IN THE NORTH GAUTENG HIGH COURT – PRETORIA

(REPUBLIC OF SOUTH AFRICA)

11/10/2010

CASE NUMBER: ~~70261/2009~~ 70259/09

THE HONOURABLE ACTING JUSTICE ROELOF DU PLESSIS

In the application of:

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES yes
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED
11/10/2010
SIGNATURE

JACK COETZEE Applicant

and

THE NATIONAL COMMISSIONER OF POLICE First Respondent

THE MINISTER OF SAFETY & SECURITY Second Respondent

AND OTHERS

JUDGMENT

INTRODUCTION AND BACKGROUND

[1] This application was urgently brought on the basis that an arrest was unlawful and that I should release the applicant in terms of the common law. I will deal with the law applicable to this matter later.

[2] The applicant filed an affidavit by its attorney, Mr Riaan Meyer with me during the evening of Sunday, 15 November 2009 wherein he

stated that he had requested the investigating officer in the matter why bail was refused to the applicant. The specific investigating officer apparently put the phone down in his ear and was of no assistance. The Pretoria West police station did not answer their telephone and after having contacted the flying squad, the applicant's attorney, Mr Meyer was also again just put through to the Pretoria West police station. Mr Meyer also stated in his affidavit to me that the applicant was to be transferred to the Atteridgeville police station during that evening.

[3] The applicant's wife, Ms Hester Maria Coetzee also filed an affidavit drafted on short notice, in terms of which she stated that the applicant had been employed for the previous twelve months at ABI Olifantsfontein and that he earns approximately R7 000,00 per month. She said that she had been married to the applicant for 22 years and that they had been resident in Jan Niemand Park, Pretoria since 1993. They have two children and the value of their house is approximately R500 000,00. They also own two vehicles. She stated that the applicant has no passport. She stated that the Tshwane Metro police apparently attempted to stop the applicant whereafter the applicant explained to them that he would stop at the nearest police station. Thereafter a number of vehicles of the Tshwane Metro police apparently forced the applicant's vehicle off the road after which he was arrested by the Metro police and taken to the Pretoria West police station. There he was apparently

charged and held. Mr Meyer also gave oral evidence before me on Sunday, 15 November 2009. He testified that the applicant was arrested at approximately 17h00 for alleged negligent and reckless driving. He and his wife were apparently returning from Hartebeespoort Dam when the Metro police indicated to the applicant to stop. He then told them that he would stop at the nearest police station.

[4] The attorney testified that in his experience, for such a transgression as was alleged to have been committed, a person is normally fined by the Metro police, alternatively if he is arrested, the SAPS is in a position to grant bail (publicly known as police bail). Mr Meyer testified that he tried to call an off-duty prosecutor but that he was told that it was not a schedule 7 criminal offence (in terms of the Criminal Procedure Act, No 51 of 1977), and for that reason, the state prosecutor could not assist. This is so because the SAPS is entitled to grant bail under these circumstances, and they would normally do so.

[5] Superintendent Malema, who was not on duty at the time, but who is the station commissioner for the area, was contacted telephonically and he arrived at the hearing on Sunday evening. He also gave evidence. He said that he had no knowledge of the matter but that there was confusion about the powers of the SAPS

and the Metro police pertaining to arrests, in respect of the new traffic offence system called "AARTO".

[6] I then issued a rule *nisi* in the terms referred to below, which rule *nisi* was issued late on the Sunday evening, after much trouble and inconvenience. I requested to be furnished with the name of the station commander of the Pretoria West police station, who was on duty the evening of 15 November 2009, as well as the name of the investigating officer of the applicant. I also ordered that the respondents should provide reasons why the investigating officer and the station commander should not be held personally liable for costs of the application. I also ordered the immediate release of the applicant.

[7] Further affidavits were then filed by the parties whereafter the matter was finally argued. I required full reasons why the applicant was not given bail or granted the opportunity of paying a fine by the SAPS after having been arrested, and as to who should pay the costs of the application. The station commander, the metro policeman, the investigating officer, and the commander responsible that evening for charging persons and granting bail, eventually appeared before me, and they were all represented by the State Attorney and counsel. They were joined as respondents and had the opportunity to file affidavits and be represented.

[8] The applicant, Mr Coetzee, filed an affidavit in which he explained what had happened according to him. He stated in the affidavit that he and his wife as well as his son and the son's girlfriend visited Hartebeespoort Dam. He stated that on their way back, he saw a person who waived at him walking into the road. He was not persuaded that it was a Metro policeman and he decided to continue driving. The Metro police followed him and indicated to him that he should pull off the road. His son indicated to them that they should follow him to the nearest police station where he thought it would be safe to stop. He states that he was scared that, as has happened often recently, the persons were not real Metro policemen but rather robbers and he wanted to safeguard his wife and his son's girlfriend. When he stopped at the said robot he noticed a person from the other vehicle following him, getting out of the vehicle with a pepper spray can. He said that he was not prepared to be assaulted and he decided to drive on through the red robot. This is apparently part of the complaint of reckless and negligent driving against him.

[9] Furtheron, approximately four to six vehicles of the Metro Police pulled him off the road. The door of his vehicle was pulled open, he was forcibly pulled out of the vehicle and his arm was twisted behind his back. The person who pulled him out then told him that he was going to be arrested. He was not told the reason for the arrest. He was then taken to the Pretoria West police station where

he was held. He was then given a SAPD 14A form which indicated that he was to be prosecuted for the following:

> *"Failed to comply with instruction of traffic officer, crimen injuria and driving unlicensed and unregistered motor vehicle."*

(There was no mention of negligent and reckless driving).

He provided the court with copies of his motor vehicle registration number and the licence documents. The allegation that he was driving an unlicensed and unregistered motor vehicle is therefore not correct. There was never a basis for the allegations. He further denies any allegation of *crimen injuria* and explained why he did not comply with the instructions of the traffic officer. A telephone number was given to his wife of the so-called "investigating officer". This is the number that the attorney had phoned. The person on the other side refused to identify himself and simply indicated telephonically that he refused bail. This was also confirmed in the evidence of the attorney, Mr Meyer. At that stage Mr Meyer had not known that it was the number of the Metro policeman. It appeared in court for the first time that this telephone number was actually the telephone number of the Metro police officer who had arrested the applicant and not the telephone number of any SAPS investigating officer.

[10] An affidavit was filed by a detective constable Mandla Steven Ntsweni. He is the appointed SAPS investigating officer in the matter. He stated that the matter was allocated to him on the Monday morning of 16 November 2009 after I had already ordered the release of the accused. He states that at the time the application had been made to court no investigating officer had been appointed. He confirmed that the telephone number that was given to the wife of the applicant was the telephone number of the Tshwane Metro police officer, constable Frans Moosa Sivayi, who was responsible for the arrest of the applicant on 15 November 2009.

[11] The deponent then, in my view, quite brazenly, stated that the applicant made out no case on the papers that served before me on Sunday evening, 15 November 2009 for interference by the court. He said that there was no reason or special circumstances why the applicant should have been released. He also disavows any question of the applicant, his family or his attorney asking for bail.

[12] He states that the Metro policman Sivayi, informed the applicant of his constitutional rights, and that the applicant at no stage according to Sivayi, sought bail or his release from detention. That is directly controverted by the applicant, his wife and the attorney. The evidence is clear that Sivayi indicated himself that he had

refused bail and that the applicant, his wife and the attorney were at all relevant times under the impression that Sivayi was an officer of the SAPS, that he was the investigating officer, and that he had the power to decide on bail or release.

[13] The deponent also then annexed the SAPS 10 occurrence book and attempted to justify his allegation that no bail was ever asked for, by stating that it was not written into the SAPS 10 occurrence book. He also stated that he had perused the statements in the crime docket, that the applicant refused to comply (which indicates that the applicant refused to comply with an instruction to stop), that the Metro police had followed him for quite a distance, that he had crossed several red robots, that he refused to stop, and that he was then forced to stop. He also stated, which later appeared to be not true, that the applicant was driving an unlicensed motor vehicle. He alleged that the applicant showed the arresting officer an offensive middle finger and told him to "f...-off". He stated that any fine payable on such a charge must be determined by a court.

[14] Annexed to that affidavit was an affidavit of the Metro policeman, Frans Moosa Sivayi. He confirmed the evidence of the investigating officer. He also stated that he was so friendly and nice that he even arranged medicine for the applicant to be brought to the police station. He also says that at no stage the applicant or his family asked for bail. (Applicant was apparently according to

him simply content to be locked up). He continued to allege that the applicant had committed several traffic offences, refused to obey a lawful instruction, drove an unlicensed vehicle, and committed a crime of *crimen injuria*. He therefore continued in court to allege that he was well within his rights to have arrested the applicant and to have detained him.

