



**IN THE HIGH COURT OF SOUTH AFRICA  
(EASTERN CAPE DIVISION, MTHATHA)**

**CASE NO.: 4514/2022**

**In the matter between:**

**LWANDILE NGOBIZEMBE BRIAN  
NDZULULEKA**

**Plaintiff**

**and**

**MINISTER OF JUSTICE FOR THE  
DEPARTMENT OF JUSTICE AND  
CONSTITUTIONAL DEVELOPMENT**

**1<sup>ST</sup> Defendant**

**THE MAGISTRATE'S COMMISSION**

**2<sup>nd</sup> Defendant**

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**JUDGMENT**

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**ZONO AJ:**

**Introduction**

- [1] The plaintiff instituted action proceedings for delictual damages arising from of the Magistrate's actions when performing her judicial functions.

The claim is against the Minister of justice and Constitutional Development<sup>1</sup>. The Minister is sued as a nominal defendant, vicariously liable for all the delicts committed by its employees when acting within the course and scope of their employment. The Magistrate's Commission is cited as the second defendant. Although in the particulars of claim the second defendant was cited on the basis that it is vicariously liable for the wrongs or omissions of the employees when acting within the course and scope of their employment, no claim had been pursued against it during the trial of this matter. The matter is defended by the first defendant (the Minister), and in so doing the Minister has filed a plea.

- [2] While the lawfulness of the conduct of the Magistrate, Mount Frere is in dispute I deal hereinafter with the averments that are common cause.
- [3] On 02<sup>nd</sup> April 2022 at or near Mt Frere, the plaintiff was arrested by the Traffic Officers for driving a motor vehicle under the influence of alcohol; and was then detained in the Mt Frere Police cells until 03<sup>rd</sup> April 2022 when he was granted police bail. The plaintiff, after payment of bail money, was warned to attend court on 04<sup>th</sup> April 2022. He was then released.
- [4] On 04<sup>th</sup> April 2022, when appearing in Mt Frere Magistrates Court, the Magistrate enquired if the plaintiff had any previous convictions and pending cases. In respect of the pending cases the plaintiff answered in the negative; with regard to previous convictions he confirmed that he had one

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<sup>1</sup> This appellation had been changed to the Department of Justice and Correctional Services.

previous conviction of selling liquor in Sasolburg without licence, in respect of which he was convicted to three months' imprisonment, wholly suspended. The Magistrate then remanded the plaintiff in custody as she wanted to satisfy herself with regards to previous convictions. The first defendant in his plea confirms that the plaintiff was remanded in custody because the court needed to satisfy itself with regard to his previous convictions.

- [5] Because of the importance of these facts it is apposite to quote the relevant averments from the pleadings. The plaintiff avers in his amended particulars of claim as follows:

*“4.2 Subsequent to the plaintiff's release on Police bail, the plaintiff alleged further that on the 04<sup>th</sup> April 2022, he did appear before the Magistrates Court as ordered where the Presiding Officer enquired as to whether plaintiff had any previous conviction and/ or pending cases.*

*4.1 According to the plaintiff his response was that he had no pending cases and that previous conviction he had was that of selling liquor without licence and that plaintiff was convicted to three months suspended sentence.*

*4.2 Plaintiff alleged further that, the Presiding Officer then told him that she would investigate whether the plaintiff has no other pending cases.*

*4.3 And that the Presiding Officer then ordered that plaintiff should be held in custody whilst the Presiding Officer was still investigating whether the plaintiff has no pending cases.*

*4.4 As a result of the Presiding Officer's order, the plaintiff was detained at Wellington Prison in Mthatha where he was held as an awaiting trial inmate as from the 04<sup>th</sup> April 2022, up until the 13<sup>th</sup> April 2022, when he was taken back to Mount Frere Magistrate's Court and appeared before the same presiding officer who then ordered that the plaintiff be released as she had established that plaintiff had no pending cases” (sic).*

- [6] To these averments the first defendant pleads as follows:

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6.

*1<sup>st</sup> Defendant denies paragraph 4.1 of the plaintiff's particulars of claim in amplification thereof, plaintiff was only granted bail after it was proven to the satisfaction of the court that plaintiff had no previous convictions.*

7.

*1<sup>st</sup> Defendant admits paragraph 4.2 of the plaintiff's particulars of claim hence plaintiff was remanded in custody.*

8.

*1<sup>st</sup> Defendant denies paragraph 4.3 of plaintiff's particulars of claim and avers that all plaintiff was told was that the court needs to satisfy itself with regards to his previous convictions.*

9.

*1<sup>st</sup> Defendant admits paragraph 4.4 of plaintiff's particulars of claim, but denies the rest of the paragraph" (sic).*

[7] The plaintiff further avers that the Magistrate was actuated by malice, recklessness as there was no probable and reasonable cause to conduct herself in the manner she did. The Magistrate acted without critically analysing the information at her disposal before detaining the plaintiff, i.e., whether the plaintiff was a flight risk or he would hamper any investigation, etcetera.

[8] During evidence, the plaintiff regurgitated the content of his particulars of claim as amended, and stated that the police bail was granted at **R2500.00** on 03<sup>rd</sup> April 2022. He confirmed that he was granted police bail on 03<sup>rd</sup> April 2022 and appeared in court on 04<sup>th</sup> April 2022 where, after disclosing that he has no pending cases and one previous conviction, the Magistrate remanded him in custody to afford herself an opportunity to investigate and verify the truthfulness of his disclosures. He was detained at Wellington Correctional Facility until 13<sup>th</sup> April 2022, the date on which he appeared in court and released by the same Magistrate as his charges were withdrawn. During cross examination the plaintiff remained consistent.

[9] The first defendant called the evidence of the Magistrate, Ms Cynthia Nokonwaba Mboto who was the Presiding Officer in the plaintiff's case respectively on 04<sup>th</sup> April 2022 and 13<sup>th</sup> April 2022. While confirming plaintiff's version about their interaction in court, she testified that she explained to the plaintiff that the police officers, who released him on bail, made a mistake by granting him bail. She explained that plaintiff's position in court had changed as he was no longer facing schedule 1 offence, but schedule 5 offence. Her understanding was that, because the plaintiff was found guilty of a Schedule 1 offence in Sasolburg for selling liquor without a licence, and had committed a further Schedule 1 offence of driving a motor vehicle under the influence of alcohol, those two schedules, put together make a Schedule 5. She further testified that on 13<sup>th</sup> April 2022 Mr Mene appeared in court representing the plaintiff and he addressed the court and as a result of the address made by Mr Mene to the court the plaintiff was released. She denied that on 04<sup>th</sup> April 2022 she postponed the matter for her to investigate as alleged by the plaintiff.

[10] It transpired that no enquiry at all was held or conducted by the Magistrate before directing that the plaintiff be detained. She categorically stated that it was enough for her to know that the plaintiff has a previous conviction. She did not ask anything after the disclosure but remanded plaintiff in custody. She confirmed that the plaintiff was arrested based on schedule 1 offence, but that changed when he disclosed his previous convictions in court on 04<sup>th</sup> April 2022. She testified also that no formal bail application took place, but she was addressed by Mr Mene, plaintiff's legal representative.

