CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 88/20

In the matter between:

J E MAHLANGU First Applicant

I T MAILELA N.O. Second Applicant

and

MINISTER OF POLICE Respondent

Neutral citation: *J E Mahlangu and Another v Minister of Police* [2021] ZACC 10

Coram: Jafta J, Khampepe J, Madlanga J, Mathopo AJ, Mhlantla J, Theron J, Tshiqi J and Victor AJ.

Judgments: Tshiqi J (unanimous)

Heard on: 12 November 2020

Decided on: 14 May 2021

Summary: Delict — Judicial detention — damages — inadmissible confession induced by assault extracted by police from accused person — liability of the Minister of Police for detention subsequent to first court appearance

ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa):

1. Leave to appeal is granted.
2. The appeal against the order of the Supreme Court of Appeal is upheld to the extent reflected below.
3. Paragraph 2(b)(i) and (ii) of the order of the Supreme Court of Appeal is set aside and substituted with the following order:

   "The first defendant is ordered to pay:

   (i) An amount of R550 000 to the first plaintiff;

   (ii) An amount of R500 000 to the second plaintiff;

   (iii) The above amounts are to be paid with interest at the prescribed rate from date of the judgment of the High Court, being 26 September 2014;

   (iv) Costs of suit, including the costs of two counsel."
4. The respondent must pay the costs of the appeal, including the costs of two counsel.

JUDGMENT

TSHIQI J (Jafta J, Khampepe J, Madlanga J, Mathopo AJ, Mhlantla J, Theron J and Victor AJ concurring):

Introduction

[1] This is an application for leave to appeal against a portion of the judgment and order of the Supreme Court of Appeal. What arises for determination is whether the

Supreme Court of Appeal was correct in refusing to hold the Minister of Police liable to compensate the first applicant (Mr Johannes Eugen Mahlangu) and the second applicant (the representative of the deceased estate of the late Mr Phanie Johannes Mtsweni)[1] for damages flowing from the entire period of Messrs Mahlangu and Mtsweni's detention following their unlawful arrest. A related question is whether the Supreme Court of Appeal was correct in holding that a failure by an accused person to apply for bail after an unlawful arrest and detention relieves the Minister of the onus to prove the lawfulness of the detention for the entire period.

[2] The detention occurred after the police unlawfully arrested Mr Mahlangu and obtained a false confession from him through torture and coercion. They used the false confession as a basis to arrest the late Mr Mtsweni. Lieutenant Mthombeni, the investigating officer, then cunningly engineered Messrs Mahlangu and Mtsweni's continued detention by misrepresenting the true state of affairs to the prosecutor. As a result, they were refused bail on their first appearance in the Magistrates' Court on 31 May 2005. According to the Supreme Court of Appeal, the liability of the Minister ceased when the Magistrate ordered their further detention during their second court appearance on 14 June 2005, on which date, according to the Supreme Court of Appeal, Messrs Mahlangu and Mtsweni ought to have applied for, and would have been granted bail.

Background facts

[3] On 25 May 2005 and at Middelburg four family members being a father, a mother and their two children were brutally murdered. One of the children was a little girl who was also savagely raped. A third child, a three-year-old girl, survived the ordeal. A case of murder, rape and robbery was opened. On 27 and 28 May 2005, Lieutenant Mthombeni took statements from various persons who had "fruitlessly visited the house of the deceased persons" and had discovered the dead bodies. He also

[1] Mr Mtsweni passed away before the trial in the High Court was finalised and the second applicant was appointed as a representative of his estate in terms of section 18(1) of the Administration of Estates Act 66 of 1965.

took statements from one of the police officers who first attended the scene of the crimes. These witnesses did not implicate anyone in the crimes.

[4] On the morning of Sunday, 29 May 2005, Lieutenant Mthombeni and three of his colleagues went to Mr Mahlangu's home where they found him with his partner, their baby and his uncle. Despite the fact that he had no basis whatsoever for suspecting that Mr Mahlangu was involved in the commission of the crimes he was investigating, Lieutenant Mthombeni arrested Mr Mahlangu without a warrant. He did not advise him of his rights in terms of the Constitution.

[5] Lieutenant Mthombeni and his colleagues took Mr Mahlangu to the office of the Serious Violence and Organised Crime Unit in Middelburg. They interviewed him and he denied any knowledge of the crimes. In order to force him to admit that he had committed the crimes, they placed his legs in irons, handcuffed his hands behind his back and repeatedly suffocated him by placing a rubber tube or a plastic bag over his head. This lasted for several hours. Mr Mahlangu ultimately succumbed and confessed to crimes he had not committed. When asked how he killed the deceased persons, he initially said that he had shot them with a firearm. This, of course, was pure guesswork and it was not correct. When he was put under further duress, he, by chance, got it right and said that the deceased persons had been stabbed to death. The police officers insisted that he could not have committed the crimes on his own and forced him to identify another person. He identified Mr Mtsweni, who was merely his acquaintance and neighbour, as his supposed co-perpetrator.