[15] During the court hearing I was told that all the relevant documents including the crime docket, were completed by the Metro policeman, constable Sivayi, himself in his own handwriting. In the affidavit filed by Sivayi in the docket, he does not mention at all the issue of bail and that he had refused bail. He completed the SAPS 3M form, namely the docket and filed a SAPS 3MB document, namely a statement. He also completed the preamble to the statement to which his affidavit was annexed. He also completed the SAP 21 form, namely a report on the investigation of the crime dated 15 November 2009. He completed the SAPS 6 check list as if he was a serving SAPS member.

[16] Constable Ramdroka who had accompanied Constable Sivayi also deposed to an affidavit. This constable confirmed that the registration of the vehicle had expired. This turned out to be not true.

[17] During argument it was submitted by the legal representatives of the respondents, who also acted for the employees of the respondents who appeared in court in terms of my court order (they became respondents), that the arrest was lawful. I may mention here that the persons who were represented and who appeared in court, and who therefore became parties to the proceedings were the following:

(a) the station commander of the Pretoria West police station, senior superintendent Moodley;

(b) his assistant, superintendent Klopper, of the same station;

(c) constable Frans Moosa Sivayi, the Metro policeman responsible for the arrest;

(d) the deponent to the opposing affidavit filed, constable Mandla Steven Ntsweni, of the same station;

(e) the complaints commander who was on duty ("aanklagbevelvoerder"), captain Nhlazo, of the same station;

(f) Inspector Dulebu who took over from Captain Nhlazo that Sunday evening at 19h00, of the same station.

[18] Dulebu, Nhlazo, Moodley and Klopper did not file affidavits, and did not present any evidence, even after I invited the legal representatives of the respondents to provide me with further facts pertaining to the events at the police station. The applicant also declined to call any of these persons as witnesses.

[19] I wanted clarification of the reasons why no member of the SAPS considered the request for bail, considered the applicant's position, and why the complaints commanders, Nhlazo and Dulebu did not take any action. I also wanted to know why the station commander on duty at the time did not do anything pertaining to the applicant's position.

[20] I have no doubt that the applicant, his wife and the attorney, Mr Meyer, requested bail to be granted and that it was refused. There is no reason whatsoever why I would have been approached at 23h00 on a Sunday evening for the release of the applicant, if nobody on behalf of the applicant or the applicant himself had not asked for bail or to be released. It is also totally and highly improbable that the applicant wanted to remain in custody for the night, as has been suggested by respondents.

[21] The fact that the abovementioned SAPS members refused to provide me with this information, and the fact that the information

was eventually not provided to me, or dealt with satisfactory in any affidavits, confirm the conclusion that I have come to that any denial that there was a request for bail is so untenable and far-fetched on the papers that it can be rejected out of hand[1].

[22] There was also no explanation given to me why the Metro police officer completed all the tasks and functions of the SAPS after the arrest and after the applicant had been handed over to the Pretoria West police station. Even though constable Sivayi was in court, he also did not wish to present me with any explanation of this aspect. Not one of the SAPS members who deposed to affidavits explained this issue, and in fact, the issue only came up when I asked direct questions to the legal representatives of the respondents, in this regard in open court. Even then the answers were not provided. In my view therefore, there was a singularly lack of co-operation on the part of the respondents to provide this court with all the facts pertaining to this matter. I must mention also that on Tuesday, 17 November 2009, the names of the persons referred to above had not been disclosed to me, as I had ordered. It was only after I insisted to be informed of the names and identities of these persons, that the information was disclosed to me.

[23] The applicant's counsel, Mr Bauer, submitted to me that the arrest was unlawful, that the applicant was unlawfully detained, and that I

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1 *Plascon Evans Paints v Van Riebeeck Paints* 1984 (3) SA 623 (A)

correctly ordered the applicant to be released immediately. It appears from the documents in the docket that the applicant had not been charged at all, and he had not been brought before any court.

THE NATURE OF THE ALLEGED OFFENCES

[24] Not one of the alleged criminal offences falls under schedule 1 of the Criminal Procedure Act, No 51 of 1977. Apart from the *crimen injuria* contravention, the other contraventions are contraventions reflected in schedule 3 of the Act. Such contraventions are normally dealt with in terms of section 341 of the Criminal Procedure Act. In respect of the alleged *crimen injuria*, it must be pointed out that normal vulgar abuse will not be an offence except when the circumstances are such that it can be regarded as serious.

[25] In *State v Lombard*[2] a traffic official was addressed loudly within the hearing of members of the public in the main street of Mossel Bay by stating to the Metro policemen: *"Ag fock-off man, jy is 'n lae donnerse vark."* In that case, the accused was found guilty of the offence but his sentence was R15,00 or fifteen days imprisonment.

2 1970 (2) SA 68 (K)

[26] There is, however authority for the proposition that in certain cases where the *injuria* is of a trivial nature, the courts should acquit an accused[3]. The principle that such a criminal offence has to be serious and not trivial, was confirmed in *S v Bugwanden*[4]. The court stated that while *injuriae* of a trivial nature should not engage the attention of the court, a real and substantial impairment of a person's dignitas should merit punishment because it is in the interest of the State. The court has to pass a valued judgment in regard to the reprehensibility of the offending conduct, viewed in the light of the principles of morality and conduct generally accepted as the norm in society. In that matter the insult had a racial connotation. In a matter such as that, where a policeman is insulted on a racial basis, I am in agreement with the conclusions the court came to in that matter. However, in this matter, the offence does not seem to me to be nearly as serious as in the matters I have referred to above.

[27] In *S v M*[5] the accused was convicted and sentenced to six months imprisonment for *crimen injuria,* which also had a racial overtone. The appeal against the sentence was allowed and the sentence was substituted with a fine of R200,00 and failing payment, six months imprisonment. A further three months imprisonment was suspended for a period of two years. I could not find any authority

3 *R v Muller* 1938 OPD 141 at 142, *S v S* 1964 (3) SA 319 (T); *S v Momberg* 1970 (2) SA 68 (CPD)
4 1987 (1) SA 787 (NPD)
5 1979 (2) SA 25 (A)

for *crimen injuria* warranting a prison sentence of six months or more. The offence therefore seems to me to have been a minor offence and possibly one that could fall under the maxim *de minimis curat lex.* I accept the explanation of the applicant that, because of the current high rate of crime in South Africa, and as a result of the fact that criminals pretend to be law-enforcement officials to commit crimes, it was justified for the applicant to have indicated that he was driving to the nearest police station.

THE LAWFULNESS OF THE ARREST

[28] Firstly the provisions of the Constitution of the Republic of South Africa, Act 108 of 1996 must be considered. Section 35 thereof deals with arrested, detained and accused persons. Section 35 (1) (d) of the Constitution provides that everyone who is arrested for allegedly committing an offence, has the right to be brought before a court as soon as reasonably possible, but not later than 48 hours after the arrest or 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.

[29] Section 35 (1) (f) provides that everyone who is arrested for allegedly committing an offence has the right to be released from detention if the interests of justice permit, subject to reasonable

conditions. Section 35 (2) 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.

[30] The provisions of the Criminal Procedure Act, No 51 of 1977 should therefore be considered against the background of these constitutional provisions.

[31] Arrest is one of the methods of securing attendance of an accused in court. The other methods are summons, written notice and indictment in accordance with the relevant provisions of the Criminal Procedure Act[6].

[32] Arrest is the most drastic method to secure a person's attendance at his trial and it ought to be confined to serious cases. It is a serious restriction of an individual's freedom of movement and it may also affect a person's dignity and privacy.

[33] It is trite law that arrest should be effected only where it is likely that a summons or written notice to appear will be ineffective[7].

[34] Therefore a peace officer may have a right in terms of section 40 of the Criminal Procedure Act to arrest a person without a warrant but it may not necessarily be the right procedure to follow. If a

6 Section 38 of the Criminal Procedure Act
7 *S v More* 1993 (2) SACR 606 (W) at 608 D-F

summons or written notice will be equally effective in bringing the accused before the court, he should not be arrested for offences of a less serious nature[8].

[35] Section 40 provides for arrest by a peace officer, such as a Metro policeman, without a warrant. It provides in section 40 (1) (a) that a peace officer may without warrant arrest any person who commits or attempts to commits any offence in his presence[9].

[36] There are various other grounds referred to in section 40 which are not applicable to this matter. Section 40 (1) (b) for instance provides that a person may be arrested without a warrant by a peace officer whom he reasonably suspects of having committed an offence referred to in schedule 1. Not one of the offences in this matter are offences referred to in schedule 1. Therefore the arrest in this matter could only have been an arrest in terms of section 40 (1) (a) of the Criminal Procedure Act.

[37] Section 59 of the Criminal Procedure Act provides that an accused who is in custody in respect of any offence other than an offence referred to in part 2 or part 3 of schedule 2 may, before his or her first appearance in a lower court, be released on bail in respect of such offence by any police official of or above the rank of non-commissioned officer, in consultation with the police official charged

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8 *S v More* supra pages 608 E-F
9 Section 40 (1) (a) of the Criminal Procedure Act

with the investigation, if the accused deposits at the police station the sum of money determined by such police official.

[38] Section 59 is only applicable to crimes which are relatively speaking fairly trivial. It is called in general "police bail", and is something that occurs daily.

