[10]

[8] There was no claim for patrimonial damages in respect of the assault.
[9] L T C Harms *Amler's Precendents of Pleadings* 9 ed (2018) at 53.
[10] *Brand v Minister of Justice and Another* 1959 (4) SA 712 (A) 714; *Mabona and Another v Minister of Law and Order and Others* 1988 (2) SA 654 (SE) at 656I-657A, *Mhaga v Minister of Safety and Security* [2001] 2 All SA 534 (Tk) at 537; *Zealand v Minister for Justice and Constitutional Development* [2008] ZACC 3; 2008 (2) SACR 1 (CC).

[7] The trial court (Mabuse J) concluded that the information which Lieutenant Mtombeni relied upon to justify the arrest of Mr Mahlangu 'was not of such a nature that he could . . . reasonably have suspected that [he] had committed the offence.' It also found that Mr Mahlangu's confession was 'irregularly obtained from him without him having been warned of his rights . . . [and] . . . because he had been tortured.' In respect of Mr Mtsweni, the trial court found that it was 'common cause that [he] was arrested following the confession made by Mr Mahlangu to the police' (more correctly, Mr Mtsweni was arrested based on what Mr Mahlangu told Lieutenant Mthombeni after his arrest). It observed that the confession, and the extent to which it implicated Mr Mtsweni, was irrelevant in determining whether the arrests of Mr Mahlangu and Mr Mtsweni were lawful, as the confession only came into existence after they had been arrested. The trial court thus held that the arrest and police detention of the plaintiffs were unlawful. Following on the findings above it awarded damages[11] of R90 000 to Mr Mahlangu and R50 000 to Mr Mtsweni, and directed the Minister to pay their legal costs on the magistrates' court scale.

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[11] The trial court granted the following order:
'1. Judgement is granted against the defendants (the Minister of Police was the first defendant and Lieutenant Mthombeni was the second defendant) in favour of the first and second plaintiffs.
2. The first defendant is hereby order to compensate the first plaintiff in the amount of R90 000.
3. The first defendant is hereby order to compensate the second plaintiff in the amount of R50 000.
4. The first defendant is hereby order to pay the costs of this action on a Magistrate's Court scale.'
(Emphasis added.)
The reason for the discrepancy between para 1, and paras 2, 3 and 4 of the trial court's judgment is not clear. Before the full court both the Minister and Mr Mthombeni opposed the appeal. The name of Lieutenant Mthombeni still featured in the heading to the judgment of the full court but had been omitted from the judgment of the trial court and has been omitted from the heading of all documents in the record from the time of the issue of the court order dismissing the appeal before the full court. He has not been cited in the petition for leave to appeal to this court, nor in the order granted, nor in the application for leave to appeal. In seeking that the appeal be upheld before this court, the appellants seek a substitution only of paras 2, 3 and 4 of the order of the trial court, to take account of the period of the judicial detention, and to provide that:
'2. The first defendant is hereby ordered to compensate the first plaintiff in the amount of R1 200 000;
3. The first defendant is hereby ordered to compensate the second plaintiff in the amount of R650 000; and that
4. The defendant is ordered to pay the costs of the plaintiffs, including the costs consequent upon the employment of two counsel.'
The respondents' heads of argument refer only to the Minister. This appeal shall accordingly be treated as an appeal claiming relief against the Minister only.

[8] No damages were awarded in respect of the claims for alleged loss of income and earning capacity,[12] nor in respect of the claim for non-patrimonial damages in respect of the plaintiffs' judicial detention. The trial court, relying on this court's judgments in *Isaacs v Minister van Wet en Orde*[13] and *Minister of Safety and Security v Sekhoto and Another*,[14] held that the plaintiffs' unlawful detention came to an end once they were detained in terms of a court order after their first appearance in court.

[9] The trial court granted the appellants leave to appeal against 'the award of damages' to the full court of the Gauteng Division of the High Court, Pretoria (the full court). The appellants did not appeal against the disallowance of their claims for loss of income and earning capacity. There was also no cross appeal in respect of the trial court's award of damages, and hence the findings that the arrests of the plaintiffs and their police detention had been unlawful, that Mr Mahlangu had been tortured, and that the confession was irregularly obtained.[15]

The proceedings before the full court

[10] The full court correctly construed the appeal as being not only against the quantum of damages awarded for the unlawful arrests and the period of police detention, but also the merits, insofar as it concerned the claims for damages for the period of the plaintiffs' judicial detention. It pointed out that

[12] The cause of action for those damages would be the *actio legis Aquiliae*.
[13] *Isaacs v Minister van Wet en Orde* 1996 (1) SACR 314 (A). In *Abrahams v Minister of Justice and Others* 1963 (4) SA 542 (C) at 545G-H the general rule was stated as, '. . . once there is a lawful detention, the circumstances of the arrest and capture are irrelevant.'
[14] *Minister of Safety and Security v Sekhoto and Another* [2010] ZASCA 141; 2011 (5) SA 367 (SCA).
[15] No argument has been advanced in this appeal that these factual findings were incorrect.

Isaacs was qualified in *Minister of Safety and Security v Tyokwana*,[16] where this court clarified that:

'. . . what was not held in Isaacs, is that an arrested person's continued detention by virtue of an order of court remanding him or her in custody in terms of s 50(1) of the CPA, will automatically render such continued detention lawful. This was not an issue that the court in Isaacs was called upon to adjudicate . . . '

Tyokwana recognised that the police could instigate and perpetuate a malicious prosecution that ultimately results in the deprivation of freedom of an individual.

[11] Dealing with the facts of the matter, the full court continued:

'The view of … the appellants, was that the unlawfully obtained confession would have had a strong and overwhelming influence on how the prosecutor would have viewed the case before him/her as well as ultimately the Court. While there may well be some merit in that contention, it ignores the notion that the prosecutor is to bring to bear his/her own mind to the matter, to interrogate the docket in its entirety, and to bring out a view with regard to the further prosecution, and by implication, detention, of the appellants.

On the evidence before the Court *a quo* there is simply no way of knowing if that happened and if it did not, whether the locus of legal liability may well rest with the prosecution. The case advanced by the appellants was not for malicious prosecution, and the absence of any evidence on this aspect cannot be the fault of the respondents. Simply put, that was not the case on the pleadings they were required to meet. If indeed it was the case for the appellants that the police failed in their duty to properly inform the prosecutor of the correct state of affairs, including the arrest of other suspects, then they were obliged to plead that, and to lead the necessary evidence in support of that.

That it was not done cannot now mean that the police continue to attract liability for all the results that follow from the extraction of an unlawful confession and its presentation in the docket. Odious and offensive as that conduct may be, its further role in the prosecution process cannot simply be the product of conjecture and speculation.

It can hardly be unreasonable to assume that a prosecutor viewing the docket in its entirety may have reached the conclusion that despite the confession, the case against the

[16] *Minister of Safety and Security v Tyokwana* [2014] ZASCA 130; 2015 (1) SACR 597 (SCA) para 38.

first appellant was not sustainable or even if it was, that his release on bail may well have been considered if a bail application was launched . . . .

Thus what emerged is a significant gap in the case for the appellants in seeking to hold the respondents liable for their judicial detention. That gap relates in its entirety to the proceedings before the Court on the 30th May 2005 and thereafter until the release of the appellants and includes the decisions taken for their further detention, the basis for such decisions, the absence of a bail application and the reasons therefore. Under those circumstances the existence of the unlawfully obtained confession cannot be dispositive of the matter. To do so would be to ignore the important role of the prosecutor and the Court, both of whom have constitutional and legal obligations with regard to the decisions taken on the further detention of the appellants.'

[12] The full court confirmed the trial court's refusal to award the plaintiffs damages for the period of their judicial detention and dismissed the appeal with costs. The present appeal is against that decision, special leave having been granted by this Court.

The constitutional framework

[13] The claims of the plaintiffs must be viewed against the provisions of the Constitution, the common law and the provisions of the Criminal Procedure Act (CPA).[17] Section 12(1)*(a)* of the Constitution guarantees the right of security and freedom of the person, which includes the right 'not to be deprived of freedom arbitrarily and without just cause'. Section 35(1) provides that anyone who is arrested for allegedly committing an offence has the right, amongst others:

'(d) to be brought before a court as soon as reasonably possible, 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 expire outside ordinary court hours or on a day which is not an ordinary court day;

[17] Act 51 of 1977.

(e) at the first court appearance after being arrested, to be charged or to be informed of the reason for the detention to continue, or to be released; and

(f) to be released from detention if the interests of justice permit, subject to reasonable conditions.'

These rights are echoed and somewhat elaborated on in s 50 of the CPA. Section 60 of the CPA deals with the release of detained persons on bail. Section 35(2)(d) of the Constitution furthermore provides that, 'Everyone who is detained … has the right to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released.'