## **Decision and Analysis**

[11] The Minister is vicariously sued for Magistrate's action of wrongful deprivation of plaintiff's liberty for a period spanning from 04<sup>th</sup> April 2022 to 13<sup>th</sup> April 2022. The exercise of her Judicial functions are said to have been actuated by malice and recklessness. However, negligent execution of judicial duties is not sufficient<sup>2</sup>, the Magistrates actions had to be *mala fide*, malicious or fraudulent before delictual liability can arise. Judges and Magistrates or any other persons exercising judicial function, are in principle not liable for acts done in their judicial capacity<sup>3</sup>. However, if the Magistrates act with an improper motive, the judicial capacity is abused and he or she may be liable. In such a case the Magistrate exceeds the bounds of the authority derived from the judicial office<sup>4</sup>. It is therefore plain that in some instances a shield of judicial immunity may be lifted or pierced.

[12] The wrongful and blameworthy form of conduct must be adjudged with reference to the facts and evidence duly led in accordance with acceptable rules of evidence. The Magistrate testified that she explained to the plaintiff that the police officers who released him on bail were wrong to do so. She further explained that the plaintiff was then facing a schedule 5 offence and would then be remanded in custody. She further testified that on 13<sup>th</sup> April 2022 she released the plaintiff because she was addressed by Mr Mene. Save for a version about schedule 5, all of this version was never put on the plaintiff when he was still on the witness box in this court to comment on. This is important because the plaintiff presented to this court a different

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<sup>2</sup> *Moeketsi v Minister Van Justice* 1988 (4) SA 707 (T) at 714.

<sup>3</sup> *Penrice v Dickson* 1945 AD 6 Para 14-15.

<sup>4</sup> LAWSA Vol 8, Part 1, Page 162-163, Para 92.

version which suggests that no explanation was ever made to him. The Magistrate, as part of her order advised the plaintiff that he would need to investigate whether or not it is true that he had no other pending cases and about his previous convictions. However, it was never put to the plaintiff in this court that on 04<sup>th</sup> April 2022 he was advised that he is facing a schedule 5 offence. The only thing that was put to the plaintiff in this court is that the Magistrate was justified to remand the plaintiff in custody, because he was facing a schedule 5 offence. I therefore accept that the plaintiff was never advised by the Magistrate that he is facing a schedule 5 offence.

[13] It is grossly unfair and improper to allow a witness's evidence to go unchallenged during cross examination and then later argue that the witness should be disbelieved. This underscores the importance of putting party's version to the other party's witness during cross-examination to allow the witness an opportunity to respond and explain any contradiction. In cross-examination parties should put their own version to the witness, especially if it contradicts the witness's testimony, to give the witness a chance to explain<sup>5</sup>.

[14] I am in full agreement with the *dictum* made in *Boesak*<sup>6</sup> where it was held that:

*“50.... it is clear law that a cross-examiner should put his defence on each and every aspect which he wishes to place in issue, explicitly and unambiguously, to the witness implicating his client. A criminal trial is not a game of catch-as-catch-can, nor should it be turned into a forensic ambush.*

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<sup>5</sup> *Small v Smith* 1954 (3) SA 434 (SWA) at 438.

<sup>6</sup> *S v Boesak* (105/99) [2000] ZACSA 24 (12 May2000) Para 50.

A Failure to put version to the witness when still in the witness box and later rely on that version amounts to a litigation by ambush which is impermissible. A defence that arises when a witness can no longer answer thereto cannot be accepted and can only be regarded as an afterthought.

[15] The Constitutional Court has not been silent on this issue<sup>7</sup> where it was held:

“61. *The institution of cross-examination not only constitutes a right; it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness’s attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness’s testimony is accepted as correct. This rule was enunciated by the House of Lords in Browne v Dunn<sup>3</sup> and has been adopted and consistently followed by our courts.*”

[16] Classen J<sup>8</sup> said this:

“It is, in my opinion, elementary and standard practice for a party to put to each opposing witness so much of his own case or defence as concerns that witness, and if need be, to inform him, if he has not been given notice thereof, that other witnesses will contradict him, so as to give him fair warning and an opportunity of explaining the contradiction and defending his own character. It is grossly unfair and improper to let a witness evidence go unchallenged in cross examination and afterwards argue that he must be disbelieved.<sup>9</sup>”

[17] Having found that the Magistrate had failed to advise the plaintiff of the alleged wrongfulness of his release on bail by the police; and that the plaintiff was then facing schedule 5 offence as explained by her in her

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<sup>7</sup> *President of the Republic of South Africa and others v South African Rugby Football Union and others* 2000(1) SA 1 (CC); 1999 (1) BCLR 1059 (CC) Para 61.

<sup>8</sup> *Small v Smith* 1954 (3) SA 434 (SWA) at 438.

<sup>9</sup> D T Zeffertt: The South African Law of Evidence, Second Edition, Page 912-914.

testimony, I find that the plaintiff's testimony is possibly true that the Magistrate advised the plaintiff that she was remanding him in custody as she would investigate plaintiff's pending cases or previous convictions. No explanation was made by the Magistrate about plaintiff's changed position as a result of changed schedule. No mention of Mr Mene's involvement was made when the plaintiff was still in the witness box. For that reason, I cannot accept anything relating to Mr Mene's involvement in the release of the plaintiff on 13<sup>th</sup> April 2022. I further deal with this subject, the reasons and the manner in which the plaintiff was deprived liberty and freedom in the ensuing paragraphs.

[18] In *Jager's*<sup>10</sup> Eksteen AJP stated as follows:

*“ ....where there are two mutually destructive stories, he can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of credibility of the witness will therefore be inexplicably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If, however, the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false”.*

[19] It is palpably clear that Magistrate's evidence sought to contradict the version set out in the first defendant's plea. The only pleaded reason for plaintiff's detention on 04<sup>th</sup> April 2022 was that the Magistrate sought to satisfy herself about plaintiff's previous convictions. That version makes common cause with plaintiff's version. Under cross examination the Magistrate testified that plaintiff's release on bail was not wrongful, but

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<sup>10</sup> *National Employers General Insurance Company v Jagers* 1984 (4) SA 437 at 440 E-G.

however states that such release was unlawful as the plaintiff faced a schedule 5 when he appeared in court on 04<sup>th</sup> April 2022. The Magistrate, however, testified that during plaintiff's arrest and release by the police official, the plaintiff was facing a schedule 1 offence of driving a motor vehicle under the influence of liquor.

- [20] I must hasten to deal with the fact whether the plaintiff, on 02<sup>nd</sup> April 2025 was charged by the Police with aschedule1, it being driving a motor vehicle under the influence of alcohol. The starting point should be offences listed under schedule 1. Specific offences are clearly mentioned thereunder. There is no Traffic offence mentioned thereunder. However, the relevant part or clause of schedule 1 reads as follows:

*“Any offence, except the offence of escaping from lawful custody in circumstances other than the circumstances referred to immediately hereunder, the punishment wherefore may be a period of imprisonment exceeding six months without the option of a fine.”*

- [21] The catch-all-clause referred to about is limited only to offences punishment of which is a period of imprisonment exceeding six months without an option of a fine. An offence qualifies to be a schedule 1 offence only if it carries a punishment that exceeds six months imprisonment without an option of a fine. That is the sole prerequisite under this clause for an unmentioned or unspecified offence to qualify as a schedule 1 offence; other than that it does not qualify.