[39] A police official must exercise a discretion after consultation with the investigating official. In *MacDonald v Kumalo*[10] the police officer empowered to grant bail went off duty at 17h00 and bail could therefore not be granted during the evening. The court frowned upon that procedure and stated that the practice is certain to lead to abuse and the holding of innocent members for petty offences who would have been released if the officer had been present[11].

[40] In the light of the provisions of the Constitution, read with the provisions of section 59, it is clear that an accused person who has been arrested for minor offences, for which bail may be granted in terms of section 59 of the Criminal Procedure Act, has a right to be treated in such a way that he is considered for purposes of obtaining bail in terms of section 59 of the Criminal Procedure Act as soon as possible. Obviously the same factors will have to be

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10 1927 EDL 293
11 Du Toit & Others: Commentary on the Criminal Procedure Act, pages 9-13

taken into account by such a police official as those applicable to normal bail applications[12].

[41] Such a police official must take into account *inter alia* the purpose of bail. Bail is a procedure directed towards breaching the right to freedom of an accused as little as possible. The purpose is to ensure the accused's appearance for trial[13].

[42] In *Louw and Another v Minister of Safety and Security and Others* 2006 (2) SACR 178 (T) Bertelsmann J considered arrest itself as a procedure to secure a person's attendance at court. He dealt with the issue and the principles as follows:

> *"An arrest is a drastic interference with the rights of the individual to freedom of movement and to dignity. In the recent past, several statements by our Courts and academic commentators have underlined that an arrest should only be the last resort as a means of producing an accused person or a suspect in court – Minister of Correctional Services v Tobani 2003 (5) SA 126 (E) ([2001] 1 All SA 370) at 371f (All SA);*
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> > 'So fundamental is the right to personal liberty that the lawfulness or otherwise of a person's detention must be objectively justifiable, regardless ... even of whether or not he was aware of the wrongful nature of the detention.'
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> *If an accused or a suspect does not represent a danger to society, will in all probability stand his trial, will not abscond, will not harm himself and is not in danger of being harmed by others and may be able and be keen to disprove the allegations against him or her, an arrest will ordinarily not be the appropriate way of ensuring the accused's presence: see S v*

12 Du Toit & Others *supra*, pages 9-1 to 9-65

13 *Minister van Wet & Orde en Andere v Dipper* 1993 (3) SA 591 (A); *S v Du Plessis* 1993 (2) SACR 379 (T) at 385; *S v Petersen and Another* 1992 (2) SACR 52 (C)

Van Heerden en Ander Sake 2002 (1) SACR 409 (T). In Ralekwa v Minister of Safety and Security 2004 (1) SACR 131 (T) (2004 (2) SA 342), my Sister, De Vos J, dealing with a similar issue, underlined the following:

> 'It is trite law that an arrest is prima facie wrongful and unlawful. It is for the defendant to prove that the arrest was lawful'.

The pre-constitutional approach by our courts and our law enforcement authorities is reflected by Schreiner JA in Tsose v Minister of Justice and Others 1951 (3) SA 10, in the Appellate Division, at 17G-H:

> 'An arrest is, of course, in general a harsher method of initiating a prosecution than citation by way of summons but if the circumstances exist which make it lawful under a statutory provision to arrest a person by means of bringing him to court, such an arrest is not unlawful even if it is made because the arrestor believes that arrest will be more harassing than summons. For just as the best motive will not cure an otherwise illegal arrest so the worst motive will not render an otherwise legal arrest illegal...
> What I have said must not be understood as conveying approval of the use of arrest where there is no urgency and the person to be charged has a fixed and known address; in such cases it is generally desirable that a summons should be used. But there is no rule of law that requires the milder method of bringing a person into court to be used whenever it would be equally effective.'

This passage is commented upon by my Sister, De Vos J, as follows:

> 'The question is whether, in view of the fact that we now have a Constitution that restricts the exercise of public power through a justiciable Bill of Rights, the last statement of the quotation can be correct. There can be no doubt that an examination into the lawfulness of an arrest against the backdrop of a statement that there is no rule of law requiring the milder method of bringing a person into court will be different from an enquiry which starts off on the premise that the right of an individual to personal freedom is a right which should be jealously guarded.
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> I am of the view that the demands of the constitutional State must be taken into account when applying the general test in cases such as these.'

In the factual context of that case, De Vos J was required to do no more than to state this as a general principle. I am of the view that the time has arrived to state as a matter of law that, even if a crime which is listed in Schedule 1 of Act 51 of 1977 has allegedly been committed, and even if the arresting police officers believe on reasonable grounds that such a crime has indeed been committed, this in itself does not justify an arrest forthwith.

An arrest, being as drastic an invasion of personal liberty as it is, must still be justifiable according to the demands of the Bill of

Rights. Nowhere has the need for justification of government action or administrative action been better described as in the oft-quoted article by the late Etienne Mureinik 'A Bridge to Where?: Introducing the Interim Bill of Rights' (1994) 10 SAJHR 31. On page 32 the following is said:

> 'What the bridge is from a culture of authority. Legally, the apartheid order rested on the doctrine of Parliamentary sovereignty. Universally, that doctrine teaches that what Parliament says is law, without the need to offer justification to the courts. In South Africa, since Parliament was elected only by a minority, the doctrine taught also that what Parliament said was law, without a need to justify even to those governed by the law. The effect of these teachings, at the apogee of apartheid, was to foster an ethic of obedience. The leadership of the ruling party commanded Parliament. Parliament commanded its bureaucracy, the bureaucrats commanded the people...
> If the new Constitution is a bridge away from a culture of authority, it is clear what it must be a bridge to. It must lead to a culture of justification – a culture in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command. The new order must be a community built on persuasion, not coercion. If the new Constitution is to be a bridge in this direction, it is plain that the Bill of Rights must be its chief strut. A Bill of Rights is a compendium of values empowering citizens affected by laws or decisions to demand justification.'

A very instructive article on the exercise of the power to arrest by Clive Plasket, under the heading 'Controlling the discretion to arrest without warrant through the Constitution' appears in Suid-Afrikaanse Tydskrif vir Strafregspleging (11) 1998 at 173. On page 194 the learned author says:

> 'The fundamental rights to freedom and to justifiable administrative action have, by rendering the offending part of Tsose's case redundant, placed the discretion to arrest on the same footing as the exercise of any other discretionary power. In the context of the high premium placed by the Constitution on the rights to human dignity and to freedom, that is important: the courts are now provided with the means to protect these rights effectively (having failed to develop meaningful safeguards themselves), thus ensuring that the drastic power of arrest without warrant is controlled by the full spectrum of the principles of legality, procedural propriety and rationality. This is not as radical a departure as some may imagine; after all, the idea of justifiability, principally articulated through a duty to consider less drastic alternatives, is part of the police standing orders, which bind every police official in the exercise of his/her duties and functions. Despite this, there may be those who perhaps, in claiming to champion the war against crime, appear to believe that the police should be freed of legal constraints. No one would suggest that the level of crime in our country is not an extremely serious problem. It is obvious that decisive steps have to be taken to address the problem. On the legal level the answer lies in convicting and sentencing criminals in fair trials. For the police that means improving their capacity to detect crime and investigate criminals in fair trials. For the police that means improving their capacity to detect crime and investigate offences. It goes without saying that this should be done within the framework of the Constitution... The power to arrest plays a minor role in the endeavour to combat crime: it is merely a means, and

> only one of a number of means, to initiate the process of prosecution. An increase in the number of arrests may not be an indication that the war against crime is being won, it may instead be an indication that our constitutional rights and freedom are being devalued.'
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> *What these statements mean is that the police are obliged to consider, in each case when a charge has been laid for which a suspect might be arrested, whether there are no less invasive options to bring the suspect before the court than an immediate detention of the person concerned. If there is no reasonable apprehension that the suspect will abscond, or fail to appear in court if a warrant is first obtained for his/her arrest, or a notice or summons to appear in court is obtained, then it is constitutionally untenable to exercise the power to arrest. Before an arrest can lawfully be exercised, the reasonable suspicion that a Schedule 1 crime has been committed must be considered by a reasonable investigating officer, and it must be considered whether the suspect will attend the court hearing if summonsed or warned. Only if there are reasonable grounds to suspect that the suspect will abscond if an application for a warrant is first made may the power contained in s 40 of Act 51 of 1977 be exercised. I do not believe that this places an undue burden on the police. It requires no more than an honest exercise of their duties. If they bona fide fear that a suspect will evade justice, then an arrest is obviously the correct option. But, by the same token, this test makes an arrest ultra vires when exercised against a suspect under circumstances where the suspect is perfectly willing to come to court on warning, on notice or summons."*[14]

[43] The Constitution places a very high premium on the right to human dignity and freedom. It is essential that the courts should protect these rights in the most effective way possible. The level of crime in South Africa should not justify a departure from the democratic and constitutional principles enshrined in our Constitution,

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14 *Le Roux v Minister of Safety & Security and Another* 2009 (2) SACR 252 (KZP); *Gellman v Minister of Safety & Security* 2008 (1) SACR 446 (W); *Minister of Safety & Security v Seymour* 2006 (6) SA 320 (SCA); *Mabona and Another v Minister of Law and Order and Others* 1988 (2) SA 654 (SE); *Minister of Safety & Security v Glisson* 2007 (1) SACR 131 (E)

safeguarding the population from any excess use of power and deprivation of freedom by government institutions and authorities.

