IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GRAHAMSTOWN CA 106/2020

In the matter between:

MINISTER OF POLICE **Appellant**

and

LOYISO MAHLEZA **Respondent**

APPEAL JUDGMENT

The Court:

[1] This is an appeal, with the leave of the court *a quo*, against the whole of the judgment wherein it awarded the sum of R600 000.00 to the respondent for damages arising from his arrest and detention for 19 days, interest on such damages and costs. The respondent cited the Director of Public Prosecutions as the second defendant in the action. The court *a quo* dismissed his claim against the Director of Public Prosecutions because it found no "*delictual wrongdoing in the hands of the Second Defendant as to the period of 24 December 2015 to 12 January 2016*". The respondent did not appeal against the dismissal of his claim against the Director of Public Prosecutions. The appellant is the Minister of Police and the respondent is Loyiso Mahleza. For the sake of convenience, we shall refer to Mr Mahleza as the plaintiff and the Minister of Police as the defendant, the only parties in this appeal.

[2] It is common cause that at approximately 04h00 on 24 December 2015 the plaintiff was arrested on a charge of murder by Khaya Mili. He was held in custody and taken to the magistrate court, Adelaide on that same day where he made an appearance at approximately 09h00. The case was postponed to 12 January 2016 and the magistrate ordered the plaintiff to remain in custody. On 12 January 2016 the case

was further postponed to 19 January 2016 on which date the case was further postponed to 25 January 2016. The appeal record shows that on that day an attorney, who was appointed by Legal Aid South Africa to represent the plaintiff, withdrew as his attorney because he had instructed another attorney, Mr du Preez, to represent him. Mr du Preez was unavailable on 19 January 2016. On 25 January 2016 the case was postponed by agreement to the following day. On 26 January 2016 the plaintiff, assisted by Mr du Preez, made an application for bail. The magistrate granted bail to the plaintiff in the sum of R600.00 which sum was paid on the same day whereupon the plaintiff was released from custody.

[3] The plaintiff then instituted an action for damages against the defendant and the Director of Public Prosecutions based on his arrest on 24 December 2015 and his subsequent detention until his release from custody. Regarding the arrest, his cause of action was pleaded as follows in his particulars of claim:

> "*4. On or about 24 December 2015 and at Bedford and in full view of the public, the Plaintiff was arrested by members of the South African Police Service at the special instance and instructions of the Director of Public Prosecutions or an official of the Second Defendant.*
>
> *5. The arrest afford mentioned, without a warrant of arrest and on a charge of murder which had allegedly had been committed by the Plaintiff on 29 August 2015, was wrongful and without justification or excuse.*" (sic)

[4] The defendant admitted that warrant officer Mili arrested the plaintiff on 24 December 2015 but denied that the arrest was wrongful and unlawful. Relying on section 40(1)(b) of the Criminal Procedure Act,[1] the defendant pleaded that warrant officer Mili arrested the plaintiff without a warrant because he reasonably suspected him of having committed murder. The relevant part of section 40(1)(b) reads as

[1] Criminal Procedure Act, 1977 (Act 51 of 1977).

follows:

> *"(1) A peace officer may without warrant arrest any person-*
>
> *(a) …;*
>
> *(b) whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody*".

[5] The jurisdictional facts of a defence created by section 40(1)(b) are that (1) the arrestor must be a peace officer; (2) the arrestor must entertain a suspicion; (3) the suspicion must be that the arrested person committed an offence referred to in Schedule 1; and (4) the suspicion must rest on reasonable grounds.[2]

[6] The jurisdictional facts which are undisputed is that warrant officer Mili, who arrested the plaintiff, is a peace officer; and that murder is an offence referred to in Schedule 1 of the Criminal Procedure Act.

[7] As the onus rested on the defendant to justify the plaintiff's arrest,[3] he was required to prove that warrant officer Mili entertained a suspicion, based on reasonable grounds, that the plaintiff committed the offence of murder on Mlondolozi Mahleza on 29 August 2015. I shall respectfully refer to him and other role players by name.

[8] The test is whether a reasonable person in the position of warrant officer Mili and in possession of the same information would have considered that there were good and sufficient grounds for suspecting that the plaintiff committed the offence of murder.[4]

[9] At the time of the plaintiff's arrest, warrant officer Mili had information at his disposal which he obtained from statements taken from Mthetheleli Antony and Mthulisi Doloni

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[2] *Duncan v Minister of Law and Order* 1986 (2) SA 805 AD at 818G-I.
[3] *Zealand v Minister of Justice and Constitutional Development and another* 2008 (4) SA 458 (CC) at para 24 and 25.
[4] *Mabona and another v Minister of Law and Order and others* 1988 (2) SA 654 (SECLD) at 658E-H.

on 30 August 2015 and 2 September 2015 respectively as well as the post-mortem examination report that Stuart Dwyer, the chief medical officer in the relevant district, compiled on 31 August 2015.