[14] Froneman J,[18] writing the second judgment in *De Klerk v Minister of Police*,[19] in his dissent explained the effect of s 35 of the Constitution in this context as follows:

'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 s 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 s 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.'

[15] Mogoeng CJ, in the third judgment in *De Klerk*, also a dissent, stressed that:[20]

'In this context, considerations of public policy based on our constitutional norms and values demand a commitment to the fulfilment of constitutional obligations, especially

[18] With whom Goliath J and Mhlantla J concurred.

[19] *De Klerk v Minister of Police* [2019] ZACC 32; 2020 (1) SACR 1 (CC) para 132. (Citations omitted.)

[20] See para 183. (Citations omitted.) At para 178 observed that the first judgment relied 'on the minority judgment of the Supreme Court of Appeal that has made no effort to grapple with the imperatives of our Constitution.' The Supreme Court of Appeal judgment is reported as *De Klerk v Minister of Police* [2018] ZASCA 45; 2018 (2) SACR 28 (SCA). He concluded at para 184 that, '(f)or these reasons, I am satisfied that the constitutional obligations imposed on the court are an automatic *novus actus interveniens*'.

those that affect the liberties of individuals, the respect for and observance of separation of powers, and the need for courts to make just and equitable orders.'

The first judgment of Theron J[21] and the separate concurring judgment of Cameron J[22] did not take issue with these principles. This delineation of constitutional responsibilities also accords with what was said by Harms DP in *Sekhoto*,[23] who added that:

'The discretion of a court to order the release or further detention of the suspect is subject to wide-ranging, and in some cases stringent, statutory directions. Indeed, in some cases the suspect must be detained pending his trial, in the absence of special circumstances. I need not elaborate for present purposes, save to mention that the [CPA] requires a judicial evaluation to determine whether it is in the interests of justice to grant bail; that in some instances a special onus rests on a suspect before bail may be granted; and the accused has in any event a duty to disclose certain facts, including prior convictions, to the court. ...

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.'[24]

[16] The roles performed by the prosecuting authority and the court in the further detention of a detained person at the first and subsequent court appearances, are significant. As regards the prosecutorial decision [25] it was held in *Minister of Police and Another v Du Plessis* that: [26]

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[21] With whom Basson AJ, Dlodlo AJ, Khampepe J and Petse AJ concurred. See paras 1-96.

[22] See paras 97-113.

[23] *Sekhoto* op cit fn 14 paras 42-44. (Emphasis added; citations omitted.)

[24] The appeal in *Sekhoto* admittedly only concerned the lawfulness of the arrest and not the issue of subsequent detention.

[25] The prosecutorial decision will inform the decision of the magistrate's order – see *Minister of Safety and Security v Magagula* [2017] ZASCA 103; 2017JDR 1486 (SCA) para 15.

See also *Minister of Police and Another v Du Plessis* [2013] ZASCA 119; 2014 (1) SACR 217 (SCA) paras 30-31:

'A prosecutor exercises a discretion on the basis of the information before him or her. In *S v Lubaxa* 2001 (2) SACR 703 (SCA) (2001 (4) SA 1251; [2002] 2 All SA 107) para 19 this court said the following:

"Clearly a person ought not to be prosecuted in the absence of a minimum of evidence upon which he might be convicted, merely in the expectation that at some stage he might incriminate himself. That is recognised by the common-law principle that there should be 'reasonable and probable' cause to believe that the

'Once an arrestee is brought before a court, in terms of s 50 of the Criminal Procedure Act 51 of 1977 (CPA), the police's authority to detain, inherent in the power of arrest, is exhausted. . . . . As pointed out . . . in the court below, before the court makes a decision on the continued detention of an arrested person comes the decision of the prosecutor to charge such a person. A prosecutor has a duty not to act arbitrarily. A prosecutor must act with objectivity and must protect the public interest.'

[17] Court orders providing for judicial detention are constitutionally significant. As a general principle, all court orders (other than some which concern constitutional invalidity) have force from the moment that they are issued, and are binding until set aside (irrespective of whether or not the orders concerned are valid,[27] and whether correctly or incorrectly granted),[28] or otherwise impugned at the instance of the person who alleges that it should be impugned,[29] where it might not be required to actually set the order aside. [30] An invalid order is not a nullity. [31] Even in the absence of a contested bail application, every court order, including the initial order for detention, should be a deliberative judicial act and must consider the rights of the arrested person and weigh those in the scales of justice against the interest of the public to have persons reasonably suspected of being

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accused is guilty of an offence before a prosecution is initiated (*Beckenstrater v Rottcher and Theunissen* 1955 (1) SA 129 (A) at 135C-E), and the constitutional protection afforded to dignity and personal freedom (s 10 and s 12) seems to reinforce it. It ought to follow that if a prosecution is not to be commenced without that minimum of evidence, so too should it cease when the evidence finally falls below that threshold."
Courts are not overly eager to limit or interfere with the legitimate exercise of prosecutorial authority. However, a prosecuting authority's discretion to prosecute is not immune from the scrutiny of a court which can intervene where such a discretion is improperly exercised. See generally *National Director of Public Prosecutions v Zuma* 2009 (1) SACR 361 (SCA) (2009 (2) SA 277; 2009 (4) BCLR 393; [2008] 1 All SA 197) para 37. Indeed, a court should be obliged to, and therefore ought to, intervene if there is no reasonable and probable cause to believe that the accused is guilty of an offence before a prosecution is initiated.' (Citations omitted.)

[26] *Minister of Police and Another v Du Plessis* [2013] ZASCA 119; 2014 (1) SACR 217 (SCA) para 28. (Citations omitted.)

[27] *Department of Transport and Others v Tasima (Pty) Ltd* [2016] ZACC 39; 2017 (2) SA 622 (CC) paras 179-181.

[28] Harms *Civil Procedure in the Superior Courts* June 2018 A3.7.

[29] *Minister of Law and Order and Another v Dempsey* 1988 (3) SA 19 (A) at 37H-38G. *Airports Company South Africa v Big Five Duty Free (Pty) Ltd and Others* [2018] ZACC 33; 2019 (5) SA 1 (CC) para 99.

[30] *Master of the High Court (North Gauteng High Court, Pretoria) v Motala NO and Others* [2011] ZASCA 238; 2012 (3) SA 325 (SCA) paras 12 -14 and the authorities there referred to.

[31] Ibid.

perpetrators of crime detained, where appropriate, pending their prosecution. A court order which simply directs the detention of an accused person without giving due consideration to these constitutional imperatives, as occurred in the notorious 'reception courts' and *De Klerk*, is liable to be impugned. Where an order for detention is impugned successfully, it is desirable that such order should be set aside rather than be allowed to remain in existence with an uncertain status.[32]

The liability of the police for detention ordered by a court

[18] Although the lawfulness or otherwise of a court order for an arrested person's judicial detention depends primarily on the conduct of the prosecutor and/or the magistrate, the police can incur liability for damages for detained persons being denied their freedom after their appearance before a court, notwithstanding the court having ordered such detention. This occurred in, amongst others, *De Klerk* and *Woji v Minister of Police*.[33] It is necessary to discern the applicable principles which resulted in liability in these decisions. Two possible situations arise. It is important to distinguish between these situations as the incidence of the burden of proof, which could be decisive, is different in each.

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[32] In *Minister of Justice and Constitutional Development Another v Zealand* [2007] ZASCA 92; 2007 (2) SACR 401 (SCA) para 17 this court held that '[a] decision by a court to remand an accused person in custody results in lawful detention of that person. Such a decision needs to be set aside before lawful detention in terms thereof ceases'. The subsequent decision of the Constitutional Court in *Zealand v Minister of Justice and Constitutional Development and Another* [2008] ZACC 3; 2008 (4) SA 458 (CC) must be understood in its correct context on the facts of that case. The Constitutional Court disagreed that the series of magistrates' court orders remanding the accused in custody rendered the detention of the accused – who was detained as a convicted prisoner, contrary to his status as an awaiting trial detainee – lawful. It held that the reasoning that the accused was detained in terms of a court order, and therefore that this does not affect the lawfulness of his detention, is to ignore the substantive protection afforded by the right not to be deprived of freedom arbitrarily or without just cause, as contained in s 12(1)*(a)* of the Constitution. *Zealand* was however not concerned with whether the accused *should* be detained, but with the place or manner of detention. The breach of s 12(1)*(a)* of the Constitution, because he was detained as a sentenced offender, was sufficient in the factual circumstances of that case to render the detention unlawful for the purposes of a delictual claim for damages.

[33] *Woji v Minister of Police* [2014] ZASCA 108; 2015 (1) SACR 409 (SCA).

