IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT case no. **CCT141/ 2025**
SCA case no. **1196/2023**

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

FIRST, SECOND AND THIRD RESPONDENTS' WRITTEN SUBMISSIONS

Table of Contents

I. INTRODUCTION

1. As the majority of the SCA concluded, the Applicant's pleaded case is not one of a disguised extradition.[1] The true question of fact which confronted the SCA, and which was formulated by the Applicant in her founding papers, was whether she was arrested and abducted by members of the South African Police Service ("the SAPS") in Tanzania on 6 or 7 April 2023.[2]

---

[1] **Record**, Vol 4, p 335, SCA judgment at para 39.
[2] **Record**, Vol 4, p 323, SCA judgment at para 16 read with para 39.

2. The Applicant ostensibly accepts that no finding can be made that she was arrested and/or abducted by members of the SAPS in Tanzania. That much is clear from the following:

2.1. In this application, she argues her case squarely on the alleged disguised extradition. The Applicant pins this argument on the circumstances surrounding her deportation from Tanzania, an issue which she says nothing about in her founding affidavit in the High Court.

2.2. In her heads of argument before this Court, the Applicant moves for an order declaring her handing-over by Tanzanian authorities to the South African High Commission in Tanzania and/or the second and sixth respondents, and the subsequent deportation, unlawful.[3] This is a radical departure from the relief she sought in her founding papers.

3. We submit, with respect, that this Court should (as the SCA majority did) hold the Applicant to the case she pleaded in her founding papers,[4] which she has failed to establish.

---

[3] Applicant's heads, p 49, para 2.1.

[4] **South African Transport and Allied Workers Union and another v Garvas and others 2013 (1) SA 83 (CC)** para 114 "Holding parties to pleadings is not pedantry. It is an integral part of the principle of legal certainty, which is an element of the rule of law, one of the values on which our Constitution is founded. Every party contemplating a constitutional challenge should know the requirements it needs to satisfy and every other party likely to be affected by the relief sought must know precisely the case it is expected to meet."

4. The Applicant's case **failed on the facts** because the matter had to be decided on the version of the SAPS which disproved the allegations of arrest and abduction of the Applicant in Tanzania on 6 April 2023.

5. Both the majority and minority of the SCA accepted that the Applicant was not arrested and/or abducted by the SAPS in Tanzania.[5] These finding, when considered in the context of the case pleaded by the Applicant, should lead to a single conclusion, and that is that the Applicant has nil prospects of success in this application. That is so because:

   5.1. There is, with respect, no basis for this Court to disturb the findings of the SCA in this regard. The Applicant herself does not take issue with this finding.

   5.2. In approaching the factual disputes on affidavits, and in reaching the conclusion, the SCA – like the High Court – applied the well-established principle applicable to motion proceedings by accepting the SAPS version.[6] Thus, there was no misdirection by the SCA on the law in this regard.

---

[5] **Record**, Vol 4, p 325, majority judgment at para 21, and p 346, minority judgment at para 74.

[6] **Plascon-Evans v Van Riebeeck Paints (Pty) Ltd [1984] ZASCA 51; 1984 (3) SA 623 (A) at 634E – 635C**.

6. Therefore, there is nothing else for this Court to correct from the SCA majority judgment because a disguised extradition case, now argued by the Applicant, is not the case she made out in her founding papers. That case, which the Applicant made for the first time in reply in the High Court, has no 'factual support' in her founding papers. Thus, it would be impermissible for this application to be determined on this basis.[7]

7. What is more, the relief now sought against the Minister of Home Affairs (hereafter referred to as "the DHA") was never sought before the Court of first instance. Such an order was never sought in the High Court, could not be granted by the SCA and with respect, may not be granted by this Court.[8] Generally, a court will not grant the relief not sought in the notice of motion.[9]

8. 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.[10]

---

[7] **Esofranki Pipelines (Pty) Ltd and Another v Mopani District Municipality and others [2014] ZASCA 21; [2014] 2 All SA 493 (SCA)** at para 36.