[44] The spirit of the Constitution, the recognition of basic human rights, and the right to freedom in particular, enshrined in the Constitution should not be compromised in any way whatsoever through the actions of government officials.

[45] The courts should therefore jealously guard these rights and act decisively upon the infringement thereof. Furthermore it is important that those who act with impunity, and who think that they can do as they please, simply because they have the force of the whole law enforcing system behind them, should be brought to book and restrained. The whole wrath of the legal system, the rule of law, the courts and the public should be brought upon such officials.

[46] It does not appear from the huge amount of damages claims instituted against the second respondent, the Minister of Safety and Security, that a damages claim constitutes a deterrent of any nature whatsoever in respect of unlawful behaviour on the part of the security forces. In fact, the only party being prejudiced as a result of damages claims based on unlawful arrest and detention, is the taxpayer, and therefore the public, who also bears the brunt normally of unlawful actions by the police services. It is in fact

those who expect that the hard fought and precious rights to freedom, dignity and not to be detained unnecessarily, should be upheld and enforced, who eventually have to pay for the breach of these rights, by state officials mostly acting with impunity.

[47] It is ironic further, that those who sometimes are subjected themselves to such unlawful breach of the aforesaid rights, form part of the taxpayers who have to pay in the form of damages for such breaches. In my view other possibilities should be considered to deter police services and metro police services from breaching the enshrined rights held dear by everybody in this country. The public must be protected.

[48] Therefore, if a preferable method of an accused's attendance is through a summons, that procedure should be employed. In this regard the risk of the suspect absconding or committing further crime should be considered. An arrest without any rational reasonable basis therefor should not occur indiscriminately.

[49] It does not matter how severe the alleged criminal offence may be. The person to be arrested is still an innocent person whose right to freedom, dignity and right to fair treatment should be upheld.

[50] I therefore come to the conclusion that the arrest in this matter was unlawful. His detention in the holding cells at the Pretoria West police station was therefore also unlawful.

[51] As I have mentioned above, those responsible for consideration of granting the applicant bail refused to do so. It follows that the applicant was held unlawfully and detained unlawfully at the Pretoria West police station.

[52] From Roman law times the right of liberty and freedom of a free man was recognised as being a right that must be protected. In Voet 43.29 the interdict *de libero homine exhibendo* was recognised as a remedy. It must be remembered that Voet wrote mostly about Roman law and not Roman-Dutch law[15]. However there are comments made by him about Roman-Dutch law in his writings. Gane in the "Selective Voet" refers to the interdict as the Roman-Dutch version of the English writ of habeas corpus. This principle (both the Roman-Dutch interdict and the English writ) had been applied in certain older South African decisions[16].

15 *Wood and Others v Ondangwa Tribal Authority and Another* 1975 (2) SA 294 (A) at 308 C to 309 D

16 *Principal Immigration Officer and Minister of Interior v Naravansamy* 1916 TPD 274; *In Re Marechane* 1 SAR 27; *In Re Cakijana and Others; In Re Willem Kock and Nataniel Bailie* (1897) Buch.Rep. 45

THE BASIS FOR THE RELIEF

[53] In *Wood and Others v OndwangaTribal Authority and Another* 1975 (2) SA 294 (AD) the court said the following pertaining to the abovementioned interdict at 310D to 311E:

> *"Although the position is that in Roman-Dutch law no private person can proceed by a popular action as such, it is clear that the interdict de libero homine exhibendo is part of our law, and it only remains to be considered at whose request a Court will issue the interdict. Basically, the cause of action is sui generis because not only was the right to freedom protected by it but 'it is set in motion as a matter of duty'. In this respect it would appear to be distinguishable from any of the other actions popularis. Voet 43.29, says that in favour shown to freedom the interdict is granted to anyone among the people (cuivis ex populo). That indicates, in my view, that he had in mind the action popularis. Nevertheless, I think it follows, from what I have said above, that although the actions populares generally have become obsolete in the sense that a person is not entitled 'to protect the rights of the public', or 'champion the cause of the people' it does not mean that when the liberty of a person is at stake, the interest of the person who applies for the interdict de libero homine exhibedo should be narrowly construed. On the contrary, in my view it should be widely construed because illegal deprivation of liberty is a threat to the very foundation of a society based on law and order. As is stated in the Utrechbtse Consultatien XCIII, 3, in relation to the arrest of a debtor:*
>
> > 'Ende alle arresten zijn odieus, verboden en de beschreven rechten contrarie…'
>
> *unless expressly allowed by statute.*
>
> *In regard to the habeas corpus of the English law, Halsbury, Laws of England, 3rd ed, vol 11, p 37, inter alia, states the following:*
>
> > 'Any person is entitled to institute proceedings to obtain a writ of habeas corpus for the purpose of liberating another from an illegal imprisonment, and any person who is legally entitled to the custody of another may sue out the writ in order to regain that custody. In any case where access is denied to a person alleged

> to be unjustifiably detained, so that there are no instructions from the prisoner, the application may be made by any relation or friend on an affidavit setting forth the reasons for its being made.
>
> A mere stranger or volunteer, however, who has no authority to appear on behalf of a prisoner or right to represent him will not be allowed to apply for habeas corpus.'

I do not wish to deal with the definition of a "friend" in our law. It would seem to me, however, that if a person who has neither kith nor kin ion this world is illegally deprived of his liberty, and a person who comes to hear of this were to apply for an interdict de libero homine exhibendo, he could hardly fail to be considered the prisoner's friend, unless, of course, one holds the view that the good Samaritan did not have the attributes of a friend.

It is useful, perhaps, to compare the position in our law with that in the American law. According to American Jurisprudence, 2nd ed, vol 39, the habeas corpus laws

> 'should receive a liberal construction, in disregard, if need be, of the technical language used and should always be construed in favor of the liberty of the citizen".

In para 11 it is stated:

> "The writ is not and never has been a static, narrow, formalistic, remedy. Its scope has grown to achieve its purposes – the protection of indivuals against erosion of the right to be free from wrongful restraints on their liberty."

In para 117 there are the following remarks:

> 'As a general rule a person who applies for a writ to secure the release of another must show some interest in the person or some authorisation to make the application. According to some authority a mere stranger, or volunteer, having no authority derived from the person detained or the legal right to the custody of such a person, has no right to a writ of habeas corpus to obtain the discharge of such person from custody, but there are cases in which the writ has issued on the application of a stranger of voltunteer who bore no legal relation to the person in custody, or who was actuated solely from humanitarian motives.'

Para 117 also contained the following:

> 'But it has been said that a person may apply for habeas corpus for another if he sets forth in the application a reason or explanation satisfactory to the Court showing why the detained person does not make the application himself.'

[54] There is no doubt therefore that this principle still forms part of our law and that such an application can be brought. That was also the basis of the application brought by the applicant in this matter. It therefore follows that the application was brought on the basis of the abovementioned interdict and I am therefore satisfied that the relief was correctly granted. The interdict referred to above has also been applied in numerous cases after the *Wood* case referred to above[17].

[55] The interdict was also considered in *Kauluma and Others v Minister of Defence and Others* 1984 (4) SA 59 (SWA) as follows on page 64:

> *"As already stated this is an application for an interdict de libero homine exhibendo, which is analogous to the English writ of habeas corpus. It is an action sui generis, and is fundamental to every civilised system of law. It protects the right of every person against an illegal deprivation of his personal liberty and asserts the right of a competent Court to protect the right of any person to his personal liberty. This principle was already established in 1879 in the case of In re Kok and Others (1879) Buch 45. In re Cakijana and Others (1908) 29 NLR 193, Bale CJ in the course of his judgment referred to Kok's case supra and stated:*
>
> > 'In the case of Sigcau v The Queen 12 Juta 256 De Villiers CJ said: 'The right of every inhabitant to protection against any illegal infraction of personal liberty has been clearly established by the case of Kok v The Queen. In the course of his judgment he asserted in no doubtful terms the right of the Court to interfere to protect against the illegal interference with the rights of personal liberty, and asserted that it is the duty of the civil courts to administer the laws of the country without fear, favour or

17 *Swart v Minister of Law and Order* 1987 (4) SA 452 (C); *Minister of Law and Order Kwandebele and Others v Mathebe and Another* 1990 (1) SA 114 (A)

> prejudice, independently of the consequences which may ensue...'
>
> *This quotation was approved and followed by Rumpff CJ in Wood's Case supra at 309-310.*
>
> *During the course of the argument the question was raised and debated as to the proper procedure to be adopted. Mr Kentridge (and Mr Chaskalson in reply) submitted that once a person is held in detention he is entitled to approach the Courts for an interdict de libero homine exhibendo as long as he advances a prima facie case that he is illegally detained (see Christian League of Southern Africa v Rall 1981 (2) SA 821 (o)) and that in such a case the Court would grant an interim interdict resulting in the production of the person detained before the Court, and the question of the legality or otherwise would then be determined on the return day."*

[56] It is important to note that the Appellate Division in *Kabinet van die Tussentydse Regering vir Suid-Wes Afrika en 'n Ander v Katofa* 1987 (1) SA 695 (A) indicated quite clearly that the interdict should not be confused with the *habeas corpus* principle of English law. It confirmed that the principle is a pure Roman-Dutch law principle that became part of South African law, and that the English law of *habeas corpus* was not incorporated into South African law. To the extent that the English remedy seeks to achieve the same as the Roman-Dutch remedy nothing turns on this issue. In this matter it makes no difference which remedy is applicable[18].