[19] In *De Klerk*, Mr de Klerk was, within hours of his arrest for assault on 20 December 2012, taken to court for his first appearance. This court was in the nature of a 'reception court' which, notwithstanding the comments in *Minister of Safety and Security and Another v Ndlovu*, [34] on the facts of *De Klerk* still existed. [35] Mr de Klerk was not afforded the opportunity to apply for bail. No consideration was given by the prosecutor or the magistrate as to whether he should be released on bail, or otherwise. He was simply informed by the magistrate that he would be remanded in custody, and an order to that effect was granted as a matter of routine. Mr de Klerk was released on 28 December 2012, before his second appearance in court and before any bail application could have been pursued,[36] after the complainant withdrew the charges against him.

[20] The judgments of Theron J and Cameron J considered the issue to be decided as one of causation;[37] that is whether the arresting officer at the time of unlawfully arresting Mr De Klerk foresaw his continued detention by the court at his first appearance. Theron J held: [38]

'In my view, on the case as brought before us, there is one potential delict, namely, the unlawful arrest of the applicant. . . . . In this case there was prior wrongful, negligent conduct by the arresting officer that factually caused the applicant to suffer harm. It is that conduct, the wrongful arrest of the applicant, which we are called to adjudicate. . . . The applicant has not argued, as the second judgement persuasively finds, that an omission by the arresting officer to prevent his further detention after the first appearance is wrongful[39]

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[34] *Minister of Safety and Security and Another v Ndlovu* [2012] ZASCA 189; 2013 (1) SACR 339 (SCA) para 13.
[35] *De Klerk* op cit fn 19 para 49.
[36] *De Klerk v Minister of Police* [2018] 2 All SA 597 (SCA); 2018 (2) SACR 28 (SCA) para 24.
[37] The judgment of Theron J stated at para 22 that '[t]he application for leave to appeal filed before us unequivocally frames the question as one of legal causation'.
[38] *De Klerk* op cit fn 19 para 19. (Emphasis added.)
[39] The minority judgment of this court in *De Klerk* (op cit fn 31 para 44) held that 'that balance is appropriately struck by holding that an arresting officer is not liable for detention ordered by a court pursuant to a deliberative or considered judicial process, unless the arresting officer has the full animus iniuriandi required for malicious deprivation of liberty. The requisite animus iniuriandi might be present at

. . . Constable Ndala subjectively foresaw the precise consequence of her unlawful arrest of the applicant. She knew that the applicant's further detention after his court appearance would ensue. She reconciled herself to that consequence. What happened in the reception court was not, to Constable Ndala's knowledge, an unexpected, unconnected and extraneous causative factor – it was the consequence foreseen by her, and one which she reconciled herself to. In determining causation, we are entitled to take into account the circumstances known to Constable Ndala. These circumstances imply that it would be reasonable, fair and just to hold the respondent liable for the harm suffered by the applicant that was factually caused by his wrongful arrest. For these reasons, and in the circumstances of this matter, the court appearance and the remand order issued by the magistrate do not amount to a fresh causative event breaking the causal chain.'[40]

[21] Theron J concluded that:

'The crucial fact in this matter is that Constable Ndala subjectively foresaw the harm arising from the mechanical remand of the applicant after his first court appearance. She knew that the applicant's further detention after his court appearance *would be the consequence of her unlawful arrest* of him.[41] She reconciled herself with this knowledge in proceeding to arrest him. In addition, she knew that her mere note inside the docket recommending bail would amount to nothing at this first appearance. That the judicial process *should* have had a different tenor and outcome seems to me to be beside the point. The point is that Constable Ndala knew it would not [42]. . .On the facts of this case, the magistrate concerned should not be exclusively liable for the subsequent detention, *given the original delict by the arresting officer and her subjective foresight of the subsequent detention, and the harm associated therewith*.'[43]

Cameron J agreed with the judgment of Theron J 'that on *the very particular facts* of Mr De Klerk's case' he should succeed with his claim 'to hold the

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the time of the arrest or might come into existence afterwards. Either way, in such a case one is dealing with two wrongful acts, namely the wrongful arrest and the malicious deprivation of liberty (ie instigating the judicial detention).'

[40] *De Klerk* op cit fn 19 para 81. Emphasis added.

[41] Emphasis added.

[42] *De Klerk* op cit fn 19 para 86. (Emphasis original.)

[43] *De Klerk* op cit fn 19 para 88. (Emphasis added.) Neither the magistrate, nor the Department of Justice, had been joined as parties to the action, which had the result of non-suiting Mr de Klerk in respect of any claim against them.

police liable for [the] whole of his detention, pre- and post-court appearance', as '[t]he particular facts linked his post-appearance detention sufficiently to *the initial unlawful arrest*.'[44]

Unlawful conduct following an arrest – a separate delict.

[22] In another instance, the police might be guilty of some wrongful conduct independent of the arrest, intended to influence the prosecutorial decision to request and/or the court's discretion to direct the further detention of the arrested person, where, but for such unlawful conduct by the police, the further detention would not have been ordered by the court. In that instance the police would foresee, as inevitable, at the time of such wrongful conduct, that the detained person would be deprived of his/her liberty at the first appearance before a court, until the validity of such detention could be reviewed. Every case will depend on its own facts.[45] In *De Klerk* Theron J said, [46] that '[the] conduct of the police after an unlawful arrest, *especially if the police acted unlawfully after the unlawful arrest* of the plaintiff, is to be evaluated and considered in determining legal causation. . .there is no general rule that can be applied dogmatically in order to determine liability.'

[23] Where the police acted unlawfully 'after' the unlawful arrest,[47] any harm resulting from having 'acted unlawfully' is not caused by the unlawful arrest, but is caused by that unlawful conduct, just as unlawful conduct by the police after a lawful arrest would constitute a separate delict. Whether

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[44] Ibid para 103. (Italics my own.)

[45] *Jurgens and Others v Volkskas Bank Ltd* 1993 (1) SA 214 (A) at 221G-H cautioned that:
'At the outset it is useful to bear in mind the salutary reminder of the Earl of Halsbury LC in *Quinn v Leatham* [1901] AC 495 (HL) at 506
". . . that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found . . . that a case is only authority for what it actually decides".'

[46] *De Klerk* op cit fn 19 para 63. (Emphasis added.)

[47] The phrase used by Theron J in *De Klerk* para 63, as quoted above.

harm was caused by that unlawful conduct must be assessed with reference to that unlawful conduct, as distinct from the arrest, whether lawful or unlawful, which preceded it. Whether that separate unlawful conduct affords a remedy in law must be established in regard to that delict. If non-patrimonial damages are sought to be recovered in respect of such unlawful act under the *actio iniuriarum*, the special features pertaining to an unlawful arrest will not apply. The onus, in accordance with general principle, would be on the plaintiff to prove all the requirements of the *actio iniuriarum*, including fault in the form of *animus iniuriandi*. Malice is not required, only legal intent, even in the form of *dolus eventualis*, [48] to injure – even in the case of malicious prosecution [49] or malicious detention. [50]

[24] In *Woji v Minister of Police*[51] Mr Woji was lawfully arrested on a charge of robbery. He was remanded in custody at his first appearance before court. At the bail hearing conducted shortly thereafter, the investigating officer untruthfully testified that Mr Woji was clearly identifiable on a video of the robbery for which Mr Woji was being detained, which he had viewed. This evidence caused the court to refuse bail. Mr Woji was detained until the prosecutor viewed the footage and saw that Mr Woji could not be identified as one of the robbers, at which point he withdrew the charge. In an action for damages for wrongful detention it was held that the investigating officer foresaw the possibility that his untruthful evidence would lead to the refusal of Mr Woji's application for bail; differently stated, on the facts and evidence the investigating officer subjectively foresaw that his evidence

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[48] *Barclays National Bank Ltd v Traub; Barclays National Bank Ltd v Kalk* 1981 (4) SA 291 (W) at 297H-298A.
[49] *Moaki v Reckitt and Colman (Africa) Ltd and Another* 1968 (3) SA 98 (A) at 104E-F; *Relyant Trading (Pty) Ltd v Shongwe and Another* [2006] ZASCA 162; [2007] 1 All SA 375 (SCA) para 5.
[50] *Sikhunana v Minister of Safety and Security* [2013] ZAECPEHC 23 para 16. An arrest is malicious when the defendant makes improper use of the legal process to deprive a plaintiff of his or her liberty. This is similarly the case in respect of malicious detention.
[51] *Woji v Minister of Police* [2014] ZASCA 108; 2015 (1) SACR 409 (SCA).

would lead to the refusal of bail and he proceeded recklessly to assert that it was Mr Woji on the video footage. This was in breach of the duty imposed by the Constitution on the State and all of its organs not to perform any act that infringes an entrenched right, such as the rights to human dignity and freedom and security of the person. The fact that the investigating officer had made a false statement which influenced the order, was raised pertinently on the pleadings[52] and canvassed fully in the evidence.

