**IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA**

CCT case no._____

SCA case no. **1196/2023**

FSHC case no. **2482/2023**

In the matter between:

| | |
|---|---|
| **NANDIPHA MAGUDUMANA** | Applicant |
| and | |
| **THE DIRECTOR OF PUBLIC PROSECUTIONS, FREE STATE** | First Respondent |
| **THE MINISTER OF THE SOUTH AFRICAN POLICE SERVICES** | Second Respondent |
| **CAPTAIN FLYMAN** | Third Respondent |
| **THE PRESIDING MAGISTRATE (N.O.) – CASE NUMBER 20A/113/23 MAGISTRATE'S COURT, BLOEMFONTEIN** | Fourth Respondent |
| **THE HEADOF BIZZAH MAKHATE CORRECTIONAL CENTRE: KROONSTAD** | Fifth Respondent |
| **THE MINISTER OF HOME AFFAIRS** | Sixth Respondent |

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**FILING NOTICE: FIRST, SECOND & THIRD RESPONDENTS' ANSWERING AFFIDAVIT**

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**FILED HEREWITH:** First, Second and Third Respondents' Answering Affidavit.

**Dated** at Bloemfontein this **17th** day of **JUNE 2025.**

**RD CANHAM**
ATTORNEY FOR 1st, 2nd & 3rd RESPONDENTS
**C/O STATE ATTORNEY**
*ATTORNEY WITH RIGHT OF APPEARANCE*
*IN TERMS OF ACT 62/ 1995*
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**REF:66/202300483/P14M**

**TO:**

**THE REGISTRAR**
CONSTITUTIONAL COURT
**CONSTITUTIONAL HILL**

**AND TO:**

**MACHINI MOTLOUNG INC. ATTORNEYS**
**ATTORNEYS FOR THE APPLICANT**
16 BARNES STREET
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EMAIL: machini@mmincattorneys.com
**Ref: M002/25/NM**

/ff

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**ANSWERING AFFIDAVIT: APPLICATION FOR LEAVE TO APPEAL**

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## I. DEPONENT

I, the undersigned,

**RICHARD ABEDINEGO SHIBIRI**

do hereby state the following under oath:

1. I am a male Major General in the South African Police Services in the Organised Crime Investigation Unit.

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2. I have the necessary authority to depose to this affidavit and to oppose this application on behalf of the First, Second and Third Respondent. I will, throughout this affidavit, refer to these respondents collectively as "the relevant Respondents".

3. The facts contained herein fall within my knowledge, save where otherwise stated, and are true and correct.

4. Due to the nature of these proceedings, I will, in this affidavit, make submissions of legal in nature, and where I do so, it is pursuant to the advice advanced by the relevant Respondents' legal representatives which is accepted by the relevant Respondents.

5. I depose to this affidavit in response to, and in opposition of the Applicant's application for leave to appeal the majority judgment and order of the Supreme Court of Appeal (by majority) handed down on **16 May 2025** which dismissed the Applicant's appeal before that Court.

## II. INTRODUCTION

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6. As dealt with below, the matter must not only fall within the jurisdiction of this Court for leave to appeal to be granted, but the Applicant must establish that that the interests of justice warrant the granting of leave.[1]

7. The interest of justice in this matter does not warrant granting of leave to appeal.

8. The interests of justice enquiry involve the weighing up of varying factors. These include reasonable prospects of success which, although not determinative, carry more weight than other factors. In a case where, as here, the matter has been to the Supreme Court of Appeal the presence of reasonable prospects of success constitutes a compelling reason for granting leave.

9. The Applicant contends that the application before the Free State High Court **("the High Court")** and appeal before the Supreme Court of Appeal **("the SCA")** concerned her unlawful disguised extradition from Tanzania to South Africa at the instance of the Respondents. With respect, and as point of departure, that is an incorrect characterization of the matter.

