



**CONSTITUTIONAL COURT OF SOUTH AFRICA**

Case CCT 95/18

In the matter between:

**BRYAN JAMES DE KLERK** Applicant

and

**MINISTER OF POLICE** Respondent

**Neutral citation:** *De Klerk v Minister of Police* [2019] ZACC 32

**Coram:** Mogoeng CJ, Basson AJ, Cameron J, Dlodlo AJ, Froneman J, Goliath AJ, Khampepe J, Mhlantla J, Petse AJ, and Theron J

**Judgments:** Theron J (majority): [1] to [96]  
Cameron J (concurring): [97] to [113]  
Froneman J (dissenting): [114] to [151]  
Mogoeng CJ (dissenting): [152] to [186]

**Heard on:** 15 November 2018

**Decided on:** 22 August 2019

**Summary:** Delict — unlawful detention — legal causation — unlawful remand

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**ORDER**

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

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The Minister of Police is ordered to pay the applicant an amount of R300 000 with interest at the prescribed rate from 30 October 2014 to the date of payment.
4. The Minister is to pay the costs of this appeal, as well as the costs before the Supreme Court of Appeal and the High Court, including the costs of two counsel.

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## JUDGMENT

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THERON J (Basson AJ, Dlodlo AJ, Khampepe J and Petse AJ concurring):

### *Introduction*

[1] This is an application for leave to appeal against a decision of the Supreme Court of Appeal.<sup>1</sup> The main issue for determination is whether the Minister of Police (the respondent) is liable to compensate Mr de Klerk (the applicant) for the entire period of his detention following his unlawful arrest, including the period following his first appearance in court. Related questions are whether the unlawful detention of the applicant ceased when the Magistrate ordered his further detention and whether the Magistrate's order rendered the subsequent harm caused by his detention too remote (for the purposes of legal causation) from the unlawful arrest.

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<sup>1</sup> *De Klerk v Minister of Police* [2018] ZASCA 45; 2018 (2) SACR 28 (SCA) (Supreme Court of Appeal judgment).

*Background*

[2] The facts are common cause. Around 11 December 2012, Mr Rael Lasarow lodged a complaint of assault against the applicant. He alleged that the applicant (his employee at the time) had pushed him into a glass picture frame hanging on a wall. As a result, the glass broke and injured Mr Lasarow.

[3] On 20 December 2012, at around 08h00, the applicant reported to the Sandton police station after receiving a voice message requesting him to do so. He was arrested without a warrant by Detective Constable Ndala on a charge of assault with intent to do grievous bodily harm. He was transported to the Randburg Magistrates' Court, placed in holding cells and appeared in Court at around 10h00.

[4] It was recorded in the docket that Constable Ndala had recommended bail in the amount of R1 000. However, the applicant was not afforded the opportunity to apply for bail at this first appearance. The matter was routinely postponed, without the question of bail arising or being addressed.<sup>2</sup> Instead, the Magistrate informed the applicant without more that he would be remanded in custody at the Johannesburg prison. The applicant was released from prison on 28 December 2012 after Mr Lasarow withdrew his complaint against the applicant.

[5] The applicant instituted a delictual claim against the respondent in the High Court of South Africa, Gauteng Division, Pretoria (High Court)<sup>3</sup> for damages flowing from his arrest and detention.<sup>4</sup> The High Court accepted that the arresting officer believed that the applicant had committed an offence in terms of Schedule 1 and had exercised her discretion to arrest him in order to secure his attendance in

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<sup>2</sup> See [48].

<sup>3</sup> *De Klerk v Minister of Police* 2016 JDR 1672 (GP).

<sup>4</sup> The respondent was, as in this Court, the Minister of Police, a member of the Executive in the national government, responsible for the actions of the Department of Police. The respondent is cited in his official capacity as the nominal defendant in terms of the State Liability Act 20 of 1957.

Court. It held that the arrest and subsequent detention were lawful and dismissed the claim.

[6] Aggrieved by this outcome, the applicant appealed to the Supreme Court of Appeal, with leave granted by that Court. All five Judges agreed that the applicant's arrest was unlawful and that he was entitled to damages in compensation for it. The Judges differed only on whether the respondent should be held liable for the applicant's unlawful detention after his first appearance in court.

[7] The majority<sup>5</sup> held that the respondent cannot be liable for the applicant's detention after his first court appearance. As they put it: "what happened in court and thereafter cannot be placed before the doorstep of the respondent".<sup>6</sup> The majority relied on an analysis of the Supreme Court of Appeal's judgment in *Sekhoto*<sup>7</sup> to find that once an accused is brought to trial, it is the presiding officer's responsibility to ensure that the accused's fair trial rights under section 35(1)(e)-(f) are not undermined.<sup>8</sup> The majority reasoned that the arresting peace officer accordingly cannot be held liable for an unlawful detention after a court hearing where the presiding officer fails to fulfil their responsibilities regarding the further detention of the arrested person. The majority judgment held that the respondent was liable to compensate the applicant for his unlawful detention only up and until his appearance in Court (for a period of approximately two hours) and awarded him R30 000 in damages, plus costs.

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<sup>5</sup> Shongwe ADP, Majiedt JA and Hughes AJA.

<sup>6</sup> Supreme Court of Appeal judgment above n 1 at para 12.

<sup>7</sup> *Minister of Safety and Security v Sekhoto* [2010] ZASCA 141; 2011 (5) SA 367 (SCA) (*Sekhoto*). In that case, the Supreme Court of Appeal held at para 44:

"While the purpose of arrest is to bring the suspect to trial, the arrestor has a limited role in that process. He or she is not called upon to determine whether the suspect ought to be detained pending a trial. That is the role of the court (or in some cases a senior officer). The purpose of the arrest is no more than to bring the suspect before the court (or the senior officer) so as to enable that role to be performed." (Footnotes omitted.)

<sup>8</sup> Supreme Court of Appeal judgment above n 1 at para 14.

[8] The minority<sup>9</sup> held that the respondent should be liable for the entire period of detention on the basis that the lawfulness of the detention after his first court appearance is not essential for establishing liability. The minority reasoned that what matters is whether the police can be said to have caused (both factually and legally) the detention after the first hearing as a result of their unlawful conduct (the arrest).<sup>10</sup> The minority found that factual and legal causation for the applicant's injury had been established and awarded him R300 000 in non-patrimonial damages. The minority held that because the Magistrate had not exercised any considered discretion regarding bail, her conduct was not a break in the causation between arrest and the detention after the applicant's first court appearance.<sup>11</sup>

[9] In this Court, the applicant seeks leave to appeal against part of the order and decision of the Supreme Court of Appeal. The applicant submits that the approach adopted in the majority judgment implies that a litigant is required to prove the unlawfulness of the harmful consequences which they have suffered if they wish to be compensated. The applicant submits that this constitutes a deviation from the normal approach to causation in delictual matters.

[10] The respondent supports the outcome and reasoning of the majority judgment. He contends that the court appearance and court remand order collectively constitute a *novus actus interveniens* (fresh intervening event) breaking the chain of causation that started with the arrest. For this reason, the respondent contends that liability cannot be imputed to the police for the applicant's further detention.

#### *Jurisdiction and leave to appeal*

[11] The issue as to whether the applicant's detention was consistent with the principle of legality and his right to freedom and security of the person in

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<sup>9</sup> Rogers AJA with Leach JA concurring.

<sup>10</sup> Id at paras 28-9.

<sup>11</sup> Id at para 47.

section 12(1) of the Constitution is a constitutional matter.<sup>12</sup> The further questions of whether any liability arising from his detention that followed his first court appearance should be attributed to the arresting officer, and the relationship between this and the lawfulness of his subsequent detention, raise arguable points of law of general public importance.

[12] These questions ought to be considered by this Court.<sup>13</sup> The existence of conflicting decisions from the lower courts pertaining to the question before us and the split decision in the Supreme Court of Appeal are indicative that the issue demands clarity from this Court and that there are prospects of success. This matter is of importance beyond the parties: its impact is substantial and has a bearing upon the public interest.<sup>14</sup> It is important for this Court to establish the parameters applicable to a claim for damages arising from detention after a court appearance and to define the circumstances in which an unlawful arrest may lead to liability being imposed on an arresting police officer for that subsequent detention. This Court has not yet considered these issues. For these reasons, it is in the interests of justice for leave to appeal to be granted.

#### *Unlawful arrest and detention*

[13] A delict comprises wrongful, culpable conduct by one person that factually causes harm to another person that is not too remote.<sup>15</sup> When the harm in question is a violation of a personality interest caused by intentional conduct, then the person who suffered the harm must institute the *actio iniuriarum* (action for non-patrimonial damages) to claim compensation for the non-patrimonial harm suffered. The harm

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<sup>12</sup> *Zealand v Minister for Justice and Constitutional Development* [2008] ZACC 3; 2008 (4) SA 458 (CC); 2008 (6) BCLR 601 (CC) at para 22.

<sup>13</sup> *Paulsen v Slip Knot Investments 777 (Pty) Ltd* [2015] ZACC 5; 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 (CC) at paras 19-21.

<sup>14</sup> *Mokone v Tassos Properties CC* [2017] ZACC 25; 2017 (5) SA 456 (CC); 2017 (1) BCLR 1261 (CC) at para 17.

<sup>15</sup> *Oppelt v Head: Health, Department of Health, Western Cape* [2015] ZACC 33; 2016 (1) SA 325 (CC); 2015 (12) BCLR 1471 (CC) at para 34 and Loubser et al *The Law of Delict in South Africa* 2 ed (Oxford University Press Southern Africa (Pty) Ltd, Cape Town 2012) at 21.

that the applicant complains of in respect of his detention is the deprivation of his liberty – a significant personality interest.<sup>16</sup> He alleges that it was his wrongful arrest that caused the harm (namely, the detention before and after his court appearance).

[14] A claim under the *actio iniuriarum* for unlawful arrest and detention has specific requirements:

- (a) the plaintiff must establish that their liberty has been interfered with;
- (b) the plaintiff must establish that this interference occurred intentionally. In claims for unlawful arrest, a plaintiff need only show that the defendant acted intentionally in depriving their liberty and not that the defendant knew that it was wrongful to do so;<sup>17</sup>
- (c) the deprivation of liberty must be wrongful, with the onus falling on the defendant to show why it is not;<sup>18</sup> and
- (d) the plaintiff must establish that the conduct of the defendant must have caused, both legally and factually, the harm for which compensation is sought.<sup>19</sup>

[15] The unlawfulness of the arrest is not at issue before us. The High Court held that the arrest and subsequent detention were lawful and dismissed the claim. This reasoning was unanimously overturned by the Supreme Court of Appeal and the majority held – with the minority concurring – that the arrest was unlawful. This finding is not challenged on appeal. There is also no issue of fault before us.

[16] Similarly, there is no appeal against the finding by the Supreme Court of Appeal that the respondent is liable for the applicant’s unlawful detention from the

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<sup>16</sup> As the High Court held in *Thandani v Minister of Law and Order* 1991 (1) SA 702 (E) at 707B:

“[T]he liberty of the individual is one of the fundamental rights of a man 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”.

<sup>17</sup> *Minister of Justice v Hofmeyr* 1993 (3) SA 131 (A) at 154H-J.

<sup>18</sup> *Zealand* above n 12 at paras 24-5.

<sup>19</sup> Loubser above n 15 at 27. See further the cases discussed at [33] to [58].

time of his arrest until his first appearance in court, a period of about two hours. This application is about whether the harm associated with the applicant's detention on the order of the Magistrate after his first court appearance until his release on 28 December 2012 can be attributed to the unlawful arrest by the police. As mentioned, the respondent contends that the unlawful detention of the applicant ceased when the Magistrate ordered his further detention.

[17] This application accordingly implicates the causation requirement in the context of alleged unlawful detention. As will become evident from the discussion below, there is a subtle relationship between the elements of causation and unlawfulness that must be considered in matters like these.

[18] I have had the pleasure of reading the judgment of my brother Froneman J in this matter (second judgment). The second judgment finds that the issue in this case is not one of legal causation but rather one of wrongfulness.

[19] In my view, on the case as brought before us, there is one potential delict; namely, the unlawful arrest of the applicant. I understand the basis of the second judgment to be that a different delict lies at the heart of this matter: an omission by the arresting officer at the applicant's first appearance to prevent the further detention. The second judgment concludes that because there is no duty on the arresting officer to do anything at the first appearance of an arrested person, the omission by the arresting officer in this case cannot be wrongful. The arresting officer cannot then be liable for the applicant's subsequent detention. I might have agreed with this reasoning if the only issue before us was an omission by the arresting officer at the first appearance.<sup>20</sup> In this case there was prior wrongful, negligent conduct by the arresting officer that factually caused the applicant to suffer harm. It is that conduct, the wrongful arrest of the applicant, which we are called to adjudicate. The applicant

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<sup>20</sup> Under the enquiry of legal causation, I consider whether the arresting officer had a duty to alert the Magistrate to the question of bail. I conclude not. See [69].

has pleaded that because of that wrongful arrest, he was detained for over a week. The applicant has not argued, as the second judgment persuasively finds, that an omission by the arresting officer to prevent his further detention after the first appearance is wrongful.

[20] The applicant's particulars of claim in the High Court state that the applicant "was arrested without a warrant by members of the Sandton SAPS" and "[a]s a result of the [applicant's] wrongful and unlawful arrest and detention", he suffered the harm in respect of which he seeks to hold the respondent liable (the entire period of detention). The applicant's pleaded case is that the unlawful arrest, rather than an omission by the police at the time of his first appearance before the Magistrate, was the cause of the harm he suffered.

[21] The applicant further avers in his particulars of claim that "[t]he members of the SAPS wrongfully failed and/or unreasonably refused to release the [applicant] on bail" and "[a]s a result of the foregoing the [applicant's] further detention was unlawful". At best, the particulars of claim appear to allude to a failure by the police to give the applicant police bail – not to cause his release at the first appearance.<sup>21</sup> It seems to me that the applicant pleaded that the police wrongfully failed to "release" him on bail at the Sandton Police station rather than failed to cause his release on bail before the Magistrate. This would tie in with the allegation in the applicant's pre-summons notice that Constable Ndala "was aware that [the applicant] can be released on bail" in the amount of R1 000 but failed to make the applicant aware of this.

[22] In any event, even if we interpret the pleadings as meaning that the applicant was suing the police for an omission during his first appearance before the Magistrate, it is quite clear that he was also suing them for the week's detention that flowed from the unlawful arrest. Before us, there was no suggestion, in the pleadings or in

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<sup>21</sup> Although the question whether bail should be granted is essentially a judicial one, bail may in limited circumstances be granted by a police official under section 59 of the Criminal Procedure Act 51 of 1977.

argument, of liability for an omission by the police at the first appearance before the Magistrate.<sup>22</sup> The parties have not been heard on this issue. The application for leave to appeal filed before us unequivocally frames the question as one of legal causation. Paragraph 4.3 of the applicant’s founding affidavit in this Court reads:

“The issue to be considered and ventilated is why the respondent, subsequent to its unlawful interference with my physical liberty, should not be subjected to the same criteria and tests applicable to other wrongdoers in a delictual claim. On a reading of the [Supreme Court of Appeal] majority judgment *the normal test of causation* is not applied. The principle applied by the majority judgment was that, absent proof that the consequence of the unlawful breach of my right to personal liberty was also, independent of the initial unlawful breach, unlawful, I am not entitled to compensation, from the respondent, for such consequences. Such finding was made notwithstanding that such consequence was not only foreseeable by the respondent but in fact known at the time when my physical liberty was unlawfully interfered with.” (Emphasis added.)