[25] Thus, if pleaded properly, the police will incur liability for wrongful conduct subsequent to an arrest, whether lawful or unlawful, which caused a detained person to be deprived further of his liberty after the first court appearance, until that unlawfulness could be corrected. It is necessary then to turn to consider the pleadings in this appeal.

The pleaded case

[26] The pleadings are of paramount importance in every civil dispute. They identify the legal and factual issues in dispute that have to be decided, determine what evidence is relevant, and determine which party bears the onus of proof proper, any evidentiary onus and the duty to begin. In *Molusi and Others v Voges NO and Others*[53] it was said that:

'The purpose of pleadings is to define the issues for the other party and the court. And it is for the court to adjudicate upon the disputes and those disputes alone. Of course there are instances where the court may of its own accord (mero motu) raise a question of law that emerges fully from the evidence and is necessary for the decision of the case as long as its consideration on appeal involves no unfairness to the other party against whom it is directed. In *Slabbert*[54] the Supreme Court of Appeal held:

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[52] The basis for Mr Woji's claim was described as '… that the magistrate, in refusing to grant bail, acted upon the information supplied by Insp Kuhn' (*Woji* op cit fn 50 at 415C-D).

[53] *Molusi and Others v Voges NO and Others* [2016] ZACC 6; 2016 (3) SA 370 (CC) para 28. (Citations omitted.)

[54] *Minister of Safety and Security v Slabbert* [2009] ZASCA 163; [2010] 2 All SA 474 (SCA) para 11.

"A party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at the trial. It is equally not permissible for the trial court to have recourse to issues falling outside the pleadings when deciding a case."'

[27] The pleadings in this matter were anything but a model of clarity. Indeed, the amended particulars on which the trial commenced, and filed in the record, possibly made out no cause of action. It seems that little attention was paid to the formulation of the plaintiffs' claims by the litigants. The particulars remained in that deficient form for the whole of the appellants' case. It was only during the evidence of Captain Mogajane that the amended particulars of claim were amended further, allegedly to accord with the evidence. These informal amendments were apparently reflected in amended replacement pages that were handed up to the trial judge. The replacement pages were however not incorporated in the record before this court. This dereliction of responsibility caused unnecessary repeated reflection by this court on the merits of the appeal.

[28] The material allegations in the particulars of claim, as finally amended, read as follows:

'7.1 On or about the 29th of May 2005, in Extension 4, Mhluzi, Middelburg, Mpumalanga, the Second Defendant, without a proper warrant, wrongfully and unlawfully arrested the First Plaintiff and Second Plaintiff;

7.2 Resulting from the aforesaid arrest **and the subsequent conduct of the Second Defendant and other police officers as mentioned below**, the First and Second Plaintiffs were incarcerated for a period of 9 [nine] months in Police custody and the charges were subsequently withdrawn against the First and Second Plaintiffs during February 2006;

7.3 Subsequent to the arrest of the First and Second Plaintiffs, and with the help of other Police Officers, whose names and further particulars are unknown to the Plaintiffs,

the Second Defendant assaulted the First and Second Plaintiffs continuously when they were handcuffed and faces covered, using clinched fists and open hands **all of which caused the First Plaintiff to make a statement incriminating himself and the Second Plaintiff**.

8 As a result of the aforesaid unlawful arrest, detention and assault, the First and Second Plaintiffs suffered damages due to the fact that their *dignitas, fama,* bodily integrity and their right to freedom was infringed.'

The words in bold reflect the amendments effected informally during the trial.

The Minister denied liability for the for the appellants' detention by pleading that, '[s]ince or about 31 May 2005 until the date of their release, the plaintiffs were detained by virtue of an order of Court.'[55] No replication was filed.

[29] The pleadings did not receive any detailed examination by the trial court. It simply observed that, '[the] battlefield between the parties, is whether the arrest of the plaintiffs was lawful. The second one was whether the further detention of the plaintiffs, after they had appeared in court, could be attributed to the defendant.' The full court also did not analyse the pleadings but commented that '… in considering the factual matrix in this matter, regard must of necessity be had to the role of the prosecutor and that of the court in the period from [31] May 2005 until 10 February 2006'.

[30] The allegations in paragraph 7.3 of the particulars referred to the assault (which the trial court found to be established) and that the assault caused Mr Mahlangu to make the confession (which the trial court found as a fact) in which he incriminated himself and Mr Mtsweni. The allegations in

[55] No consequential adjustment was made in terms of rule 28(8) in response to the amended particulars of claim, nor was any consequential adjustment made to the plea in response to the informal amendment effected during the trial.

paragraph 7.2 of the particulars of claim were however unsatisfactory. The plaintiffs' judicial detention was not caused by their unlawful arrest. Nor were they incarcerated because they were assaulted resulting in Mr Mahlangu making the incriminating confession. The causative connection between the confession and the judicial detention of the plaintiffs was not pleaded. Allegations should have been included along the lines that, as a result of Lieutenant Mthombeni submitting the improperly obtained and hence inadmissible confession to the prosecutor at the first hearing, with the intention that it be relied upon as admissible, he intended that it would be relied upon to cause the plaintiffs to not be considered for release from custody, and that any request by the plaintiffs to be released on bail would inevitably, as a matter of practical reality, require an adjournment for a bail hearing to be held, with the plaintiffs remaining in custody in the interim.

[31] The full court found that what caused the magistrate's court to order the detention of the plaintiffs at the first hearing was not dealt with in the evidence. After much reflection as to whether that omission in the pleadings was fatal, having reflected on the evidence of Lieutenant Mtombeni referred to in para 5 above, and considering that the Minister and Lieutenant Mtombeni defended the claim for damages for the period of judicial detention seemingly fully aware that the omitted allegation expressed the basis of the appellants' claims,[56] I conclude that the issues in the pleadings

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[56] The action forming the subject of this appeal was preceded by proceedings in the magistrate's court, which were withdrawn by the plaintiffs. In that action the plaintiffs formulated their cause of action as follows:

'7. The Plaintiffs appeared for the first time at Middleburg Magistrates' Court on the 31 May 2005 and consequently (Mthombeni) instructed the Prosecutor who attendant to the Case to deny them bail on the strength that he had a strong case against the Plaintiffs and they appeared under case no 201/05/2005.

8. As a result of the denial by the Prosecution to afford the Plaintiff to be released on bail Plaintiffs were kept in custody from the 31 May 2005 until the matter was withdrawn on the 10 February 2006 due to lack of evidence.

9.…

10.…

were widened by the evidence[57] and that the omission in the pleadings referred to above, was cured. The Minister has not complained of any prejudice in this regard. The plaintiffs would attract the onus of proving that such conduct on the part of Lieutenant Mthombeni occurred with *animus iniuriandi*. Such *animus iniuriandi* could however be implied from other allegations and need not be pleaded expressly.[58]

Discussion

[32] There was no evidence that the court in which the plaintiffs appeared on 31 May 2005 was a reception-type court and that Lieutenant Mthombeni, at the time of their arrest, foresaw their detention beyond their first appearance. Nor was the confession made by Mr Mahlangu a day after his arrest foreseen at that stage. This was also not a case where alternative methods to arrest were available to the arresting officer, as were available to the arresting officer in *De Klerk*.[59] The wrongful arrests were not the legal cause of any part of the appellants' judicial detention.

[33] The issue to consider then is whether the inclusion of the inadmissible confession in the docket at the first appearance factually and legally caused the plaintiffs to be detained thereafter. The full court concluded that one does not know exactly what evidence and documents were before the court when the plaintiffs appeared before the magistrate's court for the first time. The relevant evidence was, with respect, overlooked because the matter had not

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11. The arrest and detention were at all times caused or instigated by (Mthombeni) acting in the cause and scope of his employment with the (respondent).'

This formulation was however not followed in the high court pleadings.

[57] See *Shill v Milner* 1937 AD 101 at 105.

[58] The factual basis and the findings from which it can be inferred are referred to in para 5 above.

[59] These would include summons, written notice or indictment. In terms of s 38(1) of the CPA the attendance of an accused person can be secured before a court by arrest, summons, written notice, or indictment.

been pleaded properly and hence there was no focus on what would be relevant.