[6] On 30 May 2005, and as a result of the torture and assault, Mr Mahlangu made a written statement to Captain Justice Mogayane, and confessed in some detail that he and Mr Mtsweni had committed the crimes. On the same day, the police arrested Mr Mtsweni without a warrant and detained him along with Mr Mahlangu. Their first court appearance was the following day, on 31 May 2005, in the Middleburg Magistrates' Court. They did not have legal representation. When Lieutenant Mthombeni presented the case docket to the prosecutor it contained all the statements he had obtained,

including the false confession made by Mr Mahlangu. He did not inform the prosecutor that the confession was elicited through torture. It appears from the Magistrate's notes that, after an explanation of their "bail hearing rights", Messrs Mahlangu and Mtsweni indicated that they wished to apply for bail. The prosecutor, however, requested that the matter be remanded for further investigation and a bail hearing, as the state intended to oppose bail. Mr Mahlangu testified that he and Mr Mtsweni were not afforded the opportunity to address the court on the request for a postponement and that they were only told that the matter was being remanded. There was no evidence led to dispute this. They remained in custody.

[7] The matter was subsequently remanded on several occasions and Messrs Mahlangu and Mtsweni remained in custody. It appears that at some stage, an attorney represented both of them. Mr Mahlangu testified that his understanding was that Mr Mtsweni had applied for bail but that it was refused. The record does not confirm or disprove this. He further testified that he and his attorney did not "see eye to eye" and that, as a result, no application for bail was made on his behalf. He testified that whilst being held in incarceration, the police tortured them, alleging that they had killed people and that some of the prisoners assaulted them and accused them of having killed their relatives.

[8] In the meantime, the police arrested the real perpetrators of the crimes. The Director of Public Prosecutions decided to prosecute the perpetrators and declined to prosecute Messrs Mahlangu and Mtsweni. They were accordingly released on 10 February 2006, after being detained for approximately eight months. The perpetrators were subsequently convicted and sentenced to life imprisonment.

Litigation history

Trial Court

[9] The applicants instituted proceedings in the Gauteng Division of the High Court, Pretoria claiming non-patrimonial damages and patrimonial damages consisting of loss

of income. They each claimed R2 700 000 in general damages and R85 000 for loss of income and earning capacity.[2] The general damages were claimed in respect of severe emotional and psychological trauma, *contumelia*, and the loss of enjoyment of life.

[10] During the trial,[3] Mr Mahlangu testified that he was assaulted by Lieutenant Mthombeni and other unidentified policemen after the arrest. This, according to Mr Mahlangu, resulted in him doing a pointing out to Senior Superintendent Mabunda at 16h20 on 29 May 2005 and deposing to a confession before Captain Mogayane the next morning. In that confession, he admitted that he played a role in the murders and implicated Mr Mtsweni as co-perpetrator.[4]

[11] Lieutenant Mthombeni also testified at the trial. He alleged that Mr Mahlangu, after his arrest, said that "he [knew] about the murder of these people" and that "during the murder of these people, he was not alone, but was with Mr Mtsweni". According to Lieutenant Mthombeni, this information led to the arrest of Mr Mtsweni. The Lieutenant disputed the allegation of assault. He agreed that during the first court appearance, the prosecutor was given the entire docket and that the confession was included. Lieutenant Mthombeni also agreed that he knew that the prosecutor would rely on the confession to request the continued detention of Messrs Mahlangu and Mtsweni. He was asked by the court whether it was correct that apart from the confession, no evidence incriminated Mr Mahlangu. He replied to this question in the affirmative.

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[2] In their original particulars of claim, each applicant claimed R585 000 for unlawful and wrongful arrest, R1 170 000 for unlawful and wrongful detention and R500 000 in respect of the assault. This was amended to R2 700 000 in the amended particulars of claim.

[3] *JE Mahlangu v Minister of Police*, unreported judgment of the High Court of South Africa, Gauteng Division, Pretoria, Case No 39321/06 (26 September 2008) (Trial Court judgment).

4 After the case for the applicants was closed, an application for amendment of the particulars of claim was moved. There was no objection to the proposed amendment, and it was duly allowed by the trial court. The effect of the amendment was to bring the pleadings in line with the evidence of Mr Mahlangu that the assault and torture caused him to make the statement incriminating himself and Mr Mtsweni and also to allege that the wrongful arrest was the cause of their incarceration. The amendments were apparently reflected in amended pages that were handed up to the trial judge, but were for some reason not incorporated into the record. It is, however, common cause that the particulars of claim were indeed amended.

[12] The trial court held that Mr Mahlangu's confession was irregularly obtained because he was not warned of his constitutional rights and had been tortured. In respect of Mr Mtsweni, the trial court accepted as common cause that he was arrested on the basis of the confession made by Mr Mahlangu. It nevertheless held, on the basis of what it believed was the ratio in *Isaacs*[5] and *Sekhoto*,[6] that the Minister's liability ceased once the Magistrate made an order for further detention during the first court appearance. It awarded damages for the period from the date of arrest until the first appearance in court. As Mr Mahlangu was arrested on 29 May 2005 and Mr Mtsweni on 30 May 2005, the court awarded damages of R90 000 to Mr Mahlangu and R50 000 to Mr Mtsweni, and directed the Minister to pay their legal costs on the Magistrate's Court scale. No damages were awarded in respect of the claims for the alleged loss of income and earning capacity.