9.1 The Applicant's application and the appeal had all to do with her alleged "*abduction and/or arrest*" by members of the South African Police

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[11] ***General Council of the Bar of South Africa v Jiba and Others*** **2019 (8) BCLR 919 (CC)** at paras 36 to 59.

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Service **("*the SAPS*")** in Tanzania. It is that alleged abduction and/or arrest that the Applicant sought to have declared unlawful.

9.2 The High Court found that the Applicant was not abducted as she alleged, and had consented, or at the very least acquiesced to returning to South Africa – although the High Court, not having been called to do so by the case set out by the Applicant, found that the handing over of the Applicant to the respondents by the Tanzanian authorities was an extradition without any process and not a deportation.

10. The majority of the SCA did not endorse the High Court's finding of a disguised extradition. It was not bound to do so. The majority found that it was unnecessary, considering the case set up by the Applicant in her founding affidavit, to deal with any issues pertaining to the alleged disguised extradition.

11. The Applicant contends that the majority of the SCA avoided determining the merits of the appeal. That is simply not so. The majority in fact did.

12. The majority found that the appeal before the SCA raised two (2) issues:[2]

12.1 The first issue was whether the Applicant was arrested in Tanzania by members of the SAPS or the Tanzanian authorities. That was after all the Applicant's case and the case she informed DHS that she was

[2] SCA judgment para 16

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pursuing. This, as will be demonstrated later herein, was a central factual issue on which the relief sought by the Applicant rested. It is an issue which emerged from the case as pleaded by the Applicant. The majority decided on this issue and found that the Applicant had failed to establish that her arrest in Tanzania was made by the SAPS.

12.2 The second issue was whether the Applicant made out a case on the papers that her handing over by Tanzanian Ministry of Home Affairs to the South African High Commission and her transportation to South Africa was part and parcel of her disguised extradition in breach of law. The majority found that it was not necessary to decide this issue because it was not the case made by the Applicant in her founding affidavit, and that being so, no relief could be granted against the Minister of Home Affairs, who was involved in the deportation process as none was sought against him.

13. It is crucial to observe that the minority also accepts that the Applicant was neither arrested nor abducted by the SAPS in Tanzania,[3] but, with respect, downplays the significance of that finding apropos the relief sought by the Applicant against the SAPS. Instead, the minority sought to grant the Applicant relief she did not seek, against a party against whom no relief was sought at all.

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[3] SCA judgment paras 46 and 74

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14. The minority disagreed that a disguised extradition case was made out for the first time in reply because, according to the minority judgment, '*..the appellant's complaint remained consistent that she was unlawfully deported from Tanzania to South Africa. She said this was so because: (a) no documentation existed to show that there was an extradition; and (b) none of the procedures for making an extradition request had been followed.*'[4]

15. According to the minority, these averments would fairly sustain a case that the Applicant's deportation was a disguised extradition.

16. With respect, there are fundamental flaws in the reasoning and findings of the minority in this regard.

16.1 Firstly, the Applicant does not complain of an unlawful *deportation* in her founding papers.

16.2 Secondly, even if she did, that would be inconsequential because the Applicant's consistent case was that she was abducted by the SAPS in Tanzania. She repeated this allegation in her replying affidavit. To make matters worse for the Applicant, on **23 May 2023**, before all the Respondents filed their answering affidavits, the Applicant (through her attorneys) wrote to the Department of Home Affairs and unequivocally informed them and expressly recorded that she (a) does not seek any

[4] SCA judgment para 61

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relief against them [the Department of Home Affairs, (b) she does not see a need for the Minister of Home Affairs to be joined as a Respondent, and (c) importantly, her version is that she was unlawfully arrested by members of the SAPS in Tanzania and transported back to South Africa.

16.3 Simply put, the Applicant's case of abduction and forced removal from Tanzania, by the SAPS, and with no involvement of the Tanzanian authorities, logically and invariably precludes any possibility of a *deportation* or *extradition* processes. On this Applicant's version, there was no involvement of the Tanzanian authorities in her return to South Africa.

16.4 The Applicant at no time sought to amend her notice of motion, which is a pleading and needs to be amended formally.