[23] There is, in my view, no basis to frame the issue in this matter as one of wrongfulness (based on an omission by the arresting officer at the first appearance).

#### *General principles of causation*

[24] Causation comprises a factual and legal component.<sup>23</sup> Factual causation relates to the question whether the act or omission caused or materially contributed to the harm.<sup>24</sup> The “but-for” test (*conditio sine qua non*) is ordinarily applied to determine

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<sup>22</sup> In *Molusi v Voges N.O.* [2016] ZACC 6; 2016 (3) SA 370 (CC); 2016 (7) BCLR 839 (CC) at para 28, this Court held that the purpose of pleadings is to define the issues for the Court and other parties to the proceedings.

<sup>23</sup> *Lee v Minister for Correctional Services* [2012] ZACC 30; 2013 (2) SA 144 (CC); 2013 (2) BCLR 129 (CC) at para 38; *Premier of the Western Cape Province v Loots* [2011] ZASCA 32; 2011 JDR 0250 (SCA) (*Loots*) at paras 16-7; and *International Shipping Co (Pty) Ltd v Bentley* [1989] ZASCA 138; 1990 (1) SA 680 (A) (*Bentley*) at 700E-I.

<sup>24</sup> *Minister of Police v Skosana* 1977 (1) SA 31 (A); [1977] 1 All SA 219 (A) at 34F-G:

“Causation in the law of delict gives rise to two rather distinct problems. The first is a factual one and relates to the question as to whether the negligent act or omission in question caused or materially contributed to the harm giving rise to the claim. If it did not, then no legal liability can arise and *cadit quaestio* (the question falls). If it did, then the second problem becomes relevant, viz. whether the negligent act or omission is linked to the harm sufficiently

factual causation.<sup>25</sup> If, but for a wrongdoer's conduct, the harm would probably not have been suffered by a claimant, then the conduct factually caused the harm.<sup>26</sup> It is common cause that the factual component of causation is satisfied in this case: but for the arrest by Constable Ndala, the applicant would probably not have been remanded by the Magistrate for the week.

[25] Legal causation is concerned with the remoteness of damage. This entails an enquiry into whether the wrongful act is sufficiently closely linked to the harm for legal liability to ensue.<sup>27</sup> Generally, a wrongdoer is not liable for harm that is too remote from the conduct concerned<sup>28</sup> or harm that was not foreseeable.<sup>29</sup>

[26] The function of legal causation is to ensure that liability on the part of the wrongdoer does not extend indeterminately.<sup>30</sup> This is especially so when conduct factually causes harm *x*, and then harm *y* befalls the plaintiff in a manner that factually relates to harm *x*. An example from our case law demonstrates this. Suppose a defendant negligently causes a brain injury to the plaintiff; the plaintiff then becomes depressed; this depression is treated with a drug called parstellin (which has harmful

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closely or directly for legal liability to ensue or whether, as it is said, the harm is too remote. This is basically a juridical problem in which considerations of legal policy may play a part.”  
(Footnotes omitted.)

<sup>25</sup> In *Lee* above n 23 at paras 41 and 74, the majority of this Court held that in appropriate cases, the “but-for” test should be relaxed.

<sup>26</sup> *Minister of Safety and Security v Van Duivenboden* [2002] ZASCA 79; 2002 (6) SA 431 (SCA) at para 25.

<sup>27</sup> *mCubed International (Pty) Ltd v Singer N.O.* [2009] ZASCA 6; 2009 (4) SA 471 (SCA) (*mCubed*) at para 22; *Lee* above n 23 at para 38; and *Bentley* above n 23 at 700H.

<sup>28</sup> *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* [2008] ZASCA 134; 2009 (2) SA 150 (SCA) (*Fourway Haulage SA*) at paras 30-2 and *Standard Chartered Bank of Canada v Nedperm Bank Ltd* [1994] ZASCA 146; 1994 (4) SA 747 (A) at 764I-J.

<sup>29</sup> *Country Cloud Trading CC v MEC: Department of Infrastructure Development* [2013] ZASCA 161; 2014 (2) SA 214 (SCA) at para 27. See the explanation advanced by Nkabinde J in *Lee* above n 23 at para 38:

“The point of departure is to have clarity on what causation is. This element of liability gives rise to two distinct enquiries. The first is a factual enquiry into whether the negligent act or omission caused the harm giving rise to the claim. If it did not, then that is the end of the matter. If it did, the second enquiry, a juridical problem, arises. The question is then whether the negligent act or omission is linked to the harm sufficiently closely or directly for legal liability to ensue or whether the harm is too remote. This is termed legal causation.”

<sup>30</sup> *Minister of Safety and Security v Scott* [2014] ZASCA 84; 2014 (6) SA 1 (SCA) (*Scott*) at para 37.

side-effects when consumed with cheese); the plaintiff (unaware of the dangers of doing so) consumes cheese while on parstellin; and then suffers a stroke that results in additional harm.<sup>31</sup> The harm flowing from the stroke is factually caused by the conduct of the defendant – but for their negligent conduct, that harm would not have been suffered by the plaintiff. The question of legal causation is whether that further harm is too remote from the initial conduct for liability to be imputed to the defendant.

[27] In this way, remoteness operates along with wrongfulness as a measure of judicial control regarding the imposition of delictual liability and as a “‘longstop’ where most right-minded people will regard the imposition of liability in a particular case as untenable, despite the presence of all other elements of delictual liability”.<sup>32</sup>

[28] Legal causation is resolved with reference to public policy.<sup>33</sup> As held by the Supreme Court of Appeal in *Fourway Haulage SA*, although this implies that the elements of legal causation and wrongfulness will overlap to a certain degree as both are determined with reference to considerations of public policy, they remain conceptually distinct.<sup>34</sup> Accordingly, even where conduct is found, on the basis of public policy considerations to be wrongful, harm factually caused by that conduct may, for other reasons of public policy, be found to be too remote for the imposition of delictual liability.

[29] Legal causation involves a flexible test that may consider a myriad of factors.<sup>35</sup> This was affirmed by this Court in *Mashongwa*.<sup>36</sup> Traditionally, courts oscillated

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<sup>31</sup> This example is taken from *Alston v Marine and Trade Insurance Co Ltd* 1964 (4) SA 112 (W).

<sup>32</sup> *Fourway Haulage SA* above n 28 at para 31; and *Scott* above n 30 at para 37. See also *Home Talk Developments (Pty) Ltd v Ekurhuleni Metropolitan Municipality* [2017] ZASCA 77; 2018 (1) SA 391 (SCA) at para 45; and *South African Hang and Paragliding Association v Bewick* [2015] ZASCA 34; 2015 (3) SA 449 (SCA) at para 37.

<sup>33</sup> *Loots* above n 23 at para 17; *Lee* above n 23 at paras 38-9; *Skosana* above n 24 at 34G; and *Tuck v Commissioner for Inland Revenue* 1988 (3) SA 819 (A); [1988] 2 All SA 453 (A) at 832I.

<sup>34</sup> *Fourway Haulage SA* above n 28 at para 32.

<sup>35</sup> *S v Mokgethi* 1990 (1) SA 32 (A); [1990] 1 All SA 320 (A) (*Mokgethi*) at 40I-41D. See further *Loots* above n 23 at para 18; *Fourway Haulage SA* above n 28 at para 34; *OK Bazaars (1929) Ltd v Standard Bank of South*

between different tests for ascertaining legal causation. The traditional criteria are, among others, reasonable foreseeability, adequate causation, whether a *novus actus interveniens* intrudes and directness. But each of these tests was not without its problems and could lead to results contrary to public policy, reasonableness, fairness and justice. Hence in *Mokgethi*, the then Appellate Division adopted an “elastic” approach to legal causation.<sup>37</sup> This approach is sensitive to public policy considerations and aims to keep liability within the bounds of reasonableness, fairness, and justice.<sup>38</sup> In *Smit*, the Appellate Division held in the context of delict that the rigid application of legal causation to delineate the imposition of legal liability across all sets of facts is irreconcilable with the flexible approach followed in our law.<sup>39</sup> Any attempt to detract from the flexibility of the test for legal causation should accordingly be resisted.

[30] The traditional tests for legal causation remain relevant as subsidiary determinants.<sup>40</sup> These traditional criteria should be applied in a “flexible manner so as to avoid a result that is so unfair that it is regarded as untenable”.<sup>41</sup> It follows that the traditional criteria must be treated as being subsidiary to the considerations of public policy, reasonableness, fairness and justice.<sup>42</sup> It is trite that these considerations of public policy are grounded in the Constitution and its values. This Court has affirmed this position in the context of contract law<sup>43</sup> and wrongfulness in delict.<sup>44</sup> But it has also made it clear in the context of legal causation. In *Mashongwa*, this Court held:

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*Africa Ltd* [2002] ZASCA 5; 2002 (3) SA 688 (SCA) (*OK Bazaars*) at para 23; *Smit v Abrahams* [1994] ZASCA 64; 1994 (4) SA 1 (A) at 15E-G; and *Bentley* above n 23 at 701C.

<sup>36</sup> *Mashongwa v Passenger Rail Agency South Africa* [2015] ZACC 36; 2016 (3) SA 528 (CC); 2016 (2) BCLR 204 (CC) at para 68.

<sup>37</sup> *Mokgethi* above n 35 at 40I-41D.

<sup>38</sup> *Id.*

<sup>39</sup> *Smit* above n 35 at 14F-15E.

<sup>40</sup> *Scott* above n 30 at para 38; *Smit* *id.*; and *Bentley* above n 23 at 700H-701F. See Fagan “Cause in Fact” in Visser and Loubser (eds) *Thinking About Law: Essays for Tony Honoré* (Siber Ink, Cape Town 2011) at 50.

<sup>41</sup> *Fourway Haulage SA* above n 28 at para 34.

<sup>42</sup> *Smit* above n 35 at 14F-15E.

<sup>43</sup> See *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) at para 28.

“No legal system permits liability without bounds. It is universally accepted that a way must be found to impose limitations on the wrongdoer’s liability. The imputation of liability to the wrongdoer depends on whether the harmful conduct is too remotely connected to the harm caused or closely connected to it. When proximity has been established, then liability ought to be imputed to the wrongdoer provided *policy considerations based on the norms and values of our Constitution and justice also point to the reasonableness of imputing liability to the defendant.*”<sup>45</sup> (Emphasis added.)

[31] Grounding public policy in constitutional values accordingly offers an opportunity to infuse the common law with the values of the Constitution. The determination of remoteness entails applying the traditional factors, ascertaining their implications, and testing those implications against considerations of public policy as infused with Constitutional values.<sup>46</sup>

[32] With these general principles of legal causation in mind, it is apposite to consider our more specific jurisprudence relating to causation in the context of unlawful arrest and detention, specifically whether an unlawful arrest can be said to cause detention after a first court appearance before a Magistrate.

#### *Legal causation and unlawful detention*

[33] The facts of this case raise a particular question. Does an “unlawful” remand<sup>47</sup> decision by a Magistrate – for instance, as here, where the applicant should clearly have been released on bail – render harm arising from the subsequent unlawful detention too remote from the unlawful arrest? The argument advanced by the respondent is that a remand order by a Magistrate acts as a fresh intervening act that

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<sup>44</sup> *Loureiro v Invula Quality Protection (Pty) Ltd* [2014] ZACC 4; 2014 (3) SA 394 (CC); 2014 (5) BCLR 511 (CC) at para 34.

<sup>45</sup> *Mashongwa* above n 36 at para 68.

<sup>46</sup> *Id* and *Barkhuizen* above n 43 at para 28.

<sup>47</sup> For an explanation of what an unlawful remand is, see below [73].

breaks the legal chain of causation between the unlawful arrest and the detention after the remand order.

[34] Before this Court and the Supreme Court of Appeal, the respondent relied on the Appellate Division's decision in *Isaacs* in support of his argument.<sup>48</sup> He contended that according to *Isaacs*, remand after a court appearance is *always* lawful and that this finding constitutes a strong reason to consider the chain of causation broken by a first court appearance.

[35] This contention raises two issues. First, what does *Isaacs* say? Second, even if *Isaacs* says that a remand after an unlawful arrest is always lawful, does that necessarily render the harm arising from the subsequent detention too remote from the wrongful arrest? In other words, for the purposes of determining the liability of the Minister of Police, what is the relationship between the legal causation element in relation to the wrongful arrest and the lawfulness of the detention after the first appearance of an arrested person? Both these questions were sources of disagreement between the majority and minority of the Supreme Court of Appeal.

#### *The impact of Isaacs*

[36] The majority of the Supreme Court of Appeal concluded that the respondent could not be held liable for loss arising from the applicant's post-court detention merely because the arrest was unlawful. The majority reasoned that the imposition of delictual liability on the Minister of Police in these circumstances "would be legally untenable and would be contrary to well-established precedent in this court".<sup>49</sup> The precedents relied upon, namely, *Mthimkhulu*,<sup>50</sup> *Isaacs*<sup>51</sup> and *Tyokwana*,<sup>52</sup> are not,

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<sup>48</sup> *Isaacs v Minister van Wet en Orde* [1995] ZASCA 152; 1996 (1) SACR 314 (A).

<sup>49</sup> Supreme Court of Appeal judgment above n 1 at para 15.

<sup>50</sup> *Mthimkhulu v Minister of Law and Order* 1993 (3) SA 432 (E).

<sup>51</sup> *Isaacs* above n 48.

<sup>52</sup> *Minister of Safety and Security v Tyokwana* [2014] ZASCA 130; 2015 (1) SACR 597 (SCA) (*Tyokwana*).

however, authority for the proposition that the respondent is *necessarily* not liable for loss arising from the post-court appearance detention of the applicant.

[37] In *Mthimkhulu*, Nepgen J held that the remand of an arrested person does not automatically render their further detention lawful:

“In any event, I do not see how the mere fact that the further detention of the plaintiffs occurred pursuant to an order made by the magistrate in terms of section 50(1) of Act 51 of 1977 can render such detention lawful where the arrest, which resulted in such detention being ordered, was unlawful. The prior arrest of a person is a prerequisite to the provisions of the subsection coming into effect. If such arrest is unlawful, it is not a valid arrest. Whatever occurs pursuant to such arrest is therefore, in my view, invalid and unlawful.”<sup>53</sup>

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<sup>53</sup> *Mthimkhulu* above n 50 at 438C-F. Section 50(1) of the Criminal Procedure Act above n 21 provides:

“(a) Any person who is arrested with or without warrant for allegedly committing an offence, or for any other reason, shall as soon as possible be brought to a police station or, in the case of an arrest by warrant, to any other place which is expressly mentioned in the warrant.

(b) A person who is in detention as contemplated in paragraph (a) shall, as soon as reasonably possible, be informed of his or her right to institute bail proceedings.

(c) Subject to paragraph (d), if such an arrested person is not released by reason that-

(i) no charge is to be brought against him or her; or

(ii) bail is not granted to him or her in terms of section 59 or 59A,

he or she shall be brought before a lower court as soon as reasonably possible, but not later than 48 hours after the arrest.