[13] The trial court granted the applicants leave to appeal to the Full Court of the Gauteng Division of the High Court, Pretoria (the Full Court). They did not appeal against the disallowance of their claims for loss of income and earning capacity. There was no cross-appeal by the Minister against the trial court's findings that the arrests of the applicants and their detention had been unlawful, that Mr Mahlangu had been tortured, or that the confession he made was irregularly obtained. There was also no cross-appeal against the trial court's award of damages in respect of the limited period of detention.

The Full Court

[14] The Full Court approached the matter on the basis that the only remaining dispute was whether a case was made out for imputing liability to the Minister for the period of detention after the first court appearance.[7] In answering this question, the Full Court considered whether the unlawfully obtained confession had influenced the decision of

[5] *Isaacs v Minister van Wet en Orde* 1996 (1) SACR 314 (A). The test in *Isaacs* was clarified by the Supreme Court of Appeal in *Woji v Minister of Police* [2014] ZASCA 108; 2015 (1) SACR 409 (SCA).
[6] *Minister of Safety and Security v Sekhoto* [2010] ZASCA 141; 2011 (5) SA 367 (SCA).
[7] *JE Mahlangu v Minister of Police*, unreported judgment of the Gauteng High Court, Pretoria, Case No A621/2015 (31 May 2018) (Full Court judgment) at para 14.

the prosecutor to oppose bail but held that, on the facts, this was not proved. The Court stated that *Isaacs* was qualified by the Supreme Court of Appeal in *Tyokwana*,[8] in which it clarified that *Isaacs* was not authority for any legal principle that an arrested person's continued detention as a result of a court order is automatically lawful.

[15] The Full Court, however, held that there was a "significant gap" in the applicants' case seeking to hold the Minister liable for the full period of the judicial detention.[9] It said that the existence of the unlawfully obtained confession could not be dispositive of the matter. To hold that it was, the Full Court continued, would be to ignore the important role played by the prosecutor and the Court, both of whom have constitutional and legal obligations for which they must account when taking decisions on the further detention of the applicants. It confirmed the trial court's refusal to award the applicants damages for the full period of detention and dismissed the appeal with costs.

The Supreme Court of Appeal

[16] In the Supreme Court of Appeal, the issue was whether the Minister should be held liable for the full detention period. The Supreme Court of Appeal was split in its decision on the issue, with Koen AJA writing for the majority. Van der Merwe and Petse DP wrote separate dissents but reached the same conclusion. The majority judgment acknowledged that, although the lawfulness or otherwise of a court order for an arrested person's judicial detention depends primarily on the conduct of the prosecutor and/or the Magistrate, the police can incur liability for damages arising from an unlawful detention of a person. It, however, stated that where the police acted unlawfully after the unlawful arrest, any harm resulting from the unlawful conduct was no longer caused by the unlawful arrest, but was caused by the subsequent unlawful behaviour, just as unlawful action by the police after a lawful arrest would constitute a separate delict.

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

[9] Full Court Judgment above n 7 at para 31.

[17] The Court then accepted that the false confession, on probability, factually caused the further detention after the first court appearance until the second court appearance on 14 June 2005. According to the majority, it was on this date, that the applicants could have applied for and probably would have been granted bail. Regarding the period beyond 14 June 2005, the Court held that the onus was on the applicants to prove that the confession remained the decisive consideration that dictated their continued detention. It concluded that the evidence in that respect was superficial and that it was not clear what had transpired during the subsequent court appearances beyond 14 June 2005.

[18] The Supreme Court of Appeal reasoned that, had the applicants applied for bail, the Magistrate hearing the bail application, just like the Judge in the trial court, would probably have had no difficulty in concluding that the confession was inadmissible. It reasoned that neither Mr Mahlangu nor Mr Mtsweni were ever prevented from applying to be released on bail. Furthermore, it found that there was no indication that a bail hearing would not have been held and pursued to finality on 14 June 2005, that is, after a period of some two weeks' judicial detention. The Court concluded that the inclusion of the inadmissible confession in the docket was not the legal cause of the detention beyond 14 June 2005. It also held that the Minister was entitled to invoke the subsequent court remand orders after 14 June 2005 as a defence to the claim, and refused to hold the Minister liable for the detention beyond the second court appearance on 14 June 2005. In the result, it upheld the appeal in part and awarded compensation to the applicants for only the period of detention until 14 June 2005.[10]

[19] The two minority judgments considered the issue to be whether the applicants pleaded and proved that the unlawful conduct of Lieutenant Mthombeni and his colleagues was the cause of the entire period of Messrs Mahlangu and Mtsweni's post appearance detention. The first minority judgment penned by Van der Merwe J (in

[10] *Mahlangu v Minister of Police* [2020] ZASCA 44; 2020 (2) SACR 136 (SCA) (Supreme Court of Appeal judgment) at paras 42-3 and 45.

which Petse DP concurred in a separate dissenting judgment), found that there can be no doubt that the applicants were remanded in custody because the prosecutor had opposed bail. The only document contained in the docket which could have supported a decision to oppose bail was the false confession of the first applicant obtained through torture.[11] This led the minority to the conclusion that the forcible extraction of the confession was the cause of the entire period of the applicants' incarceration. It would have awarded damages for the full period of detention.[12]

In this Court

Condonation

[20] The applicants seek condonation in terms of rule 32 of the rules of this Court for their failure to file the application for leave to appeal timeously. The application for leave to appeal had to be submitted by 13 May 2020 but was only filed on 19 May 2020. The explanation proffered for the delay is that legal practitioners were operating under restrictions imposed during the national lockdown period and that this affected the proper functioning of their practices. The explanation for the delay is reasonable and the delay was not long. Condonation is therefore granted.