17. It is clear from the minority judgment that it sought to grant the Applicant relief on the *disguised extradition* case, made for the first time (ambiguously) in her replying affidavit. But this approach, with respect, led the minority to a cul-de-sac because:

17.1 Firstly, the relief sought by the Applicant remained the same. She sought an order declaring her apprehension, arrest and abduction in Tanzania, by the SAPS wrongful and unlawful.

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17.2 Secondly, on the acceptance of the respondents' version, the Department of Home Affairs was the one involved in receiving the Applicant from the Tanzanian authorities. Despite this, the Applicant never sought any relief against the Minister of Home Affairs, and had, in fact, asserted unequivocally that she would not do so as her case was that she was arrested in Tanzania by the SAPS. Thus, the Applicant sought no order declaring her deportation as a disguised extradition, and consequently unlawful.

18. The minority, in seeking to grant the Applicant the relief she did not seek, called in aid the decision of the SCA in **Modderklip**,[5] and reasoned that where a Constitutional breach has been established, a Court is entitled to grant relief different from that which was originally sought.

19. With respect, the minority's approach both in relation to a case made for the first time in reply and the granting of the relief different from one that was originally sought, is flawed. The minority failed to consider this issue against the factual context and the nature of the relief sought in **Modderklip** as compared to this case.

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[5] ***Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA & Legal Resources Centre, Amici Curiae); President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd (Agri SA & Legal Resources Centre, Amici Curiae)*** **[2004] ZASCA 47; 2004 (6) SA 40 (SCA)** at para 18

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20. The reality is that the Applicant's case, from its inception, was not that she was brought back from Tanzania through some camouflaged process. Her case was that she was plainly abducted by the SAPS in Tanzania. That case was not established. Therefore, the majority was correct in dismissing the appeal.

21. Therefore, the Applicant's fundamental problem in this application is that she has failed to demonstrate any prospects of success. To show this, I will address the following:

21.1 The pleadings, the issues as defined in the Applicant's founding papers and the correctness of the majority judgment on the issues;

21.2 The new case made in reply;

21.3 The relief proposed by the minority; and

21.4 The Applicant's failure to meet the test for leave to appeal to this Court.

## III. THE PLEADINGS, THE ISSUES AS DEFINED, AND THE CORRECTNESS OF THE MAJORITY JUDGMENT THEREON

22. The Applicant's case before the High Court was straight forward. She alleged that on **6 April 2023** she was forcefully abducted and/or arrested by members

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of the SAPS in Tanzania, and on **12 April 2023** she was taken to an airport in Tanzania by members of the SAPS, and there, she was taken into a kombi by members of the SAPS in full uniform and led to an aircraft in which she found members of the SAPS and the South African National Defence Force, whereafter she was transported to Lanseria Airport in South Africa.

23. These were the allegations that the respondents were called upon to affirm or deny and the factual substratum for the relief sought by the Applicant. The applicant's challenge, as expressed in her founding papers, is directed at the said arrest and abduction. The applicant said:

> ***'It is the very arrest and removal from Tanzania, which, according to my advice, flaws the whole process'***

24. The Applicant was also clear in her founding affidavit pertaining to the legal conclusion which she wished the Court to reach on the case she had pleaded. The Applicant said:

> ***"I have been advised that where I have been abducted from a foreign state and brought to South Africa and detained, the effect of such abduction on the jurisdiction of the Trial Court (applying the Common Law principles as well as the provisions of the Constitution of South Africa), the Court lacks jurisdiction"*** [underlined for emphasis]

25. However, before both the High Court and the SCA, the applicant completely jettisoned any reliance on her version of arrest and abduction by the SAPS in

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Tanzania. The applicant, relying on **Zealand v Minister for Justice and Constitutional Development**,[6] asserts that it was enough for her to simply plead that she was unlawfully arrested and brought to South Africa whereafter the onus to justify the detention would fall on the relevant respondents. It is on these bases that the applicant sought to rely on the relevant respondents' answering affidavits and essentially make a case in reply.