(d) If the period of 48 hours expires-

(i) outside ordinary court hours or on a day which is not an ordinary court day, the accused shall be brought before a lower court not later than the end of the first court day;

(ii) or will expire at, or if the time at which such period is deemed to expire under subparagraph (i) or (iii) is or will be, a time when the arrested person cannot, because of his or her physical illness or other physical condition, be brought before a lower court, the court before which he or she would, but for the illness or other condition, have been brought, may on the application of the prosecutor, which, if not made before the expiration of the period of 48 hours, may be made at any time before, or on, the next succeeding court day, and in which the circumstances relating to the illness or other condition are set out, supported by a certificate of a medical practitioner, authorise that the arrested person be detained at a place specified by the court and for such period as the court may deem necessary so that he or she may recuperate and be brought before the court: Provided that the court may, on an application as aforesaid, authorise that the arrested person be further

[38] However, the Appellate Division in *Isaacs* held that *Mthimkhulu* was wrongly decided.<sup>54</sup> In *Isaacs*, it was common cause that the appellant's arrest was unlawful. The question for determination was whether the appellant's unlawful arrest had the result that his detention following the Magistrate's subsequent detention order was unlawful.<sup>55</sup> It was argued by the appellant that because his arrest was unlawful, all steps thereafter were also unlawful. He argued that the unlawful detention continued after he was brought before the Magistrate who issued a detention order in terms of section 50(1) of the Criminal Procedure Act. The appellant contended that section 50(1) was applicable only to a person arrested lawfully. In other words, he could not be brought before a Magistrate properly as the section did not envisage a remand following an unlawful arrest. The Appellate Division held:

“So I believe that where section 50(1) speaks of someone who is ‘arrested’, it is not limited to a lawful arrest. It includes someone who, under an attempt to exercise the power of arrest, was brought under the arrestor’s control. It follows that the attack on the Magistrate’s competence in the present case is unfounded and that the order for further detention of the appellant fell within his competence and was valid. The mere fact that the appellant’s arrest was unlawful cannot detract from that.”<sup>56</sup> (My own translation from Afrikaans to English.)

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detained at a place specified by the court and for such period as the court may deem necessary; or

(iii) at a time when the arrested person is outside the area of jurisdiction of the lower court to which he or she is being brought for the purposes of further detention and he or she is at such time in transit from a police station or other place of detention to such court, the said period shall be deemed to expire at the end of the court day next succeeding the day on which such arrested person is brought within the area of jurisdiction of such court.”

<sup>54</sup> *Isaacs* above n 48 at 323H.

<sup>55</sup> *Isaacs* above n 48 at 321G.

<sup>56</sup> *Id* at 323H-I. The quoted passage reads:

“Ek meen dus dat waar art 50(1) praat van iemand wat 'in hegtenis geneem' is, dit nie beperk is tot 'n regmatige inhegtenisneming nie. Dit sluit iemand in wat, in 'n gepoogde uitoefening van arrestasiebevoegdhe, onder die arresteerde se beheer gebring is. Dit volg dat die aanval op die landdros se regsbevoegdheid in die onderhawige geval ongegrond is en dat die bevel vir die verdere aanhouding van die appellant binne sy regsbevoegdheid geval het en geldig was. Die blote feit dat die appellant se inhegtenisneming onregmatig was, kan nie daaraan afdoen nie.”

[39] The Appellate Division thus concluded that competence afforded by section 50(1) of the Criminal Procedure Act was not dependent on the prior arrest being lawful. It found that a detainee's continued detention pursuant to an order of court remanding him in custody in terms of section 50(1) of the Criminal Procedure Act may be lawful even though the detention followed from an unlawful arrest.

[40] In *Tyokwana*, the Supreme Court of Appeal considered whether *Isaacs* laid down the rule that all detention following a court appearance is automatically lawful.<sup>57</sup> It answered this question in the negative and clarified that the principle emerging from *Isaacs* is that the fact that a person may have been unlawfully arrested does not automatically negate the lawfulness of their continued detention arising from a court order in terms of section 50(1). *Isaacs* does not, however, mean that every remand order in terms of section 50(1) renders further detention lawful.<sup>58</sup>

[41] This view was neatly reiterated by the minority:

“In [*Tyokwana*] this court clarified that *Isaacs* should not be understood as holding that an arrested person's detention in custody after his first appearance is automatically lawful. The unlawful arrest does not preclude a lawful remand in custody, but by the same token not every remand in custody will be lawful.”<sup>59</sup>

[42] *Woji* also supports this interpretation of *Isaacs*.<sup>60</sup> In *Woji*, the accused was lawfully arrested. At the bail application, the arresting officer testified that the

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<sup>57</sup> *Tyokwana* above n 52.

<sup>58</sup> Fourie AJA, writing for the Court in *Tyokwana* id explained at para 38:

“[I]t was held that the fact, that the person may have been arrested unlawfully, does not preclude him or her from being remanded lawfully in terms of section 50(1) of the Criminal Procedure Act. However, what was not held in *Isaacs* is that an arrested person's continued detention, by virtue of an order of court remanding him or her in custody in terms of section 50(1) of the Criminal Procedure Act, will *automatically* render such continued detention lawful. This was not an issue that the court in *Isaacs* was called upon to adjudicate.”

<sup>59</sup> Supreme Court of Appeal judgment above n 1 at para 27.

<sup>60</sup> *Woji v Minister of Police* 2015 (1) SACR 409 (SCA); [2015] 1 All SA 68 (SCA) (*Woji*).

accused could clearly be seen in video footage of the alleged robbery for which he were arrested. The accused was consequently remanded in custody. The police officer's evidence, however, turned out to be false – the video did not clearly depict the accused. When the charges were dropped against the accused for lack of evidence, he instituted action against the Minister of Police for wrongful detention pursuant to the remand decision. The Supreme Court of Appeal held that the police officer had failed in his public law duty to put all relevant information before the Magistrate in a bail application.<sup>61</sup> This made the police officer's omission wrongful in the context of delict.<sup>62</sup> As for legal causation, the Supreme Court of Appeal tersely held that “[i]t is also clear that [the police officer's] wrongful conduct was sufficiently closely connected to the harm for liability to follow, hence it also constituted the legal cause of that loss”.<sup>63</sup>

[43] Before reaching this conclusion, the Supreme Court of Appeal in *Woji* explained that since this Court's judgment in *Zealand*, a remand order by a Magistrate does not necessarily render subsequent detention lawful.<sup>64</sup> What matters is whether, substantively, there was just cause for deprivation of liberty.<sup>65</sup> Moreover, in determining whether the deprivation of liberty pursuant to a remand order is lawful, a court can consider the manner in which the remand order was made.<sup>66</sup> Hence, the Supreme Court of Appeal considered how the remand decision was materially influenced by a wrongful omission by the arresting officer. Swain JA noted that the Court was in that case concerned with the manner in which the Magistrate's discretion regarding the release of the accused on bail was exercised. Conversely, *Isaacs* and *Zealand* had both dealt with the legal consequences of the remand orders.<sup>67</sup> The

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<sup>61</sup> Id at para 28.

<sup>62</sup> Id.

<sup>63</sup> Id at para 32.

<sup>64</sup> *Zealand* above n 12.

<sup>65</sup> *Woji* above n 60 at paras 25-6.

<sup>66</sup> Id at paras 26-7.

<sup>67</sup> Id at para 27.

Supreme Court of Appeal, having regard to section 12(1)(a) of the Constitution and this Court's decision in *Zealand*, concluded that:

“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.”<sup>68</sup>

[44] In this sense, the ambiguous nature of a remand order – that it may or may not render subsequent detention lawful – seemed to inform the Court's conclusion in *Woji* that the unlawful conduct of the police was the legal cause of the subsequent unlawful detention. The Court's conclusion implies that the mere existence of a remand order is not enough to break the chain of causation.

[45] *Isaacs*, therefore, should not be interpreted as laying down a blanket principle for all cases concerning post-court detention following an unlawful arrest. Indeed, given the flexible nature of legal causation and the associated issues of personal liberty, constitutional rights and constitutionally infused public policy, that approach cannot be sustained. *Isaacs* cannot be interpreted as a bar to all claims for unlawful detention following a court ordered remand. This is because *Isaacs* is not, and could not be, authority for the proposition that remand pursuant to an unlawful arrest will necessarily be lawful.

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<sup>68</sup> Id.

*Lawfulness of the subsequent detention*

[46] Even if *Isaacs* stands for the propositions that a remand order by a Magistrate necessarily renders the subsequent detention lawful, how does this impact the liability of the police for unlawfully arresting and factually causing the subsequent detention? Put differently, assuming that a Magistrate does remand someone lawfully, would it necessarily follow that the police cannot be liable for the subsequent detention factually caused by an unlawful arrest? What difference would it make if the remand was unlawful?

[47] These questions probe the role of the lawfulness of the subsequent detention in assessing the police's liability for an unlawful arrest. For the reasons that appear from an analysis of the contradictory case law below, the liability of the police for detention after court appearance should not be determined solely on the basis of whether the further detention was lawful, although that is a relevant consideration. Instead, liability should be determined in accordance with the principles of legal causation, including constitutionally infused considerations of public policy.

*Case law suggesting the lawfulness of the subsequent detention is determinative of liability*

[48] On the face of it, the decision in *Ndlovu* is similar to the matter before us.<sup>69</sup> The accused was unlawfully arrested on 21 October 2008 and brought before a Magistrate in a "reception court" on 23 October 2008. As in this matter, it was common cause that the Reception Court in question as a rule did not consider bail.<sup>70</sup> Instead, the accused was mechanistically remanded in detention for about a week.

[49] The Supreme Court of Appeal in *Ndlovu*, per Petse JA, commented that "reception courts" – which as a rule did not consider bail applications – have ceased to

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<sup>69</sup> *Minister of Safety and Security v Ndlovu* [2012] ZASCA 189; 2013 (1) SACR 339 (SCA) (*Ndlovu*).

<sup>70</sup> *Id* at paras 3-5.

exist.<sup>71</sup> Alarming, the facts of the present matter, and a recent High Court judgment,<sup>72</sup> suggest otherwise. We hope that given the duty on Magistrates to apply their mind to the question of bail at the first appearance,<sup>73</sup> “reception courts” do not exist anywhere in South Africa. The practice of mechanically remanding detained persons axiomatically results in arbitrary and extended pre-trial detention, and contributes to overcrowding in our already overburdened prisons. In 2018, it was estimated that 28.2% of the prison population in South Africa were in remand detention.<sup>74</sup> The practice of using “reception courts” abrogates the duty of judicial officers to consider bail during the first appearance of an arrested person. We strongly urge the Minister of Justice and the Magistracy to address this problem.

[50] In *Ndlovu*, the Supreme Court of Appeal held that the post-appearance detention of the accused was unlawful. Under section 60(1) of the Criminal Procedure Act and as recognised in *Kader*,<sup>75</sup> the Magistrate was obliged to apply their mind to the question of bail.<sup>76</sup> Failure to do so, and the resultant remand, was unlawful. The Court then held the police jointly and severally liable with the Minister of Justice for the subsequent unlawful detention.<sup>77</sup> The basis for liability was two-fold. First, the police had written in the police docket that the accused had no permanent address (which was false). It was common cause that this resulted in the prosecutor applying for the accused to be remanded and for opposing bail.<sup>78</sup> Second, the Magistrate did not even apply their mind to the question of bail. In this regard, Petse JA, reasoned:

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<sup>71</sup> Id at para 13.

<sup>72</sup> *Mlilo v Minister of Police* [2018] 3 All SA 240 (GP).

<sup>73</sup> See below [73].

<sup>74</sup> Institute for Criminal Policy Research *Pre-trial/remand prison population: trend* (2019) available at [http://www.prisonstudies.org/country/south-africa#further\\_info\\_field\\_pre\\_trial\\_detainees](http://www.prisonstudies.org/country/south-africa#further_info_field_pre_trial_detainees).

<sup>75</sup> *Minister of Law and Order v Kader* [1990] ZASCA 111; 1991 (1) SA 41 (A) at 51A-C (*Kader*).

<sup>76</sup> See below [73], [74] and [88] for a further discussion on the content of this duty.

<sup>77</sup> *Ndlovu* above n 69 at para 18.

<sup>78</sup> Id at para 12.

“In this case it is common cause that the ‘reception court’ never embarked on any judicial evaluation, because, as a matter of course, its function was merely to postpone cases and without, it would seem, enquiring whether or not an accused person ought to be detained pending a trial. It can thus hardly be contended that the unlawful detention of the respondent ceased when he was brought before the ‘reception court’, which ordered his further detention.”<sup>79</sup>

[51] *Ndlovu* did not expressly deal with legal causation. Instead, it focused on whether the detention remained unlawful after the remand order. Presumably, because both Ministers had been joined, the Supreme Court of Appeal considered there to be no need to prove causation flowing from the arrest as against the Minister of Police. All that mattered in that case was that there was an ongoing harm and unlawful detention. It therefore seems to imply that legal causation need not be established to hold the police liable, and that the unlawfulness of the subsequent detention is determinative of the police’s liability.

[52] In *Tyokwana*, the accused was wrongfully arrested. He pleaded guilty to the charges against him and was detained pending his sentencing. It later emerged that his plea was made under duress. It also became clear during his trial that the arresting officer had committed unconscionable crimes of assault against the accused. On top of this, the officer had lied to and misled the court, including at the accused’s bail hearing (which occurred after the accused moved to withdraw his plea).<sup>80</sup> The Supreme Court of Appeal held that this breach by the officer of their public law duty amounted to an actionable private wrong against the accused. As in *Ndlovu*, without expressly making a finding on legal causation, the police were held liable by the Supreme Court of Appeal for the detention of the accused after the remand decisions. The principal reason for this finding, it appears, was that the conduct of the police had rendered the subsequent detention unlawful.<sup>81</sup>

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<sup>79</sup> Id at para 16.

<sup>80</sup> *Tyokwana* above n 52 at para 39.

<sup>81</sup> Id at paras 39 and 42.

[53] In summary, both *Ndlovu* and *Tyokwana* suggest that if the detention pursuant to a first appearance is unlawful, then the police can be held liable for that detention as part of their liability for the unlawful arrest.

*Case law suggesting lawfulness of the subsequent detention is not determinative of liability*

[54] In *Thandani*,<sup>82</sup> members of the security branch of the South African Police unlawfully arrested the respondent and thereafter handed him over to the Ciskei police, who detained him unlawfully for 59 days. Although Joubert JA, writing for the then Appellate Division, found that the detention in the Ciskei was unlawful, the Court was mindful of the fact that it was not necessary to make this finding:

“For purposes of the respondent’s case it was irrelevant whether or not he was lawfully detained in the Ciskei. On the probabilities it would appear that he was in fact unlawfully detained in the Ciskei. . . . The issue in this Court is whether or not the appellant was liable to compensate the respondent for the period of his detention in the Ciskei.”<sup>83</sup>

[55] The Minister of Law and Order was found liable for the entire period of detention, including the period after the respondent was handed over to the Ciskei police. The Court applied the general test of causation, both factual and legal. It had regard to the actions of the police and also placed reliance on the evidence of the police officer to the effect that he knew that the respondent would be detained by the Ciskei police once handed over.<sup>84</sup> Quite clearly, the lawfulness of the detention in the Ciskei was not determinative of the liability of the police.

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<sup>82</sup> *Minister of Law and Order v Thandani* [1991] ZASCA 123; 1991 (4) SA 862 (A) (*Thandani*).

<sup>83</sup> *Id* at 872A-C.

<sup>84</sup> *Id* at 872B-F.