[10] In his statement Mr Antony alleged that during the early hours of the evening of Saturday, 29 August 2015, he was at a tavern when he heard three gunshots. The tavern is owned by Thabiso Makawu to whom we shall refer by his first name because his brother, Lebo Makawu, also features in this case. Like other persons inside the tavern, he also went outside to see what was happening. He saw that Thabiso had a firearm. He also saw the plaintiff "*beating someone who was lying on the ground*". He went closer and noticed that the person who was lying on the ground was Mlondolozi who was bleeding from his mouth. He also noticed that "*his left leg was broken*". At the request of Mlondolozi's family Mr Antony took him to the hospital where he later succumbed.

[11] In his statement constable Doloni stated that about 21h00 on that Saturday, while he and a friend were at the tavern, he heard people screaming on the other side of the tavern and that Mlondolozi was carrying an axe. He was being pulled out of the tavern by Lebo Makawu, Thabiso's brother. He saw the plaintiff, who had an empty bottle in his hand, walking behind Mlondolozi and Lebo. As soon as Lebo released Mlondolozi, the latter went towards the plaintiff who ran around some vehicles which were parked next to the tavern. The plaintiff entered the tavern after Mlondolozi had stopped chasing him.

[12] A while thereafter he heard a noise coming from the direction of the entrance of the tavern. People were running into the tavern, inclusive of Thabiso who was carrying a stick. Mlondolozi, still armed with an axe, went towards Thabiso who fell. Constable Doloni heard three gunshots and saw Mlondolozi falling. He saw Thabiso *"carrying*

something like a firearm". The plaintiff took the stick from Thabiso and used it on Mlondolozi "*while he was down and he was still moving*". He later noticed that Mlondolozi "*had two wounds on both his legs and a cut on his forehead*".

[13] In the post-mortem examination report Dr Dwyer alleged that, when he examined Mlondolozi's body, he noticed a circular wound on his right leg with a wound track through the knee; another circular wound on his left thigh with a wound track through the femur; a 35mm x 35 mm bruise on his right cheek; a 35mm sutured laceration over his right cheek; and a 40mm x 10mm bruise to the right of his right nipple. Dr Dwyer concluded that the cause of death was not inconsistent with the deceased having bled to death owing to the gunshot injuries to his legs.

[14] The issue to be determined is whether, on the above information, a reasonable person would have suspected that the plaintiff committed murder.

[15] The court *a quo* found that there "*was certainly no basis set out for the suspicion on reasonable grounds that Plaintiff was part of the murder of the deceased in any culpable way at all*" and that the "*arrest was, it seems, clearly premised on the instruction of Captain Meyer and the prior instruction of the Director of Public Prosecutions. This arrest was unwarranted, unjustified and unlawful. Warrant officer Mili failed to properly analyse and assess the quality of the information at his disposal critically and a reasonable man doing so would not have considered that there were good and sufficient grounds for suspecting that Plaintiff was guilty of murder*".

[16] The evidence relating to the instructions referred to above is that the Director of Public Prosecutions, Grahamstown addressed a letter dated 10 December 2015 to the commander of detective services, Bedford wherein he advised that the investigation

into Mlondolozi's death was incomplete and requested that certain further investigations be conducted, inclusive of obtaining an affidavit from Mlondolozi's wife and that the plaintiff "*be arrested and brought before the Magistrate to be joined with accused one as soon as possible*". On the following day captain Meyer, with reference to the letter from the Director of Public Prosecutions, made an entry in the investigation diary to the effect that there should be compliance with the letter from the Director of Public Prosecutions, that the finalisation of the investigation should be expedited and that the docket should, after the completed investigation, be taken to the public prosecutor, Adelaide so that it could be placed on the regional court roll. It is against the above background that the court *a quo* found that the plaintiff's arrest was premised on the instruction given by captain Meyer that there should be compliance with the instructions from the Director of Public Prosecutions.