[57] It was therefore on this basis that the application was brought and the relief was granted. I have no doubt that in the light of my finding

18 *Cabinet for the Interim Government of South West Africa v Bessinger and Others* 1989 (1) SA 618 (SWA)

referred to above, that there were sufficient grounds for the interdict to be granted and the order is therefore confirmed.

[50] In *SA Commercial Catering and Allied Workers Union and Another v Lehapa NO and Another (Mostert NO intervening)* 2005 (6) SA 354 (W) the court said the following about granting a costs order once all parties are properly before the court:

> *"[11] Although it may be correct that a Court is not empowered to grant costs for or on behalf of a party not before it, this does not mean that a Court is not empowered to make a costs order once all the parties are properly before Court (compare, for example, the approach adopted in Holmes and Another v Lawrie 1927 AD 535 at 536). In First National Bank of Southern Africa Ltd t/a Wesbank v First East Cape Financing (Pty) Ltd 1999 (4) SA 1073 (SE), the Court, in dealing with what are referred to as pre-litigation costs", rules that nothing precluded a litigant, after having laid sufficient facts before the taxing master, from claiming pre-litigation costs. Mbenenge AJ in this regard held as follows at 1077F-G:*
>
> > 'It has been held that where, as in the present matter, papers are prepared for an application to the High Court but not issued because a demand concerning the matter in dispute was complied with by the other party subsequently to expiry of the date of the demand but before the completion of the papers relating to the application, damages amounting to the costs payable by the applicant to his attorney cannot be claimed from the respondent and that the correct remedy is to proceed with the application in regard to costs only and obtain an order in regard thereto and then proceed to tax a bill (see Behm v Ord 1953 (4) SA 96 (C)).
>
> *And at 1080E-G:*
>
> > "In sum, I find that in the event of an applicant incurring costs in preparation of an application, and against a respondent who is put to terms but steadfastly refuses to concede the applicant's entitlement until after the application has been prepared, but not issued, the intended applicant is entitled, on demonstrating that it would have been successful in the intended application, to an order of costs reasonably incurred. None of the

> authorities which Mr Scott referred me to seem to assail this view. A party must pay such costs as have been unnecessarily incurred through his failure to take proper steps or through his taking wholly unnecessary steps (see De Villiers v Union Government (Minister of Agriculture) 1931 AD 206 at 214)'.

[12] *In my view, I need only determine whether the intervening party has demonstrated that he would have been entitled to intervene and, in doing so, had incurred costs which became wasted by virtue of the applicant's decision to withdraw the application. See, in this regard, the judgment of Van Reenen J in Reuben Rosenblum Family Investments (Pty) Ltd and Another v Marsubar (Pty) Ltd (Forward Enterprises (Pty) Ltd and Others Intervening) 2003 (3) SA 547 (C). There is also, in principle, no difference between the approach applied by Van Reenen J in Rueben (supra) and the approach adopted by Ru,mpff JA in Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk 1972 (1) SA 773 (A). Rumpff JA quoted (at 785A) with approval from Moon and Another v Hoare 1918 NPD 401:*

> 'Mr Lister, knowing that the application for the surrender had been set down for the following day, although technically there was nothing before the Court because it had been withdrawn, came into Court on the Tuesday upon an affidavit asking for costs. That was a perfectly natural thing to do'.

He referred also (at 785A-C) to the approach adopted in In re Israel 1936 NPD 548:

> ***'In In re Israel 1936 NPD 548 het Israel kennis gegee dat** hy op 'n bepaalde dag aansoek sou doen om sy boedel oor te gee. Hy dien geen stukke by die Hof in nie en hyself verskyn ook nie op die geadverteerde dag nie. 'n Skuldeiser verskyn op die betrokke dag en vra sy koste. Waarnemende Regter Carlisle verklaar oa:*
>
> > *"In these circumstances, Mr Clark asks that an order for the costs to which his client has been should be granted against the debtor. It seems to me that that is a proper request. The creditor has appeared in answer to a statutory notice in order to oppose the surrender. His opposition is rendered futile because at the last minute the petition has not been filed, but he is nevertheless entitled to his costs, and I make an order to that effect."*
>
> *Na my mening het die appellant in die onderhawige saak die korrekte en mees praktiese prosedure gevolg om met*

> *kennisgewing van mosie die feite voor die Hof te lê, en moes sy aansoek toegestaan gewees het.'*

[59] I must point out that in this matter the persons against whom I am considering giving a costs order *de bonis propriis,* were brought before court, they were identified as parties, and they were all represented by the state attorney and counsel. I have therefore no hesitation or doubt that I may make a costs order against them if it is warranted.

COSTS

[60] In the light of the aforegoing it is necessary to consider the issue of costs in this application. I have given an indication to the representatives of the officials who were involved in this matter that I will consider granting costs *de bonis propriis* against the named officials. I have also been requested by the applicant to do so. They are the persons who became parties to the proceedings and in fact who became respondents through the proceedings as referred to above. In fact, those who were on duty at the time and who would have been responsible for dealing with the applicant, as well as Constable Frans Moosa Sivayi, the Metro policeman who effected the unlawful arrest, are the parties who will be considered to be ordered to pay costs *de bonis propriis.* The real investigating

officer, Constable Mandla Steven Mtsweni was not involved to the extent that he participated in the unlawful detention.

[61] In various categories of matters costs *de bonis propriis* have been awarded against employees or representatives of a corporate or institutional party to litigation.[19]

[62] In *Umvoti Council Caucus and Others v Umvoti* Municipality[20] the question arose whether certain councillors who were cited as respondents in an application and who opposed the application, which arose out of conduct which purported to be resolutions taken by the municipal council, could have been ordered to pay the costs of the application. It was argued on appeal that councillors were indemnified against the costs order in the light of the provisions of section 28 of the Local Government: Municipal Structures Act, 117 of 1998, because the resolutions which were set aside fell squarely within the ambit of that section. The court considered that the requirements for protection of the specific section were not met and that the respondents did not act in an official capacity when the resolutions were taken. It therefore came to the conclusion that the court *a quo's* exercise of its discretion by making the costs order against the councillors personally was not improper, and it was upheld.

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19 *Kabinet van die Tussentydse Regering vir Suid-Wes Afrika en 'n ander v Katofa* 1987 (1) SA 695 (A)

20 2010 (3) SA 31 (KZP)

[63] A jurisdictional fact required to trigger the common law principle pertaining to protection of persons in the position of municipal councillors, is that the person to be held liable must have acted in an official capacity at the time the actions complained of were taken, If not, such immunity cannot be claimed.

[64] Reference was made to the case of *Swartbooi and Others v Brink and Others*[21] 2006 (1) SA 203 (CC) where the High Court originally issued a *rule nisi* requiring individual councillors who had supported impugned resolutions, to show cause why they should not pay costs *de bonis propriis*. In that matter they had no other choice but opposing the confirmation of the rule *nisi* granted if they wanted to avoid paying costs. In that matter it was also found that the councillors had acted lawfully and in an official capacity. In the *ANC* matter referred to above all of the councillors of the municipality were joined as respondents, and no costs order was sought against them unless they chose to oppose the application. The basis of seeking a costs order was therefore their opposition to the application. They chose to oppose the application. In such a matter they are bound to undertake the responsibility of liability for costs. The court said the following pertaining to the issue of costs in the event of such an opposition, at paragraph 42 of the judgment:

> *"The effect of what the second and ninth appellants say the court a quo should have done, to make the respondent bear*

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[21] 2006 (1) SA 203 (CC)

> *the costs, would be to burden the rate payers they are elected to serve with the legal costs needlessly incurred by them. I cannot concede that such an approach would be justified. The burdening of the appellants with costs cannot therefore be attacked on the basis of an improper exercise of the discretion of the court a quo.*

In this regard the court relied on *Alexander v Boksburg Municipality and Jones* 1908 TS 413 at 419 where the following was said about a case where a town council opposed an application for setting aside of a licence granted by it:

> *"With reference to the town council, they are a body who have perforce to decide matters of this kind. If they had done nothing but state that they gave their decision bona fide, and would submit to any order the court might make, I should have had considerable difficulty in awarding costs against them because they are not litigants in the ordinary sense of the word: they have no direct interest in the matter.... As a matter of fact they took upon themselves the position of an ordinary respondent, and instructed counsel to oppose the application. Having in a matter of this kind, of a civil nature, taken upon themselves the opposition, they are bound to undertake responsibility of that position, namely, liability for costs."*

[25] The abovementioned authorities are quoted for the proposition that a government official in a particular position, can be ordered to pay costs *de bonis propriis* under certain circumstances as a result of such an official's actions, and in particular where the actions of the official were unlawful and where it caused the litigation and the costs in respect thereof. That is particularly so where relief that is sought as a result of such actions, is opposed by such individuals, which should never have been opposed.