26. The applicant's attempt was bound to fail for the simple reason that she had failed to establish that the SAPS arrested or abducted her in Tanzania. In this regard the majority rightly concluded that no onus rested on the SAPS to justify any arrest or detention of the applicant in Tanzania. The majority's conclusion is unassailable: In **Mahlangu and another v Minister of Police**,[7] this Court reaffirmed:

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

27. The relevant Respondents denied that the Applicant was arrested by the SAPS in Tanzania. The relevant Respondents' version is that the Applicant was

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[6] ***Zealand v Minister for Justice and Constitutional Development and Another*** **[2008] ZACC 3; 2008 (2) SACR 1 (CC)** at paras 24 – 25.

[7] ***Mahlangu and Another v Minister of Police*** **[2021] ZACC 10; 2021 (2) SACR 595 (CC)** at paras 29 – 31.

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deported by the Tanzanian Government, and thereafter handed over to the South African High Commission and the Department of Home Affairs for her transportation back to South Africa. Therefore, the SAPS attracted no onus to justify the Applicant's arrest or abduction in Tanzania.

28. The majority found that the Applicant had failed to establish that she was arrested by the SAPS in Tanzania. Importantly, the minority also accepted that the Applicant was not arrested by the SAPS in Tanzania. The minority, at paragraph 74 of the judgment, explicitly accepts that the Applicant was lawfully arrested and detained by the Tanzanian authorities because she was in that country illegally.

29. Therefore, on the findings of both the majority and the minority, the entire factual substratum of the Applicant's case collapses.

30. The relief sought by the Applicant in the High Court, which remained unamended even before the SCA, solely entailed declaring her arrest and/or abduction by the SAPS unlawful. The consequence of the finding by both the majority and the minority that the Applicant was not arrested by the SAPS is that the relief sought could, therefore, not be granted.

## IV. A NEW CASE IN THE REPLYING AFFIDAVIT

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31. It is by now settled that in proceedings by way of motion the parties seeking relief ought in his founding affidavit to disclose such facts as would, if true, justify the relief sought, which would, at the same time, sufficiently inform the other party of the case he was required to meet.[8]

32. This Court has confirmed that a case cannot be made out in the replying affidavit for the first time.[9]

33. An issue not set out in the founding affidavit may only be entertained by the Court in exceptional circumstances. An example of such an instance is **Betlane v Shelly Court CC [2010] ZACC 23; 2011 (1) SA 388 (CC) at para 29**[10]. None of the principles are applicable in this matter.

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[8] ***National Council of Societies for the Prevention of Cruelty of Animals v Openshaw*** **[2008] ZASCA 78; 2008 (5) SA 339 (SCA)** at para 29 which was referred to by this Court when restating the principle in ***Betlane v Shelly Court CC*** **[2010] ZACC 23; 2011 (1) SA 388 (CC)** at para 29; ***National Director of Public Prosecutions v Zuma*** **(573/08) [2009] ZASCA 1; 2009 (2) SA 277 (SCA) ; 2009 (1) SACR 361 (SCA) ; 2009 (4) BCLR 393 (SCA) ; [2009] 2 All SA 243 (SCA) (12 January 2009)** para 26, the latter which was approved by this Court in ***Commercial Stevedoring Agricultural and Allied Workers Union and Others v Oak Valley Estates (Pty) Ltd and Another*** **(CCT 301/20) [2022] ZACC 7; [2022] 6 BLLR 487 (CC); 2022 (7) BCLR 787 (CC); 2022 (5) SA 18 (CC)** at para 46.

[9] ***Van der Merwe and Another v Taylor NO and Others*** **[2007] ZACC 16; 2008 (1) SA 1 (CC); 2007 (11) BCLR 1167 (CC)** at para 122.