- [22] Driving while under the influence of intoxicating liquor is an offence referred to and prescribed by section 65(1) read with section 89(2) of the National Road Traffic Act 93 of 1996. Section 65(1) of the Act reads as follows:

*“No person shall on a public road-*

*(a) drive a vehicle; or*

*(b) occupy the driver’s seat of a motor vehicle the engine of which is running, while under the influence of intoxicating liquor or a drug having a narcotic effect.”*

[23] Section 89(2) of the same Act<sup>11</sup> provides thus:

*“(2) Any person convicted of an offence in terms of subsection (1) read with section 42(1) or (2), 44(1), 45(2), 46(1) or 65(1), (2), (5) or (9) shall be liable to a fine or to imprisonment for a period not exceeding six years.”*

[24] I reiterate that the nature of the punishment is a determining factor to establish if an offence is a schedule 1 offence or not. Section 89 (2) of the Act prescribes an option of a fine for a person found guilty of driving under the influence of intoxicating liquor. However, an imperative requirement of schedule 1 is that an offence must attract a sentence of direct imprisonment without an option of a fine. In these circumstances, an offence that attracts a non- custodial sentence is not a schedule 1 offence.

[25] Accordingly, I find that the offence with which the plaintiff was charged<sup>12</sup> in the Magistrate’s court was is not a schedule 1. I may allude to the fact that some traffic offences are referred to under schedule 3. Offences relating to illicit possession, conveyance or supply of dependence producing drugs or intoxicating liquor are referred to in Part 1 of schedule 2. With this exposition, the Magistrate was clearly not correct to suggest that a traffic offence with which the plaintiff was charged was a schedule 1 offence. Equally, an illicit supply of liquor is not a schedule one offence. Even if it can be accepted that the plaintiff was advised of schedule 5

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<sup>11</sup> National Road Traffic Act 93 of 1996.

<sup>12</sup> Driving under the influence of intoxicating liquor.

offence in Magistrate's court, which is not the position, I would still find that the plaintiff was detained for all the wrong reasons. I shall further deal with this aspect elsewhere in this judgment. I however, am of the view that reference in this court to schedule 5 is an afterthought. It is used as a ruse or stratagem to successfully spite on the plaintiff and to mete out malice scot-free.

[26] For the sake of completion on this issue, section 59 of CPA<sup>13</sup> provides thus:

*“(1) (a) An accused who is in custody in respect of any offence, other than an offence (i) referred to in Part II or Part III of Schedule 2;*

*(ii) against a person in a domestic relationship, as defined in section 1 of the Domestic Violence Act, 1998 (Act 116 of 1998); or*

*(iii) referred to in*

*(aa) section 17 (1) (a) of the Domestic Violence Act, 1998;*

*(bb) section 18 (1) (a) of the Protection from Harassment Act, 2011 (Act 17 of 2011); or*

*(cc) any law that criminalises a contravention of any prohibition, condition, obligation or order, which was issued by a court to protect the person against whom the offence in question was allegedly committed, from the accused, 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 with the investigation, if the accused deposits at the police station the sum of money determined by such police official.*

*(b) The police official referred to in paragraph (a) shall, at the time of releasing the accused on bail, complete and hand to the accused a recognizance on which a receipt shall be given for the sum of money deposited as bail and on which the offence in respect of which the bail is granted and the place, date and time of the trial of the accused are entered.*

*(c) The said police official shall forthwith forward a duplicate original of such recognizance to the clerk of the court which has jurisdiction.”*

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<sup>13</sup> Criminal Procedure Act 51 of 1977.

[27] It is on the basis of the provisions of section 59(1) of CPA that the plaintiff was granted bail by the police official. It is further on this basis that the Magistrate expressly testified that the released of the plaintiff by the police official was not wrongful. However, I have already found that the version about the plaintiff's changed circumstances according to the Magistrate, was never imparted to the plaintiff on 04<sup>th</sup> April 2022. The plaintiff was never engaged on the alleged changed circumstances. According to the Magistrate, it was enough that the plaintiff had disclosed previous convictions, she did not further enquire on anything thereafter, she then remanded him in custody.

[28] Mr Nabela, Counsel for the first defendant both in his oral and written submissions sought to rely on the provisions of section 68 (1) (e) and (g) of CPA, which provides as follows:

**“68 Cancellation of bail**

*(1) Any court before which a charge is pending in respect of which bail has been granted may, whether the accused has been released or not, upon information on oath that-*

.....

*(e) the accused has not disclosed or has not correctly disclosed all his or her previous convictions in the bail proceedings or where his or her true list of previous convictions has come to light after his or her release on bail;*

.....

*(g) it is in the interests of justice to do so, issue a warrant for the arrest of the accused and make such order as it may deem proper, including an order that the bail be cancelled and that the accused be committed to prison until the conclusion of the relevant criminal proceedings.”*

[29] In *Cool Ideas*<sup>14</sup> the Constitutional Court observed as follows:

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<sup>14</sup> *Cool Ideas 1186 CC v Hubbard and another* 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) Para 28.

*“[28] A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:*

- (a) that statutory provisions should always be interpreted purposively;*
- (b) the relevant statutory provision must be properly contextualised; and*
- (c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a).”*

[30] The plain grammatical meaning of section 68(1)(e) and (g) of CPA<sup>15</sup>(the empowering provision) demonstrates the following jurisdictional facts<sup>16</sup> that need to be in existence before a judicial power<sup>17</sup> can be exercised: Firstly, there must be a case (charge) in respect of which bail has been granted; secondly, there must be an information on oath supporting cancellation of bail; thirdly, demonstrating that the accused had not disclosed or had not correctly disclosed all his or her previous convictions in the bail proceedings or that the true list must have come to light after his or her release on bail. A number of these jurisdictional facts have not been established, as I will demonstrate hereinunder.

[31] It is plain that there was no information on oath that served before the Magistrate that would justify the cancellation of bail and an order remanding the plaintiff in custody. Even the plaintiff, when he was

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<sup>15</sup> *SATAWU and another v Garvas and others* 2013 (1) SA 83 (CC); 2012 (8) BCLR 840 (CC) Para 37.

<sup>16</sup> *Paola v Jeeva NO* 2004 (1) SA 396 (SCA) Para 11, 14 and 16.

<sup>17</sup> Section 165(1) of the Constitution: The judicial authority of the Republic is vested in the courts.

answering about the existence of a previous conviction on 04<sup>th</sup> April 2022, was not doing that under oath. Put differently, no evidence that the plaintiff disclosed his previous convictions of selling alcohol without licence under or on oath. It was the duty of the defendant to demonstrate that the disclosure was made under oath. The reason for the aforesaid proposition is no far to seek. As the plaintiff was already put on bail, the Magistrate sought to interfere with plaintiff's liberty and freedom, which is a constitutional right<sup>18</sup>. Every interference with plaintiff's physical liberty is *prima facie* unlawful. Once the claimant establishes that an interference has occurred, the burden of proof falls upon the person causing the interference to establish a ground of justification.<sup>19</sup> The defendant fails on the first hurdle to show that jurisdictional facts for the cancelation of bail were met.