[17] Mr Petersen, who with Mr Madokwe appeared on behalf of the defendant, submitted that the court *a quo* misdirected itself when it made the above findings against the defendant. Counsel submitted that a finding should have been made that warrant officer Mili's suspicion, that the plaintiff was part of the murder of the deceased, was reasonable. The submission was that the court *a quo* would have come to that conclusion if it had considered warrant officer Mili's evidence that, upon reading the various statements in the docket, he connected the plaintiff to the murder. Those statements implicated the plaintiff of having assaulted Mlondolozi earlier in the day and that evening immediately after he had been shot by Thabiso. Specific reliance was placed on the statements of Mr Antony and constable Doloni. Reference was also made to the facial and other bodily injuries noted in the post-mortem examination report. It was submitted that the assault by the plaintiff could have contributed to Mlondolozi's death, since he also sustained the facial and other bodily injuries. It was

submitted that, based on the above information, warrant officer Mili had a reasonable suspicion.

[18] Ms Sephton, counsel for the plaintiff, submitted that a reading of the statements in the docket before the plaintiff's arrest, could not have constituted reasonable grounds upon which warrant officer Mili could have entertained a suspicion that the plaintiff murdered or took part in the murder of Mlondolozi.

[19] Murder is the unlawful and intentional causing of the death of another human being.[5] In this case warrant officer Mili, at the time of the plaintiff's arrest, was required to have suspected, based on reasonable grounds, that the plaintiff unlawfully and intentionally caused Mlondolozi's death. In our view and based on the information at warrant officer Mili's disposal at the time when he arrested the plaintiff, there were no reasonable grounds for suspecting that the plaintiff performed any act that caused his death. It is unclear from the evidence what the plaintiff did immediately before he hit Mlondolozi with the stick. There was no information upon which warrant officer Mili could have suspected that the plaintiff's assault on the deceased with a stick could have caused his death. On the contrary, Dr Dwyer concluded, based on his examination of the deceased's body, that the cause of death was not inconsistent with *"exsanguinations owing to gunshot injury of legs*". It is, based on the post-mortem examination report and the information contained in the statements of Mr Antony and constable Doloni, improbable that the facial injuries and/or the bruise on the right chest, assuming that they were caused by the plaintiff, could have caused the deceased's death. Other than hitting the deceased with a stick after he had been shot by Thabiso, there was simply no evidence that any act or omission by the plaintiff

[5] C R Snyman *Criminal Law* 6th Edition at 437.

could have caused his death.

[20] In all the circumstances, the criticism against the finding of the court *a quo* has no merit. It was correctly found that the plaintiff was unlawfully arrested. The appeal against the finding that the plaintiff was unlawfully arrested must accordingly be dismissed.

[21] We now deal with the plaintiff's detention following his arrest. Since it was debated at the hearing whether or not the plaintiff claimed damages from the defendant arising from his detention, it is appropriate to reproduce *verbatim* his particulars of claim in that regard.

> *"6. On 24 December 2015 the Plaintiff appeared in the Magistrate's Court, Bedford and subsequently remanded in custody until 12 January 2016:*
>
> *6.1 the State as per Ms Talubana appearing on behalf of the 2nd Defendant, opposing the Plaintiff's release on bail for no or any substantial reason;*
>
> *6.2 the Prosecutor Mrs Talubana, opposed the bail without considering:*
>
> *6.2.1 the effect of the continued detention of the Plaintiff so as to guard against the Plaintiff being detained on insubstantial or improper grounds and to ensure that his detention is not unduly extended;*
>
> *6.2.2 without considering alternative and less dramatic means of securing the attendance of the Plaintiff at Court.*
>
> *7. The plaintiff was thereafter further detained at the instance of the Second Defendant from 12 January 2016 to 19 January 2016, from 19 January 2016 to 25 January 216 and from 25 January 2016 until 26 January 2016 when he was released on bail of R600.00.*
>
> *8. In effecting the aforementioned wrongful and unlawful arrest of the Plaintiff, the arresting officer and/or the official of the Second*

Defendant who ordered the arrest of the Plaintiff:

8.1 invoked the power to arrest for the purpose not contemplated by the Legislator, namely for further investigation as opposed to for the purpose of bring the Plaintiff before Court and to justice; and/or

8.2 invoked the power of arrest to frighten and harass the Plaintiff, by punishing him through arrest and detention; and/or

8.3 invoked the power to arrest for an ulterior purpose, namely a purpose other than to secure the presence of the Plaintiff at court; and/or

8.4 acted without taking any steps to interview any of the other witnesses before arresting the Plaintiff; and/or

8.5 acted without critically analysing all the information at their disposal before arresting the Plaintiff; and/or

8.6 acted without considering alternative and less dramatic means of securing the attendance of the Plaintiff at court; and/or

8.7 acted without considering if detention of the Plaintiff was necessary at all and in particular without considering:

8.7.1 whether the plaintiff was a flight risk;

8.7.2 whether the plaintiff would interfere with witnesses;

8.7.3 whether the plaintiff would hamper investigation;

8.7.4 whether the plaintiff was of fixed abode and could easily be traced.