[10] The Court said the following: "It is trite that one ought to stand or fall by one's notice of motion and the averments made in one's founding affidavit. A case cannot be made out in the replying affidavit for the first time. It was for this reason that some of the allegations made in the replying affidavit, such as the unlawfulness of the writ of execution, were challenged. The applicant's situation is special though. He is a lay person, who until recently did not have the benefit of legal assistance. When he approached this Court, he did so on his own. Consequently his notice of motion and founding affidavit did not properly set out all the relevant issues. It was as a result of the legal advice that was not previously available to him that he became aware of the need to attack frontally, the lawfulness of the writ of execution that was issued and executed, while his application for leave to appeal was pending."

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34. In this matter, I have demonstrated above that the Applicant's case had all to do with her alleged arrest and abduction by the SAPS in Tanzania. The Applicant, in her founding affidavit, makes no mention of any official of the Department of Home Affairs, much as she did not seek any relief against the Minister of Home Affairs.

35. The majority correctly observed and found that "*[T]here was simply no case which the Minister of Home Affairs was obliged to meet. As such no onus shifted to the Minister of Home Affairs for him to discharge. The only averments, by way of argument, appear in the replying affidavit which if relief was to be based on it, should have been framed as a supplementary founding affidavit so that the Minister of Home Affairs had the opportunity to respond. In Zealand, it was made clear that, even if amended relief was considered against the party alleged to have breached the constitutional right, prejudice should be considered before such relief be granted.*"[11]

36. With respect, the conclusion of the majority on this issue is unassailable.

37. The minority differs. It holds that the Applicant's case has consistently been that her deportation is unlawful. I have already indicated, in my introduction above, that this finding by the minority is factually incorrect. The Applicant simply made general statements that no extradition processes were followed when she was

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[11] SCA judgment para 32.

returned to South Africa, but that allegation related on her case that she was abducted by members of the SAPS in the circumstances described by her.

38. Like the High Court, the minority finds that these general and sparse statements made by the Applicant in her founding affidavit provide a sufficient basis for a disguised extradition case. That is simply not so.

38.1 These general statements should not be divorced from the actual facts pleaded by the Applicant. The statements should be viewed in the light of the case set out by the Applicant that she was arrested and abducted by the SAPS in Tanzania.

38.2 I reiterate. The Applicant's case is not that her extradition from Tanzania (without process) was cloaked as a deportation. As a matter of fact, the Applicant's case is that she was neither extradited, nor deported, but was forcefully abducted by the SAPS.

39. With respect, by finding that this general averments on extradition could ground a case for a disguised extradition, the minority (like the High Court) failed to observe the very fundamental principle of pleading, namely that, an Applicant's case must be set out with sufficient specificity, clarity and supporting admissible evidence so that the functionary or repository of power knows the case that has to be met. **Minister of Cooperative Governance and Traditional Affairs v**

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**De Beer and another [2021] ZASCA 95; [2021] 3 All SA 723 (SCA)** *("De Beer")* **at para [100].**

40. The minority goes further to hold that the High Court refused to strike out the assertions in the Applicant's replying affidavit relating to a disguised extradition and because there was no cross-appeal before the SCA against the High Court's order dismissing the application to strike out, it was not open to the majority to decline to consider the issue and, by so doing, overrule the order of the High Court.

41. With respect, this approach by the minority is also flawed. Whether or not the assertions of disguised extradition in the Applicant's replying affidavit are struck out or not, the fact still remains that the replying affidavit seeks to make out a new case which the Applicant expressly stated before all the respondents filed answering affidavits, through her attorneys on 23 May 2023, was not her case. What is more fundamental, also, is that the finding of a disguised extradition was not made by the Court in the course of deciding the striking-out application, but when it determined the merits of the main application.

42. The minority's reliance on **Botha v Smuts**[12] is, with respect, not apposite. In **Botha**, Kollapen J, at **para 171**, found that a case that was sought to be argued was advanced in the Notice of Motion and founding affidavit, and that the Respondents were aware that the issue had been raised and they were

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[12] ***Botha v Smuts and Another*** **[2024] ZACC 22; 2025 (1) SA 581 (CC).**

required to address it. That is not the case in this matter. Quite the apposite.

