REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NUMBER: 60311/2015

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

DATE: 14/11/2023

SIGNATURE:

In the matter between:

LIZELLE SCHREUDER N.O. **APPLICANT**

and

MINISTER OF POLICE **1ST RESPONDENT**

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES **2ND RESOONDENT**

NATIONAL DIRECTOR OF PUBLIC PROSECUTION **3RD RESPONDENT**

OFFICER THABETHE **4TH RESPONDENT**

JUDGEMENT – APPLICATION FOR LEAVE TO APPEAL

Barit, AJ

Introduction

[1] The applicant, in this application, was the unsuccessful party in the matter decided by this Court. The applicant, is seeking the Court to grant leave to appeal to the Supreme Court of Appeal, or alternatively, to a full bench of the Gauteng Division, with respect to the judgement of the trial court on 10 May 2022 (published on CaseLines on 11 May 2022). In that judgement, I dismissed the applicant's claims with costs.

[2] The respondents have opposed the application for leave to appeal.

[3] The applicant is Lizelle Schreuder N.O. the plaintiff in the trial court, acting in her representative capacity as the duly appointed curator ad litem on behalf of the patient, Sunnyboy Nene.[1]

[4] The respondents are:

(a) The Minister of Police;

(b) The Minister of Justice and Correctional Services;

(c) National Director of Public Prosecutions;

[1] Sunnyboy – for convenience sake the person represented by Lizelle Schroeder, will be referred to as "Sunnyboy".

(d) Officer Thabethe

[5] After having heard counsel for the parties, on 3 July 2023, I made the following Order:

> Application for leave to appeal is dismissed with costs.

Written reasons for this decision follow below.

[6] In the application for leave to appeal, the appellant has brought forth a number of grounds, on which the applicant is relying on:

6.1 The validity of the arrest and detention of Sunnyboy.

6.2 Whether Sunnyboy was treated as a minor or a major (i.e., the age of Sunnyboy).

6.3 Whether Sunnyboy was legally represented.

6.4 A document by Ms. Masebe which was not admitted as evidence in the trial court.

6.5 The costs order in the court a quo.

6.6 The interests of justice.

[7] Other aspects of the application are speculative, and consequently, the “ifs”, would not take the matter any further. In addition, certain aspects of the applicant’s application are interrelated and interlinked to “the age of Sunnyboy”. However, all aspects as mentioned in the application by the applicant have been taken into account, even if not specifically referred to.

Rule 17 (1) (a) (I) of the Superior Courts Act

[8] The applicant states in the application that it is being made in terms of the provisions of Section 16 (1) (a) (i), [2] read with Section 17 (1) (a) (i) and/or section 17 (1) (a) (ii) of the Superior Courts Act 10 of 2013 and in terms of Rule 49 (1) (b) of the Uniform Rules of Court.[3]

[9] Section 17 (1) (a) of the Superior Courts Act 10 of 2013 ("the Act") states that:

> *"Leave to appeal may only be given where the judge or judges concerned are of the opinion that - the appeal would have a reasonable prospect of success (Section 17 (1) (a) (i)) or; there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration. (Section 17 (1) (a) (ii))".*

[10] The Supreme Court of Appeal has held in the matter of *MEC for Health, Eastern Cape v Ongezwa Mkhitha & The Road Accident Fund,*[4] that the test for granting Leave to Appeal is as follows (para 16-17):

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[2] Section 16 (1) Subject to section 15(1), the Constitution and any other law - (a) and appeal against any decision of a Division as a court of first instance lies, upon leave having been granted - (i) if the court consisted of a single judge, either to the Supreme Court of Appeal or to a full court of that Division, depending on the direction issued in terms of section 17(6):

[3] Rule 49 (1) (b) of the Uniform Rules of Court: "When leave to appeal is required and it has not been requested at the time of the judgment or order, application for such leave shall be made and the grounds therefor shall be furnished within fifteen days after the date of the order appealed against: Provided that when the reasons or the full reasons for the court's order are given on a later date than the date of the order, such application may be made within fifteen days after such later date: Provided further that the court may, upon good cause shown, extend the aforementioned periods of fifteen days."