9. In effecting the unlawful detention of the Plaintiff the arresting officers and officials of the 2nd Defendant acted without considering whether the detention of the Plaintiff was necessary at all and in particular without considering:

9.1 whether the plaintiff was a flight risk;

9.2 whether the plaintiff would interfere with witnesses;

9.3 whether the plaintiff would hamper investigation;

9.4 whether the plaintiff was of fixed abode and could easily be

traced;

9.5 acted in a way which ignored the Plaintiff's constitutional rights as enshrined in the Bill of Rights and the Constitution, and contrary to the presumption of innocence of the Plaintiff; and/or

9.6 failed to exercise their discretion properly, in that the Plaintiff should never have been detained at all had the relevant officials taken due account of all the above circumstances and in particular in view thereof that the offence for which the Plaintiff had been arrested had taken place on 29 August 2015.

10. In and as a result of the unlawful arrest and detention, the plaintiff suffered damages in the sum of R990 000.00 being in respect of loss of liberty, impairment of dignity and contumelia."

[22] The plaintiff complained in paragraph 6 of his particulars of claim that, after his appearance in court on 24 December 2015, he remained in custody because the public prosecutor opposed his release on bail for no or any substantive reason and without considering firstly, the effect of his continued detention; and secondly, alternative and less dramatic means of securing his attendance at court. The evidence showed that at his court appearance on 24 December 2015 neither he nor the magistrate mentioned the issue of bail. The transcript of the proceedings reveals that the public prosecutor indicated that she would oppose the plaintiff's release on bail.

[23] In paragraph 7 the plaintiff referred to his detention after his first appearance in court until his release on bail. He alleged that he was detained at the instance of the Director of Public Prosecutions, obviously acting through the public prosecutor in the magistrate's court.

[24] It is apparent that up to and including paragraph 7 of his particulars of claim the plaintiff did not plead that the defendant caused his detention.

[25] In paragraph 8 the plaintiff pleaded, insofar as the defendant was concerned, that when warrant officer Mili unlawfully arrested him, he omitted to consider whether or not his detention was necessary without considering the factors listed in paragraphs 8.7.1 to 8.7.4 of his particulars of claim.

[26] In paragraph 9 the plaintiff pleaded that, when warrant officer Mili unlawfully detained him, he acted without considering whether that detention was necessary without considering the factors listed in paragraphs 9.1 to 9.6 of his particulars of claim.

[27] In paragraph 10 the plaintiff alleged that, as a result of his unlawful arrest and detention, he suffered damages.

[28] The plaintiff's claims could have been pleaded more eloquently. That was conceded by Ms Sephton. Where a suspect has been unlawfully arrested and detained before being taken to court, he has two separate claims against his arrestor. The one is for his unlawful arrest and the other for his unlawful detention.[6] Those claims should be separately pleaded. It is trite that, in respect of the arrest, all that a plaintiff is required to plead is that he was arrested. In respect of the detention it would be sufficient for him to plead that he was detained. Grosskopf JA had the following to say in this regard in the pre-constitution case of *Minister van Wet en Orde v Matshoba:*[7]

> *"… daar kan myns insiens geen twyfel bestaan dat 'n person wat teen sy aanhouding beswaar maak, in eerste instansie niks meer hoef te beweer as dat hy deur die verweerder of respondent aangehou word nie (waarskynlik hoef hy nie eers te beweer dat die aanhouding wederregtelik of teen sy sin is nie – sien Chetty v Naidoo (supra op 20D-E)). Die verweerder of die respondent dra dan die bewyslas om die aangehoudene se aanhouding te regverdig."*

[29] Loosely translated it means that there can be no doubt that a person who is detained

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[6] *MR v Minister of Safety and Security* 2016 (2) SACR 540 (CC) at para 39.
[7] *Minister van Wet en Orde v Matshoba* 1990 (1) SA 280 (A) at 286C.

against his will does merely has to state that he has been unlawfully detained. It is unnecessary for him to allege anything more than that he was detained against his will (apparently not even needing to allege that his detention was unlawful). The defendant then bears the onus to justify the plaintiff's detention.