[34] On the pleadings, as now taken to have been widened, and the evidence of Lieutenant Mtombeni that the confession had been placed before the prosecutor as part of the docket, it is reasonable to conclude that, on probability, the confession would have been the material consideration which caused the continued detention of the plaintiffs at their first appearance. Believing that the confession was an admissible confession, the prosecutor would have been justified to request a remand with Mr Mahlangu being detained further. Similar considerations would apply to Mr Mtsweni's detention. The only evidence implicating him was probably the confession of Mr Mahlangu. It was argued that such evidence would be inadmissible against Mr Mtsweni[60] as a co-accused. However, Mr Mahlangu's status as a co-accused could be terminated in the discretion of the prosecution should it decide not to indict Mr Mahlangu and Mr Mtsweni together. Alternatively, it would also be reasonably probable for the prosecution to accept that Mr Mahlangu, consistent with his confession, would plead guilty and be convicted and would then become a competent and compellable witness to give such evidence [61] against Mr Mtsweni. Although these possibilities were not explored in evidence, they would, in all probability, have justifiably caused the further detention of Mr Mtsweni at the first appearance.

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[60] In terms of section 219 of the CPA, an extra-curial confession cannot be used against a co-accused. The confessor cannot be called as a witness by the prosecution in the same proceedings unless his status as a co-accused is ended. There was no indication that the status of Mr Mahlangu as a co-accused would be terminated for this purpose.

[61] *S v Hudson and Others 1998 (2) SACR 359 (W) at 360J-361A. The question which arose in that matter was whether a confession implicating a co-accused was sufficient to refuse an application in terms of* s 174 of the CPA. It was held that 'where such confession contained an indication that the co-accused would possibly implicate the applicant for discharge, the court could form an impression of how the trial might unfold' and that '[i]n such circumstances the court would fail in its duty to weigh also the interests of the State and of the community, if it simply granted a discharge' (359). That conclusion can no longer be good law after the decision in *S v Lubaxa* (op cit fn 52).

[35] Accepting that the confession, on probability, factually caused the order for the further detention of the plaintiffs until 14 June 2005 being granted, the next question is whether the confession was the factual cause for the subsequent orders which resulted in the plaintiffs' judicial detention. It is not clear what transpired at the subsequent hearings from 14 June 2005. The Minister was entitled to invoke the subsequent successive court orders as a defence to the plaintiffs' claims that their further detention was unlawful. These court orders were all prima facie valid. Cameron J in *De Klerk* cautioned,[62] that:

'The test of factual causation should be flexibly applied and was here plainly established. *By contrast, where a court has given judicial consideration to whether to remand the arrestee,* [63] *the police, as instigators of the detention, would not be liable. In that case, malice as understood under the actio iniuriarum would be required to establish liability*.'

[36] The onus was on the plaintiffs to prove that these subsequent orders somehow stood to be impugned, and/or that the confession remained the decisive consideration which dictated their continued detention from the second appearance. The evidence in that respect was superficial. The evidence of Lieutenant Mthombeni, referred to in para 5 above, appears to be restricted to when the plaintiffs 'now appeared as accused in court', that is at 'the first and second appearance.' Lieutenant Mthombeni was not cross examined specifically on what informed the court orders at the numerous subsequent court appearances. This aspect should not be left to speculation, or inferences on probabilities. In any event, there can be no inference drawn unless there are objective facts from which to infer other facts sought to be

[62] Ibid. (Citations omitted; emphasis added.)
[63] On the facts of *De Klerk*, in a non-reception court situation, as in the present appeal.

relied upon. [64] What this apparent lacuna does illustrate, is the importance of proper pleadings in the first place. It was not for the Minister to negative every conceivable ground on which a court order could be impugned, without the plaintiffs having replicated any factual basis to do so. In the light of the view I have taken of the matter, it is not necessary to address this question further.

[37] Assuming in favour of the plaintiffs that the factual cause of the plaintiffs' detention for the remainder of their entire judicial detention after 14 June 2005 was the inadmissible confession, the decisive enquiry in this appeal is whether the plaintiffs proved legal causation, and whether the Minister should be held liable for the full period of their judicial detention. That enquiry raises the issue whether the plaintiffs could and should have applied to be released on bail during the period of judicial detention, and what limits of liability the legal convictions of the community and legal policy determine.

[38] Legal liability in delict is limited in accordance with the flexible test for legal causation. Recently, in *Nohour and Another v Minister of Justice and Constitutional Development*,[65] this court again dealt with the requirement of legal causation, stating inter alia that:

'In order to prevent the "chilling effect" that delictual liability in such cases may have . . . such proportionality exercise must be duly carried out and the requirements of foreseeability and the proximity of harm to the action or omission complained of, should be judicially evaluated. .Legal causation entails an enquiry into whether the alleged wrongful act . . . is sufficiently closely linked to the harm for legal liability to ensue. . . . *Legal causation is resolved with reference to public policy*. . . . The result is that even if

[64] *Caswell v Duffryn Associated Collieries Ltd* (1939) 3 All ER 722 at 733; followed in *S v Naik* 1969 (2) SA 231 (N) at 234D-E.
[65] *Nohour and Another v Minister of Justice and Constitutional Development* [2020] ZASCA 27 paras 14-15. (Citations omitted; emphasis supplied.).

conduct is found to have been wrongful (or even negligent, for that matter), a court may still find, *for other reasons of public policy*, the harm flowing therefrom to have been too remote for the imposition of delictual liability. The traditional tests for determining legal causation (reasonable foreseeability, adequate causation, proximity of the harm etc) remain relevant as subsidiary determinants. These traditional tests should be applied in a flexible manner. *They should be tested against considerations of public policy as infused with constitutional values*. Insofar as legal causation is concerned, every matter must be determined on its own facts.'

[39] An important consideration in this regard, is that in accordance with the constitutional order applicable to detained persons and their constitutional rights, the plaintiffs could have applied to be released on bail. The issue of legal causation did not arise in *De Klerk* as Mr de Klerk was released before his next court appearance and before any bail application could have been conducted. Similarly, in *Woji* the period of detention caused by the investigating officer's untruthful evidence was restricted to the period from when bail was refused until when Mr Woji was released. On probability, had the plaintiffs in this matter applied for bail, the magistrate hearing the bail application, just like the judge in the trial court, would have had no difficulty in concluding that the confession was inadmissible, which, if that was the reason for their continued detention (as I have assumed above in favour of the plaintiffs), would mean that the State would have no case against the plaintiffs and they would have been released, whether on bail, or otherwise; that is, if the charges were not withdrawn.

[40] The plaintiffs' rights to be released on bail were fully explained to them at their first court appearance, and according to Mr Mahlangu they indicated that they wished to apply for bail. The matter was adjourned to 14 June 2005 for that purpose. Mr Mahlangu testified that he applied for bail at

the 'second hearing;' he was simply not sure of the date. It does not seem that the plaintiffs applied for bail. Mr Maklangu's evidence as to why a bail application was not pursued, is confusing. He testified that he did not 'get along' with his legal representative and that another representative was appointed, but made no attempt to explain why that would impact on the plaintiffs applying for bail. What is clear, however, is that neither Mr Mahlangu nor Mr Mtsweni was ever prevented from applying to be released on bail.

[41] Public policy considerations, determined with reference to constitutional values[66] and the constitutional order referred to above, limit liability for the continued judicial detention to the stage where it could reasonably be expected of the plaintiffs to have pursued a bail application to finality. In the present matter, there was no indication that a bail hearing could not have been held and pursued to finality on 14 June 2005. The onus was on the plaintiffs to prove why they did not pursue a bail application. A bail hearing was, on the probabilities, unlikely to have taken more than one day. Mr Mahlangu would have testified of the assault upon him, Mr Mtsweni would have denied all involvement in the matter, consistent with his previous statement of 30 May 2005, Lieutenant Mthombeni would have testified (like Mr Mahlangu and Lieutenant Mthombeni testified before the trial court) and the magistrate, would, on the probabilities, have had no difficulty in concluding that the confession was inadmissible, accordingly that no case remained against Mr Mahlangu and Mr Mtsweni, and that the interest of justice required their release.

[42] In summary then:

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[66] *Barkhuizen v Napier* 2007 (5) SA 323 (CC) para 28.

(a) It is common cause that Lieutenant Mthombeni and other unidentified policemen, tortured [67] Mr Mahlangu after his arrest, as a result of which he made the confession in which he implicated himself and Mr Mtsweni;

(b) The confession would not be admissible in evidence;

(c) The confession was included in the police docket at the time of the plaintiffs' first appearance in court on 31 May 2005;

(d) The inclusion of the confession in the docket with the intention that it be relied upon, was the factual cause of the plaintiffs' further detention from their first appearance until they again appeared in court on 14 June 2005;

(e) Even assuming that the inclusion of the inadmissible confession in the docket was thereafter also the factual cause of the plaintiffs' judicial detention, it was not the legal cause of their detention beyond 14 June 2005, on which date the plaintiffs could on probability have applied for bail, and would have been released – that is, after a period of some two weeks' judicial detention.

[43] An appropriate award of damages for the period of two weeks' detention would be R100 000. This amount will be in addition to the amounts awarded by the trial court in respect of the damages suffered preceding their judicial detention.