[56] Like *Thandani*, *Ebrahim II* was decided on the basis of principles of legal causation.<sup>85</sup> In *Ebrahim II*, the accused had been unlawfully abducted from Swaziland and brought into South Africa, where he was unlawfully arrested. He was then remanded, tried, convicted, and sentenced. However, he was released from prison pursuant to the Appellate Division's decision in *Ebrahim I*, which held that a South African court does not have jurisdiction to try an accused who was unlawfully abducted from another state (instead of being lawfully extradited).<sup>86</sup> The accused then instituted a claim in delict against the police for his unlawful detention flowing from his unlawful arrest. As in this case, the Minister argued that there was no legal causation in light of the court orders to remand and imprison the accused. The Appellate Division rejected this argument:

“The remaining question is whether, from the angle of legal causation, the original arrest and the re-arrest were linked sufficiently closely to the respondent's continued detention during the period under consideration. I have little doubt that they were. Indeed, it appears to me that the link was very real. The re-arrest flowed from the original arrest and the purpose of both was to eventually bring the respondent before the courts so that he might ultimately be convicted and sent to prison. This purpose was achieved, and the responsible police officers must have foreseen that the respondent might be detained until so sentenced. Hence the roles of the Attorney-General and the courts in the whole process constituted no more than contributory links in the chain of causation.”<sup>87</sup>

[57] The effect of *Ebrahim I* was to strip the remanding court of jurisdiction to try or detain the accused. This meant its remand orders were null and void. Consequently, the Appellate Division held, they did not amount to a fresh intervening event that rendered the harm too remote. Quite clearly, the matter is distinguishable from the one before this Court. It is not contended that the remand order in this matter is void or that the Magistrate lacked the jurisdiction to issue it. At the same time, it

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<sup>85</sup> *Minister of Law and Order v Ebrahim* [1994] ZASCA 163 (*Ebrahim II*).

<sup>86</sup> *Ebrahim v State* [1991] ZASCA 3; 1991 (2) SA 553 (A) (*Ebrahim I*).

<sup>87</sup> *Ebrahim II* above n 85 at 11-2.

indicates that the issue before this Court is one of legal causation, and that the legality of the subsequent detention is but a factor relevant to that issue.

[58] As discussed, the Supreme Court of Appeal in *Woji* tersely considered legal causation.<sup>88</sup> Perhaps because of how egregious the arresting officer's breach of duty was, the Supreme Court of Appeal did not spend too much time on the issue of legal causation. But, importantly, and unlike *Ndlovu* and *Tyokwana*, it did consider causation in establishing the liability of the police. Liability did not hinge exclusively on the lawfulness of the subsequent detention.

#### *Conclusion on case law*

[59] In sum, there are then two Supreme Court of Appeal decisions suggesting that the lawfulness of the subsequent detention determines without more whether the arrestor is liable. There are three going the other way, with an express consideration of legal causation. How is this difference to be resolved?

[60] From the outset, it appears that to the extent that *Ndlovu* and *Tyokwana* assume that legal causation does not need to be established to hold the police liable, they depart from established principle. The Supreme Court of Appeal's minority judgment in this matter explains why. In establishing a delictual claim, a plaintiff needs to prove that the unlawful, wrongful conduct of the *police* (i.e. the arrestor) factually and legally caused the harm (post-court hearing deprivation of liberty). The plaintiff does not need to establish, necessarily, the unlawfulness of the harm (i.e. that the detention after remand was itself unlawful). The plaintiff need only establish that the harm was not too remote from the unlawful arrest.<sup>89</sup> This is not to say that the unlawfulness of the post-court hearing detention is irrelevant. It is crucial if a plaintiff aims to hold the

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<sup>88</sup> *Woji* above n 60 at 32.

<sup>89</sup> Supreme Court of Appeal judgment above n 1 at para 36.

Minister of Justice liable.<sup>90</sup> Furthermore, importantly, it is a relevant consideration in establishing legal causation.

[61] *Ndlovu* and *Tyokwana* made no express pronouncement on legal causation: it was not necessary. In both cases, the conduct of the police was egregious and undoubtedly proximate to the subsequent unlawful detention of each plaintiff.

[62] The principles emerging from our jurisprudence can then be summarised as follows. The deprivation of liberty, through arrest and detention, is per se prima facie unlawful. Every deprivation of liberty must not only be effected in a procedurally fair manner but must also be substantively justified by acceptable reasons.<sup>91</sup> Since *Zealand*, a remand order by a Magistrate does not necessarily render subsequent detention lawful. What matters is whether, substantively, there was just cause for the later deprivation of liberty. In determining whether the deprivation of liberty pursuant to a remand order is lawful, regard can be had to the manner in which the remand order was made.

[63] In cases like this, the liability of the police for detention post-court appearance should be determined on an application of the principles of legal causation, having regard to the applicable tests and policy considerations. This may include a consideration of whether the post-appearance detention was lawful.<sup>92</sup> It is these public policy considerations that will serve as a measure of control to ensure that liability is not extended too far. The conduct of the police after an unlawful arrest,

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<sup>90</sup> See further below [83].

<sup>91</sup> *Zealand* above n 12 at para 43. See also *S v Coetzee* [1997] ZACC 2; 1997 (3) SA 527 (CC); 1997 (4) BCLR 437 (CC) at para 159, where O'Regan J held that "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."

<sup>92</sup> Importantly, this relationship between lawfulness of the decision to remand and legal causation of the unlawful arrest is distinct from the relationship between wrongfulness and legal causation of the same delict. I make no pronouncements on the latter.

especially if the police acted unlawfully after the unlawful arrest of the plaintiff,<sup>93</sup> is to be evaluated and considered in determining legal causation. In addition, every matter must be determined on its own facts – there is no general rule that can be applied dogmatically in order to determine liability.

[64] With these principles in mind, I now consider the facts of this case.

*Should the Minister of Police be held liable?*

[65] Did the wrongful act of Constable Ndala in arresting the applicant legally cause the harm arising from his detention for a further seven days after his first court appearance? The determination of legal causation is based on the consideration of the various traditional factors already discussed, including direct consequences, reasonable foreseeability, and the presence of a *novus actus interveniens*. The implications of these factors must then be tested against constitutionally-infused considerations of public policy.<sup>94</sup>

*Separation of powers and accountability*

[66] A key factor suggesting that the Minister of Police should not be held liable for the further detention is the mechanical and unlawful nature of the decision by the Magistrate to remand the applicant in custody. This factor drives the conclusion of the judgment by my brother Mogoeng CJ, which I have had the pleasure of reading (third judgment). The Magistrate's conduct represented an abrogation of her constitutional and statutory duties. As the Appellate Division in *Kader* explained in relation to section 50(1) of the Criminal Procedure Act:

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<sup>93</sup> In all the cases discussed above this was the case. Examples include misleading a court or presenting false evidence.

<sup>94</sup> See [28] above.

“[I]t is the function of the judicial officer to guard against the accused being detained on insubstantial or improper grounds and, in any event, to ensure that his detention is not unduly extended”.<sup>95</sup>

[67] In *Lawyers for Human Rights*, this Court made it clear that the intervention of a court when a person is detained forms an integral part of the safeguards guaranteed to detained persons by the Constitution.<sup>96</sup> The purpose of the 48-hour window for an arrested person to be brought before a court, as envisaged in section 35(1)(d) of the Constitution, is to empower and oblige a judicial officer to ensure that any infringement of an accused’s rights is rectified and that their rights regarding bail are realised.<sup>97</sup> Ultimately, it is a constitutional imperative geared at preventing arbitrary detention and deprivations of liberty.

[68] It can be argued, as the third judgment forcefully does, that because of the unlawful nature of the Magistrate’s decision, and the clear abrogation by the Magistrate of her constitutional duties, the police officer’s unlawful arrest is too remote from the harm suffered by the applicant from the post-court appearance detention. This would give effect to the separation of powers as envisaged in the Constitution and prevent the executive from being held liable for a failure by the judiciary. To find that the subsequent detention was too remote from the unlawful arrest would emphasise the importance of Magistrates’ duties when considering whether to grant bail and how that duty accrues to the judiciary alone. When the harm associated with the subsequent detention is too remote from the unlawful arrest by the police officer, liability for this harm must fall on the judiciary alone.

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<sup>95</sup> *Kader* above n 75 at 51A-C.

<sup>96</sup> *Lawyers for Human Rights v Minister of Home Affairs* [2017] ZACC 22; 2017 (5) SA 480 (CC); 2017 (10) BCLR 1242 (CC) at paras 39-40.

<sup>97</sup> *Id.*

[69] Linked to the separation of powers is the value of accountability; a value upon which our democratic state is founded.<sup>98</sup> Once a police officer hands over an arrested person to an officer of the court, it is the judiciary, and not the executive, who is primarily responsible. Previous cases dealing with this issue have imposed liability on the Minister of Police in cases where the arresting or investigating officer had taken unlawful steps resulting in the remand other than just the unlawful arrest.<sup>99</sup> Constable Ndala, here, did discharge her constitutional duty to bring the applicant before Court. In addition, she recommended inside the docket that, if bail was considered, the applicant should be released.

[70] It seems that this is what the majority in the Supreme Court of Appeal alluded to when it emphasised the “limited role” of the arresting officers.<sup>100</sup> Their duty extends no further than securing the presence of the arrested person before the Court:

“Failure [by the Magistrate] to enquire at the first appearance as to 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.”<sup>101</sup>

[71] In support of its finding, the majority invoked *Sekhoto*, where the Supreme Court of Appeal held that “the power to arrest may be exercised only for the purpose of bringing the suspect to justice, the arrest is only one step in that process.”<sup>102</sup> Thereafter, the authority of the police to detain the suspect, is exhausted, and further

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<sup>98</sup> *My Vote Counts NPC v Minister of Justice and Correctional Services* [2018] ZACC 17; 2018 (5) SA 380 (CC); 2018 (8) BCLR 893 (CC) at para 31 and section 1(d) of the Constitution.

<sup>99</sup> See, for example, *Woji* above n 60 and *Tyokwana* above n 52.

<sup>100</sup> Supreme Court of Appeal judgment above n 1 at para 14.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at para 12.

authority rests with the court.<sup>103</sup> On the back of these statements, Shongwe ADP held that the police should not held be liable.

[72] The reliance on *Sekhoto* is in my view, misplaced. I agree with the minority that *Sekhoto* “was not concerned with the question whether the [respondent] could be held liable for detention following judicial remand, but with whether the arrest itself was unlawful”.<sup>104</sup> *Sekhoto* did not deal with the role of a police officer in the context of delictual liability for post-court appearance detention. It merely delineated the functions of the police vis-à-vis the court in the judicial process, in particular the bringing a suspect to court to stand trial. Anyhow, the statements were obiter. The appeal in *Sekhoto* was upheld because the Court held that the arrest was lawful.<sup>105</sup>

[73] The minority reasoned that liability of the Minister of Police should be limited only by the genuine exercise of a judicial discretion, constituting a *novus actus interveniens*. Where a Magistrate fails to apply their mind to the question of bail, and thus unlawfully remands an arrested person to detention, there is sufficient reason to hold the Minister of Police liable for the ensuing detention.<sup>106</sup> The minority cited English authority to support this proposition<sup>107</sup> and sought justification on grounds of public policy. Treating an exercise of judicial discretion as an intervening act strikes a balance between, on the one hand, there being no need for *an arrestor* to be aware of the unlawfulness of an arrest for delictual liability to be imposed, and on

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<sup>103</sup> Id.

<sup>104</sup> Supreme Court of Appeal judgment above n 1 at para 46.

<sup>105</sup> *Sekhoto* above n 7 at para 57:

“The case can be disposed of on a simple basis, namely, that the proper exercise of Van der Watt’s [the peace officer performing the arrest] discretion was never an issue between the parties. The plaintiffs, who had to raise it either in their summons or in a replication, failed to do so. The issue was also not ventilated during the hearing. This means that, since the magistrate had found that the four jurisdictional facts required for a defence under s40(1)(b) were established by the appellant – a finding upheld by the court below – their claims had to be dismissed.”

<sup>106</sup> A Magistrate failing to apply their mind to the question of bail and remanding the arrested person is necessarily an unlawful remand.

<sup>107</sup> *Lock v Ashton* [1848] EngR 878; (1848) 12 QB 871; [1848] ER 878; *Harnett v Bond* [1924] 2 KB 517 (CA); [1925] AC 669 (HL); and *Diamond v Minister* [1941] 1 All ER 390.

the other hand, the requirement for a defendant who is *not an arrestor* to have full *animus iniuriandi* (including awareness of wrongfulness) for delictual liability to be imposed.<sup>108</sup> This approach attempted to mitigate the apparent greater risk of incurring delictual liability faced by an arrestor than that faced by third parties who otherwise unlawfully and factually cause harm to an accused.

[74] This argument, however, may cut both ways. Unlawful positive conduct (as opposed to a mere failure to exercise a genuine discretion) on the part of a Magistrate is also capable of mitigating the increased risk faced by arrestors if it is considered as an intervening event. There is no reason why deliberative juridical decisions (in contradistinction to merely a failure to apply the mind) should not constitute a break in the chain of causation. The balance sought by the minority in the Supreme Court of Appeal may also be struck by finding that unlawful positive conduct on the part of a Magistrate may break the chain of causation. In any event, and this point must be emphasised, the exercise of a proper judicial discretion should not always be considered sufficient to break the chain of causation, lest the elasticity of legal causation established in *Mokgethi* be compromised.

[75] While there are strong public policy reasons to only find the Minister of Police delictually liable in this case, there are, in my view, stronger public policy reasons for finding fully for the applicant on these facts. This is where I part ways with the third judgment. Ultimately, the test for legal causation, while infused with constitutional considerations, must remain flexible and fact-sensitive. I disagree with the third judgment to the extent that it finds that the separation of powers invariably means that the police cannot be liable for detention after a remand order.<sup>109</sup> All relevant factors must be considered on a case-by-case basis. There may be times, as in this case, where the police must be liable notwithstanding the persuasive separation of power considerations expressed in the third judgment.

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<sup>108</sup> Supreme Court of Appeal judgment above n 1 at para 44.

<sup>109</sup> This reasoning implies that the judgments that have held that the question of legal causation involves a flexible test were wrongly decided.

*Foresight*

[76] A reasonable arresting officer in the circumstances may well have foreseen the possibility that, pursuant to an unlawful arrest, the arrested person would routinely be remanded in custody after their first appearance.<sup>110</sup> Here, however, the arresting officer had actual, subjective foresight that the proceedings in the “reception court” would occur as they did and that the applicant would not be considered for bail at all and accordingly suffer the harm that he did.

[77] The High Court in *Ebrahim*, the Police Minister (Minister of Law and Order) contended that his liability relating to the unlawful arrest of the plaintiff was limited to the time of the plaintiff’s detention until the date of his first appearance before a Magistrate.<sup>111</sup> The High Court reasoned that in order to determine whether the Police Minister was liable, it had to be established whether the requisite causation was present to give rise to legal responsibility. Applying the test for causation as enunciated in *Skosana*<sup>112</sup> and *Bentley*,<sup>113</sup> the High Court concluded that the plaintiff’s loss of liberty was caused by the abductors’ wrongful acts, but for which he would have been a free man:<sup>114</sup>

“I am of [the] opinion that a supervening act which is foreseen as the likely consequence of the wrong does not break the chain of causation and can be taken into account in assessing damages.”<sup>115</sup>

[78] The decision was confirmed on appeal. The Court held that the original arrest and re-arrest were linked sufficiently closely to the respondent’s continued detention:

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<sup>110</sup> Importantly, this is not the same as saying that a reasonable officer would foresee that a Magistrate would *unlawfully* remand an arrested person. It is unnecessary to make such a pronouncement in this case, and I expressly refrain from doing so.

<sup>111</sup> *Ebrahim v Minister of Law* 1993 (2) SA 559 (T) (*Ebrahim*).

<sup>112</sup> *Skosana* above n 24 at 34F-G.

<sup>113</sup> *Bentley* above n 23 at 700E-I.