Jurisdiction

[21] This case concerns issues of fundamental constitutional import. It implicates the fundamental rights of Messrs Mahlangu and Mtsweni entrenched in sections 12(1) and 35(1)(c) of the Constitution, including their entitlement to be adequately compensated in the event that there was an unlawful breach of their constitutional right to liberty. In *Zealand*[13] and in *Lee*[14] this Court held that, where an applicant seeks to vindicate his or her rights under sections 12(1) and 35 of the Constitution, this Court

[11] Id at para 72.

[12] Id at para 75.

[13] *Zealand v Minister for Justice and Constitutional Development* [2008] ZACC 3; 2008 (2) SACR 1 (CC); 2008 (6) BCLR 601 (CC) at para 22.

[14] *Lee v Minister of Correctional Services* [2012] ZACC 30; 2013 (2) SA 144 (CC); 2013 (2) BCLR 129 (CC) at para 30.

has jurisdiction. Similarly, in *De Klerk*, this Court held that the issue of whether the applicant's detention was consistent with the principle of legality and whether his right to freedom and security of the person in section 12(1) of the Constitution has been infringed is a constitutional matter.[15] This Court, therefore, has jurisdiction to entertain this application.

Leave to appeal

[22] As it has been repeatedly held by this Court that a finding that a matter involves constitutional issues is not decisive, this Court must still determine whether leave to appeal should be granted. Leave may be refused if it is not in the interests of justice that this Court should hear the appeal.[16]

[23] The finding by the Supreme Court of Appeal that the onus was on the applicants to prove that, even if bail applications had been made, they would probably not have been granted, has introduced a new test. This new test is contrary to the one previously adopted by the Supreme Court of Appeal and by this Court.[17] The appeal also turns on the Supreme Court of Appeal's conclusion that the applicants' failure to apply for bail constituted a new intervening act. This is contrary to the Supreme Court of Appeal's own decisions in *Woji*[18] and *Tyokwana*.[19] It is thus in the interests of justice for this Court to unravel the confusion that has been created by the Supreme Court of Appeal. An application of the correct test also impacts the merits of the application. The application thus bears reasonable prospects of success.

[15] *De Klerk v Minister of Police* [2019] ZACC 32; 2020 (1) SACR 1 (CC); 2019 (12) BCLR 1425 (CC) at para 11.

[16] *Magajane v Chairperson, North West Gambling Board* [2006] ZACC 8; 2006 (5) SA 250 (CC); 2006 (10) BCLR 1133 (CC) at para 29; *National Education Health and Allied Workers Union v University of Cape Town* [2002] ZACC 27; 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC) at para 25 and *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) at para 12.

[17] *Woji* above n 5; *Tyokwana* above n 8; *Zealand* above n 13.

[18] *Woji* above n 5.

[19] *Tyokwana* above n 8.

Issues for determination

[24] It is worth re-stating that the main issue in this application is whether the Minister should be held vicariously liable for damages flowing from the detention for the entire period following the arrest up to the time of release. A related issue is whether the Supreme Court of Appeal was correct in holding that the failure by Messrs Mahlangu and Mtsweni to apply for bail shifted the onus from the Minister to Messrs Mahlangu and Mtsweni to prove the lawfulness of their detention from 14 June 2005 to the date of their release. If this Court finds that the Supreme Court of Appeal was incorrect, the last issue is the quantum of damages that ought to be awarded.

Unlawful arrest and detention

[25] The prism through which liability for unlawful arrest and detention should be considered is the constitutional right guaranteed in section 12(1) not to be arbitrarily deprived of freedom and security of the person. The right not to be deprived of freedom arbitrarily or without just cause applies to all persons in the Republic. These rights, together with the right to human dignity,[20] are fundamental rights entrenched in the Bill of Rights. The state is required to respect, protect, promote and fulfil these rights, as well as all other fundamental rights.[21] They are also part of the founding values upon which the South African constitutional state is built.[22]

[26] The police, like any other state functionary in the country for that matter, are constrained by the principle of legality imposed by the Constitution and may not exercise any power nor perform any function beyond that conferred upon them by law.[23]

[20] Section 10 of the Constitution states that every person has inherent dignity and everyone has the right "to have their dignity respected and protected".

[21] Section 7(2) of the Constitution. Note too that section 7(1) provides that "[t]his Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom".

[22] Section 1(a) of the Constitution states that "[t]he Republic of South Africa is one, sovereign state founded on the following values" including, "human dignity, the achievement of equality and the advancement of human rights and freedoms".

[23] *Masetlha v President of the Republic of South Africa* [2007] ZACC 20; 2008 (1) SA 566 (CC); 2008 (1) BCLR 1 at para 80; *Affordable Medicines Trust v Minister of Health* [2005] ZACC 3*;* 2006 (3) SA 247 (CC); 2005 (6)

That is a basic component of the rule of law and one of the founding values of our Constitution.