Costs

[44] Although the plaintiffs have not been successful to the full extent claimed by them, they have enjoyed substantial success. There is no reason

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[67] Art 1 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) defines 'torture' to include '. . . (A)ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession . . . when such pain and suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity . . . . ' South Africa ratified CAT on 10 December 1984, and it entered into force on 26 June 1987, 1465 UNTS 85. The prohibition against torture is one of our most fundamental constitutional values. To torture anyone to obtain a confession is a crime that the CAT requires all member states to investigate thoroughly to ensure that perpetrators are severely punished. See *S v Mthembu* [2008] ZASCA 51; 2008 (2) SACR 407 (SCA) para 30.

why they should not be awarded the costs of the appeal, the costs of the proceedings before the full court, and the costs before the trial court. Both sides employed two counsel. Having regard to the novelty and complexity of the matter, the employment of two counsel appears reasonable and appropriate and the costs occasioned thereby should be allowed.

Order

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

1 The appeal is upheld with costs, such costs to include the costs consequent upon the employment of two counsel where employed.

2 The order of the full court is set aside and substituted with the following:

> ‘(a) The appeal succeeds with costs, including the costs of two counsel where employed;
>
> (b) The order of the trial court is set aside and replaced with the following:
>
> “The first defendant is ordered to pay:
>
> (i) The amount of R190 000 to the first plaintiff;
>
> (ii) The amount of R150 000 to the second plaintiff;
>
> (iii) Costs of suit, including the costs of two counsel where employed.”’

P A KOEN

ACTING JUDGE OF APPEAL

Van der Merwe JA (dissenting)

[46] I have had the benefit of reading the judgment of Koen AJA. However, I find myself in respectful disagreement with its reasoning and conclusion, hence this judgment.

[47] The first appellant is Mr Johannes Eugen Mahlangu. The second appellant is Ms I T Mailela, in her representative capacity as the duly appointed executrix of the deceased estate of Mr Phannie Johannes Mtsweni. Mr Mtsweni passed away after he and Mr Mahlangu had instituted action against the respondent, the Minister of Police, as well as his employee, Detective Inspector Emson Mthombeni, for damages arising from unlawful arrest and detention.

[48] The matter proceeded to trial before Mabuse J in the Gauteng Division of the High Court, Pretoria. That court held that the respondent was liable for the unlawful arrest of Mr Mahlangu and Mr Mtsweni as well as for their detention up to their first appearance in court, but not for their subsequent detention. The appellants unsuccessfully appealed to the Full Court (Molopa-Sethosa, Ranchod and Kollapen JJ) against the dismissal of their claims in respect of post-appearance detention. The appeal is before us with the special leave of this Court. Only the respondent opposes the appeal. The issues in the appeal are whether the respondent is liable for damages arising from the detention of Mr Mahlangu and Mr Mtsweni during the period from their first appearance in court on 31 May 2005 to their release on 10 February 2006 and, if so, the quantum of damages to be awarded.

[49] Mr Vusi Motebu, his partner, Ms Thuli Mathebula and three children respectively approximately eight, six and three years old, resided at 12359, Extension 7, Mhluzi, Middelburg, Mpumalanga. From Monday 23 May 2005

onwards no-one responded when relatives and friends visited the home of this family. It was noticed that the children had not attended school and that the house was dark at night. Eventually, on 27 May 2005, a visitor heard the youngest child crying inside the house. This led to the gruesome discovery that Mr Motebu, Ms Mathebula and the two elder children had been murdered. Mr Motebu and Ms Mathebula were both hanged from rafters and suffered stab wounds. One of the children was strangled with a wire around her neck and the other appeared to have been suffocated but also had a stab wound in the neck. It appeared that one of the girls may have been raped. The house was ransacked and several items were missing. A case of murder, rape and robbery was opened.

[50] Detective Inspector Emson Mthombeni was appointed as the investigating officer in the case. On 27 and 28 May 2005 he took statements from various persons. These were the persons that had fruitlessly visited the house of the deceased persons and that had subsequently discovered these crimes, as well as one of the police officers who first attended the scene of the crimes. These witnesses did not in any way implicate anyone in the crimes.

[51] Between eight and nine o' clock on Sunday morning 29 May 2005, Mr Mthombeni and three of his colleagues went to the house of Mr Mahlangu. Mr Mahlangu was at home with his partner and their baby. Despite the fact that he had no grounds whatsoever for suspecting that Mr Mahlangu had been involved in the commission of the crimes that he investigated, Mr Mthombeni arrested him without a warrant.

[52] Mr Mthombeni and his colleagues took Mr Mahlangu to their offices. They placed his legs in irons and handcuffed his hands behind his back. In order to force Mr Mahlangu to admit that he had committed the crimes, they repeatedly suffocated him by placing a rubber tube or a plastic bag over his head. This lasted for a couple of hours. Mr Mahlangu ultimately succumbed and confessed to what he had not done. When asked how he killed the deceased persons, he initially said that he had shot them with a firearm. This was, of course, not correct and under further duress he said, by pure guesswork, that the deceased persons had been stabbed to death. The police officers insisted that he could not have committed the crimes on his own. Mr Mahlangu was thus forced to identify Mr Mtsweni, who was merely an acquaintance of his that resided in the same street, as his supposed co-perpetrator.

[53] As the result of the aforegoing, Mr Mahlangu made a written statement to a justice of the peace (a police captain) on 30 May 2005, in which he declared in some detail that he and Mr Mtsweni had committed the crimes. On the same day, Mr Mtsweni was arrested without a warrant. Both Mr Mahlangu and Mr Mtsweni were detained until they appeared in the Middelburg magistrates' court on 31 May 2005.

[54] When they appeared in court, Mr Mahlangu and Mr Mtsweni did not have legal representation. That is clear from the evidence of Mr Mahlangu and the record of the magistrate. The magistrate recorded that after an explanation of their 'bail hearing rights', the accused indicated that they wished to apply for bail. The prosecutor, however, requested that the matter be remanded for further investigation and a bail hearing, as the State intended to oppose bail. Mr Mahlangu testified that he and Mr Mtsweni were

not afforded the opportunity to address the court in relation to the request for postponement and that they were only told that 'the matter was being remanded'. There is no reason to doubt that this was how it came about that the matter was postponed to 14 June 2005 and that Mr Mahlangu and Mr Mtsweni remained in custody.

[55] The matter was subsequently remanded on several occasions. Mr Mahlangu and Mr Mtsweni remained in custody. It appears that at some stage an attorney represented both Mr Mahlangu and Mr Mtsweni. Mr Mahlangu testified that he and the attorney did not see eye to eye. As a result, no application for bail for Mr Mahlangu was made. Mr Mahlangu said that his understanding was that Mr Mtsweni had applied for bail but that bail was refused. The record does not confirm or refute this.

[56] In the meantime, the police arrested the real perpetrators of these crimes. The fingerprints of two of the real culprits matched fingerprints that had been lifted from the crime scene inside the house of the deceased. The Director of Public Prosecutions decided to prosecute these persons and declined to prosecute Mr Mahlangu and Mr Mtsweni. They were accordingly released on 10 February 2006. Both the aforesaid perpetrators were subsequently convicted and sentenced to life imprisonment.

[57] In their particulars of claim, the appellants claimed non-patrimonial damages and patrimonial damages consisting of loss of income. However, no evidence that Mr Mahlangu or Mr Mtsweni suffered any loss of income was adduced. What then remained were their claims for infringement of their personality rights under the *actio iniuriarum.* At issue therefore is whether the appellants pleaded and proved that the unlawful conduct of Mr

Mthombeni and his colleagues was the cause of the entire period of the post-appearance detention of Mr Mahlangu and Mr Mtsweni.

[58] The principles of our law in respect of causation were laid down in judgments of this Court such as *Minister of Police v Skosana* 1977 (1) SA 31 (A) at 34F-H and *S v Mokgethi en Andere* 1990 (1) SA 32 (A) at 39D-41H. See also *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) at 700E-701E. In a delictual setting they provide that a defendant will be held liable for the factual consequences of his or her wrongful and culpable conduct, unless, having regard, inter alia, to considerations of legal and public policy, a consequence is regarded as too remote from the conduct to justify liability.

[59] After the appellants had closed their cases at the trial, they applied for leave to amend their particulars of claim. There was no objection to the proposed amendment and it was duly allowed by the trial court. Prior to the amendment the particulars of claim contained detailed allegations that the police had assaulted Mr Mahlangu (and Mr Mtsweni). The purpose and effect of the amendment was to bring the pleadings in line with the evidence of Mr Mahlangu that the assault on him caused him to make the statement incriminating himself and Mr Mtsweni and to allege that that was also the cause of their incarceration.