[66] The decisions are also quoted for purposes of support pertaining to the argument that the taxpayer should not be the liable party to pay for unlawful, indiscriminatory and illegal actions committed by government officials. I have already referred to the extent of damages claims that are instituted yearly against the first and second respondents and the costs involved in respect thereof, which must be carried by the tax payer. Government officials who act with impunity cannot simply, and should not be allowed to do what they please, and thereafter be exonerated from their actions because of the fact that the relevant government institution is held responsible for payment of damages and the costs caused by their unlawful actions.

[67] In *Mlatsheni v Road Accident Fund* 2009 (2) SA 401 (E) the Eastern Cape Provincial Division dealt with a matter where the Road Accident Fund raised spurious defences which had not been mentioned in the pleadings and where no evidence was presented upon which the defences could have been based. By so frustrating the legitimate claim of a plaintiff, the employee of the fund who gave the defendant's legal representatives instructions, was found to have acted in violation of the Constitution. His actions fell short of what is expected of public administrators in section 195 of the Constitution of the Republic of South Africa, Act 108 of 1996.

[68] *Plasket J* considered granting costs *de bonis propriis* against the said employee. He said the following in paragraph 18 of the judgment:

> *"It is also necessary to state that, in my view, if this type of conduct continues, the time may well have arrived for orders of costs de bonis propriis to be awarded against employees of the defendant to give instructions that have the effect of frivolously frustrating legitimate claims."*

[69] In *Bovungana v Road Accident Fund* 2009 (4) SA 123 (E) a costs order was granted on an attorney and client scale *de bonis propriis* against the Fund's officials. The court stated in that matter that the Fund had paid no heed to the many judgments in the relatively recent past in which the court had expressed concern about the conduct of the Fund and in particular the conduct of employees of the Fund who gave instructions that had the effect of frivolously frustrating legitimate claims. The court found that the explanations by Fund officials revealed incompetence and dishonesty and that they had acted recklessly. They were ordered to pay costs personally.

[70] This is a further indication that the courts will consider granting a costs order *de bonis propriis* against officials of a government entity or institution, that act in a way that justifies such a costs order. Actions that cause unnecessary litigation and costs, that are

unreasonable, reckless and dishonest, will justify costs orders *de bonis propriis.*

[71] One of the reasons for granting the order in the abovementioned decision was that the Fund had a callous disregard for its primary responsibility to administer the public funds under its control, in the interests of road accident victims. It was taxpayers funds that were squandered unnecessarily and unjustifiably.

[72] In *Tshona v Principal Victoria Girls High School and Others* 2007 (5) SA 66 (E) a guardian was ordered to pay cost *de bonis propriis* when assisting a minor in litigation, on the basis that the guardian acted *mala fide*, unreasonably and negligently[22].

[73] In *Ntuli v Zulu and Others* 2005 (3) SA 49 (N) the court considered a costs order *de bonis propriis* against a judicial officer where the judicial officer's conduct was *mala fide*, where he had conducted himself maliciously and where there had been a gross illegality in the case. The court came to the conclusion that such a costs order can be awarded only if it can be said that the judicial officer had acted *mala fide* or with manifest bias[23].

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22 See also *Grobler v Potgieter* 1954 (2) SA 188 (A); *Ex Parte Hodgert* 1955 (1) SA 371 (D); *Ex Parte Bloy* 1984 (2) SA 410 (D)

23 *Geldenhuys v Regional Magistrate Sutherland* 1914 CPD 62; *Regional Magistrate Du Preez v Walker* 1976 (4) SA 849 (A)

[74] In *Venbor (Pty) Ltd v Vendaland Development Company (Pty) Ltd t/a Campstore* 1989 (2) SA 619 (V) consideration was given to ordering directors of a company to pay costs *de bonis propriis* when they acted frivolously and in total disregard of the rights of the applicant in litigation proceedings[24]. Costs *de bonis propriis* have also been granted against a party who acts in a representative capacity without making provision for the defendant's costs and without certainty that he will be successful[25].

[75] The standard categories in respect of which costs *de bonis propriis* have been considered and ordered, are parties who act or litigate in representative capacities such as executors, trustees[26], judicial officers, trustees of insolvent estates, persons litigating on behalf of companies, administrators[27] and even insolvents[28].

[76] As *Plasket J* has said in the decision quoted above, the time has come to consider costs orders *de bonis propriis* against public officials acting in bad faith and causing unnecessary legal costs and

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[24] See also *Trek Tyres Ltd v Beukes* 1957 (3) SA 306 (W); *Registrateur van Banke v Clanwilliam-Eksekuteurskamer Bpk* 1972 (4) SA 387 (C); *Francarmen Delicatessen (Pty) Ltd v Gulmini* 1982 (2) SA 485 (W); *Finance Corporation (Pty) Ltd v Trusting Engineering (Pty) Ltd* 1987 (4) SA 581 (W)

[25] *Venter NO v Scott* 1980 (3) SA 988 (O)

[26] *Louw v Lampert and Chipkun* 1972 (2) SA 501 (T); *Die Meester v Meyer* 1975 (2) SA 1 (T); *Legal Practitioners; H Merks & Co (Pty) Ltd v The B-M Group (Pty) Ltd* 1996 (2) SA 225 (A); *Napier v Tsaperas* 1995 (2) SA 665 (A); *Waar v Louw* 1977 (3) SA 297 (O)

[27] *Port Elizabeth Assurance Agency & Trust Co Ltd v Estate Richardson* 1965 (2) SA 936 (C); *Jakins v Berton* 1971 (3) SA 735 (C)

[28] *The Master v Omar* 1958 (2) SA 547 (T); *Du Plessis v Tzerevos* 1979 (4) SA 819 (O)

litigation, for their opponents, for the general public and for taxpayers.

[77] In *Pillay v Licencing Officer Umkomaas and Another* 1930 NLR 111 a *mandamus* was granted against the respondent to issue a dealers licence to the applicant. It was held that the power that was exercised originally to refuse the licence, was exercised fraudulently.

[78] This case was referred to by *Clive Plasket,* then an associated professor of Rhodes University, Grahamstown, in an article entitled *"Protecting the Public Purse: Appropriate Relief and Costs Order Against Officals"* published in the 2000 South African Law Journal page 151.

[79] He posed the problem arising from the abovementioned *Pillay* case, as follows in his article:

> *"2. THE PROBLEM*
>
> *Dove-Wilson JP was rather restrained on his description of the conduct of the five members of the town board. One can think of any number of terms stronger than 'extraordinary' and "tainted by want of good faith' to describe what they did. In these circumstances, it strikes one as unfair that the applicant's costs would have been paid not by the five dishonest members but the town board. In other words, the ratepayers of Umkomaas would have had to foot the bill for the crass attempt by the five to deny the applicant his licence to trade. And that is not all they would have to pay for: they would also have had*

> *to pay the costs of the vain attempt by the respondents to oppose the application."*

[80] *Plasket* refers to decisions where public officials were found guilty of bad faith and where costs *de bonis propriis* were granted against them. In these cases the *mala fide* actions of a public official caused the cost orders to be granted[29].

[81] *Plasket* argues that the new Constitution created certain rights for the public and placed certain obligations on public officials. He refers to section 195 (1) of the Constitution that sets out the basic values and principles governing public administration, which requires *inter alia* a high standard of professional ethics that must be promoted and maintained. Furthermore efficient economic and effective use of resources must be promoted. Services must be provided impartially, fairly, equitably and without bias. These principles must be applied throughout government on all levels. He also referred to section 237 of the Constitution in this regard, as well as various rights set out in the bill of rights, Chapter 2 of the Constitution.

[82] He also refers to section 38 of the Constitution that creates a right to approach a competent court where it is alleged that a right in the bill of rights has been infringed or threatened, and which provides

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29 *Regional Magistrate Du Preez v Walker* 1976 (4) SA 849 (A) at 853 H; *Credex Finance (Pty) Ltd v Kuhn* 1977 (3) SA 482 (N); *Moeca v Addisionele Kommissaris Bloemfontein* 1981 (2) SA 537 (O)

that the court may grant appropriate relief, including a declaration of rights.