<sup>114</sup> *Ebrahim* above n 111 at 566A.

<sup>115</sup> *Id.*

“The re-arrest flowed from the original arrest and the purpose of both was to eventually bring the respondent before the courts so that he might ultimately be convicted and sent to prison. This purpose was achieved and the responsible police officers must have foreseen that the respondent might be detained until so sentenced. Hence the roles of the Attorney-General and the courts in the whole process constituted no more than contributory links in the chain of causation.”<sup>116</sup>

[79] Professor Burchell is of the view that an intervening event does not necessarily break the causal chain where it was subjectively foreseen, even though it is otherwise considered as abnormal. Burchell explains that “[a]n abnormal event which would otherwise rank as a *novus actus* does not so rank if it was actually foreseen (or was reasonably foreseeable in negligence cases) or planned by the accused”.<sup>117</sup>

[80] Professor Snyman puts it as follows:

“All the . . . rules relating to a *novus actus* are subject to the qualification that if X planned the unusual turn of events or foresaw it, it cannot amount to a *novus actus*. This accords with the rule of the adequate causation test . . . that, in determining whether an act tends to lead to a certain result, one should take into account not only the circumstances ascertainable by the sensible person, but also the additional circumstances known to X.”<sup>118</sup>

[81] As explained, subjective foresight of harm cannot itself necessarily imply that harm is not too remote from conduct. It is, however, a weighty consideration. In the present matter, Constable Ndala subjectively foresaw the precise consequence of her unlawful arrest of the applicant. She knew that the applicant’s further detention after his court appearance would ensue. She reconciled herself to that consequence. What

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<sup>116</sup> *Ebrahim II* above n 85 at 12.

<sup>117</sup> Burchell *Principles of Criminal Law* Fourth Edition (Juta, Cape Town 2013) at p 101 (citing *S v Stavast* 1964 (3) SA 617 (T) and *S v Goosen* 1989 (4) SA 1013 (A)).

<sup>118</sup> Snyman *Criminal Law* Sixth Edition (Lexis Nexis, South Africa 2014) at p 93-4 (citing *In re S v Grotjohn* 1970 2 SA 355 (A)).

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

*Apportionment of damages and concurrent wrongdoers*

[82] The applicant did have alternative avenues of recourse regarding his unlawful detention after the remand order beyond only pursuing a claim against the respondent. There appears to have been multiple, concurrent wrongdoers in this matter. They all contributed to a systemic failure that led to the applicant being unlawfully detained for seven days. These parties were not joined and are not before us and we are thus unable to pronounce definitively on their liability.

[83] The Minister of Justice and Director of Public Prosecutions might be jointly and severally liable with the Minister of Police, but it is sufficient for one of them to be sued for their proven delict for the applicant to succeed. A plaintiff may elect to sue only one person whose delict caused her harm, even if another person's independent delict also caused that same harm. It is not obligatory that *all* joint wrongdoers be sued in the same action. Where all joint wrongdoers have not been sued, a court is not barred from determining the liability, if any, of the party or parties before it. This happened in *Carmichele*<sup>119</sup> (and *K and F*),<sup>120</sup> where the plaintiff sued

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<sup>119</sup> *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).

<sup>120</sup> *F v Minister of Safety and Security* [2011] ZACC 37; 2012 (1) SA 536 (CC); 2012 (3) BCLR 244 (CC); *K v Minister of Safety and Security* [2005] ZACC 8; 2005 (6) SA 419 (CC); 2005 (9) BCLR 835 (CC).

only the state officials for their delict, and not the party who had actually assaulted her.

[84] This matter is similar. There are potential concurrent wrongdoers: the Minister of Justice, the Minister of Police and the relevant Director of Public Prosecutions. Each of these actors may have committed independent delicts resulting in harm to the applicant. This would render them jointly and severally liable. So, while Mr de Klerk may successfully sue only one wrongdoer, it does not follow that the others did not commit a delict.

[85] The Apportionment of Damages Act then provides that where a plaintiff successfully sues only one of the concurrent wrongdoers, then that wrongdoer can bring a claim of contribution against the other wrongdoers that were not sued by the plaintiff.<sup>121</sup> It is open then to the Minister of Police to bring a claim of contribution against the Minister of Justice or Director of Public Prosecutions if the requirements for concurrent wrongdoing are met. These latter actors are absolved of liability as against the applicant, because the Minister of Police will foot the bill, but they may still be liable for contribution claims at the instance of the Minister.

### *Conclusion*

[86] The crucial fact in this matter is that Constable Ndala subjectively foresaw the harm arising from the mechanical remand of the applicant after his first court appearance. She knew that the applicant's further detention after his court appearance would be the consequence of her unlawful arrest of him. She reconciled herself with this knowledge in proceeding to arrest him. In addition, she knew that her mere note inside the docket recommending bail would amount to nothing at this first appearance.

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<sup>121</sup> 34 of 1956. Section 2(4)(b) requires the defendant to have notified the other wrongdoers under section 2(2)(a) or, if not, to show good cause for why such notice was not given. Further, section 2(2)(b), (6) and (7) states that a court will then determine how much the other wrongdoer must contribute by considering their contributory fault to the harm caused to the original plaintiff.

That the judicial process *should* have had a different tenor and outcome seems to me to be beside the point. The point is that Constable Ndala knew it would not.

[87] Public policy considerations, based on the norms and values of our Constitution, and the principles emerging from *Zealand*, point to the respondent being liable for the entire period of the detention. To impose liability on the respondent for the entire period of the detention, in the circumstances of this matter, would not be exceeding the bounds of reasonableness, fairness and justice. On the contrary, following this line of reasoning, it would be fair and just to impute liability to the respondent.

[88] At the same time, and this point must be underscored, holding the Minister of Police liable does not mean that a Magistrate, as an officer of the court, cannot and should not in egregious cases be held accountable for dereliction of constitutional duties. For the reasons given, the duty of Magistrates to apply their minds to the question of bail is of the utmost constitutional significance. Failure to discharge this duty must result in consequences for the presiding officer involved. Moreover, in the ordinary course, members of the police will not be liable for derelictions of duty by members of the Magistracy. On the facts of this case, the Magistrate concerned should not be exclusively liable for the subsequent detention, given the original delict by the arresting officer and her subjective foresight of the subsequent detention and the harm associated therewith.

#### *Compensation and costs*

[89] Should this Court determine the amount of the compensation to be paid to the applicant or refer the matter to the High Court to make a determination in this regard?

[90] This Court has on numerous occasions expressed itself on the undesirability of sitting as a court of first and last instance.<sup>122</sup> In *Fleecytex*, this Court stated:

“It is, moreover, not ordinarily in the interests of justice for a court to sit as a court of first and last instance, in which matters are decided without there being any possibility of appealing against the decision given. Experience shows that decisions are more likely to be correct if more than one court has been required to consider the issues raised. In such circumstances the losing party has an opportunity of challenging the reasoning on which the first judgment is based, and of reconsidering and refining arguments previously raised in the light of such judgment.”<sup>123</sup>

[91] The quantum of the compensation was disputed before the High Court, the Supreme Court of Appeal, and this Court. All three courts were asked to decide the question of quantum.<sup>124</sup> We have heard full argument and also have the benefit of a reasoned minority judgment from the Supreme Court of Appeal on this aspect.<sup>125</sup> The applicants provided precedent for the quantum of the general damages that they sought,<sup>126</sup> and the respondent did not put up a serious fight in respect of this. The respondent was not opposed to this Court making a determination on quantum.

[92] The facts are sufficiently clear for this Court to award just and equitable general damages.

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<sup>122</sup> *MM v MN* [2013] ZACC 14; 2013 (4) SA 415 (CC); 2013 (8) BCLR 918 (CC); *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile* [2010] ZACC 3; (2010) 31 ILJ 273 (CC); 2010 (5) BCLR 422 (CC); *Dormehl v Minister of Justice* [2000] ZACC 4; 2000 (2) SA 987 (CC); 2000 (5) BCLR 471 (CC); and *Bruce v Fleecytex Johannesburg CC* [1998] ZACC 3; 1998 (2) SA 1143 (CC); 1998 (4) BCLR 415 (CC) (*Fleecytex*).

<sup>123</sup> *Fleecytex* id at para 8.

<sup>124</sup> Compare *Mighty Solutions t/a Orlando Service Station v Engen Petroleum Ltd* [2015] ZACC 34; 2016 (1) SA 621 (CC); 2016 (1) BCLR 28 (CC) at para 63.

<sup>125</sup> In *MR v Minister of Safety and Security* [2016] ZACC 24; 2016 (2) SACR 540 (CC); 2016 (10) BCLR 1326 (CC) neither the High Court nor the Full Court had granted judgment on quantum. This Court held at para 73 that “[t]here cannot be an appeal where there is no judgment” and remitted the matter to the High Court for a determination on quantum. That matter concerned both general and patrimonial damages. Here, the applicant claims only general damages.

<sup>126</sup> *Duma v Minister of Police* [2016] JDR 1102 (GP) and *Mokaedi v Minister of Police* [2016] ZAGPPHC 405 where a plaintiff in a similar position to Mr de Klerk had been awarded R300 000.

[93] There is no reason not to award the applicant the general damages he seeks. In addition, having regard to the amount involved, it would not be in the parties' best interests for this matter to be protracted and to incur further legal fees. In my view, it is just and equitable that the matter be finalised by this Court.

[94] In addition, the minority in the Supreme Court of Appeal also saw it fit to award the applicant patrimonial damages for his medical expenses.<sup>127</sup> Because this matter is an action for non-patrimonial damages, and no evidence was put before us regarding patrimonial damages, I decline to follow the minority on that front. Instead, the order is limited to 300 000 in general damages under the *actio iniuriarum*.

[95] There is no reason why costs should not follow the result.

#### *Order*

[96] For these reasons the following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The Minister of Police is ordered to pay the applicant an amount of R300 000 with interest at the prescribed rate from 30 October 2014 to the date of payment.
4. The Minister is to pay the costs of this appeal, as well as the costs before the Supreme Court of Appeal and the High Court, including the costs of two counsel.

CAMERON J:

[97] After an altercation that descended into violence, a charge was laid against Mr de Klerk (the applicant) at the Sandton Police Station. Eight days later, Constable

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<sup>127</sup> Supreme Court of Appeal judgment above n 1 at para 53.

Ndala contacted the applicant, who agreed to present himself at the station. This he did, on 21 December 2012. There he was unexpectedly arrested and detained. His arrest was woefully unlawful. Though the trial judge did not think so, everyone now accepts that it was. Less than 45 minutes after this woeful act, a colleague of Constable Ndala took the applicant, still under arrest, to the Randburg Magistrates' Court. There his case docket was handed to the prosecutor. Inside the docket was recorded a recommendation that he be granted bail of R1 000.

[98] But this did not happen. There was no bail application. There was no bail hearing. Instead, the applicant was summarily processed and sent to Johannesburg Correctional Centre, Diepkloof (Sun City). The presiding Magistrate simply postponed the case, without consideration, representations or discussion, remanding the applicant in custody. Seven days later, on 28 December 2012, when the complainant withdrew the complaint, the charges were dropped. The applicant was then released.

[99] The applicant issued summons for unlawful arrest and detention against Constable Ndala's employer, the Minister of Police (the respondent). The point in dispute is that he did not sue the Minister of Justice and Constitutional Development, in whose employ the Magistrate was.<sup>128</sup> Had he done so, that would have put the focus on the conduct of the Magistrate in simply postponing the case, and remanding him in custody, with no whisper or mention of bail.

[100] Instead, in his pleadings, at the trial, and before this Court, the applicant sought to hold the police liable for the whole of his detention, pre- and post-court appearance. The question is whether he can. Theron J (first judgment) says Yes.<sup>129</sup> Froneman J

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<sup>128</sup> For consideration of the employment status of magistrates – which was not in issue in this case – see Leana Diedericks “The Employment Status of Magistrates in South Africa and the Concept of Judicial Independence” (2017) Vol 20, No 1 *Potchefstroom Electronic Law Journal* 1.

<sup>129</sup> See [86]-[87] above.

(second judgment)<sup>130</sup> and Mogoeng CJ (third judgment) say No.<sup>131</sup> I agree with the first judgment that on the very particular facts of Mr de Klerk's case the answer is Yes, but differ from its analysis of the pleadings and of the issues. Hence this short concurrence.

[101] The majority of the Supreme Court of Appeal upheld the applicant's unlawful arrest claim – but held that a claimant unlawfully arrested by a police officer in the circumstances proved here cannot hold the police liable for continued detention after a magistrate orders a remand in custody. The majority awarded modest damages for the few hours of unlawful police detention, but dismissed the applicant's claim that the police were liable for the full seven-day imprisonment.

[102] The majority took the view that the police “were doing their job by taking the suspect to court”<sup>132</sup> and could not be held liable for his further detention. Had the prosecution and the presiding officer done what ought to have been done,<sup>133</sup> the applicant would not have been imprisoned. Even though his further detention would have been arbitrary and unlawful, the police could not be held liable for it.<sup>134</sup>

[103] The dissent in the Supreme Court of Appeal held that the police were responsible for the applicant's entire period of detention. The particular facts linked his post-appearance detention sufficiently to the initial unlawful arrest. The dissent considered the fact that the consequence of the initial unlawful act (namely, the arrest and detention) might have been lawful (a magistrate-ordered further detention) did not end the enquiry.<sup>135</sup> The test of factual causation should be flexibly applied and was

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<sup>130</sup> See [134], [139] and [140] above.

<sup>131</sup> See [162], [163], [164] and [165] above.

<sup>132</sup> Supreme Court of Appeal judgment above n 1 at para 15.

<sup>133</sup> *Id* at para 14.

<sup>134</sup> *Id*.

<sup>135</sup> *Id* at paras 32-3.

here plainly established.<sup>136</sup> By contrast, where a court has given judicial consideration to whether to remand the arrestee, the police, as instigators of the detention, would not be liable.<sup>137</sup> In that case, malice as understood under the *actio iniuriarum* would be required to establish liability.<sup>138</sup>

[104] In its essentials, this reasoning seems to me to be correct. The question whether the police can after a wrongful arrest be held liable for continued court-ordered detention has long intrigued and troubled litigants and the courts. *Isaacs* held that the fact that an arrest is unlawful does not, by itself, make post-court detention unlawful, though it is plain that there the then-Appellate Division (now Supreme Court of Appeal) presupposed that the unlawful arrest was followed by a proper deliberative determination on the part of the remanding court.<sup>139</sup> Grosskopf JA noted that the very purpose of requiring speedy post-arrest court appearances was amongst others that it enabled the exercise by a remand court of its power to release the arrestee or, *where good grounds exist*, protract the detention.<sup>140</sup>

[105] *Isaacs*<sup>141</sup> expressly approved *Thandani*.<sup>142</sup> There an unlawful arrest in South Africa was followed by a grossly unlawful kidnapping and “cross-border” rendition into the hands of the Ciskei Security Police.<sup>143</sup> The arresting police in South Africa were held liable for the entire period of detention.<sup>144</sup> The point is that there was no interposing judicial evaluation to limit the liability of the police for their unlawful conduct. This feature is emphasised in *Ndlovu*.<sup>145</sup> There the arresting police actively

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<sup>136</sup> Id at paras 33 and 39.

<sup>137</sup> Id at para 40.

<sup>138</sup> Id at para 43.

<sup>139</sup> *Isaacs* above n 48 at 322C-H.

<sup>140</sup> Id. See *Kader* above n 75 at 51B.

<sup>141</sup> *Isaacs* id at 324B.

<sup>142</sup> *Thandani* above n 82.