[60] The relevant paragraph of the amended particulars of claim read as follows: (The portions introduced by the amendment are italicised):

‘7.1 On or about the 29th of May 2005, in Extension 4, Mhluzi, Middelburg, Mpumalanga, the Second Defendant, without a proper warrant, wrongfully and unlawfully arrested the First Plaintiff and Second Plaintiff;

7.2 Resulting from the aforesaid arrest, *and the subsequent conduct of the Second Defendant and other police officers as mentioned below,* the First and Second Plaintiffs were incarcerated for a period of 9 [nine] months in Police custody and the charges were subsequently withdrawn against the First and Second Plaintiffs during February 2006;

7.3 Subsequent to the arrest of the First and Second Plaintiffs, and with the help of other Police Officers, whose names and further particulars are unknown to the Plaintiffs, the Second Defendant assaulted the First and Second Plaintiffs continuously when they were handcuffed and faces covered, using clienched fists and open hands *all of which caused the First Plaintiff to make a statement incriminating himself and the Second Plaintiff.*'

[61] In my view the amended particulars of claim encapsulated the following case: Mr Mthombeni unlawfully arrested Mr Mahlangu. Subsequent to the arrest, Mr Mthombeni and other police officers subjected Mr Mahlangu to a continuous assault and caused him to make a statement falsely incriminating himself and Mr Mtsweni. As a result of the unlawful arrest of Mr Mahlangu and the subsequent conduct of the police (extraction of a false confession by assault), both Mr Mahlangu and Mr Mtsweni were incarcerated for a period of nine months. Therefore the forcible extraction of the confession was the cause of the entire period of the incarceration of Mr Mahlangu and Mr Mtsweni.

[62] That is how the parties addressed the matter before the Full Court. As a result the Full Court considered whether the unlawfully obtained confession had influenced the decision of the prosecutor to oppose bail, but held on the facts that that was not proved. The respondent supported this finding before us. I shall revert to this aspect after reference to the applicable legal principles.

[63] In the recent matter of *De Klerk v Minister of Police* [2019] ZACC 32 (*De Klerk* CC), the Constitutional Court considered the liability of the respondent for detention subsequent to a remand order. The facts of the matter were briefly that after his employer had lodged a complaint of assault against him, Mr De Klerk was requested to report to the Sandton police station. Upon his arrival he was arrested without a warrant. It was common cause that the arrest was unlawful. He was then taken to the Randburg magistrates' court, where he appeared approximately two hours after his arrest. The arresting officer recorded in the docket that she recommended that Mr De Klerk be released on bail in the amount of R1 000. However, Mr De Klerk appeared in a 'reception court' where the magistrate routinely postponed the matter without any consideration of bail. The arresting officer knew that this would happen and therefore subjectively foresaw that despite her recommendation, Mr De Klerk would remain in detention after his first appearance in court.

[64] The Constitutional Court handed down four judgments. Theron J (Basson AJ, Dlodlo AJ, Khampepe J and Petse AJ concurring) held that the unlawful arrest was the cause of the post-appearance detention of Mr De Klerk and that the respondent was liable for damages in respect thereof. Cameron J agreed but did so on a different basis. He reasoned that in the light of the knowledge of the police of how the 'reception court' operated, the respondent was liable for the post-appearance detention because the police failed to release Mr De Klerk on bail as they were empowered to do. Froneman J (Goliath AJ and Mlantla J concurring) disagreed and held that the respondent was not liable by reason thereof that the conduct of the arresting officer had not been wrongful. Moegoeng CJ concurred with

Froneman J and added, in essence, that the remand order of the magistrate had been 'an automatic *novus actus interveniens*', which absolved the respondent from liability for subsequent detention. Thus, the Constitutional Court by majority set aside the majority judgment of this court in *De Klerk v Minister of Police* [2018] ZASCA 45; 2018 (2) SACR 28 (SCA), but did so for reasons that did not carry a majority.

[65] Seven of the ten members of the Constitutional Court decided the matter on causation. Apart from this, *De Klerk* CC offers no assistance for the determination of the present matter. First, the facts of that matter are entirely different from those in the present appeal. Second, as is apparent from what I have said, *De Klerk* CC did not lay down any binding principle of law in respect of the liability of the police for detention subsequent to a remand order.

[66] It follows that *De Klerk* CC did not affect the unanimous judgment of this court in *Woji v Minister of Police* 2015 (1) SACR 409 (SCA); [2015] 1 All SA 68 (SCA). Mr Woji was arrested on suspicion that he had participated in an armed robbery of a bank. When he appeared in court, Mr Woji applied for bail, but it was refused and he was remanded in custody. He remained in custody for 13 months, until the charge against him was withdrawn. Mr Woji sued the respondent for damages for unlawful arrest as well as for his detention after bail had been refused.

[67] This court found that the arresting officer (Inspector Kuhn) had an objectively reasonable suspicion that Mr Woji was one of the robbers and that the respondent accordingly discharged the onus of justifying his arrest. During the application for bail, however, Inspector Kuhn falsely testified that Mr Woji was clearly depicted on video footage of the robbery. The

magistrate relied upon this evidence when refusing bail. The subsequent discovery that the video footage did not clearly depict Mr Woji led to the withdrawal of the charge against him.

[68] In respect of the claim for unlawful detention, Swain JA held that the conduct of Inspector Kuhn had been wrongful and negligent. He dealt with causation in these terms:

'[32] The detention of Mr Woji, however, resulted from the order granted by the magistrate. In order to determine whether the conduct of Inspector Kuhn was a *sine qua non* and therefore the factual cause of Mr Woji's detention, it has to be determined 'what the relevant magistrate on the probabilities would have done' had the application for bail not been opposed, or Inspector Kuhn had revealed that Mr Woji was not clearly depicted on the video. Because the video was the only evidence ostensibly linking Mr Woji to the crime, the magistrate more probably than not would have released him on bail. It is also clear that Inspector Kuhn's wrongful conduct was sufficiently closely connected to the loss for liability to follow, hence it also constituted the legal cause of that loss. The court a quo therefore erred in dismissing the appellant's claim for unlawful detention. The duration of his unlawful detention was accordingly from 12 December 2007 when bail was refused, until his release on 13 January 2009, a period of 13 months.' (References omitted.)

[69] In *Woji*, therefore, this Court held the respondent liable for post-appearance detention where the wrongful and culpable conduct of the police had materially influenced the decision of the court to remand the person in question in custody. It is immaterial whether the unlawful police influence is exerted directly or through the prosecutor. As I shall show, the present matter cannot on principle be distinguished from *Woji*.

[70] There can be no doubt that Mr Mahlangu and Mr Mtsweni were remanded in custody because the prosecutor had opposed bail for them. How

it came about that the prosecutor opposed bail, was explained in the evidence of Mr Mthombeni. He said that the case docket that he had presented to the prosecutor prior to the first appearance of Mr Mahlangu and Mr Mtsweni in court, contained all the statements that he had obtained by that time. The entire docket was placed before the trial court. We therefore know which statements had been obtained by that time. They were the statements that I referred to in para 50 above, an equally innocuous statement of a person who said that he had previously sold a hi-fi to Mr Mahlangu and the statement of Mr Mahlangu.

[71] Mr Mthombeni knew that the prosecutor would rely on the statement of Mr Mahlangu to justify the continued detention of both Mr Mahlangu and Mr Mtsweni. Mr Mthombeni further said that the decision to oppose bail had been arrived at following a discussion between him and the prosecutor and having had regard to the docket, and in particular Mr Mahlangu's statement. Mr Mthombeni and his compatriots obviously obtained the statement to ensure the incarceration of Mr Mahlangu. Mr Mthombeni said that he 'knew' that the statement would result in a life sentence. This is the attitude that he would have displayed during the discussion with the prosecutor.

[72] And, as I have said, the only content of the docket on which a decision to oppose bail could have been based, was the statement of Mr Mahlangu. On the face of it, the statement constituted conclusive evidence against Mr Mahlangu and reasonably justified the detention of Mr Mtsweni for further investigation of the case against him. It is accordingly overwhelmingly probable that the decision to oppose bail was based on Mr Mahlangu's unlawfully obtained and inadmissible confession. For the same reasons Mr Mahlangu would probably not have been granted bail had he so applied, and bail for Mr Mtsweni would have or had been refused.

[73] But Mr Mthombeni knew full well that the statement had not been made freely and voluntarily and had been obtained by torture and coercion. Had he revealed the truth, the prosecutor would have realised that there was no ground whatsoever for the detention of Mr Mahlangu and Mr Mtsweni and they would probably not have been further detained. The unlawfully obtained statement factually caused the post-appearance detention of Mr Mahlangu and Mr Mtsweni.