[83] He then argues that appropriate relief, with reference to the Constitution, where there is a breach of a fundamental right, should be to vindicate the Constitution and to deter its further infringement. Such appropriate relief should act as a deterrent against further violations of rights enshrined in the Constitution[30]. He then argues that punitive costs orders, such as costs *de bonis propriis* against public officials who act *mala fide,* fraudulently and in breach of their Constitutional obligations, can in appropriate cases be regarded as appropriate relief.

[84] For international authority he referred to the decision of *Re West Nissouri Continuation Board* (1970) 38 *Ontario Law Reports* 207. In that matter the members of a municipal council had refused to appoint persons to vacant positions on the board of trustees of a school as they were obliged to do in terms of a statute. An application was made to compel the council to make the appointments. A *mandamus* was issued but the council has appealed.

[85] The issue in the matter was described as follows on page 210 of the judgment:

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30 See *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC)

> *"Without canvassing in detail the somewhat complicated facts in this much-litigated matter, I am compelled to the conclusion that the township council should forthwith appoint new trustees of the school board in question so as to enable that board, when thus completed, to deal with the present urgent situation existing as to the continuation school in question.*
>
> *Unless therefore by Monday next, the 2nd October, the said Township Council for the Township of West Nissouri so fill the vacancies in the said board by the election of new trustees, the order will go so asked. I will make no disposition of the costs of the motion until after the date named.*
>
> *The order issued directed that Richard Fitzgerald, Reeve of the Township of West Nissouri, and W F McGuffin, James Smibert, William Wiseman, and John Pardy, councillors, and the township council should forthwith fill the vacancies in the Board caused by the resignation of Fitzsimmons, McGuffin and Wheaton."*

[83] The court described the actions of the appellants in that case, namely the councillors who had refused to act in accordance with their constitutional and statutory obligations, and who had taken a technical point in the litigation opposing the court application, as follows on page 211:

> *"There is also imposed upon the head of the council, who is one of the appellants, the statutory duty: to "be vigilant and active in causing the laws for the government of the municipality to be duly executed and obeyed and to 'oversee the conduct of all subordinate officers in the government of it, and, as far as practicable, cause all negligence, carelessness, and violation of duty to be prosecuted and punished: and he, as well as each of his fellow-members of the council, and co-appellants to this appeal has made the statute-imposed declaration in which he has solemnly promised and declared that he will truly, faithfully and impartially, and to the best of his knowledge and ability perform the duties of his office: The Municipal Act, RSO, 1914, eh. 192, secs 215, 242 and 193."*

[87] In the judgment of appeal by *Riddel J* the matter was explained as follows on pages 216 to 217 of the judgment:

> *"We are all of opinion that the whole trouble has been caused by the foolish (I use no harsher word) conduct of the members of the township council, who seem to have imagined that their silly evasion of the order of the Court would be accepted as an honest attempt to obey it. For this they are personally to blame, and they must suffer the legitimate consequences of their folly.*
>
> *It is said – and it is not unlikely – that their opposition to the school is its accord with the wish of the vast majority of the ratepayers; but it cannot be too strongly stated and firmly insisted upon that an order of the Court must be obeyed, however unpopular it may be.*
>
> *In our system there is no union of powers, legislative, administrative, and judicial, in one person – we divide and limit power. In its own sphere the electorate is supreme and must have the council or parliament it desires – the council or parliament when elected is supreme in its own domain, and no Court can interfere with (say) a township council acting in good faith within the ambit of its powers.*
>
> *The Court is charged with certain duties also – and it also is supreme within its jurisdiction. When a Court makes an order within its jurisdiction, it is the duty of every person affected by it to obey and to obey loyally. It is not a matter for a vote or an issue at an election whether to obey or not; the Constitution has made the Court the final authority: unless and until Parliament enacts otherwise (and Parliament is all powerful in that regard), no one is allowed to exercise private judgment or follow what he believes to be public opinion by wilful disobedience.*
>
> *The wrongdoing here was that of the individuals, and they cannot hide behind a majority of the ratepayers.*
>
> *Nor can they be allowed to use public money to pay for the results of their own misconduct – it is too often forgotten that the levying of taxes is an interference with private rights of property; that, consequently, taxes should not be levied except for public purposes, and that, when levied, they are charged with a trust for such purposes. A municipality is not a complainant benefactor, a fairy godmother, to lavish gifts indiscriminately – the Legislature defines the objects upon*

> *which money raised from the people by taxes can be spent – and so far not one of these can fairly be said to include paying for disobedience to a lawful order. The township's money is in no very remote sense the money of all the ratepayers, and the money of not even 15 or 5 or one per cent, is to be used in disputing an order the obedience of which they desire and to the obedience of which they are entitled.*
>
> ...
>
> *The individual members of the council will indemnify the township against all costs, repaying to the township all costs, between solicitor and client, and all costs the township is obliged to pay. The respondents are to have all their costs payable by these individuals (or, if more convenient, by the township in the first instance)."*

[58] *Plasket* argues that South African courts will have inherent jurisdiction to issue costs orders similar to the one referred to above. He argues that that type of costs order would probably be best suited to a more easily justifiable vindication for constitutional rights where the public interest in relief such as this is often obvious and apparent. He argues that such an order may amount to appropriate relief for purposes of section 38 of the Constitution, when unconstitutional administrative conduct is of such an order of bad faith that it does not only harm the individual against whom it is primarily directed, but also impedes the fuller realisation of our constitutional promise. If the conduct is motivated by bad faith of a sufficiently gross degree, it may be appropriate for the court to make an order that the administrative official concerned repay the state for the cost incurred by it in defending his or her actions in addition to paying the costs of the applicant *de bonis propriis*. He concludes with the following remark:

> *"Such an order would be appropriate if it was suitable, in the circumstances of a particular case, to vindicate the Constitution and deter further violations of constitutional rights (Fose's case supra, para 97). Given the exorbitant cost of High Court litigation, the prospect of costs orders of this type would probably serve as a particularly potent inducement to administrative officials to do their jobs honestly and properly and, in this way, promote efficient administration and contribute to the attainment of the basic values and principles for public administration set out in s 195 (1) of the Constitution."*

[89] There is in my view no question that the actions of the officials concerned in this matter namely the officials from the Metro police and the South African police services, fall under the category referred to in some of the decisions I have dealt with above and also the type of conduct referred to by *Plasket* in his article, and referred to in the Ontario court judgment.

[90] In my view the time has come for courts to impose the full extent of the law upon government officials who arrogantly act in breach of the constitutional imperatives referred to above, who act with impunity, and who are not taken to task by government, mostly because of inability, unwillingness or political reasons.

[91] South Africa is facing a tsunami of corruption, bribery, state intervention in all spheres of the economy, unlawful, incompetent and malicious execution by public officials of the exercise of their duties, in breach of the Constitution, and in breach of virtually every other obligation that exists. The only bulwark against this threat to

the public, innocent citizens, and the poor, the frail and the needy, are the courts and the rule of law. The courts and the independence of the courts, and the willingness of the judiciary to stand up against intimidation and *mala fide* actions of state officials must be utilised in its full force.

[92] The public and innocent citizens should be vindicated, and a deterrence should be available to force public officials to comply with their duties and obligations, to act constitutionally, and to act within their authority, and without trampling upon the rights of citizens, who are free men and women in a modern democratic society, and who are entitled to demand of public officials to act in such a fashion.

[93] Citizens and free men should not be subjected to force, intimidation, unlawful detention, and similar behaviour perpetrated upon them by government officials who view themselves as above the law, not having to adhere to their constitutional obligations, and who think that they can do as they please, when they please and how they please.

[94] It is the right of citizens and free men to insist upon the courts creating a deterrent, and providing within the confines of the law the necessary and appropriate relief in instances such as the aforegoing, to enforce our progressive, admired and wonderful

Constitution, that has brought freedom and human rights to millions of previously disenfranchised, and disregarded citizens. The rights created in the Constitution must be safeguarded and protected and any infringement thereof should be deterred through whatever lawful mechanisms possible, including appropriate relief which could and should function as a deterrent for public officials who infringe the principles enshrined in the Constitution, who act outside the scope of their constitutional duties, and who infringe upon the rights of normal, free and law abiding citizens.

[95] Unlawful detention has had an infamous history in our law. It was utilised during the apartheid era to force persons into submission, where they were locked up in solitary confinement for days on end, and it was utilised in a brutal and unacceptable fashion. Its utilisation for political reasons was criticised worldwide, it was not justified, and have caused severe human rights infringements and violations. This should not be allowed to happen again in a free democratic society such as the one created by our Constitution. It should not be tolerated by any law abiding citizen, and it cannot be justified on any basis whatsoever.

[96] For the public then, under these circumstances, where there is a shortage of funds to pay for health care, proper administrative and security services, for environmental protection, education and for a host of other areas of government where funds are needed, to be

forced to pay for the actions of wilful, *mala fide* and arrogant public officials, who have without hesitation breached the Constitution, the fundamental rights of the applicant, and who have acted in violation of their obligations of the Constitution, is simply not acceptable. It cannot be justified and it should not be tolerated.