[30] Recently the Constitutional Court stated the position as follows in *J E Mahlangu and Another v Minister of Police*:[8]

> *"It follows that in a claim based on the interference with the constitutional right not to be deprived of one's physical liberty, all that the plaintiff has to establish is that an interference has occurred. Once this has been established, the deprivation is prima facie unlawful and the defendant bears an onus to prove that there was a justification for the interference."*

[31] Despite the manner in which the particulars of claim have been framed, it is nevertheless evident from a reading of paragraphs 6, 8.7, 9 and 10 thereof that the plaintiff pleaded that he was in detention. His detention commenced immediately after the plaintiff's arrest and continued until his release on bail. There are two periods during that period of detention that have to be considered. The first period of detention is from immediately after the plaintiff's arrest until his first appearance in court. The second period of detention is from his first appearance in court until his release on bail.

[32] The defendant cannot complain that he was prejudiced by the plaintiff's ineloquent particulars of claim because, during a pre-trial conference, the parties agreed that one of the issues to be decided was the unlawfulness of the plaintiff's arrest and detention before his appearance in court on 24 December 2015. The defendant also admitted that he bore the onus to justify the plaintiff's arrest and detention until his

[8] *J E Mahlangu and Another v Minister of Police* [2021] ZACC 10 (14 May 2021) at par 32.

first appearance in court. In the circumstances, the defendant admitted that the plaintiff was detained. He accordingly bore the onus to justify the deprivation of the plaintiff's liberty.

[33] Since it has earlier been found that the court *a quo* correctly held that the plaintiff was unlawfully arrested, it follows that his detention until his first appearance in court was also unlawful because there was no lawful justification therefor.

[34] We now consider whether or not the defendant was correctly held liable for the damages that the plaintiff suffered as a result of his detention after his first appearance in court.

[35] For the defendant to be held liable for the plaintiff's detention after his first appearance in court, the plaintiff was required to show that he sustained harm and that the harm was caused by a wrongful and intentional act (or failure to act) on the part of the defendant or his employees.

[36] It is undisputed that warrant officer Mili failed to release the plaintiff (omission to act); the plaintiff's detention was intentional (fault in the form of intent); and the plaintiff was deprived of his liberty when he was in detention after his first appearance in court (harm).

[37] It is in dispute whether the defendant wrongfully caused the deprivation of the plaintiff's liberty after his first appearance in court.

[38] Regarding the plaintiff's detention after his first appearance in court, the defendant and the Director of Public Prosecutions pleaded as follows:

> "6.2.1 The relevant case docket of the SAPS contained sufficient information to warrant the prosecution of the Plaintiff and the granting of bail being opposed.

6.2.2 For purposes of considering bail, murder is an offence listed in Schedule 5 of the Act and, consequently, the provisions of section 60(11)(b) are applicable in terms whereof:

"… *the court shall order that the accused be detained in custody until he or she has been dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that the interests of justice permit his or her release*."

6.2.3 The Plaintiff had a previous conviction for rape, which similarly is an offence listed in Schedule 5 of the Act and, consequently, the provisions of section 60(11)(a) are applicable in terms whereof:

"… the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional circumstances exist which in the interest of justice permit his or her release."

6.2.4 The detention of the Plaintiff, after his appearance in court on 24 December 2015 and until 26 January 2016, occurred pursuant to detention orders issued by the presiding magistrate and in terms of due process of the law.

6.2.5 The granting or not of bail was a matter that fell within the discretion of the relevant presiding magistrate(s). In exercising this discretion, the presiding magistrate exercised a judicial function.

6.2.6 In terms of section 42 of the National Prosecuting Authority Act 32 of 1998 no person is liable in respect of anything done in good faith under the said Act.

6.2.7 All functions performed by the relevant public prosecutor(s) with regard to the criminal prosecution were performed in good faith.

6.2.8 The relevant public prosecutor(s) acted neither with *animus iniuriandi* nor maliciously.

6.2.9 The rights contained in the Bill of Rights of the Constitution of the Republic of South Africa, 1996, are subject to certain limitations, including the general limitation set out in section 36. The basis upon which the Plaintiff was lawfully

> arrested, detained and prosecuted is set out above. Section 205 of the Constitution specifically mandates members of SAPS to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law. Section 79 of the Constitution mandates the National Prosecuting Authority to institute criminal proceedings on behalf of the state and to carry out any necessary functions incidental to instituting criminal proceedings."