[8] **MEC for the Department of Public Works and Others v Ikamva Architects CC and Others [2024] ZASCA 95** at para 28 – 32.

[9] **National Commissioner of Police and Another v Gun Owners of South Africa [2020] ZASCA 88; 2020 (6) SA 69 (SCA)** at para 26 – 27.

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

9. In this matter, the interest of justice does not warrant granting of leave to appeal.

10. The interests of justice enquiry involves 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.[11]

11. The Applicant's fundamental problem in this application is that she has failed to demonstrate any prospects of success. To show this, we structure our argument as follows:

11.1 Firstly, we analyse the Applicant's true case in the High Court;

11.2 Secondly, we demonstrate why the judgment of the SCA majority is correct;

11.3 Thirdly, we highlight why the SCA minority's approach to the pleadings and its embrace of the disguised extradition case is, with respect, flawed;

---

[11] **Paulsen and Another v Slip Knot Investment 777 (Pty) Limited [2015] ZACC 5; 2015 (3) SA 479 (CC)** at para 29.

11.4 Fourthly, we address the new relief sought on appeal; and

11.5 Lastly, we address the Applicant's failure to meet the test for leave to appeal to this Court.

II. THE APPLICANT'S TRUE CASE:

12. In motion proceedings, affidavits serve as both the pleadings and evidence. It is to the founding affidavit that the court must look to determine what the complaint is. The main foundation of the application is the allegations of facts stated therein, because those are the facts that the respondent is called upon either to affirm or deny.[12]

13. 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 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.[13]

---

[12] **Director of Hospital Services v Mistry 1979 (1) SA 626 (A)** at 635H – 636B.
[13] **Record**, Vol 1, p 8, Founding Affidavit **('FA')**, para 8.

14. 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, was 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'***[14]

15. The Applicant goes further to state:

> ***'The State must come to Court with clean hands and such requirement is clearly not satisfied where the state is involved in abduction of myself across the country's borders. As mentioned, the Second Respondent's servants had no jurisdiction and/or authority to bring me to South Africa and charge me as they did'***

16. 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 <u>where I have been abducted</u> from a foreign state and brought to South Africa and detained, <u>the effect of such abduction</u> 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"***[15] [underlined for emphasis]

---

[14] **<u>Record</u>**, Vol 1, p 12, FA, para 17.
[15] **<u>Record</u>**, Vol 1, p 9, FA, para 9.

17. On 22 May 2023, days before the answering affidavits were filed, the Applicant – in correspondence with the DHA – told the DHA that despite the facts available to her at the time regarding her deportation: (a) she was seeking no relief against the DHA and saw no need to join it to the proceedings and (b) her version was that she was unlawfully arrested by members of the SAPS in Tanzania and transported back to South Africa.[16]

18. In her replying affidavit, the Applicant persisted that she was arrested in Tanzania by members of the SAPS.[17]

19. In her notice of motion, the Applicant sought to have declared as unlawful, her arrest and abduction in Tanzania on or about 7 April 2023 declared unlawful.[18] At no stage did the Applicant amend this relief before the High Court.

20. Therefore, the Respondents were made to understand, and in fact understood the Applicant's case to be that of arrest and abduction by members of the SAPS in Tanzania.

III. THE SCA MAJORITY IS CORRECT:

---

[16] **Record**, Vol 1, pp 161 – 166 (Letter dated 23 May 2023 by Machini Motloung Inc).
[17] **Record**, Vol 1, pp 224, Replying Affidavit (**'RA'**), paras 20 – 22.
[18] **Record**, Vol 1, p 2, prayer 2 of the Notice of Motion.

21. In argument 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 Tanzania. She once more does so also in this Court.

22. The applicant, relying on **Zealand**,[19] 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 respondents' answering affidavits and essentially make a case in reply.