- [32] Both the pleadings and evidence are bereft of information that the plaintiff failed to disclose or that he had incorrectly disclosed his previous convictions in bail proceedings. Again the defendant has fail to call or lead evidence to show that the police official who granted bail was not favoured with the requisite information or was misled. No facts pleaded by the first defendant showing reliance on section 68(1) (e) and (g) of CPA<sup>20</sup>. I need not decide if there were bail proceedings serving before a police official referred to in section 59(1) of CPA. However, for purposes of this matter, I am confident that plaintiff's bail application duly

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<sup>18</sup> Section 12(1) of the Constitution provides thus: *Everyone has the right to freedom and security of person, which includes the right-*

*(a) not to be deprived of freedom arbitrary or without just cause.*

*(b) not to be detained without trial*

<sup>19</sup> **Zealand v Minister of Justice and Constitutional Developmnet and another** 2008 BCLR 601 (CC), 2008 (2) SACR 1 (CC) Para 25.

<sup>20</sup> **Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and others** 2004 (4) SA 49 (CC); 2004 (7) BCLR 687 (CC) Para 27-28.

proceeded before the police official above the rank of non-commissioned officer, in consultation with the police official charged with the investigation. That bail is *ex lege* given a status of bail granted in terms of section 60 of CPA<sup>21</sup>, where the bail is granted by court pursuant to bail proceedings. In the light of the above, I am of a considered view that reliance on the provisions of section 68(1) (e) and (g) of CPA is misplaced.

[33] Reliance on the provisions of section 68(1) (e) and (g) of CPA is misplaced for another reason. Neither the plea nor first defendant's evidence identify facts clearly showing that section 68(1) (e) and (g) of CPA is relied upon<sup>22</sup>. It was improper for Mr Nabela, first defendant's Counsel to seek refuge on the statutory provision that is not relied on in the pleadings or canvassed in evidence. The purpose of the pleadings is to define the issues for the other party and the court. A party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for a party to plead a particular case and seek to establish a different case at the trial<sup>23</sup>. Defendant's pleaded case is that the Magistrate remanded the plaintiff in custody simply because she wanted to satisfy herself [with regard to plaintiff's previous convictions]. That version is fairly consistent with plaintiff's case.

[34] In the light of the above, it is plain that Magistrate's decision to remand plaintiff in custody was blatantly arbitrary, unlawful and was without just

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<sup>21</sup> Section 59(2) of Criminal Procedure Act 51 of 1977 as amended.

<sup>22</sup> *Imprefed (Pty) Ltd v National Transport Commission* 1993 (3) SA 94 (A) at 107.

<sup>23</sup> *Minister of Safety and Security v Slabbert* 210 (2) ALL SA 474 (SCA) Para 11.

cause. It is so because it offended the provisions of Section 12(1) (a) of the Constitution which reads as follows:

*“(1) everyone has a right to freedom and security of the person, which includes the right-*

*(a) not to be deprived of freedom arbitrarily or without just cause.”*

There was simply no basis in law for the Magistrate to remand the plaintiff in custody the plaintiff. That is however not the end of the enquiry. It is not enough to prove that Magistrate’s conduct was unlawful and arbitrary; it must also be shown that the Magistrate was motivated by malice or was *mala fides*<sup>24</sup> or was fraudulent. The test should now be factual and objective.

[35] Firstly, there are a number of things the Magistrate was unable to explain to support her decision to remand plaintiff in custody. It is common cause that the plaintiff was remanded in custody for the Magistrate to investigate plaintiff’s previous conviction, at least at the level of the pleadings. I found that was the sole reason for plaintiff detention on 04<sup>th</sup> April 2022.

[36] Under cross examination the plaintiff testified that she did not ask anything after the plaintiff told her of his previous convictions. When she was asked if she had facts around previous conviction, the Magistrate testified that it was enough that she was informed of previous convictions. Both in her evidence in chief and under cross examination the Magistrate testified that she remanded plaintiff because she wanted to ensure that interests of justice are served. Interests of justice would be served by her

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<sup>24</sup> Inspired by bad faith.

being satisfied of plaintiff's pending cases or previous convictions. I am therefore satisfied that the Magistrate ordered the detention of the plaintiff because she wanted to investigate plaintiff's previous convictions.

[37] It is apposite to refer to the case of SFW<sup>25</sup> where Nienaber JA had this to say:

“[5] On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So too on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness's candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness's reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail.”

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<sup>25</sup> *Stellenbosch Farmers Winery Group Ltd and another v Martell et CIE and others* 2002 (1) SA 11 (SCA) Para 5.

I have dealt above with the internal contradictions between first defendant's plea and Magistrate's evidence.

### **Was it the duty of the Magistrate to investigate?**

[38] Plaintiff's freedom and liberty was severely interfered with in the process or context of Magistrates performance of judicial functions. The basis for remanding the plaintiff in custody is that the Magistrate sought to satisfy herself by investigating plaintiff's previous convictions or pending cases. I have stated above that in terms of section 165(1) of the Constitution judicial authority is vested in courts. However, investigative powers do not vest in courts. A court that taps into the investigative terrain encroaches to the competency of another branch, sphere, arm of government or functionary.

[39] Investigations relating to the crimes allegedly committed is a preserve of the police service. It falls within the objects of the police service. Section 205(3) of the Constitution provides thus:

*“(3) The objects of the police service are 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.”*

Whilst adjudicative powers vests in courts<sup>26</sup>, investigative powers vests in the police service<sup>27</sup>.

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<sup>26</sup> Section 165(1) of the Constitution.

<sup>27</sup> Section 205(3) of the Constitution.

[40] In *Bato Star Fishing*<sup>28</sup> O'Regan J made the following expression:

*“[48] In treating the decisions of administrative agencies with the appropriate respect, a court is recognising the proper role of the executive within the Constitution. In doing so a court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field. The extent to which a court should give weight to these considerations will depend upon the character of the decision itself, as well as on the identity of the decision-maker. A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the courts. Often a power will identify a goal to be achieved, but will not dictate which route should be followed to achieve that goal. In such circumstances a court should pay due respect to the route selected by the decision-maker. This does not mean however that where the decision is one which will not reasonably result in the achievement of the goal, or which is not reasonably supported on the facts or not reasonable in the light of the reasons given for it, a court may not review that decision. A court should not rubber-stamp an unreasonable decision simply because of the complexity of the decision or the identity of the decision-maker.”*

[41] Hoexter<sup>29</sup> observes as follows:

*“Sort of deference we should be aspiring to in administrative law consists of Judicial willingness to appreciate the constitutionality ordained province of administrative agencies, to acknowledge the expertise of those agencies in policy-laden or polycentric issues, to give their interpretations of fact and law due respect; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they have to operate.”*

Only the police service is trained and obtained expertise in investigating crime related facts. In the police service there is criminal record centre in which all the information relating to the previous and pending cases is stored. The court or magistrate cannot conduct such investigations

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<sup>28</sup> *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and others* 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) Para 48.