[4] MEC for Health, Eastern Cape v Ongezwa Mkhitha and The Road Accident Fund [2016] ZASCA 176 (25

"Once again it is necessary to say that Leave to Appeal, especially to this Court, must not be granted unless there truly is a reasonable prospect of success. Section 17 (1) (a) of the Superior Courts Act 10 of 2013 makes it clear that Leave to Appeal may only be granted where the Judge concerned is of the opinion that the Appeal would have a reasonable prospect of success, or there is some other compelling reason why it should be heard". (My underlining)

"An application for leave to appeal must convince the court on proper grounds that the applicant would have a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough. There must be a sound rational basis to conclude that there "would be a reasonable prospect of success on appeal". (My underlining).

[11] This is apparently in contrast to a test under the previous Supreme Court Act, 1959 that Leave to Appeal is to be granted where a reasonable prospect was that another court might come to a different conclusion. *(Commissioner of Inland Revenue v Tuck).*[5]

November 2016).

[5] Commissioner of Inland Revenue v Tuck; 1989 (4) SA 888 (T) at 890 B/C.

[12] In the matter of *Fusion Properties 233 CC v Stellenbosch Municipality*,[6] it was stated:

> *"Since the coming into operation of the Superior Courts Act there have been a number of decisions in our courts which dealt with the requirements that an applicant for leave to appeal in terms of Section 17 (1) (a) (i) and 17 (1) (a) (ii) must satisfy in order for leave to be granted. The applicable principles have over time crystallised and are now well established. Section 17 (1) provides, in material part, that leave to appeal may be granted where the judge or judges concerned are of the opinion that:*
>
> *(a)(i) the appeal would have a reasonable prospect of success; or*
>
> *(ii) there is some other compelling reason why the appeal should be heard….*
>
> *Accordingly, if neither of these discrete requirements is met, there would be no basis to grant leave".*

[13] In Chithi and Others; in re: *Luhlwini Mchunu Community v Hancock and Others,*[7] it was held:

> *"[10] The threshold for an application for leave to appeal is set out in section 17(1) of the Superior Courts Act, which provides that leave to*

[6] Fusion Properties 233 CC v Stellenbosch Municipality [2021] ZASCA 10 (29 January 2021) (para 18).

[7] Chithi and Others; in re: Luhlwini Mchunu Community v Hancock and Others [2021] ZASCA 123 (23 September 2021) ("para 18").

appeal may only be given if the judge or judges are of the opinion that the appeal would have a reasonable prospect of success……"

[14] In *S v Smith*,[8] the court stated that:

"Where the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed therefore the applicant must convince this court on proper grounds that the prospects of success of appeal and that those prospects are not remote but have a realistic chance of succeeding. More is required to be established then that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound rational basis for the conclusion that there are prospects of success on appeal."

[15] The Supreme Court of Appeal in the matter of *Notshokovu v S,* [9] held that an Applicant *"faces a higher and stringent threshold, in terms of the Act compared to the provisions of the repealed Supreme Court Act 59 of 1959 (para 2)".* (My underlining).

[8] S v Smith 2012 (1) SALR 567 (SCA) [para 7].

[9] See also the Supreme Court of Appeal in the matter of Notshokovu v S [2016] ZASCA 112, where it was held that an Appellant "faces a higher and stringent threshold, in terms of the Act compared to the provisions of the repealed Supreme Court Act 59 of 1959 (para 2)".

[16] Reading Section 17 (1) (a) of the Act one sees that the words are: *"Leave to Appeal may <u>only</u> be given where the Judge or Judges concerned are of the opinion that - the appeal <u>would</u> have a reasonable prospect of success".* (My underlining)

[17] Bertlesmann J, in the *Mont Chevaux Trust v Goosen and Eighteen Others,*[10] stated the following:

> *"It is clear that the threshold for granting leave to appeal against the judgment of a High Court has been raised by the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court may come to a different conclusion, see Van Heerden v Cromwright and Others (1985) (2) SA 342 (T) at 343 H".*

[18] In a recent case, in this division, Mlambo JP, Molefe J, Basson J, cautioned that the higher threshold should be maintained when considering applications for leave to appeal. *Fairtrade Tobacco Association v President of the Republic of South Africa,* [11] the court stated:

> *"As such, in considering the application for leave to appeal, it is crucial for this Court to remain cognizant of the higher threshold that needs to be met before leave to appeal may be granted. There must exist more than just a mere possibility that another court, the SCA in this instance, will, not*

[10] Mont Chevaux Trust v Goosen and Eighteen Others (2014 JDR) 2325 (LCC) at para 6

[11] Fairtrade Tobacco Association v President of the Republic of South Africa (21686/2020) [2020] ZAGPPHC 311

might, find differently on both facts and law. It is against this background that we consider the most pivotal ground of appeal".