23. 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.[20] The majority's conclusion is unassailable: In **Mahlangu and another v Minister of Police**,[21] 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]

---

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

[20] **Record**, vol 4, p 330, SCA majority judgment at paras 31 – 32.

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

24. The SAPS denied that the Applicant was arrested by the SAPS in Tanzania.[22] The SAPS' version is that the Applicant was 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.[23] Therefore, the SAPS attracted no onus to justify the Applicant's arrest or abduction in Tanzania. The Applicant's version was [is] thoroughly untruthful.

25. 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.[24]

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

27. 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

---

[22] **Record**, Vol 1, p 52 of the SAPS Answering Affidavit (**'AA'**), par 36, p 53 of the SAPS AA, para 41.
[23] **Record**, Vol 1, pp 54 -66, SAPS AA, paras 44 – 78.
[24] **Record**, Vol 4, p 346, SCA minority judgment at para 74.

majority and the minority that the Applicant was not arrested by the SAPS is that the relief sought could, therefore, not be granted.

28. For reasons already alluded to in the introductory section of these heads, the SCA majority was correct in refusing to grant the Applicant the relief different to that which she sought before the High Court, because there was simply no case made against the DHA and no relief sought against it in the High Court.[25]

IV. THE MINORITY'S APPROACH TO THE PLEADINGS IS FLAWED:

29. 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.[26]

---

[25] **Record**, Vol 4, pp 332 – 333, SCA judgment at paras 32 – 38.

[26] **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.

30. This Court has repeatedly confirmed that a case cannot be made out in the replying affidavit for the first time.[27]

31. 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**[28]. None of the principles are applicable in this matter.

32. In this matter, 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 DHA, much as she did not seek any relief against the Minister of Home Affairs.

33. 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*

---

[27] See for instance **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.

[28] 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."

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."[29]

34. The minority differs. It holds that the Applicant's case has consistently been that her deportation is unlawful. This finding by the minority is, with respect, factually incorrect. The Applicant simply made general statements that no extradition processes were followed when she was returned to South Africa,[30] but that allegation related on her case that she was abducted by members of the SAPS in the circumstances described by her.

35. 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.

35.1 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.

---

[29] **Record**, Vol 4, pp 331 – 332, SCA judgment at para 32.
[30] **Record**, Vol 1, p10 FA, para 13.

35.2 To emphasise, the Applicant's case is not that her extradition from Tanzania (without process) was cloaked as a deportation. The Applicant's case is that she was neither extradited, nor deported, but was forcefully abducted by the SAPS.

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

37. 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.

38. 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.

39. The ruling regarding parts of the Applicant's replying affidavit which were sought to be struck was merely a step along the way towards the final conclusion and consequent order on the merits.[31]

40. Moreover, the executive part of the order of the High Court does not reflect the dismissal of the striking out application. None of the parties have sought variation of that order. Regarding this, the sentiments of the SCA in **Carter v Haworth,**[32] are apt:

> "[12] In my view the weakest link in the judgment lies in the absence of an order. I do not think there is a part of a judgment that provides a stronger indication of finality than an order at the end. If the order is removed or omitted the judgment is rendered ineffective and so, too, its element of finality. It is incapable of execution by the Sheriff or Messenger of the court in the case of proceedings in the magistrate's court. I cannot emphasize the importance of the order more than was done by this court in *SA Eagle Versekeringsmaatskappy Bpk v Harford* where it was said an order is the operative part of the judgment. It is what a losing party appeals against. The court also stressed that a duty rests on a court to formulate a clear

---

[31] **Carter v Haworth [2009] ZASCA 19; 2009 (5) SA 446 (SCA**) at para 12.
[32] Ibid.

> order and for the registrars to ensure that the order so issued is clear and corresponds with the judgment. On the same theme this court in *Administrator, Cape, and Another v Ntshwaqela and Others* declared that there can be an appeal only against a substantive order made by a court, not against the reasons for judgment."