<sup>29</sup> Hoexter: Administrative Law in South Africa, 2<sup>nd</sup> Edition, Page 151.

without the assistance of the police service. Criminal record centre is an investigative tool at the disposal of the police service. The Magistrate does not have that tool.

[42] Courts have a duty to ensure that the doctrine of legality is upheld<sup>30</sup>. They have a duty to uphold as they are constrained by doctrine of legality. The courts have to exercise only those powers bestowed upon them by the law<sup>31</sup>. State functionaries, no matter how well-intentioned, may only do what the law empowers them to do<sup>32</sup>. That is the essence of the principle of legality, the bedrock of our constitutional dispensation, and has long been enshrined in our law<sup>33</sup>. The rule of law does not permit an organ of state to reach what may turn out to be a correct outcome by any means. On the contrary, the rule of law obliges an organ of state to use the correct legal process<sup>34</sup>. These propositions apply with greater force in the exercise of judicial power.

[43] In conclusion on this topic, the National Prosecuting Authority Act 32 of 1998 provides for investigative directorate<sup>35</sup>. The Prosecuting Authority, in addition to the police service, has investigative powers exercisable by the Investigating Directorate<sup>36</sup>. The Prosecuting authority has its representatives in the Magistrates courts, namely, Public Prosecutors.

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<sup>30</sup> *Lester v Ndlambe Municipality* 2014 (1) ALL SA 402 (SCA), 2015 (6) SA 283 (SCA) Para 24 and 27.

<sup>31</sup> *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) Para 15 and 28.

<sup>32</sup> *Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and another* 2013 (6) BCLR 989 (CC); 2014 (2) SA 228(CC) Para 1.

<sup>33</sup> *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and another* 2007 (1) SA 343 (CC); 2006(11) BCLR 1255 Para 68.

<sup>34</sup> *In Re Exparte President of the Republic of South Africa and others* 2000(2) SA 674 (CC) Para 90-94; *Head of Department, Department of Education, Free State Province (Supra)* Para 86.

<sup>35</sup> Chapter 5 of National Prosecuting Authority Act 32 of 1998- Section 26-31.

<sup>36</sup> Section 7 of National Prosecuting Authority Act 32 of 1998.

Thereanent to the facts of this matter, the Magistrate had before her the investigating officer from the police service and the Public Prosecutor from the Prosecuting authority, both of their offices are charged with investigative duties. She however failed to engage them about her intended decision, to trigger proper investigation.

- [44] On the conspectus of all of this, I find that the Magistrate did not have any power to investigate. As a corollary, it was not at all justifiable for the Magistrate to remand the plaintiff in custody for her to undertake the functions of investigating plaintiff's pending cases and previous convictions. It is trite that Magistrate's Court are creatures of statute. As such, they have no inherent jurisdiction and their powers must be deduced from the four corners of statute<sup>37</sup>. Magistrate's Court Act 32 of 1944, as amended and the Magistrate's Court Rules are sources of power of the Magistrates and Magistrate's court. Both these two instruments are giving effect to section 165(1) of the Constitution. In addition to the Magistrates Court Act and the Rules, the Criminal Procedure Act 51 of 1977 as amended, does not confer investigative powers upon the Magistrate's or Magistrates' court. In my view, Magistrates conduct as stated above, was not only arbitrary but was also unlawful.

### **First Defendant's Liability**

- [45] I have found that, Magistrate's conduct was arbitrary and was without just cause. Her conduct was in direct violation of section 12(1)(a) of the Constitution. It is by now well established in our Constitutional

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<sup>37</sup> *Kondlo v Eastern Cape Development Corporation* 2014(2) ALL SA 328 (ECM) Para 39.

jurisprudence that the right not to be deprived of freedom arbitrary or without just cause affords both substantive and procedural protection against such deprivation<sup>38</sup>.

[46] In *Cotzee*<sup>39</sup> O’rgan dealt with two aspects of freedom, namely the *substantive and procedural components in this fashion:*

*“[159] These are separate questions. They raise two different aspects of freedom: the first is concerned particularly with the reasons for which the state may deprive someone of freedom; and the second is concerned with the manner whereby a person is deprived of freedom. As I stated in Bernstein and Others v Bester and Others NNO [1996] ZACC 2; 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC) at paragraphs 145-7, our Constitution recognises that both aspects are important in a democracy: the state may not deprive its citizens of liberty for reasons that are not acceptable, nor, when it deprives citizens of freedom for acceptable reasons, may it do so in a manner which is procedurally unfair. The two issues are related, but a constitutional finding that the reason for which the state wishes to deprive a person of his or her freedom is acceptable, does not dispense with the question of whether the procedure followed to deprive a person of liberty is fair. With respect, therefore, I cannot agree with Kentridge AJ when he states at paragraph 93 of his judgment:*

*“In brief, if an offence of absolute liability had been created, it would not in itself have given rise to any question of the unfairness of the trial of such an offence. Where the severity of such a provision has been mitigated by allowing the accused to prove a special defence it is in my view illogical if not perverse to say that this destroys the fairness of the trial.”*

[47] The two components of freedom referred to above must co-exist. They must occur conjunctively. I have stated above that both the reasons (investigation) and the procedure led to the detention of the plaintiff are unacceptable. I will hereafter deal with procedure in more detail.

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<sup>38</sup> *ZEALAND V Minister for Justice and Constitutional Development and another* 2008 (2) SACR 1 (CC) Para 33.

<sup>39</sup> *S v Coetzee and others* [1997] ZACC2; 1997 (3) SA 527 SA Para 159.

[48] While the reasons for plaintiff's detention was for the Magistrate to investigate plaintiff's pending cases and previous convictions, the procedure that was followed was fatally flawed. The Magistrate is on record to say it was enough that she heard that the plaintiff had previous convictions, she did not talk further to the plaintiff, but resorted to remand him in custody. That approach was unequivocally flawed as I will demonstrate hereinafter.

[49] The plaintiff was lawfully released on bail in court on 04<sup>th</sup> April 2022, and warned to appear in court on 04<sup>th</sup> April 2022, which he did. On 04<sup>th</sup> April 2022, when the plaintiff was appearing in court, was a freeman. He was enjoying his right to freedom and liberty. The Magistrate failed dismally to observe one element of Rules of natural justice, *to wit, audi alteram partem* rule, which requires that a person against whom an adverse decision will be taken must be heard. No invitation or whatsoever was made to the plaintiff to make representations or show cause why he should not be remanded in custody when he was clearly out on bail as evidenced by his bail bond, evidencing his enjoyment of his right to freedom and liberty. Infact, according to Magistrates evidence in chief, nothing was said to the plaintiff about his bail.