43. A significant difference between the circumstances of **Botha** and this matter is also evident from the judgment of the minority in this case (at **para 58**) where the minority notes that in **Botha**, Kollapen J pointed out that in asserting his right to privacy in the replying affidavit, the applicant in that matter had relied substantially on the same facts advanced in the founding affidavit. Again, that is not the case in this matter. In *casu*, the Applicant seeks to rely on facts which she did not set out in her founding affidavit.

44. The minority goes further to find that even if the Applicant sought to make a new case in reply, it would be permissible to hear her on that case and to grant her relief because *there is no suggestion by any of the respondents that had disguised extradition been expressly mentioned in the founding affidavit, they would have framed their answering affidavit differently.* The minority, relying on **Betlane,** observed that the rule that a new case may not be made in reply is not immutable and may, in appropriate circumstances, be relaxed. Those principles are indeed well-established, but in the circumstances of this matter, they do not assist the Applicant and do not support the minority's approach.

44.1 Firstly, this Court held that there must be special circumstances before there can be a relaxation of the cardinal principle that a case must be made out in the founding papers. For instance, in **Betlane**, the applicant would excused from not lucidly pleading the case and framing the relief

in the notice of motion, thus be permitted to raise new issues in reply, because he was a lay person not legally represented when he formulated the founding affidavit.

44.2 Secondly, an applicant may only be allowed to make out a case belatedly in reply or in argument, if the point that is being raised is legal in nature, foreshadowed in the pleaded case and does not cause prejudice to the other party.[13] In the present matter, the argument of a disguised extradition is completely not foreshadowed in the case pleaded by the Applicant in her founding affidavit. In other words, no finding of a disguised extradition can be made on the facts as pleaded by the Applicant in her founding affidavit.

44.3 Thirdly, in this matter, the Applicant had unequivocally informed the Minister of Home Affairs (before the answering affidavits were filed) that she would seek no relief against him as her case was (and this would remain her case notwithstanding its explanation in the said correspondence of what would have transpired on its version) that she was unlawfully arrested by the SAPS in Tanzania and forcibly put on a plane by them.[14] The authorities did not enter into the equation. Thus,

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[13] ***My Vote Counts NPC v Speaker of the National Assembly and Others (CCT121/14) [2015] ZACC 31 (30 September 2015)*** at para 177 and this Courts judgments on point referred to in footnote 253 of the judgment.

[14] It is apposite to reiterate that the Applicant, before any respondent filed an answering affidavit (through her attorneys) wrote to the Department of Home Affairs and unequivocally informed them that she (a) does not seek any relief against them, (b) she does not see a

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the respondents' minds were not attuned to a disguised extradition case when their answering affidavits were prepared. Regarding this dynamic, the SCA said this in **The Government of the Province of Kwazulu-Natal and Another v Ngwane**:[15]

> "The first is that Bhekuyise does not say so himself. Nowhere in the correspondence or in the founding or replying affidavits is it stated that he expected or believed himself to be entitled to be briefed or consulted before any appointment was made. Had the point been spelt out in the application papers the respondents, duly alerted, could have responded on fact and on law. It was argued on Bhekuyise's behalf that the picture was complete because everything that could be said had been said. That may or may not be so. Although it is difficult to envisage what other material could have been adduced, counsel for the appellants rightly submitted that the issue was not explored because the minds of the appellants and their advisers were simply not attuned to the doctrine of legitimate expectation when the answering affidavits were drawn."

## V. THE RELIEF PROPOSED BY THE MINORITY NOT TENABLE:

45. Despite the fact that the Applicant had not sought any relief against the Minister of Home Affairs, the minority would have been inclined to grant an order against it. Similarly, the minority would have been inclined to grant an order

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need for the Minister of Home Affairs to be joined as a Respondent, and (c) importantly, her version is that she was unlawfully arrested by members of the SAPS in Tanzania and transported back to South Africa.