41. Therefore, in respect of the striking application, there is no order to appeal against.

42. That aside, the minority's reliance on **Botha v Smuts**[33] 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 required to address it. That is not the case in this matter. Quite the opposite.

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

---

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

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 was 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.[34] 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.[35] The DHA authorities did not enter into the equation. Thus, the respondents' minds were not attuned to a disguised extradition case when their answering affidavits were prepared.[36] Regarding this dynamic, the SCA said this in **The Government of the Province of**

---

[34] **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.

[35] 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 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.

[36] **Aeroguip South Africa (Pty) Ltd v Gross and others [2009] ZAGPPHC 25; [2009] 3 All SA 264 (GNP)** at para 6

Kwazulu-Natal and Another v Ngwane:[37]

> "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. NEW RELIEF SOUGHT ON APPEAL:

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 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**.[38] The minority's approach, apropos the relief, is respectfully flawed for the reasons which follow:

---

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

46.1 Firstly, in **Modderklip** this Court was concerned with a just and equitable remedy under section 172(1)(b), having already found that there was a constitutional breach.[39] That is not the case in this matter.

46.2 Secondly, 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.[40]

---

[38] **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.

[39] **Modderklip** at para 52 – 58.

[40] **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'.

46.3 Thirdly, the minority, with respect, 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.

46.4 Fourthly, even after the Respondents filed their answering affidavits, the Applicant elected to, and did not seek, an appropriate amendment to the relief she sought in the High Court.[41] She also never sought a formal amendment in the SCA.

46.5 Fifthly, the SCA, in **De Beer**,[42] 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.

46.6 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

---

[41] **Mgoqi v City of Cape Town and Another 2006 (4) SA 355 (CPD)** at 362F-J to 363A-C.

[42] **Minister of Cooperative Governance and Traditional Affairs v De Beer and another [2021] ZASCA 95; [2021] 3 All SA 723 (SCA)** at para 85.

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 partem-rule to grant such relief.'

VI. THE APPLICANT'S DEPORTATION AND HER CONSENT TO RETURNING TO SOUTH AFRICA:

47. The SCA majority, in view of the conclusions it reached, found it unnecessary to deal with the issue of the Applicant's consent and/or acquiescence to return to South Africa. The majority was correct in adopting that approach.

48. We however address the issue of consent, seeing that is still argued by the Applicant.

49. On closer consideration of the Applicant's founding affidavit, she constructed her case along the lines of **S v Ebrahim 1991 (2) SA 553 (A)**. But the Applicant has failed to establish her abduction in Tanzania by members of the SAPS.

50. The SAPS' version is that when the Appellant was handed over to the officials of the DHA in Arusha on 12 April 2023, she offered no protest or resistance and

in fact, told all and sundry that she wanted to return to her children in South Africa.[43]

51. The SAPS' version fits with the probabilities. The Applicant, in her bail application in the Bloemfontein Magistrates Court, testified under oath that she had not left South Africa for Tanzania willingly. She told the bail court that she was forcibly taken to Tanzania by Thabo Bester.[44] It makes logical sense that she would have wanted to return to South Africa to be with her children, of whom she testified that she was a primary caregiver.

52. Therefore, the *Ebrahim*- consequence does not apply to this matter. In this case, the SAPS – **against whom the Applicant sought relief** – did not in any way violate the territorial jurisdiction and sovereignty of Tanzania.

53. Tanzanian authorities, acting autonomously and independently, arrested the Applicant for being illegally in that country. Even the SCA minority accepts this. The Tanzanian government also decided to deport the Applicant, who was also desirous of returning to South Africa.

54. The High Court correctly found that the appellant consented, or at the very least acquiesced to be transported back to South Africa by the officials of the DHA,

---

[43] **Record**, Vol 1, pp 64 – 65, FA, paras 78.8 and 78.9

[44] The Applicant's bail affidavit was admitted as further evidence before the SCA.

and why would she not have done so. Thus, this case fell squarely within the reach of the principles laid down in **S v December,**[45] and **S v Mahala**.[46] These decisions of the Appellate Division comprehensively considered and discussed the mainstay cases on which the appellant's argument was premised.