[50] The Magistrate talked about the cancellation of bail during cross-examination in this court when her attention was brought to the manuscripts exhibited in the charge sheet. The plaintiff was never given a hearing prior the Magistrate's decision to remand him in custody. There is no way that a person's right may be interfered with without that person being engaged or given a hearing. That procedure was clearly flawed. To make matters worse, no explanation was made by the Magistrate for such failure.

[51] On 13<sup>th</sup> April 2022 the plaintiff was released from custody and, according to the plaintiff, on that date charges were withdrawn. This version was never disputed when the plaintiff was still in the witness box. It will be unfair not to accept it<sup>40</sup>. The Magistrate herself expressly testified that there was no formal bail application. She stated that she was only addressed by Mr Mene, plaintiff's legal representative in court. She said it is as a result of that address that the plaintiff was released. In the alleged address nothing seemingly related to the reason for plaintiff's detention on 04<sup>th</sup> April 2022. The Magistrate was allegedly addressed on different issues relating to plaintiff's address (place of abode); that the plaintiff would attend trial and then requested that the plaintiff be released on warning. What boggles one's mind is the fact that, what seemingly was the reason or purpose of the plaintiff's detention was never talked about again after his detention. Nothing suggests that such reason or purpose was followed through or pursued by the Magistrate. The question is, why was the plaintiff detained on 04<sup>th</sup> April 2022? The alleged reason was only a ruse to mete out malice to the plaintiff.

[52] While absence of one of the two component of liberty is enough for a finding of unlawful and arbitrary deprivation of liberty, it is also clear that both components of liberty are absent. Reverting to the second component of liberty, which is the procedural component; it was peremptory for the Magistrate to engage the parties, especially the plaintiff about his remand in custody, whilst he was out on bail. Hereinafter I deal with the worst situation of an arrested and detained person, to justify a point

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<sup>40</sup> *Small v Smith* 1954 (3) SA 434 (SWA) at 438.

that the Magistrate was enjoined to engage the parties in court when she wanted to order the detention of the plaintiff.

[53] Section 35(1) (e-f) of the Constitution provides thus:

*“Everyone who is arrested for allegedly committing an offence has the right-*

*.....*

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

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

In dealing with these provisions, the Supreme Court of Appeal in *De Klerk*<sup>41</sup> held that:

*“[14] It is well established that the purpose of arrest is to bring the suspect to court for trial. I agree with what Harms DP said in Sekhoto, that the arresting peace officer has a limited role in the process that takes place in court. In my view presiding officers in courts of first appearance must ensure that the rights in s35(1)(e-f) of the Constitution are not undermined. It is imperative for a presiding officer to enquire from the prosecution why it is necessary to further detain a suspect. In that enquiry the reasons for further detention will emerge as to whether or not it is in the interests of justice to further detain or release the suspect. This I say, mindful of the provisions of s 12(1) of the Constitution which deals with freedom and security of the person and the right not to be deprived of freedom arbitrarily or without just cause. Failure to enquire at the first appearance of the reasons for further detention is clearly a contravention of the above constitutional imperatives and therefore the further detention of a suspect without just cause would be arbitrary and unlawful. In my view the police cannot be held liable for the further detention, even if the arrest is found to have been unlawful. What is critical is that, the justice department would be responsible and liable for the further detention because of its failure to observe the constitutional rights of a detained person.”*

[54] The *dictum* in *De Klerk*, although it was made in the context of an accused person brought before court by means of an arrest, it applies with more or greater force in the circumstances of this case, where the plaintiff attended

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<sup>41</sup> *De Klerk v Minister of Police* 2018 (2) ALL SA 597 (SCA) 2018 (2) SACR 28 (SCA) Para 14.

court as a free man. This *dictum* fortifies my earlier point that there was no justification at all for the Magistrate not to have engaged the plaintiff, the Prosecutor and or the investigating officer (police) about her intentions. There should have at least been that engagement of the relevant parties in court.

[55] What is worse, the Magistrate, on her own accord and volition ordered the detention of the plaintiff without any application having been made by the state. She did not even ask if the state agrees to the detention of the plaintiff. That highly manifested highhandedness on the part of the Magistrate, which amounted to unreasonable and arrogant use of Judicial Authority, ignoring the rights, roles and opinions of other role players in the court room. The inconsiderate and tactless manner characterized by haughtiness conduced to a quality of malice and *mala fides*. A wanton disregard of litigant's rights, and roles of other role players in court should be taken into account when a decision uplifting or piercing judiciary immunity is to be taken.

[56] To expand and demonstrate this attitude; the Magistrate, according to her own version remanded the plaintiff in custody because she wanted to satisfy herself, which satisfaction was found to be about the plaintiff pending cases or previous convictions. She did not postpone the matter to afford the plaintiff an opportunity to make bail application. Infact, on the 04<sup>th</sup> April 2022, no opportunity was afforded to the plaintiff to make bail application in the light of the fact that the first one was unilaterally and surreptitiously cancelled. The plaintiff was remanded in custody with no hope of when and how he would be released. Most importantly no rights appear to have been announced to the plaintiff by the court. The plaintiff

was not apprised of his constitutional rights. After the Magistrate had resolved to cancel plaintiff's bail and knew of her intention to remand the plaintiff in custody, she should have advised the plaintiff of his constitutional rights<sup>42</sup>. It is so because the Magistrate unilaterally changed the status of the plaintiff to that of a detained person. The Magistrate's failure was an affront to section 35(2) of the Constitution. This leaves one with a singular impression that the order directing the detention of the plaintiff was made with an ulterior motive.

[57] In the previous paragraph I stated that the plaintiff's bail was surreptitiously cancelled. I said so because during the proceedings on 04<sup>th</sup> April 2022, nothing was said about the plaintiff's bail, let alone cancellation thereof. The plaintiff went to custody without knowing what had happened with his bail. The decision to remand the plaintiff in custody was taken by the Magistrate in bad faith. It is so because such an egregious decision was not explained to this court during these proceedings. That again was a manifestation of highhandedness.

[58] The remark made in obiter in *De Klerk*<sup>43</sup> that

*“What is critical is that, the justice department would be responsible and liable for the further detention because of its failure to observe the constitutional rights of a detained person ”*

was built and rooted in the *ratio* of *Zealand*<sup>44</sup> where the Minister of Justice and Constitutional Development was vicariously found liable for the Magistrate's unlawful decision which violated Mr Zealand Constitutional

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<sup>42</sup> Section 35(2) of the Constitution.

<sup>43</sup> *De Klerk v Minister of Police* 2018 (2) ALL SA 597 SCA; 2018 (2) SACR 28 (SCA) Para 14.

<sup>44</sup> *Zealand v Minister for Justice and Constitutional Development and another* 2008(2) SACR (1) (CC) Para 46-49.

right<sup>45</sup> to freedom and security, of which he was deprived arbitrarily and without just cause. Magistrate's conduct arbitrarily and grossly violating accused right to freedom and security which was without just cause attracted liability.