[27] The unlawful deprivation of liberty, with its accompanying infringement of the right to human dignity, has always been regarded as a particularly grave wrong and a serious inroad into the freedom and rights of a person.[24] In *Thandani*,[25] the Court said that:

> "sight must not be lost of the fact that the liberty of the individual is one of the fundamental rights of a [person] in a free society which should be jealously guarded at all times and there is a duty on our Courts to preserve this right against infringement. Unlawful arrest and detention constitutes a serious inroad into the freedom and the rights of an individual."[26]

[28] This Court has previously pronounced that "the right not to be deprived of freedom arbitrarily or without just cause affords both substantive and procedural protection against such deprivations",[27] In *Coetzee*,[28] this Court clarified the two components of this right in the following manner:

> "[There are] two different aspects of freedom: the first is concerned particularly with the reasons for which the state may deprive someone of freedom [the substantive component]; and the second is concerned with the manner whereby a person is deprived of freedom [the procedural component]. . . . [O]ur Constitution recognises that both aspects are important in a democracy: the state may not deprive its citizens of liberty

BCLR 529 (CC) at paras 49, 75 and 77 and *Fedsure Life Assurance v Greater Johannesburg Transitional Metropolitan Council* [1998] ZACC 17; 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC) at para 58.

[24] *Peterson v Minister of Safety and Security* [2009] JOL 24495 (ECG) and *Areff v Minister van Polisie* 1977 (2) SA 900 (A) 914 and *May v Union Government* 1954 (3) SA 120 (N).

[25] *Thandani v Minister of Law and Order* 1991 (1) SA 702 (E).

[26] Id at para 707A-B.

[27] *Zealand* above n 13 at para 33.

[28] *S v Coetzee* [1997] ZACC 2; 1997 (3) SA 527 (CC); 1997 (4) BCLR 437 (CC).

> 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."[29]

[29] It is uncontroverted that the initial arrest of Messrs Mahlangu and Mtsweni was unlawful and amounted to an arbitrary deprivation of freedom substantively and procedurally. To analyse the correctness of the Supreme Court of Appeal's refusal to award compensation for the period beyond 14 June 2005, it is necessary to briefly set out the principles of delictual liability, following wrongful arrest. It is to this that I now turn my focus. In *Relyant Trading*,[30] the Supreme Court of Appeal said that "[t]o succeed in an action based on wrongful arrest the plaintiff must show that the defendant himself, or someone acting as his agent or employee deprived him of his liberty".[31]

[30] In *Hurley*,[32] the Court stated the following:

> "An arrest constitutes an interference with the liberty of the individual concerned, and it therefore seems to be fair and just to require that the person who arrested or caused the arrest of another person should bear the onus of proving that his action was justified in law."[33]

This statement was referred to with approval in *Hofmeyr*[34] where the Court held that when "the arrest or imprisonment has been admitted or proved it is for the defendant to allege and prove the existence of grounds in justification of the infraction".[35]

[31] This approach was affirmed in *Zealand* in which – as in the instant matter – the focus was on detention. There this Court held that:

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[29] Id at para 159. See also *De Lange v Smuts N.O.* [1998] ZACC 6; 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC) at para 18.

[30] *Relyant Trading (Pty) Ltd v Shongwe* [2006] ZASCA 162; [2007] 1 All SA 375 (SCA) (*Relyant Trading*).

[31] Id at para 6.

[32] *Minister of Law and Order v Hurley* [1986] ZASCA 53; 1986 (3) SA 568 (A) (*Hurley*).

[33] Id at 589E-F.

[34] *Minister of Justice v Hofmeyr* [1993] ZASCA 40; 1993 (3) SA 131 (AD) (*Hofmeyr*).

[35] Id at 153D-E.

> "It has long been firmly established in our common law that every interference with physical liberty is prima facie unlawful. Thus, once the claimant establishes that an interference has occurred, the burden falls upon the person causing that interference to establish a ground of justification. In *Minister van Wet en Orde v Matshoba*, the Supreme Court of Appeal again affirmed that principle, and then went on to consider exactly what must be averred by an applicant complaining of unlawful detention. In the absence of any significant South African authority, Grosskopf JA found the law concerning the rei vindicatio a useful analogy. The simple averment of the plaintiff's ownership and the fact that his or her property is held by the defendant was sufficient in such cases. This led that Court to conclude that, since the common law right to personal freedom was far more fundamental than ownership, it must be sufficient for a plaintiff who is in detention simply to plead that he or she is being held by the defendant. The onus of justifying the detention then rests on the defendant. There can be no doubt that this reasoning applies with equal, if not greater, force under the Constitution."[36] (Footnotes omitted.)

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

[33] In *Woji*, the Supreme Court of Appeal followed *Zealand*. It held that the Minister was liable for post appearance detention where the wrongful and culpable conduct of the police had materially influenced the decision of the court to remand the person in question in custody.[37] Its reasoning effectively means that it is immaterial whether the unlawful conduct of the police is exerted directly or through the prosecutor.