55. The following core facts from **December** are relevant:

53.1. The appellant in that case had committed offences in the then Republic of South Africa and thereafter fled to King William's Town, which was situated in the then Independent Republic of Ciskei. He was traced and found by the South African Police in Ciskei, who then took him back to South Africa where he was interrogated and thereafter arrested.

53.2. The appellant was tried in South Africa and convicted for the offences with which he was charged and sentenced to death.

53.3. The appellant appealed the conviction and sentence and chief amongst his grounds of appeal was that he was arrested and abducted from Ciskei, and relying on **S v Ebrahim 1991 (2) SA 553 (A)**, he argued that the Criminal Courts lacked jurisdiction to try him.

---

[45] **S v December 1995 (1) SACR 438 (A)**.

[46] **S v Mahala and another 1994 (1) SACR 510 (A)**.

56. In dismissing that appellant's contentions and appeal, the Appellate Division said the following:[47]

> "Where the appellant was not forcibly abducted and his return to South Africa was voluntary there was no infraction of South African or public international law; consequently the decision in Ebrahim's case supra did not preclude a South African court from exercising jurisdiction to try the appellant… For the purpose of his alternative argument the appellant accepted that he was not forced to accompany the South African policemen to East London but he did so willingly. Nevertheless, on the authority of S v Wellem (supra), it was submitted in this court that the rationale of Ebrahim's case supra is to be extended to a situation where an accused persons presence within the jurisdiction is obtained by 'craft or cunning'… The argument founders at its berth: there is no basis whatsoever on the facts of this case for a finding that the appellant was enticed into South Africa by devious means. And to the extent that it was further suggested that the appellant should at the outset have been lectured on the nature and details of extradition proceedings in place between South Africa and Ciskei at the time, … this court in Mahala's case supra, at 516D-E held that no such duty is cast on the police as a precondition to consent from a person they wish to escort into this country. Failing a duty to speak, there can be no false representation by silence. Consent so obtained is not improperly obtained. Consent properly obtained dispenses with the necessity of seeking formal extradition."

57. The Court concluded:[48]

> "In the absence of unlawful or improper conduct in the sense referred to in Ebrahim's case supra on the part of any of the organs or functionaries of the South African State, a South African Court is not precluded from trying anyone for the crimes committed within its borders. Here was not unlawful conduct."

---

[47] At 441b-g.
[48] At 441i-j.

58. In **December**, the Appellate Division followed the principles it had laid down just a year earlier in **Mahala**. In the latter case, the Appellate Division had held that where the transportation of a person investigated for criminal offences from a foreign jurisdiction to South Africa is consented to by such a person, there is no violation of such persons' fundamental rights or International Law and that being so, the South African Criminal Courts would have jurisdiction over such a person.

59. In **Mahala**,[49] the Appellate Division reasoned as follows:

> "In the present matter the proven and accepted facts established that the South African Police did not unlawfully abduct the accused from the Ciskei or Ciskeian territory in violation of public international law and/or South African law. Accused 1 was arrested by and released from custody by the Ciskei police in the Ciskei. He voluntarily agreed to return to South Africa after he had been informed of the charge against him. He had been given a choice either to return or to be extradited. There was not duty on Captain McLaren to explain to him the exact nature and details of the extradition proceedings in terms of Claus 5 of the Extradition Treaty.. between the Ciskei and South Africa. Leg irons were put on him as mere precautionary measure when he was taken to the vehicle in which he was to return to South Africa. He acquiesced in it. He was arrested in East London. These facts are clearly distinguishable from those in Ebrahim's case. There was no violation of the sovereignty of the Ciskei. Nor was there an infringement of his fundamental human rights. His return to South Africa was not a breach of South African law. The position of Accused 2 relating to his voluntarily acquiescence to travel with the South African police from the roadside in the Ciskei to Stutterheim where he was arrested likewise

---

[49] At 516b-g.

was not conflict with the sovereignty of the Ciskei, his fundamental human rights or South African law. In his case there was likewise no breach of South African law and accordingly the facts applicable to him are clearly distinguishable from those in Ebrahim's case."

