IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION JOHANNESBURG

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED
25 July 2022 SIGNATURE

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DATE: .....

CASE NO:2017/30057

In the matter between:

MSIZI BOOI	**PLAINTIFF/ Respondent in leave to appeal**
And	
MINISTER OF POLICE	**FIRST DEFENDANT / Applicant in leave to appeal**
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	**SECOND DEFENDANT**

Leave to Appeal Judgment

VICTOR J

[1] The applicants seek condonation for the late filing of the Notice of Appeal. It is clear from the applicants' own correspondence that it knew time was running out time to lodge the notice and remained supine. The respondent submits that the delay in bringing the appeal has severely prejudiced the respondent. The respondent has been kept him out of his treatment for his psychological condition as a result of the unlawful arrest and detention. The applicant was cavalier in giving the state attorney instructions to proceed with the appeal and there was a further delay in appointing counsel. The only basis that condonation is granted is the importance of the legal argument on causation. Condonation is granted.

[2] The applicants submit that the appeal has reasonable prospects of success. In particular, the applicant submits that the Court wrongly held the Minister of Police liable for post appearance detention.

[3] The facts of the arrest and detention were found to be proved. It is unlikely that the same facts would result in a different result. The applicant must set out facts that demonstrate there are prospects of success. These facts must show that will result in a different outcome before a court of appeal. This the applicant has not done.

[4] The judgment spelt out the gross error and reckless procedure in the identification process. The identification of the respondent took place by someone sitting in a car with dark tinted windows. There was no identity parade. The alleged offenders were light in complexion and the other one had dread locks. It is common cause there was no identity parade. None of these physical features fitted the respondent. Constable Hlophe knew the respondent's address but rather arrested him without warrant. His room was searched for a firearm. None was found. There was a locked cupboard belonging to his father who was at the time not at home. The respondent had to take the police to his father's girlfriend to fetch the cupboard key. He was handcuffed. The cupboard was opened and no firearm was found. No fingerprints were taken. In essence no facts linked the respondent to the crime and nothing except for the disquieting identification through the unknown person through the tinted windows of a car was present.

[5] The undisputed facts showed that the conduct of the police materially influenced the decision of the Magistrate's court to keep remanding the matter. Constable Hlophe who arrested him was fully aware that save for the sinister identification referred to and the statements by the complainants there was no further evidence. He was aware that the senior public prosecutor Mr Khosa never interviewed the complainants.

[6] Tshiqi J quoted with approval the principle in *Woji*,[1] where the Supreme Court of Appeal held that the Minister of Police was liable for post appearance detention where the wrongful and culpable conduct of the police had materially influenced the decision of the court to remand the person in question in custody.[2] Its reasoning effectively means that it is immaterial whether the unlawful conduct of the police is exerted directly or through the prosecutor.[3]

[7] The State did not provide legal representation to the respondent when it ought to have. The fact that a legal representative to assist the respondent was unavailable does not justify the unnecessary detention. Until the respondent could bring a bail application the court was a *reception court.*

[8] The arrest was in the face of the principle in *De Klerk v Minister of Police* [4] Theron J held

> "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. 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

[1] *Woji v Minister of Police* 2015 (1) SACR 409 (SCA) ([2014] ZASCA 108): d
[2] Id. at para 27.
[3] *Mahlangu and Another v Minister of Police* (CCT 88/20) [2021] ZACC 10; 2021 (7) BCLR 698 (CC); 2021 (2) SACR 595 (CC) (14 May 2021)
[4] *De Klerk v Minister of Police* 2021 (4) SA 585 (CC)

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."[5]

[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. 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, especially if the police acted unlawfully after the unlawful arrest of the plaintiff, 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." [6]

[9] The wrongful conduct of Constable Hlophe clearly continued post appearance. He took no more steps in the investigation after the arrest which he knew was based on very flimsy and unreliable evidence. Based on the facts I found to be proved the continued post-appearance detention caused the damages and therefore the Minister of Police was liable. As stated in *De Klerk*

"Foresight

"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. 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."[7]

[10] In applying the principles in *De Klerk* to Constable Hlophe his subjective foresight is a "weighty consideration". As stated by Theron J subjective foresight of harm cannot itself necessarily imply that harm is not too remote from conduct. It is, however, a weighty consideration.[8]

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[5]Id para 62
[6] Id para 63
[7] Id para 76
[8] Id para 81

[11] Where the circumstances imply that it would be "reasonable, fair and just to hold the respondent liable for the harm suffered by the respondent that was factually caused by his wrongful arrest." [9] It is for these reasons that I find the appearance and remand issued by the Magistrate did not break the casual link.

[12] The appeal in relation to the quantum of the awards ordered was based on a consideration of many cases in similar matters. The respondent was seriously affected by the unlawful arrest and detention. The facts I found to be proved justified the quantum.

In the result I grant the following orders.

1. Condonation for the late filing for leave to appeal is condoned.
2. Leave to appeal is refused.
3. The applicants are ordered to pay the respondent's costs.

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VICTOR, J

JUDGE OF THE HIGH COURT GAUTENG LOCAL DIVISION

DATE: 25 JULY 2022……

Appearing For the Applicant:

Mr Ndou Phumudzo Faranani (attorney with right of appearance in the high court)

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[9] Id para 81