[34] In this matter, Lieutenant Mthombeni and his colleagues arrested Messrs Mahlangu and Mtsweni unlawfully and engineered a false confession through

[36] *Zealand* above n 13 at para 25.

[37] *Woji* above n 5 at para 27.

assault and torture. They failed to disclose this to the court and it was this conduct on their part that led to the further detention. Lieutenant Mthombeni's duty to be candid and inform the prosecutor that the arrest was unlawful and that the confession was obtained unlawfully persisted during the full period of the detention of Messrs Mahlangu and Mtsweni.

[35] Recently in *De Klerk*,[38] this Court handed down four judgments. The majority view was that the unlawful arrest was the cause of Mr De Klerk's post appearance detention and that the Minister was liable for damages in respect thereof. The facts were briefly that, after his employer had lodged a complaint of assault against him, Mr De Klerk was requested to report to the Sandton Police Station. Upon his arrival, he was arrested without a warrant. It was common cause that the arrest was unlawful. He was then taken to the Randburg Magistrates' Court, where he appeared approximately two hours after his arrest. The arresting officer recorded in the docket that she recommended that Mr De Klerk be released on bail in the amount of R1 000. However, Mr De Klerk was not afforded the opportunity to apply for bail at this first appearance.

[36] This matter is distinguishable from *De Klerk* on the facts. Here, Lieutenant Mthombeni knew that there was no evidence upon which the applicants could be successfully and lawfully prosecuted. He was aware that Mr Mahlangu's confession was obtained under duress and that it was false. He was also aware that Mr Mahlangu had been subjected to torture, but decided not to inform the state prosecutor of the true state of affairs.

[37] The Supreme Court of Appeal's decision to relieve the Minister from liability for damages suffered by the applicants after a further remand order was made on 14 June 2005, implies that the obligation on members of the police to make proper and complete disclosure to the prosecutor of the facts relevant to the further detention of the

[38] *De Klerk* above n 15.

applicants did not exist on the second court appearance. The obligation on the police to disclose all relevant facts to the prosecutor is to be regarded as a duty that remains for as long as the information withheld is relevant to the detention.

[38] In *Woji,* the Supreme Court of Appeal reminded us that the police, as state officials, have a public law duty to safeguard the constitutional rights of the members of society. It said:

> "The Constitution imposes a duty on the state and all of its organs not to perform any act that infringes the entrenched rights, such as the right to life, human dignity and freedom and security of the person. This is termed a public law duty. On the facts of this case, Inspector Kuhn, a policeman in the employ of the state, had a public law duty not to violate Mr Woji's right to freedom, either by not opposing his application for bail, or by placing all relevant and readily available facts before the Magistrate. A breach of this public law duty gives rise to a private law breach of Mr Woji's right not to be unlawfully detained, which may be compensated by an award of damages. There can be no reason to depart from the general law of accountability, that the state is liable for the failure to perform the duties imposed upon it by the Constitution, unless there is a compelling reason to deviate from the norm. Mr Woji was entitled to have his right to freedom protected by the state. In consequence, Inspector Kuhn's omission to perform his public duty was wrongful in private law terms."[39]

[39] In *Tyokwana* the Supreme Court of Appeal held:

> "the [Minister] has shown that the circumstances in which the appellant's employees instigated and persisted with his prosecution, amounted to an unjustifiable breach of section 12(1)(a) of the Constitution. This is sufficient to establish delictual liability on the part of the appellant for the full period of the Minister's detention from 2 October 2007 to 20 July 2009."[40]

[39] *Woji* above n 5 at para 28. See also *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) at paras 34-8 and 43-4.

[40] *Tyokwana* above n 8 at para 44.

[40] In *Botha*[41] the Court stated:

> "It is also trite law that in a case where the Minister of Safety and Security (as defendant) is being sued for unlawful arrest and detention and does not deny the arrest and detention, the onus to justify the lawfulness of the detention rests on the defendant and the burden of proof shifts to the defendant on the basis of the provisions of section 12(1) of the Constitution. . . . These provisions, therefore, place an obligation on police officials who are bestowed with duties to arrest and detain persons charged with and/or suspected of the commission of criminal offences, to establish before detaining the person, the justification and lawfulness of such arrest and detention.
>
> This, in my view, includes any further detention for as long as the facts which justify the detention are within the knowledge of the police official. Such police official has a legal duty to inform the public prosecutor of the existence of information which would justify the further detention. Where there are no facts which justify the further detention of a person, this should be placed by the investigator before the prosecutor of the case and the law casts an obligation on the police official to do so. In *Mvu v Minister of Safety and Security* Willis J held as follows:
>
> > 'It seems to me that, if a police officer must apply his or her mind to the circumstances relating to a person's detention, this includes applying his or her mind to the question of whether detention is necessary at all.'
>
> It goes without saying that the police officer's duty to apply his or her mind to the circumstances relating to a person's detention includes applying his or her mind to the question whether the detention is necessary at all. This information, which must have been established by the police officer, will enable the public prosecutor and eventually the magistrate to have an informed decision whether or not there is any legal justification for the further detention of the person."[42] (Footnotes omitted.)

[41] And in *Tyokwana* the Court reasoned:

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[41] *Botha v Minister of Safety and Security, January v Minister of Safety Security* 2012 (1) SACR 305 (ECP).