[15] ***The Government of the Province of Kwazulu-Natal v Ngwane [1996] ZASCA 88; 1996 (4) SA 943 (SCA)*** at 949A-D

against the SAPS despite having accepted that the Applicant was not arrested by the SAPS as she alleged.

46. The minority finds support for its approach in **Modderklip**. The minority's approach, apropos the relief, is respectfully flawed for the reasons which follow:

46.1 Firstly, the minority disregards the fact that on **23 May 2023**, before all the Respondents filed their answering affidavits, the Applicant (through her attorneys) wrote to the Department of Home Affairs and unequivocally informed them that she (a) does not seek any relief against them, (b) she does not see a need for the Minister of Home Affairs to be joined as a Respondent, and (c) importantly, her version is that she was unlawfully arrested by members of the SAPS in Tanzania and transported back to South Africa.[16]

46.2 Secondly, the minority failed to distinguish between the circumstances of **Modderklip** and those of this case. **Modderklip**'s facts and circumstances cannot be compared with the facts of this case, nor the need for the Court in Modderklip to fashion a remedy.

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[16] ***Combustion Technology (Pty) Ltd v Technoburn (Pty) Ltd* 2003 (10 SA 265 (C)** at 268I to 269B. The Court held in the aforesaid case that the clear purpose of the applicant's application was to bring about a *concursus creditorum* resulting in the 'hand of the law being laid on the estate' with a view to achieving an orderly realisation of assets and the distribution of the proceeds thereof to creditors. Apposite to the facts in this matter, the Court remarked that not only was 'the relief that that is now being sought, namely payment (ignoring the frills and furbelows), substantially dissimilar to the relief sought in the notice of motion, but the respondent has not been apprised that such relief would be sought and furthermore has not had an adequate opportunity of considering and dealing with it in the answering affidavit'.

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46.3 Thirdly, even after the Respondents filed their answering affidavits, the Applicant elected and did not seek an appropriate amendment to the relief she sought in the High Court.[17] She also never sought a formal amendment in the SCA.

46.4 Fourthly, the SCA, in **De Beer**,[18] expressed that if the Court grants relief different to that which had initially been sought, it ranges beyond what had been sought by the parties. This denies the Respondent a proper hearing and, in that sense, the Court's Judgment suffers a failure to proper judicial reasoning and also fails to recognize and respect – as it is constitutionally obliged to do – the limits of judicial function.

46.5 Similarly when dealing with relief sought belatedly in reply in **Jiba v President of the Republic of South Africa and others [2019] ZAWCHC 136; [2019] 4 All SA 742 (WCC) at para 45** the Court held that 'it would be unfair and not in the interest of justice for the Court to grant such drastic relief against the President and the NPA under the circumstances where they have not been asked in these proceedings to answer to, which they were made to believe would not be the same relief that the applicant would be seeking in Part B'. And said the Court, '[I]t would clearly be an ambush and not in conformity with the audi alteram

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[17] ***Mgoqi v City of Cape Town and Another 2006 (4) SA 355 (CPD)*** at 362F-J to 363A-C.
[18] ***Minister of Cooperative Governance and Traditional Affairs v De Beer and another [2021] ZASCA 95; [2021] 3 All SA 723 (SCA)*** at para 85.

partem-rule to grant such relief.'

## VI. NOT IN THE INTERESTS OF JUSTICE THAT LEAVE TO APPEAL BE GRANTED:

47. As stated in the introduction, in order to determine whether leave to appeal should be granted, the applicant for leave to appeal must establish that the jurisdiction of the court is engaged, consistent with the provisions of the Constitution providing that this court's jurisdiction is employed in constitutional matters, as well as matters raising an arguable point of law of general public importance.

48. In addition to the above test, the applicant must establish that it is in the interests of justice for leave to appeal to be granted.

49. Whilst, as general point of departure, the Court's jurisdiction would be engaged because the Applicant complains that she was arrested and/or abducted by the SAPS which would raise a constitutional issue since it implicates, amongst others, section 12(1) of the Constitution of the Republic of South Africa[19], that is not the end of the enquiry in this matter nor is it dispositive of this application.