[illegible] In my view the abovementioned authorities provide ample justification and authority for this court to grant appropriate relief which would act as a deterrent for those responsible, and for others, to act within their constitutional obligations, and to serve the country and its people rather than to serve themselves. Any public official who knows that he would be ordered personally to pay costs of any court application or litigation flowing from his unlawful actions, instead of the taxpayer having to carry such a burden, and such an official not suffering any consequences therefrom, will think twice before acting in the manner and fashion those responsible in this matter had acted.

[illegible] I am therefore of the view that the time has come to order such public officials, not only to right the wrong that has been caused, and not only to avoid the taxpayer to fund their unlawful frolics of their own, but also to act as a deterrent to public officials in future, to grant an order in terms of which all the costs of the litigation caused should be carried by those responsible. Only in the event of those responsible not being able to pay the full costs of the parties to the litigation, should the taxpayer be called upon to make good any payment of costs to a person who has been wronged and whose rights have been infringed. Because senior superintendent Moodley, his assistant, superintendent Klopper, Captain Nhlazo and inspector Dulebu, as well as Metro Police constable Mandla Steven Ntsweni had been joined as respondents to the proceedings, because they were represented by counsel and also because they opposed the relief sought and even argued that the arrest and detention was lawful, I have no hesitation to come to the conclusion that a costs order can and should be made against them. They infringed upon the constitutional right of the applicant not to be detained unlawfully, and therefore his right to freedom, and also did not act in accordance with their constitutional obligations and imperatives as set out in the Constitution.

[100] I also take further into account that they did not play open cards with this court. I have already explained above their approach to the court and their approach to disclosure of all the relevant facts to this court. In my view this is an important factor that weighs heavily against the persons referred to above. They should never have opposed the matter, they should not have attempted to argue that the arrest and detention was in fact lawful, and they should never have attempted to justify their actions. The simple fact that they had attempted to do so illustrates the high-handed arrogance with which they have acted and with which they acted in this court.

[101] Because of the fact that the applicant's fundamental human rights and constitutional rights had been infringed, this court is enjoined to consider appropriate relief as referred to in section 38 of the Constitution. Appropriate relief against a constitutional background, and where there was a breach of constitutional rights, has been the subject of recent court decisions and has been a hotly debated topic. In *Fose v Minister of Safety & Security*[31] the Constitutional Court dealt with appropriate relief as follows in paragraphs 23 and 60:

> *"[23] The 'constitutional damages' are claimed by the plaintiff in addition to the common-law damages to which he would be entitled for the assault on which the action is founded. It is contended that these 'constitutional damages' are required to enforce the provisions of the Constitution and are appropriate in order to achieve any of the ends mentioned in para 17 (a), (b) and (c) above.*
>
> *[60] For the purposes of the present case I will assume that 'appropriate relief' in s 7 (4) (a) includes an award of damages where such award is required to enforce or protect chap 3 rights. What has to be decided is whether on the allegations made in the pleadings the plaintiff would be entitled to the particular damages with which the exception is concerned. These are:*
>
> *(a) damages to vindicate the fundamental rights of the plaintiff alleged to have been infringed, and*
>
> *(b) punitive damages to deter and prevent future infringements of the fundamental rights in question by organs of the State and to punish those organs of the State whose officials*

31 1997 (3) SA 786 (CC)

> *infringed the plaintiff's rights in a particularly egregious fashion."*[32]

[102] I have no hesitation to come to the conclusion that appropriate relief in this matter, with reference to the costs of the application, that should never have been brought and that should never have been necessary, is that those responsible therefor, and who were derelict in their duties, and who did not act in accordance with their constitutional obligations, should carry the costs of the application. Furthermore there is no reason why the taxpayer should carry the costs of the actions of these officials. Senior Superintendent Moodley and his assistant, Superintendent Klopper who were on duty at the Pretoria West Police Station that day and evening, should not have allowed the arrest, and should have acted in such a fashion that the infringement of the rights of the applicant had not occurred. The Metro policemen responsible for the arrest, namely Constable Frans Moosa Sivayi had acted completely outside his authority and acted unlawfully by arresting the applicant. Constable Mandla Steven Ntsweni who is the deponent to the opposing affidavit filed, and who tried to justify the actions of the respondents, and who acted together with Constable Sivayi is similarly responsible. The original complaints commander and the commander who took over from him namely Captain Nhlazo and

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[32] See also *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA & Legal Resources Centre, amici curiae)* 2004 (6) SA 40 (SCA) and 2005 (5) SA 3 (CC); *MEC Department of Welfare, Eastern Cape v Kate* 2006 (4) SA 478 (SCA); *Von Abo v Government of the Republic of South Africa and Others* 2010 (3) SA 269 (GNP); *Glenister v President of the Republic of South Africa and Others* 2009 (1) SA 287 (CC)

thereafter Inspector Duledu, similarly did not act in accordance with their duties, namely to consider bail and to consider the position and rights of the applicant.

[103] Section 173 of the Constitution provides that the Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice. In my view the interests of justice call for the kind of order I intend to give.

[104] The basic rule is that subject to any enactments to the contrary all costs are in any event in the discretion of the court. This is the overriding principle and must be exercised judicially upon the consideration of the facts of each case. The discretion is wide[33]. I am also of the view that in terms of the inherent jurisdiction of this court, such an order as I will grant hereunder can and should be granted[34].

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33 *LAWSA Volume 3 Part 2, First Reissue* paragraph 292; *Blue Circle Ltd v Valuation Appeal Board Lichtenburg* 1991 (2) SA 772 at 796; *Mouton v Die Mynwerkersunie* 1977 (1) SA 119 (A) at 149A; *Kruger Brothers and Wasserman v Ruskin* 1918 AD 63 at 69; *Union Government (Minister of Railways and Harbours) v Heiberg* 1919 AD 477 at 484; *Koenig v Johnson & Co Ltd* 1935 AD 262 at 298

34 *Law Society Northern Provinces v Mogami and Others* 2010 (1) SA 186 (SCA); *Bisset and Others v Boland Bank Ltd and Others* 1991 (4) SA 603 (D); *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A); *Western Assurance Co v Chledwell's Trustee* 1918 AD 262 at 271; *Hudson v Hudson and Another* 1927 AD 259 at 268; *Phillips and Others v National Director of Public Prosecution* 2006 (1) SA 505 (CC); *S v Pennington and Another* 1997 (4) SA 1076 (CC); *Parbhoo and Others v Getz NO and Another* 1997 (4) SA 1095 (CC); *Zondi v MSC Traditional & Local Government Affairs and Others* 2006 (3) SA 1 (CC); *Gumede and Others v Subel NO and Others* 2006 (3) SA 498 (SCA); *Nedcor Bank Ltd and Another v Gculitshana and Others* 2004 (1) SA 232 (SE); *Van Deventer v Reichenberg and Another* 1996 (1) All SA 125 (C) at 132 F

[105] In my view the persons referred to above should therefore be liable jointly and severally, the one paying the other to be absolved, for the costs of the applicant on an attorney and own client scale. That is however not the end of the matter. The costs of the first and second respondents will normally have to be paid by way of taxpayer money. That is unacceptable. I am therefore of the view that in the exercise of my discretion, and in terms of the inherent jurisdiction of this court, I can also grant a cost order, which I hereby do, that all the costs of the first and second respondents incurred in respect of this application on an attorney and own client scale should also be paid by the abovementioned officials jointly and severally, the one paying the other to be absolved.

[106] Only in the event of the officials referred to above not being able to pay the costs concerned, the costs of the application of the applicant shall be paid by the first and second respondents on an attorney and own client scale. The right to payment of such costs will only arise after all possible execution steps have been taken and exhausted against the public officials referred to above for purposes of payment of the costs order.

[107] The following order is therefore granted:

"1. The following persons shall pay the costs of the applicant as well as the costs of the first and second respondent *de bonis propriis* on the scale of attorney and own client:

1.1 the station commander of Pretoria West Police Station: Senior Superintendent Moodley;

1.2 Superintendent Klopper of the Pretoria West Police Station;

1.3 Captain Nhlazo of the Pretoria West Police Station;

1.4 Inspector Dulebu of the Pretoria West Police Station;

1.5 Tshwane Metro Police Constable Frans Moosa Sivayi.

2. In the event, and only in the event of all execution steps having been taken, finalised and exhausted against the abovementioned officials, the first and second respondents shall be ordered to pay any further outstanding costs of the applicant on a scale of attorney and own client."

DATED AND SIGNED AT PRETORIA THIS 11th DAY OF OCTOBER 2010.

ACTING JUDGE ROELOF DU PLESSIS

COETZEE/NATIONAL COMMISSIONER OF POLICE AND ANOTHER

On behalf of applicant:	Riaan Meyer Inc (Mr Riaan Meyer) Millenium Park 512 Van der Hoffweg 2nd Floor Suite 10 Pretoria Gardens Tel: (012) 3773560
	Adv JR Bauer
On behalf of respondents:	State Attorney (Mr Chris Malan) Bothongo Heights 8th Floor 167 Andries Street Pretoria Tel: (012) 3091500
	Adv TP Kruger