[74] It was also the legal cause of their post-appearance detention. Mr Mthombeni subjectively foresaw what was reasonably foreseeable, namely that the statement would lead to the post-appearance detention. The forcibly extracted confession can clearly not be regarded as too remote from the harm suffered by Mr Mahlangu and Mr Mtsweni. In the final analysis gross police impropriety informed the decision of the prosecutor and tainted the magistrate's remand orders. In these circumstances Constitutional values and public policy require that the respondent be held liable for the post-appearance detention.

[75] For these reasons I hold that the respondent is liable to compensate both Mr Mahlangu and Mr Mtsweni for the infringement of their personality rights by their detention for the period from 31 May 2005 to 10 February 2006. They were deprived of their Constitutional rights to freedom for a period of eight months and ten days. According to the evidence of Mr Mahlangu, the circumstances of their detention were unpleasant, to say the least. In addition, each of them were in effect placed in solitary confinement for a period of two months in order to protect them from attack by fellow detainees who believed that they had killed their relatives. In my view

damages in the amount of R400 000 should be awarded to each appellant in addition to the amounts awarded by the trial court in respect of pre-hearing damages.

[76] In the result I would make the following order:

1 The appeal is upheld with costs, including the costs of two counsel.

2 The order of the Full Court is set aside and replaced with the following:

'(a) The appeal succeeds with costs, including the costs of two counsel.

(b) The order of the trial court is set aside and replaced with the following:

"The first and second defendants are jointly and severally ordered to pay:

(i) The amount of R490 000 to the first plaintiff;

(ii) The amount of R450 000 to the second plaintiff;

(iii) The costs of suit."'

C H G VAN DER MERWE

JUDGE OF APPEAL

Petse DP (concurring)

[77] I have had the privilege of reading with interest the judgments of my Colleagues van der Merwe JA and Koen AJA in this matter. I respectfully agree with the judgment of my Brother van der Merwe and the order that he proposes. With equal respect, I do not agree with the judgment of my Brother Koen and the reasoning underpinning it.

[78] On Sunday morning of 29 May 2005, and at his home situated in Extention 4, Mhluzi township Middelburg in Mpumalanga, the first appellant, Mr Johannes Eugen Mahlangu, was enjoying quiet time with his uncle and 'the mother of [his] one child'. At that stage little did he know what fate awaited him as the clock ticked away. At approximately 10h00 he was arrested by Lieutenant Mthombeni in connection with the gruesome murder of four persons who lived in the same street just a few houses away from his. This was the beginning of a horrific nightmare that endured for some eight months. What happened next and for the duration of his ordeal and that of Mr Phannie Johannes Mtsweni, following the latter's arrest, has been sufficiently traversed in the judgments of my Brethren. I therefore do not propose to recapitulate that factual narrative in this judgment, save to the limited extent that it may be necessary to do so in order to promote a better understanding of this judgment.

[79] I have to confess that after much anxious consideration it was not easy to dispel some of the initial doubts that lingered in my mind soon after reading the first judgment of my Brother Koen. But I am now happy to say that on mature reflection I am persuaded, on balance, that the appeal must succeed.

[80] Although I have come to the same conclusion as my Colleague van der Merwe JA and embrace the order formulated by him, I considered it necessary to write separately in order to underscore certain features of this case that are of fundamental importance.

[81] The logical point of departure, in my view, in matters such as this case, is the Bill of Rights, which enshrines the right of every accused person

not to be compelled to make any confession or admission that could be used in evidence against him or her.[68] And to be released on bail or warning, while still awaiting trial, subject to whatever conditions that a court might deem necessary to impose in the interests of justice.[69]

[82] The first judgment proceeds from the premise that court orders 'are prima facie valid and will legally justify what they direct'. And that a court order 'prevails until the validity thereof is challenged successfully at the instance of the person who alleges that it should be impugned'. True, it is so that in our law an order of court remains valid and effective until it has been set aside or rescinded (see, for example, *Clipsal Australia (Pty) Ltd and Others v Gap Distributors (Pty) Ltd and Others* 2010 (2) SA 289 (SCA) para 22). The rationale for this principle is rooted in public policy considerations to provide for certainty and finality in litigation. The exception to the general rule is when a judgment or order is a nullity, invalid or of no force and effect because the court that made the order lacked the requisite jurisdiction. In those circumstances the order may be disregarded without a pronouncement as to its invalidity (see, for example, *Master of the High Court Northern Gauteng High Court, Pretoria v Motala N.O. and Others* [2011] ZASCA 238; 2012 (3) SA 325 (SCA) paras 12-14).

[83] In the context of a court ordained detention of an accused person, our courts have come to recognise that where the order authorising detention or further detention is not a result of a deliberative judicial process – as it happened in this case – such an order does not constitute a new intervening act capable of terminating the unlawfulness of the initial detention. (See, in

[68] Section 35(1)*(c)* of the Constitution.
[69] Section 35(1)*(f)* of the Constitution.

this regard, *De Klerk v Minister of Police* (CCT95/18) [2019] ZACC32; 2019 (1) BCLR 1425 (CC); 2020 (1) SACR 1 (CC).)

[84] Two crucial factual findings of the trial court bear emphasis. First, it found that Mr Mahlangu and Mr Mtsweni were subjected to a sustained assault at the hands of the police. Second, as a result of the assault Mr Mahlangu made a statement to the police (subsequently reduced to writing before Captain Mabunda) incriminating himself and Mr Mtsweni in the commission of the murders under investigation by Lieutenant Mthombeni.

[85] It is as well to remember that it was never the case of Mr Mahlangu and Mr Mtsweni that the prosecutor, in requesting their further detention, acted arbitrarily. On the contrary, their case and the evidence that was before the magistrate's court from none other than Lieutenant Mthombeni himself, was to the effect that Lieutenant Mthombeni was instrumental in orchestrating their further detention. This he did by actively drawing the attention of the prosecutor to the existence of Mr Mahlangu's incriminating statement and that, based on its contents, the prosecution had an open and shut case against the accused then before court. Hence the unequivocal indication to the magistrate by the prosecutor that bail would be opposed.

[86] The upshot of the first judgment, as I understand it, is that in the context of the facts of this case borne out by the evidence adduced at the trial, it matters not that Lieutenant Mthombeni cunningly engineered the further detention of Mr Mahlangu and Mr Mtsweni by wilfully misrepresenting the true state of affairs to the prosecutor. This cannot be. The reason for that is not far to seek. As the Constitutional Court made plain in *Zealand v Minister of Justice and Constitutional Development and*

Another [2008] ZACC 3; 2008 (2) SACR 1 (CC), albeit in a different context, that approach entirely 'ignores the substantive protection afforded by the right not to be deprived of freedom arbitrarily or without just cause' enshrined in s 12(1)*(a)* of the Constitution. That *Zealand* 'was not concerned with whether the accused should be detained, but with the place or manner of detention' as the first judgment noted matters not. To hold otherwise, as the first judgment does, would serve as a perverse incentive to unscrupulous police officers to subvert the proper course of justice as has been witnessed in this case.

[87] Here, s 12(1)*(a)* of the Constitution was similarly breached because Lieutenant Mthombeni, in flagrant disregard of his duty to scrupulously uphold the law, deliberately supressed the truth in order to secure the further arbitrary detention of Mr Mahlangu and Mr Mtsweni. Lieutenant Mthombeni knew full well that absent Mr Mahlangu's inculpatory statement there was no other incriminating evidence. This notwithstanding, he orchestrated the further detention of Mr Mahlangu and Mr Mtsweni through his unconscionable machinations. All of this occurred after Mr Mahlangu's rights to bodily integrity had been gratuitously violated in breach of s 12(1)*(c)* of the Constitution.[70]

[88] That the Department of Justice and Constitutional Development, as the employer of both the Magistrate and Prosecutor, might have been liable, had it been sued in respect of the post first appearance detention, cannot, in the context of the facts of this appeal, absolve the Minister of Police. This must be so because what ultimately eventuated (the several remands following the

[70] Section 12(1)*(c)* reads:
'Everyone has the right to freedom and security of the person, which includes the right –
(c) to be free from all forms of violence from either public or private sources.'

first appearance) is what Lieutenant Mthombeni had wilfully orchestrated by manipulating the judicial system.

[89] There can be no question of the harm that is divisible here, where it could be said that the initial harm following the unlawful arrest that is attributable to the police came to an end once Mr Mahlangu and Mr Mtsweni were remanded in custody. It might well be that the Magistrate's dereliction of his or her constitutional duties under s35 of the Constitution could be said to have rendered the Magistrate a joint wrongdoer with the police. But that is not a subject that I need to broach for present purposes. Hence my endorsement of the judgment and reasoning of my Colleague, van der Merwe JA.

[90] For the aforegoing reasons, it is therefore with a great sigh of relief that I find myself in agreement with the order proposed by van der Merwe JA.

X M PETSE

DEPUTY PRESIDENT

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