60. The principles laid down in **December** and **Mahala**, have not been overruled. In **Mohamed**,[50] this Court did not disturb those principles either. This Court had no reservations regarding a person's ability to consent as dealt with below.

58.1. In **Mohamed**, an illegal immigrant who entered the Republic of South Africa using fraudulent papers was handed over to authorities, ("*the FBI*") in a foreign country (United States) of which he was not a national to stand trial there on a capital charge, thus a charge for which the death sentence could be imposed.

58.2. The Court had reservations, not that a person may consent to extradition or deportation, even where there is doubt as to whether the deportation was in fact an extradition, but regarding whether a person in Mohamed's position, facing the death penalty in the country to which he would be taken, could validly consent to being removed to a country in order to face a criminal charge where his life would be in jeopardy.

---

[50] **Mohamed v President of the Republic of South Africa and others 2001 (3) SA 893 (CC)** at paras 62 and 64.

61. That said, it is important to bear in mind that the issue of a disguised extradition does not arise. That is not the case which the appellant makes on her papers. The issue in *casu* is whether or not the appellant was abducted by the SAPS in Tanzania and if, in those circumstances, the South African Criminal Courts forfeit their jurisdiction to try her.

62. In this case, where an unlawful abduction by the SAPS is not proven, the *Ebrahim*- effect on the criminal court's jurisdiction does not arise.

63. The Applicant's attempt to build a case of a disguised extradition against the DHA, based on the allegations in its answering affidavit and the decision of this Court in **Zealand,** is impermissible for reasons already stated above. The Applicant cannot obtain a *Ebrahim*- effect on a case that she did not plead.

64. In any event, the Respondents answering affidavit should be considered against the case the SAPS was called to meet – that of an abduction. As the SCA said in **Administrator, Transvaal and others v Theletsane and others**:[51]

> "It is not permissible to consider the Appellants' affidavits in isolation, divorced from the context of the case which they were answering. To the extent that the appellants' deponents went further than may have been necessary to answer the case as presented, it cannot be postulated *a priori* that they were not prejudiced if their

---

[51] **Administrator, Transvaal and others v Theletsane and others 1991 (2) SA 192 (A)** at 196D-E.

affidavits are relied upon to determine the nature and ambit of the hearing that took place. To do so may be unfair to the appellants and in fact is tantamount to reversing the onus."

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

65. As stated in the introduction to these heads, 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.

66. 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.

67. Whilst, as general point of departure, the Court's jurisdiction would be engaged because the Applicant complaint of deprivation of liberty would raise a constitutional issue since it implicates, amongst others, section 12(1) of the

Constitution of the Republic of South Africa[52], that is not the end of the enquiry in this matter nor is it dispositive of this application.

68. 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.

69. 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:

69.1 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.

69.2 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

---

[52] **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 (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)** at para 22.

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.

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

69.4 The fact that the SCA may have erred, which we respectfully submit on evaluation of the application and evidence in its entirety the SCA 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.

69.5 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.

70. The Applicant has no prospects of success on a further appeal. In **Jacobs v S**,[53] Theron J held:

> "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."

71. 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.

VIII. REMEDY & COSTS:

72. 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.

---

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

73. Alternatively, if leave is granted, the appeal should be dismissed with costs, including, if the Court deems meet, those occasioned by the employment of two (2) counsel.

N SNELLENBURG SC

M.S. MAZIBUKO

Counsel for First to Third Respondents

Free State Society of Advocates
Chambers
Bloemfontein
19 December 2025