<sup>143</sup> Id at 872A.

<sup>144</sup> Id at 872B-D.

<sup>145</sup> *Ndlovu* above n 69.

misled the prosecutor with the consequence that bail was denied.<sup>146</sup> Again, the arresting police were held liable for the entire period of detention.<sup>147</sup>

[106] The principle that emerges from these cases is that where a remand court undertakes a deliberative evaluation whether an arrested person should be detained, police liability for wrongfully arresting that person is truncated. Not so where there is none.<sup>148</sup> Here, though during argument applicant’s counsel merely noted that something untoward appeared to have coloured the most unusual events that befell Mr de Klerk at the police station and court, there is no evidence on record that police impropriety intruded into the prosecutorial process.

[107] The question the claim raises is whether a mere unlawful arrest where to the knowledge of a police officer, a malfunctioning or dysfunctioning remand system supervenes, may give rise to liability on the police for post-court detention.<sup>149</sup>

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<sup>146</sup> Id at paras 14-6.

<sup>147</sup> Id at para 16.

<sup>148</sup> The Supreme Court of Appeal judgment above n 1 at para 14, well appreciated the importance of a deliberative interposition:

“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* [*Minister of Safety and Security v Sekhoto* [2010] ZASCA 141; 2011 (5) SA 367 (SCA)], 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 section 35(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 section 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.”

<sup>149</sup> The Supreme Court of Appeal has in a number of decisions limited the impact of *Isaacs*. See *Tyokwana* above n 52, where the Supreme Court of Appeal declared the Minister of Safety and Security liable to compensate Mr Tyokwana for damages he may have suffered as a consequence of an unlawful arrest, detention and subsequent malicious prosecution by members of South African Police Services acting in the course and scope of their employment. Mr Tyokwana washed police vehicles as part of community services sentences, when a Warrant Officer Kani’s firearm was allegedly stolen from the cubbyhole of the police vehicle that Mr Tyokwana had washed, a horrific chain of events took place that involved a brutal assault, unlawful and

[108] In seeking to get to Yes, the applicant circumscribed his case narrowly. He conceded that, had there been a proper deliberative court process after his arrest, he could not succeed against the police for his post-court detention. But there was none. His argument was that each case should be determined strictly on its own facts – and that the facts here indicated that the claim should succeed. This was because the police officer who arrested him knew exactly what would befall him at court. She did nothing to forestall it. The police should therefore be liable.

[109] The applicant’s pleadings support this casting of the claim. From the outset, what the applicant set out to prove was that the failure by the police officials who arrested him to secure him bail was wrongful, and that this was what caused him to be detained until 28 December 2012. His case was expressly that the police were responsible for the entire period of his detention, because they neglected to offer him bail, as they were empowered to do.<sup>150</sup>

[110] What is more, the evidence established that, when Constable Ndala arrested the applicant, she knew that at the Randburg Magistrates’ Court he would have his first appearance and that is normally postponed. This conforms her other evidence about

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wrongful arrest and detention, and malicious prosecution. The Minister relied on *Isaacs* for the claim that the unlawful detention ceased when the magistrate ordered further detention. In *Woji* above n 60 an armed robbery and video footage led to the arrest of four individuals including Mr Wojci on 20 November 2007. On 11 and 12 December 2007 Mr Wojci was denied bail owing to the video footage evidence, Mr Wojci was detained in custody until 13 January 2009. However, the charge against Mr Wojci was withdrawn after the prosecutor had viewed the video footage and decided that Mr Wojci could not be identified as one of the robbers. Here, however, it impermissibly constricted the circumstances in which a pre-appearance unlawful arrest and detention would lead to police liability for post-appearance detention.

<sup>150</sup> In his statutory pre-summons notice, the applicant asserts that Constable Ndala was “aware” that he could be released on bail at R1000 but that this was never put to him. He also avers that the police officials at the Sandton Police Station “did not make any reference and/or attempt to finalise the matter on a speedy and prompt manner and with due regard neglected to offer our client any bail conditions”. In claiming damages for wrongful arrest and detention, the applicant’s particulars of claim assert that the members of the South African Police Services *wrongfully failed or unreasonably refused to release him on bail*. On malicious prosecution, the applicant’s claim avers that the police officials “wrongfully and maliciously set the law in motion by arresting and charging the plaintiff.”

Echoing his letter of demand, the applicant’s particulars of claim aver that the police officials “did not make any reference and/or attempt to finalise the matter without delay . . . and failed and / or refused and/or *neglected to proffer to the plaintiff any bail conditions*” and that as a result of this conduct the applicant was detained until 28 December 2012.

what she knew of how that Court operated. The arresting officer thus knew that, without her intervention, in the particular court to which he would be taken, the case would be postponed for at least seven days, and that he would be imprisoned during the postponement.

[111] On these facts, the dissent in the Supreme Court of Appeal correctly concluded that Constable Ndala actually foresaw what would happen at court.<sup>151</sup> Namely that the applicant would be remanded in custody, without a bail hearing, until his next appearance.<sup>152</sup> Not only was his prolonged detention foreseeable; Constable Ndala did in fact foresee it, since she knew that the Randburg Magistrates' Court did not deal with bail at first appearance and that the applicant would be sent away to prison:

“In other words, she knew that at the first appearance the remand would be a routine or mechanical act rather than a considered judicial decision.”<sup>153</sup>

[112] In these circumstances, in wrongfully arresting the applicant and sending him without more for processing to that particular court, with no effort to ensure that he was processed differently, and thus afforded the opportunity to apply for bail, the police officer who unlawfully arrested the applicant is as much responsible for the wrong done by his further detention as if, were she being sued for personal injury inflicted by a negligently driven motor car, she had culpably caused him to fall into its path.

[113] This is why I agree with the first judgment that the appeal must succeed.

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<sup>151</sup> Supreme Court of Appeal judgment above n 1 at para 39.

<sup>152</sup> Id at paras 39 and 49.

<sup>153</sup> Id at para 49.

FRONEMAN J (Goliath J, Mhlantla J concurring):

*Introduction*

[114] I have had the benefit of reading the judgment of my sister, Theron J (first judgment) and gratefully adopt her more detailed treatment of the facts, litigation history and merits of granting leave to appeal. Unfortunately, I cannot agree with her reasoning and outcome in allowing the appeal. I would dismiss the appeal.

[115] Our disagreement stems mainly from her characterisation of the appropriate normative inquiry as being that of legal causation. I consider an inquiry into the wrongfulness element of the *iniuria* (injury or wrong) at stake here, namely the deprivation of liberty, to be the better one. That inquiry is infused by the guiding principle of the *actio iniuriarum*: equity and good conscience (*ex aequo et bono*).<sup>154</sup>

[116] A brief recap of the facts.

[117] On 11 December 2012, the applicant's employer lodged a complaint of assault with intent to do grievous bodily harm against him. On 21 December 2012, at about 08h00, the applicant reported to the Sandton police station in Johannesburg at the request of a police official, Constable Ndala. She arrested the applicant without an arrest warrant on the complaint lodged by his employer.

[118] The applicant was taken to the Randburg Magistrates' Court, placed in holding cells and appeared in Court at around 10h00. The applicant was not afforded the opportunity to apply for bail at this first appearance. However, it was recorded in the docket that Constable Ndala had recommended that the applicant be granted bail in the amount of R1 000. The matter was postponed and the Magistrate informed the

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<sup>154</sup> As explained in Neethling, Potgieter and Visser *Neethling's Law of Personality* 2 ed (LexisNexis, Durban 2005) at 65, "the *actio iniuriarum* had the character of an *actio aestimatoria* (action for assessment) – its formula was *quantum pecuniam aequum bonum videbitur* (the amount of money must be seen to be just and fair)". See further the discussion at [138] below.

applicant that he would be remanded in custody at the Johannesburg prison until his next appearance. The applicant was released from prison on 28 December 2012 after his employer withdrew the assault complaint against the applicant.

[119] The applicant sued the respondent on the basis of being vicariously liable for Constable Ndala's alleged unlawful conduct. He failed in the High Court and was only partially successful in the Supreme Court of Appeal, where the majority held that his claim was restricted to the unlawful arrest and detention for the period until he appeared in the Magistrates' Court. He was, accordingly, awarded damages in the amount of R30 000. In contrast, the minority would have held the respondent liable for damages for the entire period until he was released.

[120] The issue before us relates only to whether the respondent is also liable for the applicant's detention after being remanded in custody in the Magistrates' Court.

*Proper characterisation of the issue*

[121] The different elements of a delictual claim function as controls that regulate conflicting interests in order to establish a fair balance in fixing and limiting liability.<sup>155</sup> Each has its unique and distinct character which aims to strike a fair balance between the interests of perpetrator and victim. The obvious starting point here would be wrongfulness. Obvious, because if the conduct complained of is found not to be wrongful, then there is no need to proceed further. Only if wrongfulness is established will it still be necessary to enquire into the normative issue of legal causation.<sup>156</sup>

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<sup>155</sup> These elements should not be treated as discrete, inflexible items on a checklist, but rather as elastic and adaptable principles that together offer a normative basis for establishing delictual liability. This is especially important in view of the influence of the Bill of Rights on the evolution of the law of delict, with the general criterion of reasonableness (as informed by public policy, the legal convictions of the community, or *boni mores*) playing a more dominant role in fixing and limiting liability than the traditional focus on the foreseeability of harm. See generally, Van der Walt and Midgley *Principles of Delict* 3 ed (LexisNexis, Durban 2005) at 31.

<sup>156</sup> Both wrongfulness and legal causation are strongly rooted in policy considerations, but they involve different enquiries. As the Supreme Court of Appeal recognised in *Fourway Haulage SA* above n 28 at para 32, even where wrongfulness is established, "the loss may therefore, for other reasons of policy, be found to be too

[122] Wrongfulness is assessed in relation to the harm that is caused, either by infringing a legally recognised right of the plaintiff or by breaching a legal duty owed by the defendant to the applicant.<sup>157</sup> The harm complained of here is the further detention in custody after the applicant’s appearance in court. The underlying right is protected in section 12(1)(a) of the Constitution: not to be deprived of freedom arbitrarily or without just cause. The applicant’s right not to be deprived of freedom or liberty in the context of court proceedings is protected by section 35(1)(d)-(f) of the Constitution.<sup>158</sup> This kind of harm enjoyed common-law protection under the *actio iniuriarum*, which is compatible with its constitutional protection.<sup>159</sup>

[123] Is the legal duty to protect the applicant’s right not to be deprived of freedom or liberty in proceedings under section 35(1)(d)-(f) only that of the Magistrate, or does that duty also extend to the prosecutor and the relevant police official?

[124] Injury to personality is a kind of non-patrimonial loss involving infringement of highly personal interests which cannot be given an economic value. Its assessment is done *ex aequo et bono* – according to equity and good conscience.<sup>160</sup> In classical Roman law, this normative standard of equity and good conscience determined both the scope of the delict, as well as the measure of redress.<sup>161</sup> Does that still hold good? If it does, is a further normative limitation, in the form of legal causation, necessary?

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remote and therefore not recoverable”. Van der Walt and Midgley above n 155 at 204 explain the two different enquiries as follows:

“The wrongfulness enquiry focuses on whether or not the plaintiff’s interest is entitled to protection from the defendant’s conduct. The legal causation enquiry, in contrast, focuses on the limitation of loss flowing from the wrongful conduct. It is an enquiry into closeness or remoteness of the particular harm.”

<sup>157</sup> Van der Walt and Midgley above n 155 at 68.

<sup>158</sup> See discussion at [127] to [128] below.

<sup>159</sup> *Zealand* above n 12 at para 25. See further Neethling, Potgieter and Visser above n 154 at 73-8.

<sup>160</sup> Neethling, Potgieter and Visser above n 154 at 60 and 121; and Potgieter, Steynberg and Floyd *Visser & Potgieter Law of Damages* 3 ed (Juta, Cape Town 2012) at 545-8.

<sup>161</sup> See [134] below.

[125] Lastly, the normative assessment of wrongfulness should also take account of whether our law does not already make adequate provision for legal redress in cases where the deprivation of liberty takes place under the guise of a valid judicial process.<sup>162</sup> Malicious detention and prosecution are of particular relevance in this regard.

[126] So, properly considered, the initial and crucial issue is whether Constable Ndala's conduct in relation to the harm involved – the further detention after the appearance in the Magistrates' Court – is wrongful. The first judgment considers that this issue was not properly raised before us. I disagree. The facts are undisputed and it is a legal issue that must be dealt with. None of the parties can and have been prejudiced.<sup>163</sup>

*Wrongfulness: harm-causing conduct*

[127] Wrongfulness may consist of the breach of a legal duty not to cause harm to another or to infringe that person's rights, converse sides of the same coin.<sup>164</sup>

[128] The *actio iniuriarum* is available where there has been harm to personality interests which cannot be given an economic value.<sup>165</sup> It involves injury to one's *corpus* (person), *dignitas* (dignity) or *fama* (reputation).<sup>166</sup> The evaluation is not of *damnum* (loss), which is the domain of the *actio legis Aquiliae*, but rather of *solatium*

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<sup>162</sup> See [135] to [137] below.

<sup>163</sup> *CUSA v Tao Ying Metal Industries* [2008] ZACC 15; 2009 (2) SA 204 (CC); 2009 (1) BCLR 1 (CC) at para 68.

<sup>164</sup> *Loureiro* above n 44 at para 53; *Country Cloud Trading CC v MEC, Department of Infrastructure Development* [2014] ZACC 28; 2015 (1) SA 1 (CC); 2014 (12) BCLR 1397 (CC) (*Country Cloud*) at para 21; and *H v Fetal Assessment Centre* [2014] ZACC 34; 2015 (2) SA 193 (CC); 2015 (2) BCLR 127 (CC) (*Fetal Assessment Centre*) at para 69.

<sup>165</sup> Van der Walt and Midgley above n 155 at 47.

<sup>166</sup> *Id* at 48.

(satisfaction) for *contumelia* (contempt), which is the hallmark of *iniuria* (outrage, insult).<sup>167</sup>

[129] Harm may be determined objectively, subjectively, or through a combination of both assessments, depending on the nature of the right infringed.<sup>168</sup> Deprivation of liberty is assessed objectively. This means, for example, that the motive of the person who effects the deprivation is irrelevant.<sup>169</sup>

[130] Section 35(1) of the Constitution provides that everyone who is arrested for allegedly committing an offence has the right, among others—

- “(d) to be brought before a court as soon as reasonably possible, but not later than—
  - (i) 48 hours after the arrest; or
  - (ii) the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day;
- (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.”<sup>170</sup>

[131] These provisions give effect to the protection against arbitrary and unjust deprivation of freedom under section 12(1)(a) of the Constitution when a suspect has to be brought to court for an appearance.

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<sup>167</sup> This is as true of the historical origins of *iniuria* in Roman law as it is of *iniuria* in our law. See Birks *The Roman Law of Obligations* (Oxford University Press, Oxford 2014) at 224; Nicholas *An Introduction to Roman Law* (Oxford University Press, Oxford 1962) at 217; and Neethling, Potgieter and Visser above n 154 at 108-9.

<sup>168</sup> Van der Walt and Midgley above n 155 at 48.

<sup>169</sup> Id.

<sup>170</sup> These constitutional guarantees are also contained in section 50 of the Criminal Procedure Act above n 21.