[42] Id at paras 29-30.

> "[T]he duty of a policeman, who has arrested a person for the purpose of having him or her prosecuted, is to give a fair and honest statement of the relevant facts to the prosecutor, leaving it to the latter to decide whether to prosecute or not."[43]

[42] There is no question – as the Supreme Court of Appeal also concluded – that "the inclusion of the confession in the docket *with the intention that it be relied upon*" (emphasis added) factually caused Messrs Mahlangu and Mtsweni's detention up to their second court appearance.[44] A question that arises is whether public policy dictates that this conduct – accompanied by the silence of the police about it throughout – is too remote for delictual liability to attach to the police and, vicariously, to the Minister beyond the second court appearance.[45] A related question is whether – despite this concealed criminal conduct – Messrs Mahlangu and Mtsweni bore the onus that the Supreme Court of Appeal said they did.

[43] It is now trite that public policy is informed by the Constitution.[46] Our Constitution values freedom, and understandably so when regard is had to how before the dawn of democracy freedom for the majority of our people was close to non-existent. The primacy of "human dignity, the achievement of equality and the advancement of human rights and freedoms" is recognised in the founding values contained in section 1 of the Constitution. Section 7(1) of the Constitution provides that the Bill of Rights "enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom". These constitutional provisions and the protection in section 12 of the right of freedom and security of the person are at the heart of public policy considerations.

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[43] *Tyokwan*a above n 8 at para 40. See also *Prinsloo v Newman* 1975 (1) SA 481 (A) at 492G and 495A. In *Carmichele* above n 39 at para 63, it was held that the police have a clear duty to bring to the attention of the prosecutor any factors known to them relevant to the exercise by the magistrate of his discretion to admit a detainee to bail.

[44] Supreme Court of Appeal judgment above n 10 at para 42.

[45] The relevance of public policy is that legal causation turns on the dictates of public policy. In this regard see *De Klerk* above n 15 at para 28.

[46] *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) at para 57. See also *Beadica 231 CC v Trustees for the time being of the Oregon Trust* [2020] ZACC 13; 2020 (5) SA 247 (CC); 2020 (9) BCLR 1098 (CC) at para 87.

[44] If we are to give meaning to freedom as a foundational value of our Constitution and to the right to freedom and security of the person, we cannot allow the police to deprive people of their freedom by so simple a stratagem as behaving in the egregious manner in which they did here and then lying low and keeping quiet to see if anything will come to the rescue of the victims of their nefarious deeds. If we allow that to happen, then police – like they did before the advent of our democracy – will continue to ride rough shod over the freedoms of our people. So, generally in circumstances like the present public policy dictates that delictual liability must attach, lest we find ourselves in a situation where freedom as a constitutional value and the right to freedom and security of the person are devalued.

[45] The unlawful continued concealment by the police of the fact that the confession was obtained illegally therefore provides the applicants with a basis for holding the Minister delictually liable for the full detention period. This ordinarily would have been the end of the enquiry, but it is prudent that this Court determines the second issue that arises in this appeal: whether the Supreme Court of Appeal was correct in criticising Messrs Mahlangu and Mtsweni for their failure to apply for bail. And, whether the Court was correct in shifting the onus to prove the lawfulness of their post appearance detention from the Minister to them, such that they had to prove the unlawfulness of their continued detention.

[46] It is common cause that the Supreme Court of Appeal adopted a novel approach to determine liability on this basis. This was also not pleaded by the Minister. As stated above, it is in any event, contrary to the jurisprudence of the Supreme Court of Appeal and this Court. In *Woji*, the Supreme Court of Appeal said:

> "In the context of section 12(1)(a) of the Constitution and the decision by the Constitutional Court in *Zealand*, an examination, of the legality of the manner in which the Magistrate's discretion to further detain Mr Woji was exercised, cannot be precluded simply by the existence of the Magistrate's order. The Constitutional Court in *Zealand* did not require the decisions of the respective Magistrates to be set aside,

> before the lawfulness of the appellant's detention could be determined. Once it is clear that the detention is not justified by acceptable reasons and is without just cause in terms of section 12(1)(a) of the Constitution, the individual's right not to be deprived of his or her freedom is established. This would render the individual's detention unlawful for the purposes of a delictual claim for damages."[47]

It follows that the approach adopted by the Supreme Court of Appeal, in shifting the onus onto the applicants, constituted an error in law.

[47] Apart from the patent error in law, the approach of the majority judgment is flawed even on the facts. The majority judgment's view – that a bail application could have been finalised within one day and would have resulted in the release of Messrs Mahlangu and Mtsweni – disregards the fact that the prosecutor had expressed a clear intention to oppose bail. The basis for opposing bail was the unlawful confession. The unlawful confession implicated the applicants in a gruesome murder of several members of a family. That they would have been released on bail was not a foregone conclusion, having regard to the confession made by Mr Mahlangu.

[48] Furthermore, the majority judgment did not give proper consideration to the fact that the trial in the High Court ran for six days with the police vehemently denying any wrongdoing. The majority judgment's view that the applicants would have had no problem in convincing a court hearing the bail application that the confession was false disregards this factor. Thus, the Supreme Court of Appeal misdirected itself in holding that the applicants' failure to apply for bail constituted an intervening act breaking the chain of legal causation.