[59] In the amalgam of all this I conclude that the Magistrate acted with malice and ulterior motive. She was mala fide and also acted in bad faith. Her actions grossly violated plaintiff's constitutional right to freedom and security. The plaintiff was deprived of his freedom arbitrarily and without cause. The time now has come for the highhandedness in the Magistrates courts to frontally be dealt with. The indignity<sup>46</sup> with which accused persons or litigants are dealt with in those courts must be condemned in strongest terms possible in our democratic state founded on human dignity, the achievement of equality and advancement of human rights and freedom<sup>47</sup>. If violation of person's dignity occurs arbitrarily and without any cause, as in this case, it must follow that such egregious conduct is malicious and undertaken in bad faith. The right to liberty and right to human dignity are inseparable and interlinked. In *Du Plessis*<sup>48</sup> NAVSA ADJP held thus:

*"[15] Our new Constitutional Order, conscious of our oppressive past, was designed to curb intrusions upon personal liberty which has always, even during the dark days of apartheid, been judicially valued, and to ensure that the excesses of the past would not recur. The right to liberty is inextricably linked to human dignity. Section 1 of the Constitution proclaims as founding values, human dignity, the achievement of equality and the advancement of human rights and freedoms. Put simply, we as a society place a premium on the right to liberty."*

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<sup>45</sup> Section 12(1)(a) of the Constitution.

<sup>46</sup> Section 10 of the Constitution.

<sup>47</sup> Section 1 of the Constitution.

<sup>48</sup> *Minister of Police v Du Plessis* 2014 (1) SACR 217 (SCA) Para 15

Wanton disregard of rights and unjustifiable infringement of right to liberty and human dignity by the court is, as a corollary malicious and also amounts to an abuse of judicial power. That conduct is a relevant consideration for the upliftment and piercing of judicial immunity enjoyed by judicial officers.

[60] Sight should not be lost of the fact that the Magistrate, as part of the judiciary, should account for the decisions she makes<sup>49</sup>. The Magistrate should fully explain the facts that gave rise to their decision<sup>50</sup>. If that is required of the public servants and government officials generally, that applies with greater force with the members of the judiciary. In *Kalil No*<sup>51</sup> Leach JA had the following to say in the context of the legality of the Municipality's decisions:

*“[30] That having been said, the manner in which the Municipality approached the appellants’ application militates against a costs order in its favour. This is public interest litigation in the sense that it examines the lawfulness of the exercise by public officials of the obligations imposed upon them by the Constitution and national legislation. The function of public servants and government officials at national, provincial and municipal levels is to serve the public, and the community at large has the right to insist upon them acting lawfully and within the bounds of their authority. Thus where, as here, the legality of their actions is at stake, it is crucial for public servants to neither be coy nor to play fast and loose with the truth. On the contrary, it is their duty to take the court into their confidence and fully explain the facts so that an informed decision can be taken in the interests of the public and good governance. As this court stressed in Gauteng Gambling Board and another v MEC for Economic Development, Gauteng, our present constitutional order imposes a duty upon state officials not to frustrate the enforcement by courts of constitutional rights.”*

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<sup>49</sup> *Macingwane v S* (CA&R20/18) [2019] ZAECCMHC 96 (20 November 2019) Para 39.

<sup>50</sup> *S v Van Der Meyden* 1999 (1) SACR 447 (W); 1999 (2) SA 79 at 449J - 450C.

<sup>51</sup> *Kalil No and others v Mangaung Municipality and others* 2014(3) ALL SA 291 (SCA), 2014 (5) SA 123 (SCA) Para 30.

[61] The Magistrate, both in the pleadings and in evidence does not satisfactorily explain or provide cogent reasons for her decision depriving the plaintiff of his liberty and freedom which quintessentially infringed plaintiff's right to human dignity. She failed to take this court into her confidence and explain the facts giving rise to her decision to deprive the plaintiff of his liberty and freedom. I am therefore unable to know or see if the Magistrate was acting *bona fide* and in the honest discharge of her duty<sup>52</sup>. Decisions made in bad faith are unlawful and can give rise to damages claim<sup>53</sup>.

[62] The enforcement of section 10 and section 12(1) rights accords with the fundamental maxim *ubi jus, ibi remedium* (where there is a right, there is a remedy)<sup>54</sup>. It admits of no doubt that the plaintiff is the bearer of the aforesaid rights, and that such rights were infringed by the conduct of Magistrate. In *Harris*<sup>55</sup> Centlivres CJ held that:

*"There can to my mind be no doubt that the authors of the Constitution intended that those rights [that is the rights entrenched in the Constitution] should be enforceable by the court of law. They could never have intended to confer a right without a remedy. The remedy is indeed, part and parcel of the right. Ubi jus, ibi remedium."*

Even international authorities are not silent about enforcement of rights. In *Ashby*<sup>56</sup> Holt CJ stated:

*"If a plaintiff has a right he must of necessity have a means to vindicate and maintain it, and a remedy, if he is injured in the exercise or enjoyment of it; and indeed it is vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal."*

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<sup>52</sup> *Mathews and others v Young* 1922 AD 492 at 509-510.

<sup>53</sup> *Telematrix (Pty) Ltd v Advertising Standard Authority* SA 2006 (1) ALL SA 6 (SCA); 2006 (1) SA 461 (SCA) Para 26.

<sup>54</sup> *Masemola v Special Pensions Appeal Board and another* 2019 (12) BCLR 1520; 2020 (2) SA (1) (CC) Para 51.

<sup>55</sup> *Minister of the Interior v Harris* 1952 (4) SA 769 (A) at 780H- 781B.

<sup>56</sup> *Ashby v White* [1790] EngR 55; [1703] 92 ER 126 at 136.

[63] The Constitutional Court still concerned in *Kirland*<sup>57</sup> about the infringement of human rights held that:

“82. *All this indicates that this Court should not decide the validity of the approval. This would be in accordance with the principle of legality and also, if applicable, the provisions of PAJA. PAJA requires that the government respondents should have applied to set aside the approval, by way of formal counter-application. They must do the same even if PAJA does not apply. To demand this of government is not to stymie it by forcing upon it a senseless formality. It is to insist on due process, from which there is no reason to exempt government. On the contrary, there is a higher duty on the state to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights. Government is not an indigent or bewildered litigant, adrift on a sea of litigious uncertainty, to whom the courts must extend a procedure-circumventing lifeline. It is the Constitution's primary agent. It must do right, and it must do it properly.*”

It is without a doubt that the Magistrate did not do things in accordance with the law, the procedural requirements were not fulfilled when the plaintiff was remanded in custody; and that she obviously did not tread carefully and respectfully when plaintiff's rights in terms of section 10 and section 12(1) of the Constitution were violated. I reiterate that there is no cogent explanation and justification for all these transgressions. Magistrate's conduct is inexcusable. With her experience, she should have done better.

[64] It is not in dispute that the Magistrate, when remanding the plaintiff in custody, was acting within the course and scope of her employment with the first defendant's Department, *to wit*, Department of Justice and Constitutional Development<sup>58</sup>. In the circumstances I find the first defendant, the Minister of Justice and Constitutional Development liable for all the damages arising out of the Magistrate's conduct resulted in

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<sup>57</sup> *MEC for Health Eastern Cape and another v Kirland Investments (Pty) Ltd* 2014 (5) BCLR 547 (CC); 2014 (3) SA 481 (CC) Para 82

<sup>58</sup> Section 2 of State Liability Act 20 of 1957 as amended

plaintiff's deprivation of liberty between 04<sup>th</sup> April 2022 and 13<sup>th</sup> April 2022.