[132] Subsections 35(1)(d)-(f) impose constitutional obligations on three different institutions of government: the police services, the National Prosecuting Authority and the Judiciary. The police carry the responsibility to ensure a criminal suspect is brought before a court as required by section 35(1)(d). This is an administrative function to be exercised within the broader executive authority of government.<sup>171</sup> The decision to charge a suspect under section 35(1)(e) is one that falls under the authority and competence of the National Prosecuting Authority, an independent institution under the Constitution.<sup>172</sup> The decision to release or detain a suspect falls within the independent judicial authority or competence of the Judiciary.<sup>173</sup>

[133] Constable Ndala thus only had the constitutional responsibility of bringing the applicant to court timeously. She did so. Once she had done that, she had no further direct legal competence or authority to charge the applicant or to decide on his release or further detention.<sup>174</sup> At best, she could attempt to influence these decisions by recommending bail. This she also did. There is no objective evidence that she acted unlawfully in terms of her statutory powers and obligations in respect of the harm at stake here, namely the further detention of the applicant after his court appearance.

[134] If there was nothing further within her competence that she could have done, then the foreseeability of further unlawful detention as a matter of legal causation does not make *her* liable for such harm. This is because her participation cannot be said to have wrongfully caused harm if that harm was beyond her constitutional or legislative authority, control or competence, irrespective of whether it was foreseeable or not.

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<sup>171</sup> See sections 205-8 of the Constitution and the preamble to the South African Police Service Act 68 of 1995.

<sup>172</sup> See section 179(2) of the Constitution.

<sup>173</sup> See section 165(2) of the Constitution.

<sup>174</sup> An indirect competence to grant bail is provided for in section 59(1)(a) of the Criminal Procedure Act above n 21:

“An accused who is in custody in respect of any offence, other than an offence referred to in Part II or Part III of Schedule 2 may, before his or her first appearance in a lower court, be released on bail in respect of such offence by any police official of or above the rank of non-commissioned officer, in consultation with the police official charged with the investigation, if the accused deposits at the police station the sum of money determined by such police official.”

The responsibility to charge the applicant was that of the Prosecutor, that of deciding to release him or detain him further was that of the Magistrate.<sup>175</sup>

*Wrongfulness: using the guise of valid judicial process*

[135] In these circumstances, to ascribe liability to Constable Ndala on the mere basis of foreseeability of harm would undermine the distinction between unlawful and malicious deprivation of liberty. The underlying principles regarding the deprivation of liberty were set out in *Cole's Estate*:

“I apprehend the law to be (1) that acts done in excess of and without judicial process give rise to an action for damages without requiring proof of malice, but (2) that acts done under the sanction of judicial process improperly obtained do not give rise to an action for damages unless done maliciously and without reasonable and probable cause.”<sup>176</sup>

[136] The interposition of a judicial act is key in distinguishing unlawful and malicious deprivation of liberty. So, unlike wrongful deprivation of liberty, malicious deprivation of liberty *takes place under the guise of a valid judicial process*.<sup>177</sup> It therefore involves the improper use of the legal machinery of the state to effect the deprivation of liberty.<sup>178</sup> Proof of malicious prosecution involves showing that (a) the defendant instigated the deprivation of liberty; (b) the instigation was without reasonable and probable cause; and (c) the defendant acted with malice or *animo iniuriandi*.<sup>179</sup>

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<sup>175</sup> Compare *Carmichele* above n 119 at paras 71 and 74.

<sup>176</sup> *Cole's Estate v Olivier* 1938 CPD 464 at 468.

<sup>177</sup> Neethling, Potgieter and Visser above n 154 at 122.

<sup>178</sup> *Id* at 122-3.

<sup>179</sup> *Id* at 123.

[137] This distinction has not been questioned under the Constitution.<sup>180</sup> Magistrates and Prosecutors currently enjoy this protection for good faith execution of their functions as judicial officers.<sup>181</sup> It would undermine the distinction between unlawful and malicious deprivation of liberty to extend liability on the basis of mere foreseeability in legal causation to police officials with the most tenuous competencies, if any, to decide whether to prosecute, release or further detain an arrested person.

*Wrongfulness: equity and good conscience*

[138] To do so would also be inequitable and not in good conscience. Under the *actio iniuriarum* in classical Roman law, the dictates of equity and good conscience (*bonum aequum*) provided a normative standard that set the scope of the delict as well as its measure of redress.<sup>182</sup> Its current normative equivalent is determining wrongfulness. This Court’s determination of that normative consideration has been to focus on—

“the [harm-causing] conduct and goes to whether the policy and legal convictions of the community, constitutionally understood, regard it as acceptable. It is based on the duty not to cause harm – indeed to respect rights – and questions the reasonableness of imposing liability.”<sup>183</sup>

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<sup>180</sup> See *Kruger v National Director of Public Prosecutions* [2019] ZACC 13; 2019 JDR 0721 (CC); 2019 (6) BCLR 703 (CC).

<sup>181</sup> *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* [2005] ZASCA 73; 2006 (1) SA 461 (SCA) at paras 17-20; *Claassen v Minister of Justice and Constitutional Development* 2010 (6) SA 399 (WCC) at paras 22-3; and *Moeketsi v Minister van Justisie* 1988 (4) SA 707 (T) at 712B-H.

<sup>182</sup> See discussion in *Birks* above n 167 at 222-4. At 225, *Birks* summarises this insight as follows:

“What I have been suggesting is that the engine driving that specialisation was the need to understand how to approach the quantification of damages under the words *quantum pecuniam . . . bonum aequum videbitur . . . condemnari*. If the award of money was designed to solace wounded self-respect, *contumelia* not *damnum*, that would necessarily work back into the substance of the action. *It would shape and limit the conduct actionable.*”

<sup>183</sup> *Loureiro* above n 44 at para 53, quoted with approval in *Country Cloud* above n 164 at para 21. See further *Fetal Assessment Centre* above n 164 at para 53; *Mashongwa* above n 36 at para 13; *Oppelt* above n 15 at para 51; and *DE v RH* [2015] ZACC 18; 2015 (5) SA 83 (CC); 2015 (9) BCLR 1003 (CC) at para 18.

[139] I do not see any reason in equity or good conscience to hold a police official and, vicariously, her employer (the respondent) liable for a result that was not within her constitutional or legislative authority, control or competence to determine. Whether the applicant should be charged, released or further detained on his first court appearance were decisions that the Prosecutor and Magistrate had constitutional and legislative authority to make. They are not legally liable for the possible unlawfulness of the further detention unless they acted maliciously by using the cloak of prosecutorial or judicial authority for the further detention as a guise for the applicant's further detention. Why demand more from someone with no, or negligible, competence to prevent the further detention, and who in fact did what she could to prevent the further detention by recommending bail?

[140] In contemporary legal terms, "the policy and legal convictions of the community, constitutionally understood" would not regard the imposition of liability as "acceptable" or "reasonable".<sup>184</sup> Constable Ndala's conduct in relation to the harm of further detention after the applicant's first court appearance was not wrongful. In the absence of wrongfulness neither she nor her employer, the respondent, is liable to compensate the applicant.

[141] Whether the applicant's continued detention was lawful is not an issue that bears on their liability. It is only if the hurdle of Constable Ndala's own unlawful conduct in relation to the continued detention is cleared that it becomes relevant.

[142] Strictly speaking, this conclusion renders further discussion unnecessary, but for the sake of clarity I will briefly deal with three other aspects: precedent, joint wrongdoers and just and equitable compensation.

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<sup>184</sup> *Loureiro* above n 44 at para 53.

*Judicial precedent*

[143] There is nothing in this judgment that is in conflict with this Court's decision in *Zealand*.<sup>185</sup> The wrongfulness of the detention in that case involved the continued detention of the claimant as a convicted person in a correctional facility on what were held to be unlawful grounds by the judicial authorities.<sup>186</sup> The issue of the wrongfulness of the conduct of police officials, either in the applicant's initial arrest and detention, or his subsequent detention at the correctional facility, was not relevant or pronounced upon.

[144] There is no binding precedent from this Court on the issue of the police's liability for the continued detention of a criminal suspect after a first court appearance. It should be apparent from the reasoning in this judgment what my differences and agreements are with the not always harmonious judgments on this aspect in the old Appellate Division and the current Supreme Court of Appeal. It is not a sign of disrespect not to go into detail on this. On the contrary, I consider it more respectful to articulate one's own self-standing reasons, which may then be contrasted and tested against the reasoning in these other cases. This avoids prolixity and the perception of trying to show up in a more direct and personal way the perceived shortcomings of other viewpoints. It is better to accept that reasonable disagreement is possible and for readers to form their own views on the differing perspectives.

*Joint wrongdoers?*

[145] In my analysis above, I hold that Constable Ndala's conduct in relation to the further detention of the applicant after his court appearance was not wrongful. This finding logically excludes her and her employer, the respondent, as wrongdoers who can be held jointly and severally responsible for the damages to be paid as compensation for that further detention.

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<sup>185</sup> *Zealand* above n 12.

<sup>186</sup> *Id* at para 34.

[146] Where the harm is divisible, to the extent that it is possible to demarcate with sufficient precision the particular harm caused by various parties, then joint or joint and several liability is inappropriate. Factually and conceptually, the harm here is divisible – the police clearly caused the specific harm of the unlawful arrest, while the post-appearance unlawful detention is a further, but discrete, harm caused by the Magistrate’s failure to uphold his constitutional duties in terms of section 35. That the applicant attempts to conceptualise the harm as indivisible should not force us into a causal analysis between the police’s unlawful arrest and the discrete harm of the further unlawful detention caused by the Magistrate.

*Equity and good conscience, or legal causation?*

[147] Earlier I mentioned that the better view, according to scholars, is that equity and good conscience (*bonum aequum*) was a normative standard that set the scope of the *actio iniuriarum* as well as its measure of redress.<sup>187</sup> But even if one accepts that it relates only to the measure of redress, not much changes in practical effect.

[148] All the inequitable aspects of holding only Constable Ndala (and vicariously the respondent) responsible would then simply be transferred to the assessment of damages for the wrong caused. The wrong would still only be Constable Ndala’s relatively insignificant constitutional and legislative responsibility in not preventing the further detention of the applicant. The primary responsibility for that would still, constitutionally and legally, be that of the prosecutor and the Magistrate. On the current state of the law they would still not be legally liable for their respectively greater role in the further detention of the applicant. They would not be joint wrongdoers under the Apportionment of Damages Act for the harm caused.<sup>188</sup>

[149] Would it nevertheless be equitable and in good conscience to hold the respondent solely liable for damages for the detention after the applicant’s court

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<sup>187</sup> Above at [138].

<sup>188</sup> As defined in section 2(1) of the Apportionment of Damages Act above n 121.

appearance? I think not. And we do not need the recent judicially-developed normative limitation of “legal causation” to get there. It is already there, in the “equity and good conscience” requirement under the *actio iniuriarum*. There is no need to reinvent the wheel.

[150] But even using legal causation as the normative boundary should not necessarily yield a different outcome. Legal causation, like wrongfulness, is also deeply rooted in policy considerations. Many of the arguments about the limited scope of Constable Ndala’s competence to prevent further detention also apply in respect of legal causation.

### *Conclusion*

[151] As indicated at the outset I accept that the matter involved a constitutional aspect which implicated this Court’s jurisdiction and that there were reasonable prospects of success. I would therefore grant leave to appeal, but dismiss the appeal. *Biowatch* applies, so no costs order is warranted.<sup>189</sup>

MOGOENG CJ:

[152] I have read with great interest and appreciation the judgment of my sister Theron J (first judgment) and that penned by my brother Froneman J (second judgment). Respectfully, I do not agree with much of the reasoning and especially the conclusion arrived at in the first judgment. I concur with the second subject to the points of difference that will be apparent from a reading of this concurrence.

[153] The point to be made is very narrow and relates to the interface between considerations of public policy and justice, and the legal concept of a

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<sup>189</sup> *Biowatch Trust v Registrar, Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) (*Biowatch*).

*novus actus interveniens* ( new intervening event) on the one hand and legal causation on the other.<sup>190</sup> A *novus actus interveniens* has a very important role to play in limiting the extent of the damages for which a defendant may in law be held liable. And that limitation exists for good reason. Otherwise liability could potentially be left to spiral out of control and be never-ending to the ruination of defendants.

[154] More pointedly, a constitutionally-prescribed first court appearance does constitute a new intervening act that must disrupt legal causation, and considerations of public policy and justice render it unreasonable to impute liability to the Police for a court's failure to fulfil its exclusive constitutional obligations.

[155] Mr de Klerk was arrested and detained by Constable Ndala.<sup>191</sup> The arrest and detention were unlawful, but she did not know. She wanted to but lacked the authority to release him on bail. However, she did what the Criminal Procedure Act<sup>192</sup> allowed her to do, which was to recommend to her statutorily empowered superiors that Mr de Klerk be released on bail for an amount of R1 000. Sadly, they did not.<sup>193</sup> But even if Constable Ndala did not do so, it would still have been open to her seniors to release him of their own accord.<sup>194</sup> I hasten to say that the entire period of detention for which the Minister of Police is sought to be held liable by the first judgment, would have been justifiable if Mr de Klerk had remained under the exclusive control of the Police, and no other authority, statutorily or constitutionally empowered to release him on bail or on his own recognisance, got involved before he was released.

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<sup>190</sup> Snyman above n 118 at 86.

<sup>191</sup> Supreme Court of Appeal judgment above n 1 at para 3.

<sup>192</sup> Section 59(1)(a) of the Criminal Procedure Act above n 21.

<sup>193</sup> Supreme Court of Appeal judgment above n 1 at para 3.

<sup>194</sup> Section 59(1)(a) of the Criminal Procedure Act above n 21.

[156] What happened however is that within two hours of Mr de Klerk’s arrest and detention, Constable Ndala took him to the Randburg Magistrates’ Court.<sup>195</sup> This afforded the Judiciary the opportunity to do what the law empowered and demanded of it to do. After all, there is no statutory or constitutional excuse for the Randburg Magistrates’ Court’s failure to interrupt the illegality attendant to the arrest and detention of Mr de Klerk at his first court appearance.

[157] Section 35 of the Constitution provides in relevant part:

- “(1) Everyone who is arrested for allegedly committing an offence has the right—
- ... .
- (d) to be brought before a court as soon as reasonably possible, but not later than—
- (i) 48 hours after the arrest; or
- (ii) the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day;
- (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.”

*New intervening act*

[158] Section 35 imposes a constitutional obligation on the Police to ordinarily present an arrested or detained person to court within 48 hours of her arrest or within a period that is as close to 48 hours as possible, if 48 hours expires when a court cannot sit. Why was it deemed necessary for our Constitution to repeat what has always been adequately provided for in the Criminal Procedure Act?<sup>196</sup> The reason is not hard to find. Section 12(1)(a) and (b) of the Constitution guarantees the right not to be

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<sup>195</sup> Supreme Court of Appeal judgment above n 1 at para 3.

<sup>196</sup> Section 50(1)(c)(ii) of the Criminal Procedure Act above n 21.

deprived of freedom arbitrarily or without just cause and the right not to be detained without trial.

[159] Our history of arbitrary deprivation of liberty or detention without trial necessitated special and stronger protection or a constitutional guarantee of personal freedom. It demanded that more effective measures be provided to ensure that the Police are kept in check for the arrest and detention of citizens.

[160] This constitutional provision ensures that an arrested person like Mr de Klerk is expeditiously taken to court. And its object and purport is to contain and tamper with the unjustifiable or arbitrary detention of citizens. To this end, on a detainee's first court appearance, his or her arrest and continued detention must either be explained by the Police and Prosecuting Authority to the satisfaction of the Magistrate or the suspect must, in the interests of justice, be released in any of the prescribed ways.