Conclusion

[49] The Supreme Court of Appeal erred in refusing to award damages for the full period of detention. The Minister is therefore liable to compensate the applicants for

[47] *Woji* above n 5 at para 27. See also *Zealand* above n 13 at para.

the period of their detention from the date of their arrest, being 30 May 2005, to the date of their release on 10 February 2006. This amounts to eight months and ten days.

Quantum

[50] It is trite that damages are awarded to deter and prevent future infringements of fundamental rights by organs of state. They are a gesture of goodwill to the aggrieved and they do not rectify the wrong that took place. In *Seymour*,[48] the Supreme Court of Appeal encapsulated the purpose of damages and said:

> "Money can never be more than a crude solatium for the deprivation of what in truth can never be restored and there is no empirical measure for the loss."[49]

[51] And then in *Tyulu*,[50] the Court re-affirmed it as follows:

> "In the assessment of damages for unlawful arrest and detention, it is important to bear in mind that the primary purpose is not to enrich the aggrieved party but to offer him or her some much-needed solatium for his or her injured feelings. It is therefore crucial that serious attempts be made to ensure that the damages awarded are commensurate with the injury inflicted. However, our courts should be astute to ensure that the awards they make for such infractions reflect the importance of the right to personal liberty and the seriousness with which any arbitrary deprivation of personal liberty is viewed in our law. I readily concede that it is impossible to determine an award of damages for this kind of injuria with any kind of mathematical accuracy. Although it is always helpful to have regard to awards made in previous cases to serve as a guide, such an approach if slavishly followed can prove to be 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."[51]

[48] *Minister of Safety and Security v Seymour* [2006] ZASCA 71; 2006 (6) SA 320 (SCA).

[49] Id at para 20.

[50] *Minister of Safety and Security v Tyulu* [2009] ZASCA 55; 2009 (5) SA 85 (SCA).

[51] Id at para 26.

[52] In *Rahim*,[52] the Supreme Court of Appeal listed the following as factors relevant when determining the amount of damages to award for the deprivation of liberty: (a) the circumstances under which the deprivation of liberty took place which would include the fact that the arrest was not only arbitrary but was preceded by brutality and torture by the arresting officer; (b) the conduct of the defendants – the arresting officer continued to attempt to influence the prosecutor after the unlawful arrest to ensure the applicants would remain in detention despite knowing that such arrest was unlawful; and (c) the nature and duration of the deprivation.[53]

[53] In *Woji*, the Supreme Court of Appeal took into account the following: the cells where Mr Woji had been kept were overcrowded, dirty and there were insufficient beds to sleep on; he was subjected to the control of a gang who raped other prisoners; he suffered the appalling, humiliating and traumatic indignity of being raped on two occasions which he did not report to the prison authorities because he feared retaliation from gang members; and the fact that he endured these humiliating and degrading experiences for 13 months. The Court found that an award in the sum of R500 000 was appropriate.

[54] In *De Klerk* this Court took into account the fact that the applicant was detained from 20 December 2012 to 28 December 2012. It also took into account the fact that the applicant had provided precedent for the quantum of the general damages he sought and the fact that the respondent did not put up a serious fight in that respect. It awarded damages in the amount of R300 000 for the eight days' deprivation of freedom.

[55] The relevant factors here are that Mr Mahlangu was tortured by several police officers before he made the confession that led to the deprivation of his liberty. The investigating officer did not disclose the torture and assault to the prosecutor, nor did he inform the prosecutor that the confession was engineered by the assault and torture.

[52] *Rahim v Minister of Home Affairs* [2015] ZASCA 92; 2015 (4) SA 433 (SCA).

[53] Id at para 27.

[56] The circumstances under which Mr Mahlangu and Mr Mtsweni were detained for eight months and 10 days were unpleasant, to say the very least. In addition, they were placed in solitary confinement for two months to protect them from attack and taunting by fellow detainees who believed that they had killed their relatives. No amount of compensation can undo the humiliation and human rights violations suffered by the applicants. Appropriate *solatia*, taking into account all of these factors, are the following: the first applicant should be awarded total compensation in the amount of R550 000 and the second applicant, total compensation in the amount of R500 000. There is no reason why the Minister should not be ordered to pay the costs, including the costs of two counsel.

Order

[57] I make the following order:

1. Leave to appeal is granted.
2. The appeal against the order of the Supreme Court of Appeal is upheld to the extent reflected below.
3. Paragraph 2(b)(i) and (ii) of the order of the Supreme Court of Appeal is set aside and substituted with the following order:

   "The first defendant is ordered to pay:

   (i) An amount of R550 000 to the first plaintiff;

   (ii) An amount of R500 000 to the second plaintiff;

   (iii) The above amounts are to be paid with interest at the prescribed rate from date of the judgment of the High Court, being 26 September 2014;

   (iv) Costs of suit, including the costs of two counsel."
4. The respondent must pay the costs of the appeal, including the costs of two counsel.

For the Applicants:	A B Rossouw SC, S J Myburgh and C H Badenhorst instructed by Makhafola and Verster Incorporated
For the Respondent:	R Bedhesi SC and D Moodliyar instructed by State Attorney