[39] Two elements of the delict in respect of the defendant are in issue, namely wrongfulness and causation. To be successful in his claim against the defendant, the plaintiff was required to establish both elements. The failure to establish any one of those elements would mean that the plaintiff has not established that warrant officer Mili or any other member of the South African Police Service caused the plaintiff's detention after his first appearance in court. We will now determine whether the plaintiff has established causation. Regarding factual causation, the test is that the plaintiff would not have been brought before the court, but for the unlawful arrest. In other words, the court would not have ordered the plaintiff's further detention but for the unlawful arrest.

[40] There can be no doubt that, had it not been for the plaintiff's unlawful arrest (but for the unlawful arrest), he would not have appeared before the magistrate with the result that there would not have been a need for the magistrate to remand him in custody. In our view, factual causation has been established. We now examine the traditional factors to determine whether legal causation has also been established.

[41] Immediately after his arrest at approximately 04h00, the plaintiff was unlawfully detained by warrant officer Mili until his first appearance in court about five hours thereafter. During that period the plaintiff's arrest was processed and preparations

were made for him to appear in court. One of the documents prepared by the police for the plaintiff's first appearance in court was a document in which "*bail information*" was compiled for the attention of the public prosecutor. In that document the police indicated that an application for bail should not be opposed and, if bail was granted, recommended that it be set in the amount of R500.00. Warrant officer Mili testified that the plaintiff was taken "*to court because … I did not have the intent of not or refusing him to get bail*" and "… *I was not even opposing bail*".

[42] The evidence shows that after his arrest, the plaintiff was kept in a cell for a short while whereafter he was taken to court in Adelaide. Upon arrival he was once again placed in a cell until his appearance in court at 09h00. Under cross-examination it was put to warrant officer Mili that, although he indicated in the "*bail information*" form that bail should not be opposed, he must have known when he arrested the plaintiff a day before Christmas and charging him with a Schedule 5 offence, it was likely that he would remain in custody for a significant period before applying for bail. His response was that he did not know that, because the plaintiff was facing a Schedule 5 offence, he would be remanded in custody to enable him to make a bail application. He relied on the fact that he, as the investigating officer, indicated to the public prosecutor that bail should not be opposed.

[43] The court *a quo* did not accept warrant officer Mili's evidence as a credible response for a policeman of 30 years' experience. It found that warrant officer Mili subjectively foresaw the plaintiff's post-appearance detention because of "*an inevitable mechanical remand*" of the plaintiff at his first appearance in court with no prospect of bail being granted until a formal bail application had been held.

[44] Counsel for the defendant were critical of the finding that the remand on 24 December 2015 was "*mechanical*", submitting that such a case was neither

pleaded nor fully canvassed by the parties during the trial. In her heads of argument Ms Sephton submitted that warrant officer Mili "*should have foreseen the respondent's further detention arising from a mechanical remand on the day of arrest. A remand for a formal bail application for at least a Schedule 5 offence was both objectively and subjectively foreseeable*", the submission continued.

[45] The only two persons who gave evidence in this regard were the plaintiff and warrant officer Mili. We have already dealt with warrant officer Mili's evidence. The plaintiff testified that he and other unknown persons appeared before a magistrate on 24 December 2015. The transcript of proceedings on that day reflects the following:

> "*On 24-12-15*
> *Parties as before*
> *Acc 2 added*
> *Ms Tatubana: This is a Sch 5 offence. State opposes Acc release*
> *Acc rights to legal rep expl*
> *Acc 2: I want LA.*
> *Postponed to 12-1-16 LA*
> *Acc 2 i/c*".

[46] The proceedings can only be interpreted to mean that, when the plaintiff appeared in court on 24 December 2015, he was added as the second accused in that case. The public prosecutor, Ms Tatubana, informed the magistrate that the plaintiff was facing a Schedule 5 offence and that the state opposed the plaintiff's release on bail. The magistrate then explained to the plaintiff that he had the right to legal representation and that the plaintiff indicated that he would want to be assisted by Legal Aid South Africa. The case was then postponed to 12 January 2016 and the magistrate ordered that the plaintiff be remanded in custody.

[47] The plaintiff testified that he was not informed of his right to apply for bail, but simply informed that the case would be postponed and that he would remain in custody.