[161] In order for a failure to fulfil that constitutional obligation by an independent arm of the State to constitute a truly new and legally cognisable intervening act, it does not matter what the Executive, as represented by the Police, knows. Whether the Police know as they take a detainee to court within 48 hours that the Magistrate is likely to care less about the lawfulness or justifiability of the continued detention, what is constitutionally designed to be a new intervening act should still be regarded as such as long as the Police have fulfilled their own constitutional obligations.

[162] In other words, a constitutionally-ordained intervening mechanism cannot only be recognised as such in one magisterial district but not in another, depending only on whether Magistrates take their constitutional obligations seriously. The constitutional obligation of a court to act in terms of section 35(1)(e) and (f) is for all intents and purposes a deliberately crafted new intervening act that all Judicial Officers are expected to be alive or sensitive to at all times. And they are obliged to be conscientious in the execution of this constitutional mandate.

[163] The control that the Police have over the release or detention of an accused person who has been taken to court in terms of section 35(1)(d) gets decisively terminated by a constitutionally-created court intervention. That is the reason why people have to be taken to court without unnecessary delay in the first place. It is to ensure that they are only deprived of their liberty lawfully and with just cause. And only a court of law may determine the justification for the further detention of suspects. Court appearance is therefore a new act of intervention. It is the court alone that may decide whether to release or to continue to detain, regardless of whether the Police and the Prosecuting Authority support or oppose further detention. The Police have no power to release a suspect once brought before court in terms of section 35(1)(d). Their compliance with this obligation is a guillotine that severs the Executive's constitutional role from that of the Judiciary.

[164] In this case, the Police could have released Mr de Klerk on bail.<sup>197</sup> But having failed to do so, the Randburg Magistrates' Court could, in the exercise of its discretionary power, have released him.<sup>198</sup> That the Police chose not to do so at the first available opportunity is neither here nor there in determining whether the Executive should be held liable for the further detention that was ordered by the Judiciary. A separation of powers dimension has to be strongly infused in determining whether court intervention meets the requirements of *novus actus interveniens* in a case like this.

[165] The Minister of Police should not be made to bear the constitutional burden of the Judiciary, simply because Mr de Klerk failed to sue the latter for the period of detention beyond the two hours for which the Police are exclusively responsible. Nothing stopped him from doing so. It was his own lawyers' ineptitude that is responsible for this failure. It is therefore not the responsibility of a court to bend over backwards to mercifully accommodate him at the expense of constitutional

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<sup>197</sup> Id section 59(1).

<sup>198</sup> Id section 60(1)(a).

imperatives or sound legal principles. Part of what follows reinforces the conclusion that court intervention in terms of section 35(1) constitutes a new intervening act.

*Public policy*

[166] As we are correctly reminded by the first judgment, in *Mashongwa* this Court said:

“No legal system permits liability without bounds. It is universally accepted that a way must be found to impose limitations on the wrongdoer’s liability. The imputation of liability to the wrongdoer depends on whether the harmful conduct is too remotely connected to the harm caused or closely connected to it. When proximity has been established, then liability ought to be imputed to the wrongdoer, provided policy considerations based on the norms and values of our Constitution and justice also point to the reasonableness of imputing liability to the defendant.”<sup>199</sup>  
(Footnotes omitted.)

Of immediate importance here is that even the proximity of the cause of harm to the damage or harm caused is not dispositive of the issue of liability. Once proximity is established, it is still necessary to answer the question whether the imputation of liability is reasonable, having regard to considerations of public policy and justice.

[167] Two functionally independent arms of State are involved here. The Executive, under which the Police operate, and the Judiciary which is synonymous with the courts. The doctrine of separation of powers is therefore eminently implicated here. And three of the foundational values of our democratic State that ought to inform public policy considerations in relation to legal causation are also involved – the supremacy of our Constitution, the rule of law (legality) and accountability.<sup>200</sup> A bit more about these later. I reiterate the constitutional obligations that rest on each arm of State involved here.

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<sup>199</sup> *Mashongwa* above n 36 at para 68.

<sup>200</sup> Sections 1(c)-(d), 2 and 41(1)(c) of the Constitution.

[168] Once arrested an accused person, like Mr de Klerk, has a fundamental right which translates into a constitutional obligation on the Executive, to be brought before a court of law within 48 hours or as close thereto as is reasonably possible.<sup>201</sup> Why? It bears repetition that we have an ugly and painful past of arbitrary and long detentions without trial. To give practical and more authoritative expression to the fundamental right “not to be deprived of freedom arbitrarily or without just cause”,<sup>202</sup> the right to be brought to court within 48 hours had to be entrenched in the supreme law of the Republic so that it is insistently treated with the seriousness it deserves. The drafters of our Constitution, alive to a similar provision in the Criminal Procedure Act,<sup>203</sup> presumably knew just too well how inadequate the latter’s protection had been over the years. Now that the right to be brought before an independent arm of the State is a constitutional imperative, its implications or significance may not be treated as flippantly as it often was during the apartheid era.

[169] I could not agree more with the Supreme Court of Appeal majority judgment that—

“Failure [by the Magistrate] to enquire at the first appearance as to 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.”<sup>204</sup>

[170] This reasoning is based on the inescapable force of our constitutional principles, norms and values. In a country that bleeds from acute dereliction of duty

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<sup>201</sup> Section 35(1)(d) of the Constitution.

<sup>202</sup> Section 12(1)(a) of the Constitution.

<sup>203</sup> Section 50(1)(c) of the Criminal Procedure Act above n 21.

<sup>204</sup> Supreme Court of Appeal judgment above n 1 at para 14.

and cries out for more attention to be given to accountability, each must therefore be held accountable for their own failure to fulfil their constitutional obligations. Equally important is the need to reiterate the provisions of section 2 of the Constitution that “the obligations imposed by it must be fulfilled”.

[171] The Police fulfilled their section 35(1)(d) constitutional obligations here. To what end? So that another independent arm of the State could do what it exists for – check on any arbitrariness or absence of just cause in depriving Mr de Klerk of his right to liberty. Remember, this Court in *AZAPO*<sup>205</sup> and more recently in *Economic Freedom Fighters*<sup>206</sup> endorsed Constitutional Principle VI, which is one of the principles that guided our Constitution-making process. That principle says:

“There shall be a separation of powers between the Legislature, the Executive and Judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.”<sup>207</sup>

[172] This then means that once the Executive has discharged its section 35(1)(d) obligations, it is denuded of the legal authority to detain or release a suspect. That then triggers the Judiciary’s constitutional obligation. And that is the obligation to operationalise the checks and balances that would ensure accountability and expose and end any abuse of power, arbitrariness or unjust cause relating to the arrest and detention.

[173] It must be emphasised that on the accused person’s first appearance, the Judiciary or court is under a weighty obligation to understand and satisfy itself that there is justification for the past and continued detention of a suspect or else release her if the interests of justice so dictate. This personal liberty-inclined obligation

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<sup>205</sup> *Azanian Peoples Organization (AZAPO) v President of the Republic of South Africa* [1996] ZACC 16; 1996 (4) SA 671 (CC); 1996 (8) BCLR 1015 (CC) (*AZAPO*) at para 12.

<sup>206</sup> *Economic Freedom Fighters v Speaker, National Assembly* [2016] ZACC 11; 2016 (3) SA 580 (CC); 2016 (5) BCLR 618 (CC) at para 90.

<sup>207</sup> Schedule 4 to the interim Constitution.

cannot be passed on to another arm of the State - it remains under the exclusive domain of the Judiciary. It is a constitutionally-imposed new intervening act that must always break the chain of possible abuse, arbitrariness, illegality or error in the arrest or detention of an accused person, and by extension of legal causation. The duty to fulfil that obligation cannot be shared with the Police just because they would have initiated the chain of events that culminated in the suspect being brought to court which then ordered a further detention in flagrant disregard for its obligations in terms of section 35(1)(e) and (f) of the Constitution.

[174] The interface between the common law in general, delict in particular, and the Constitution is not a casual meet and greet from which consequences need not or do not flow. It is not a question of two co-equal legal systems that exist side by side and each being free to go wherever it pleases. The Constitution always dictates the direction in which our jurisprudence must develop, regardless of how settled a common law principle might be. To this end section 2 of the Constitution correctly puts us on high alert in these terms:

“This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and *the obligations imposed by it must be fulfilled.*”

[175] What this then means is that all laws must bow to the imperatives or dictates of our Constitution. And constitutionally-assigned obligations must be fulfilled by those who bear them. To have arms of the State share the obligations imposed on only one would muddy the need for and inadvertently undermine the values of accountability, legality, and separation of powers. Importantly, the force of section 2 of the Constitution does not only find application when the constitutionality of law or conduct is challenged or when a failure to fulfil a constitutional obligation is brought to the attention of the court for a ruling to be made. It bites wherever a departure from the spirit, purport or object of the Constitution could otherwise meander into our jurisprudence and legitimise an injustice or undermine the role of our Constitution as the lodestar of our jurisprudential development.

[176] Anyone who is arrested for allegedly committing an offence is brought to court within 48 hours so that they are not detained any longer than they should without just cause. This is also because it is never in the interests of justice and in accordance with the rule of law to keep any person detained in circumstances where it is legally impermissible to do so.

[177] Public policy that is informed by considerations of our constitutional norms and values of separation of powers, supremacy of the Constitution, legality, accountability and the constitutional command that “the obligations imposed by it must be fulfilled”, would not allow the principles of the law of delict to be applied as if the Constitution is not the supreme law of the Republic.<sup>208</sup> Relevant constitutional principles cannot just be mentioned, acknowledged and then be essentially left out of meaningful consideration or made to have no impact on principles of delict.

[178] The first judgment relies on the minority judgment of the Supreme Court of Appeal that has made no effort to grapple with the imperatives of our Constitution. Instead, that minority judgment sought guidance from English authorities that do not resonate with the values, norms and principles of our Constitution. This Court must never prefer decisions guided by English common law above our Constitution, thus allowing our supreme law to play second fiddle to English Law. Our courts routinely invalidate legislation, customary law principles and practices grounded on, for example, the exercise of the constitutional right of freedom of religion. But, there is a reluctance to interfere with common law principles that do not accord with our constitutional values, norms and principles. We should not allow the common law to be a jurisprudential holy cow in disregard for the spirit, purport and object of our constitutional imperatives. There is only one supreme law in South Africa, it is our Constitution.

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<sup>208</sup> Section 2 of the Constitution.

[179] Accountability will be severely undermined if the bright line of demarcation between the functional spaces of the Executive and the Judiciary are allowed to be blurred as in this case. Similarly, separation of powers, the significance of putting checks and balances into operation and the supremacy of the Constitution and its values,<sup>209</sup> over principles of delict, would be effectively undermined by the adoption of any approach that sidesteps the application of these key constitutional principles in favour of the common law.

[180] Why is the Minister of Police sought to be held liable in the first judgment? The conclusion seems to flow fundamentally from the fact that—

“Ms Ndala subjectively foresaw the precise consequence of her unlawful arrest of the applicant. She knew that the applicant’s further detention after his court appearance would ensue. She reconciled herself to that consequence. What happened in the reception court was not, to Ms Ndala’s knowledge, an unexpected, unconnected and extraneous causative factor – *it was the consequence foreseen by her, and one which she reconciled herself to. In determining causation, we are entitled to take into account the circumstances known to Ms Ndala.* These circumstances imply that it would be reasonable, fair, and just to hold the respondent liable for the harm suffered by the applicant that was factually caused by his wrongful arrest. For these reasons, and in the circumstances of this matter, the court appearance and the remand order issued by the Magistrate do not amount to a *fresh causative* event breaking the causal chain.”<sup>210</sup>

[181] This constitutes the essence of what the first judgment sees as stronger public policy reasons “to find the Minister liable in this case”. The fundamental difficulty that I have with this approach is that it does not even acknowledge that a remand order by the Magistrate *may* indeed in certain circumstances constitute a break in the chain of causation. What is missing is why considerations of separation of powers and the

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<sup>209</sup> Sections 1(c) and 2 of the Constitution; *Glenister v President of the Republic of South Africa* [2008] ZACC 19; 2009 (1) SA 287 (CC); 2009 (2) BCLR 136 (CC) at para 29; and *South African Association of Personal Injury Lawyers v Heath* [2000] ZACC 22; 2001 (1) SA 883 (CC); 2001 (1) BCLR 77 (CC) at para 22.

<sup>210</sup> See [81] above.

reality that the Police had no authority to do anything about the Judiciary's insensitivity to the need, reluctance, failure or to fulfil its critical constitutional obligations do not break the chain of causation? Why must the Police be held accountable for the Judiciary's dereliction of its constitutional obligations? What about the need to ensure, in line with the value of accountability, that the fulfilment of obligations imposed by the supreme law is required *only* of those who bear them? The supremacy of the Constitution cannot, properly factored in the causation issue, be effectively side-lined by the mere fact that Constable Ndala knew that although she has fulfilled her own constitutional obligations, the Judiciary will probably fail to honour their constitutional obligations as demanded of them by their oath or affirmation of office.

[182] A proper regard for separation of powers, our constitutional norms and values, the interests of justice and the need to fulfil constitutional obligations makes no room for a public policy that would allow the Police to be held accountable for the constitutional remissness of the Judiciary largely because of what Constable Ndala knew. Her knowledge or ignorance of the Court's probable dereliction of its critical constitutional obligations cannot be a "stronger public policy reason"<sup>211</sup> for disregarding other constitutional norms and values. Public policy is about much more than what individuals know or do not know.

[183] In this context, considerations of public policy based on our constitutional norms and values demand a commitment to the fulfilment of constitutional obligations, especially those that affect the liberties of individuals, the respect for and observance of separation of powers and the need for courts to make just and equitable orders.<sup>212</sup> It cannot be correct that these weighty constitutional considerations be made subservient to whatever knowledge Constable Ndala had of some Magistrates' disregard for their undertaking to "uphold and protect the Constitution and human

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<sup>211</sup> See [75] above.

<sup>212</sup> Section 172(1)(b) of the Constitution.

rights entrenched in it and, administer justice to all persons alike . . . in accordance with the Constitution and the law”.<sup>213</sup> The nature or gravity of obligations that flow from the Constitution, duly undergirded by this oath or affirmation, is irreconcilable with the notion that Judicial Officers could be held jointly and severally liable with the Police for their failure to honour their oath of office. These constitutional considerations must dictate the public policy that must help determine whether liability is to be imputed to the Police or not.

[184] More importantly, Constable Ndala arrested and detained Mr de Klerk unlawfully for two hours and she did not know that her conduct was unlawful or wrongful, not that it is a requirement for Police liability. Her recommendation to her superiors to release Mr de Klerk on bail and the fact that she took him to court within two hours of his arrest and detention cannot be reconciled with the intention attributed to her - to have him detained longer than two hours.

### *Conclusion*

[185] For these reasons, I am satisfied that the constitutional obligations imposed on the Court are an automatic *novus actus interveniens*. Also that considerations of public policy, particularly the value of accountability for one’s own constitutional obligations, and justice, which can never depend on what an individual who causes the initial harm knows, as well as separation of powers and the supremacy of the Constitution, render it unreasonable to impute the liability due to the Judiciary to the Minister of Police as well.

[186] It is for these reasons that I concur in the judgment of Froneman J.

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<sup>213</sup> Oath or affirmation of office for Judicial Officers in terms of section 174(8) read with Item 6 of Schedule 2 to the Constitution.

For the Applicant:

S J Myburgh, A van Staden and J C  
van Eeden instructed by Pieter Nel  
Attorneys

For the Respondent:

M S Phaswane and D D Mosoma  
instructed by State Attorney