### **Quantum**

[65] Plaintiff's deprivation of liberty at the instance of the Magistrate occurred from 04<sup>th</sup> April 2022 until 13 April 2022. When the plaintiff was released from custody his detention was for nine (9) days. Alternatively, he spent nine (9) nights in the prison cells. Plaintiff's rights to freedom or liberty and human dignity were unjustifiably violated. The detention constitutes an in-road into the freedom and the right to human dignity of an individual<sup>59</sup>.

[66] Section 12 deals with freedom and security of the person. Importantly it provides as follows in relevant parts:

*"Everyone has the right to freedom and security of the person, which includes the right-*

- (a) not to be deprived of freedom arbitrarily or without just cause;*
- (b) not to be detained without trial;*
- (c) to be free from all forms of violence from either public or private sources;*
- (d) not to be tortured in any way; and*

.....

*(2) Everyone has the right to bodily and psychological integrity....."*

Section 10 deals with dignity as follows:

*"Everyone has inherent dignity and the right to have their dignity respected and protected".*

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<sup>59</sup> *Thandani v Minister of Law and Order* 1991 (4) SA 904 (A).

[67] In *Diljan*<sup>60</sup> Makaula AJA had the following to say:

*“[18] The acceptable method of assessing damages includes the evaluation of the plaintiff’s personal circumstances; the manner of the arrest; the duration of the detention; the degree of humiliation which encompasses the aggrieved party’s reputation and standing in the community; deprivation of liberty; and other relevant factors peculiar to the case under consideration.*

*[19] Whilst, as a general rule, regard may be had to previous awards, sight should, however, not be lost of the fact that previous awards only serve as a guide and nothing more. As Potgieter JA cautioned in Protea Assurance Co. Ltd v Lamb:*

*‘It should be emphasised, however, that this process of comparison does not take the form of a meticulous examination of awards made in other cases in order to fix the amount of compensation; nor should the process be allowed so to dominate the enquiry as to become a fetter upon the Court’s general discretion in such matters. Comparable cases, when available, should rather be used to afford some guidance, in a general way, towards assisting the Court in arriving at an award which is not substantially out of general accord with previous awards in broadly similar cases, regard being had to all the factors which are considered to be relevant in the assessment of general damages. At the same time, it may be permissible, in an appropriate case, to test any assessment arrived at upon this basis by reference to the general pattern of previous awards in cases where the injuries and their sequelae may have been either more serious or less than those in the case under consideration.’*

[68] In *Tyulu*<sup>61</sup> the Supreme Court of Appeal held:

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

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<sup>60</sup> *Diljan v Minister of Police* (746/2021) [2022] ZSCA 103 (24 June 2022) 22 JDR 1759 SCA Para 18-19.

<sup>61</sup> *Minister of Safety and Security v Tyulu* 2009 (5) SA 58 (SCA); 2009 (2) SCAR 282 (SCA); 2009 (4) ALL SA 38 Para 26.

*guide, such an approach if slavishly followed can prove to be treacherous. The correct approach is to have regard to all the facts of the particular case and to determine the quantum of damages on such facts (Minister of Safety and Security v Seymour 2006 (6) SA 320 (SCA) 325 para 17; Rudolph & others v Minister of Safety and Security & others (380/2008) [2009] ZASCA 39 (31 March 2009) (paras 26-29)."*

[69] The plaintiff is a major unemployed male<sup>62</sup> born on 26<sup>th</sup> August 1981. He describes the conditions at Wellington Prison, where he was detained, in Paragraph 7 of his amended particulars of claim as follows:

- “7.1    *The conditions under which the plaintiff was detained at Wellington Prison were poor.*
- 7.2    *At Wellington Prison plaintiff was detained amongst gangsters, the cells were dirty, filthy, and had a very bad smell and even toilets were not in working condition.*
- 7.3    *It is the plaintiff’s assertion that before he used the toilet he had to sing first and that he slept on a rough old tiny blanket without matrass.*
- 7.4    *Plaintiff could not bath himself in prison as there was no water to shower.*
- 7.5    *It is the plaintiff assertion that the food at Wellington Prison was of a poor quality.*
- 7.6    *Plaintiff was trained for a period of ten days at the instance of the presiding officer.*
- 7.8    *The plaintiff’s constitutional right to liberty and freedom    was grossly violated” (sic).*

[70] In evidence the plaintiff testified that he was assaulted by other inmates and his food was taken as he did not belong to any prison group as he said he “*had no number*”. Assault and torture are manifest in the conditions the

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<sup>62</sup> At the time of institution of these proceedings he was employed as a taxi driver.

plaintiff experienced in custody. I take into account the fact that the Magistrate testified that he has twelve (12) years as the magistrate.

[71] In *Diljan* the Supreme Court of Appeal awarded **R120 000.00** as fair and reasonable amount for appellant's deprivation of liberty for three (3) days. When dividing that amount by three (3) days, one gets **R40 000.00**. In *Madyibi*<sup>63</sup> an amount of **R35 000.00** was awarded for twenty (20) hours detention. In *Ncume*<sup>64</sup> this court awarded **R45 000.00** as fair and reasonable compensation for arrest and detention for approximately eighteen (18) hours. Taking into account the circumstances and conditions of plaintiff's detention or deprivation of liberty, I am satisfied that the first defendant is liable to the plaintiff in the amount of **R360 000.00** as fair and reasonable compensation for deprivation of liberty for approximately nine (9) days. Costs should therefore follow the results as there is no justification for the deviation from the general rule.

### **Order**

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

1. **The first defendant is liable for damages suffered by the plaintiff as a result of deprivation of liberty spanning from 04<sup>th</sup> April 2022 to 13<sup>th</sup> April 2022.**
2. **The first defendant is hereby ordered to pay to the plaintiff an amount of R360 000.00 (*Three Hundred and Sixty Thousand***

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<sup>63</sup> *Nel v Minister of Police* (Case No CA 62/2017) [2028] ZAECGHC

<sup>64</sup> *Andile Ncume v Minister of Police* (Case No 3219/2021) Eastern Cape, Mthatha

***Rand*) as and for damages suffered by the plaintiff as a result of deprivation of liberty referred to in paragraph 65.1 above.**

- 3. The first defendant shall pay interest on the capital amount at the prescribed legal rate calculated from the date of this judgment to the date of final payment.**
- 4. The first defendant shall pay costs of suit on a party and party scale.**

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**A.S ZONO**

**JUDGE OF THE HIGH COURT (ACTING)**

**APPEARANCES:**

**For the Plaintiff**

**Instructed by**

**:Adv Mbiko**

**:MK MAJAVU & ASSOCIATES**

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**Instructed by**

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**: THE STATE ATTORNEY**

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**Fortgale**

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**Tel: 047 501 9900**

**Ref: 1196/22-A8N**

**Matter heard on**

**: 10-11 September 2025**

**Delivered on**

**: 21 October 2025**