[48] In the light of the plaintiff's evidence as to what happened during his first appearance

in court and warrant officer Mili's evidence that he did not know or foresee that the plaintiff would remain in custody after his first appearance, we are of the view that the evidence did not support the criticism by the court *a quo* of warrant officer Mili's evidence in that regard. That criticism was based on an acceptance that warrant officer Mili must have known of the provisions of section 60 of the Criminal Procedure Act which relate to bail proceedings. It was also based on an acceptance that warrant officer Mili must have known that, when the plaintiff appeared in court, the public prosecutor would oppose an application for bail, if made by the plaintiff; and that the magistrate would remand the case for a formal bail application without explaining to the plaintiff his right to apply for bail. With respect, there was no evidence to support any of those factors which the court *a quo* accepted to make that finding.

[49] There was nothing in the docket which could have supported the public prosecutor's decision to oppose bail. The undisputed evidence extracted from warrant officer Mili during cross-examination was that the public prosecutor did not discuss the case with him before the magistrate ordered the plaintiff's further detention on 24 December 2015. Unsurprisingly, once again without any evidence of police involvement, the plaintiff's bail was fixed at R600.00 on 26 January 2016.

[50] In this regard this case is distinguishable from *de Klerk v Minister of Police*[9] where the evidence created a picture "*of a high-volume remand court in which accused persons were brought up and down from the cells with great rapidity*". The evidence of the arresting officer, detective constable Ndala, in that case showed that she knew "*that Randburg court would not deal with the question of bail at the first appearance and that the appellant would be remanded in custody. In other words, she knew at the first appearance the remand would be a routine or mechanical act rather than a*

[9] *de Klerk v Minister of Police* 2018 (2) SACR 28 (SCA).

considered judicial decision".[10] Against that factual background, it is not difficult to understand why Theron J found, on appeal, that constable Ndala subjectively foresaw that Mr de Klerk would be further detained after his first appearance in court. The court said that what happened at Mr de Klerk's first appearance in court "*was not, to const Ndala's knowledge an unexpected, unconnected an extraneous causative factor – it was the consequence foreseen by her, and one which she reconciled herself to*".[11] Theron J found that the order of the magistrate remanding Mr de Klerk in custody did not amount to a fresh causative event breaking the causal chain.

[51] The facts of this case are also distinguishable from *Mahlangu* where the arresting officer and his colleagues arrested Mr Mahlangu and his co-accused and engineered a false confession from him through assault and torture. The investigating officer failed to disclose to the public prosecutor and the court that Mr Mahlangu's arrest was unlawful and that the confession was unlawfully obtained. The court found that the basis for the public prosecutor expressing an intention to oppose bail was the unlawful confession. It found that the investigating officer knew that, absent the confession, there was no evidence upon which Mr Mahlangu could lawfully and successfully be prosecuted. The court found that the continued concealment by the police of the fact that the confession was illegally obtained provided a basis for holding the Minister of Police liable for the entire period of Mr Mahlangu's detention. The court found that the inclusion of the confession in the docket with the intention that it be relied upon, was not too remote for delictual liability to attach to the police. See also *Minister of Safety and Security v Tyokwana.*[12]

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[10] Ibid n 10 at paras 48 and 49.
[11] *de Klerk v Minister of Police* 2020 (1) SACR 1 (CC) at par 81.
[12] *Minister of Safety and Security v Tyokwana* 2015 (1) SACR 597 (SCA).

[52] In this case, save for a proposition put to warrant officer Mili that he must have known that the magistrate would remand the case for a formal bail application, respectfully there was no evidence to support a finding that warrant officer Mili subjectively or objectively foresaw that eventuality. In the circumstances, it should be found that warrant officer Mili did not subjectively or even objectively foresee that the plaintiff would be further detained after his first appearance in court.

[53] Section 35 of the Constitution guarantees certain rights to persons who have been arrested, detained and accused. In terms of section 35(1)(d)(i) any person who has been arrested by the police for allegedly committing an offence has the right to be brought before a court as soon as reasonable but not later than 48 hours after arrest. The duty to take the arrested person to court rests on the police. In terms of section 35(1)(e) any arrested person has the right, at the first court appearance, to be charged or to be informed of the reasons for the detention to continue, or to be released. The decision to charge the arrested person falls exclusively within the domain of the National Prosecuting Authority, represented in these proceedings by the public prosecutor. In terms of section 25(1)(f) any arrested person has the right to be released from detention if the interests of justice permit, subject to reasonable conditions. The power to release an arrested person from detention vests in the presiding officer.

[54] The Constitutional Court has upheld the doctrine of separation of powers. In terms of that doctrine the different arms of the state should refrain from interfering on the terrain of the other. That doctrine is implicated in this case. Two arms of the state are involved, the executive and the judiciary.