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[19] ***National Union of Metalworkers of SA on behalf of Fohlisa and Others v Hendor Mining Supplies (a Division of Marschalk Beleggings (Pty) Ltd)*** **(2017) 38 ILJ 1560**

50. It is well established that the fact that the Court enjoys jurisdiction does not mean that leave should be granted. That is because the Applicant cannot establish that it is in the interests of justice for leave to appeal to be granted as dealt with above and below.

51. It is well established by this Court, as succinctly summarised in ***General Council of the Bar of South Africa v Jiba and Others*** **2019 (8) BCLR 919 (CC) paras 36 to 59**, that:

51.1 As dealt with above, the matter must fall within the jurisdiction of this Court and that the interests of justice warrant the granting of leave. The interest of justice in this matter does not warrant granting of leave to appeal.

51.2 The interests of justice enquiry involve the weighing up of varying factors. These include reasonable prospects of success which, although not determinative, carry more weight than other factors. In a case where, as here, the matter has been to the Supreme Court of Appeal the presence of reasonable prospects of success constitutes a compelling reason for granting leave.

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**(CC) (2017 (7) BCLR 851; [2017] ZACC 9) para 8**; ***Links v Department of Health, Northern Province*** **2016 (4) SA 414 (CC) (2016 (5) BCLR 656; [2016] ZACC 10) para 22**.

51.3 The determination of facts, whether right or wrong, does not amount to a constitutional issue.

51.4 The fact that the Court *a quo* may have erred, which I respectfully submit on evaluation of the application and evidence in its entirety the Court *a quo* did not do does not raise an arguable point of law of general public importance. Where the alleged error lies in the factual assessment, a decision that is based on wrong facts does not amount to an arguable point of law. The enquiry that is undertaken to correct it remains factual.

51.5 The wrong application of an established legal test does not constitute an arguable point of law. All that is required to be determined in such a case is whether the court whose judgment is subject to an appeal has correctly applied the test to the facts. This issue ordinarily illustrates the presence of reasonable prospects of success. It does not generate an argument on the content or scope of the legal principle itself but indicates an incorrect application of that principle. This is relevant to the interests of justice inquiry which differs from jurisdiction.

52. The Applicant has no prospects of success on a further appeal. In **Jacobs v S**,[20] Theron J held:

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[20] ***Jacobs v S [2018] ZACC 4; 2019 (1) SACR 623 (CC)*** at para 57

RAS

"It is a well-established principle that if a constitutional issue is raised, this Court will grant leave to appeal if it is in the interests of justice to do so. The factors to be considered at this stage of the enquiry include whether the matter raises only factual issues, has reasonable prospects of success and is of broader importance beyond the parties. For example, where there are no prospects of success it is unlikely that leave to appeal will be granted. In this way, the interests of justice enquiry serves as a limiting or controlling measure; thus ensuring that this Court is not required to hear every matter."

53. In this matter, for reasons fully set out herein above, the Applicant has no prospects of success. The majority judgment is unassailable. The majority was correct in holding the Applicant to the case she made in her founding papers.

## VII. PRAYER AND COSTS

54. In all these circumstances, it is respectfully submitted that this application for leave to appeal should be dismissed with costs, including, if the Court deems meet, those occasioned by the employment of two (2) counsel.

**R A SHIBIRI**

**I CERTIFY** that this affidavit has been sworn to and signed before me at RANDFONTEIN this 17 day of JUNE **2025** by the abovementioned deponent who declared that he is acquainted with the contents of this affidavit and understands same, that he has no objection to taking the prescribed oath and further, that he considers the said oath as binding on his conscience, which oath was properly taken by me, as required by law.

**COMMISSIONER OF OATHS**

**FULL NAMES** :

**ADDRESS** :

**CAPACITY** :

**AREA** :

Neil.B. Peters (SAC)
COMMISSIONER OF OATHS
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