[55] In this case warrant officer Mili, who operates under the executive arm of the state as a member of the South African Police Service, complied with his constitutional and

statutory duty to ensure that the plaintiff was brought before a court as soon as reasonably possible. It was for another arm of the state, the National Prosecuting Authority, represented by the public prosecutor, to determine whether or not the plaintiff should be charged. She decided to charge the plaintiff with murder. It was then for yet another arm of the state, the judiciary, to determine whether it would have been in the interest of justice to have the plaintiff released from detention.

[56] After warrant officer Mili had complied with his obligation to ensure that the plaintiff was brought before the court, two further constitutional steps had to be taken by two different role players before the conduct of warrant officer Mili could be said to have legally caused the deprivation of the plaintiff's liberty after his appearance in court on 24 December 2015.

[57] It was common cause firstly, that the public prosecutor indicated that the state would oppose the plaintiff's release on bail; and secondly, that the magistrate failed to consider whether or not the plaintiff should be released on bail. Section 60(1)(c) of the Criminal Procedure Act provides that a court shall ascertain from an accused person whether he or she wishes the question of his release on bail to be considered by the court, if that question has not been raised by the accused or the public prosecutor. The magistrate also failed to ascertain from the plaintiff whether he wished him to consider his possible release on bail.

[58] The public prosecutor, on her own, decided to oppose bail and the magistrate remanded the plaintiff in custody without enquiring whether he wanted to apply for bail. In our view these two factors created a new intervening event (*novus actus interveniens*) sufficient to break the chain of causation. Those two factors make warrant officer Mili's arrest and failure to release the plaintiff after his arrest too remote for liability to be imputed to the defendant.

[59] In the circumstances of this case, we are of the view that considerations of public policy, informed by warrant officer Mili's failure to release the plaintiff, that he indicated that the plaintiff's release on bail should not be opposed, that he caused the plaintiff to be brought before a magistrate approximately four hours after his arrest, that the public prosecutor and the magistrate took decisions in which warrant officer Mili took no part, would render it unfair and unreasonable to impute delictual liability to the police.

[60] In the circumstances, the defendant should be held liable for the plaintiff's unlawful arrest and his detention until his first appearance in court. His subsequent detention was not caused by any member of the South African Police Service. The defendant can accordingly not be held liable for the plaintiff's detention after his first appearance in court. It means that the defendant should compensate the plaintiff for his arrest and detention for approximately five hours. Since the plaintiff failed to prove that any member of the South African Police Service caused his detention after his first appearance in court, on 24 December 2015,it is unnecessary to deal with the issue of wrongfulness.

[61] The Constitution places a high premium on the right to freedom which includes the right not to be deprived of freedom without just cause. We have had regard to the plaintiff's personal circumstances, the circumstance under which he was detained and the authorities referred to by the court *a quo* as well as the majority judgment in *de Klerk v Minister of Police.*[13] In our view the sum of R50 000.00 is appropriate to compensate the plaintiff for damages suffered by him.

[62] The defendant was substantially successful in the appeal. He is accordingly entitled

[13] *de Klerk v Minister of Police* 2018 (2) SACR 28 (SCA).

to the costs of the appeal.

[63] In the result, it is ordered:

63.1. The appeal succeeds, with costs.

63.2. The order of the court *a quo* is set aside and replaced with the following:

"1. The plaintiff was unlawfully arrested.

2. The plaintiff's detention until his first appearance in the magistrate's court, Adelaide at 09h00 on 24 December 2015 was unlawful.

3. The plaintiff's claim, that members of the South African Police Service caused his further detention after his first appearance in court on 24 December 2015, is dismissed against the first defendant.

4. The first defendant shall pay to the plaintiff the sum of R50 000.00 as and for damages for his aforesaid unlawful arrest and detention.

5. The first defendant shall pay interest on the sum of R50 000.00 at the prescribed rate of interest, from the date of judgment to date of payment.

6. The first defendant shall pay the plaintiff's costs on the appropriate magistrate's court scale."

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I SCHOEMAN
Judge of the High Court

Bloem J,

I agree

_____

G H BLOEM
Judge of the High Court

Rusi AJ,

I agree

_____

L RUSI
Acting Judge of the High Court

For the appellant:	Mr F Petersen and Mr V Madokwe, instructed by the State Attorney, Port Elizabeth and Zilwa Attorneys, Grahamstown.
For the respondent:	Ms S A Sephton, instructed by Huxtable Attorneys, Grahamstown.
Date heard:	7 June 2021.

Date of delivery of the judgment: 14 September 2021.