[19] From the above, and in considering the Application for Leave to Appeal, the Court is aware that the bar has been raised. Hence, this higher threshold needs to be met before leave to appeal may be granted.[12]

The Facts

[20] It was common cause or not disputed in this matter that:

20.1. On 12 February 2013, Sunnyboy was arrested without a warrant on a charge of attempted robbery (a Schedule 1 offence) and detained in custody until his first appearance in court on 14 February 2013. On that date, Sunnyboy was remanded in custody until his release on 3 May 2013, into the care of his aunt.

20.2. Sunnyboy's arrest was effected by a policeman. Further from 14 February 2013 to 3 May 2013, his detention having been applied for by

[12] In the Annual Survey of South African Law (2016) (Juta, Cape Town p706), the following is stated in a discussion on the case of Seathlolo v Chemical Energy Paper Printing Wood and Allied Workers Union (2016) 37 ILJ 1485 (LC). The court noted that Section 17 of the Act sets out the test for determining whether leave should be granted: "Leave to appeal may only be granted if the appeal would have a reasonable prospect of success. According to the court the "would" in Section 17 (1) (a) (i) raised the threshold. The traditional formulation of the test only required Applicants for leave to appeal to prove that a reasonable prospect existed that another court might come to a different conclusion. That test was also not applied lightly. The court noted that the Labour Appeal Court had recently observed that the Labour Court must not readily grant leave to appeal or give permission for petitions. It goes against the statutory imperative of expeditious resolution of labour disputes to allow appeals where there is no reasonable prospect that a different court would come to a different conclusion". (My underlining)

the prosecutor, was authorised by the magistrate of Pretoria North, in terms of section 77(1) of the Criminal Procedures Act No. 51 of 1977.[13]

[21] The incident which led to the arrest was that an alleged attempt was made to rob the handbag[14] of a female lady, Ms. Betty Topese Chauke, by two males. One of the two being Sunnyboy. The attempt did not succeed, and the two fled. Sunnyboy (later to become accused two) and the second male (later to become accused one) however were apprehended by a Security Officer in the area.

[22] Police arrived on the scene and both males were arrested. The arrest was made by Warrant Officer Ringani, acting in the course of his employment with the South African Police Services. The arresting officer identified the men at the scene of the arrest with the assistance of the complainant (the lady whose handbag was attempted to be snatched).

[23] The arrest of the two males was without any warrant for their arrest but based on what the police observed and heard at the scene.

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[13] Criminal Procedures Act No. 51 of 1977: Section 77 - Capacity of accused to understand proceedings
(1) If it appears to the court at any stage of criminal proceedings that the accused is by reason of mental illness or mental defect not capable of understanding the proceedings so as to make a proper defence, the court shall direct that the matter be enquired into and be reported on in accordance with the provisions of section 79.

[14] Paragraph 5 of the Affidavit of Warrant Officer Rangani dated 12 February 2013: *"I then search the two suspects, nothing was found on them, but I explained to them that they are been arrested for attempt robbery common, due to they try to rob the handbag of Mrs Betty Chauke as the complainant, and they have been pointed out by complainant".*

[24] A statement dated 12 February 2013 indicated that Sunnyboy understood that he was being investigated after being involved in the alleged crime of attempted robbery. The statement recorded the name of Sunnyboy as being "Sunnyboy Kunene". In addition, the SAP form had the address of Sunnyboy as being "Mamelodi" and his date of birth was recorded as "6 June 1985". It later turned out that the name was incorrect in that Sunnyboy's correct surname was "Nene" and that he lived in Atteridgeville.

[25] On February 14, 2013, Sunnyboy was transferred to court for his first appearance (being the Pretoria North Magistrates Court). His age was recorded in accordance with his date of birth on the case docket namely, 27 (twenty-seven) years. The magistrate cast some doubt as to Sunnyboy's mental state. The prosecutor at that stage requested that the District Surgeon evaluate the mental status of Sunnyboy. The court ordered that Sunnyboy be held in custody. Following his appearance, Sunnyboy, at that stage (accused 2) was transferred to the Newlock Prison.

[26] On 18 February 2013 Sunnyboy was examined by the District Surgeon before appearing in court again. On the papers of the District Surgeon, the District Surgeon recorded Sunnyboy's age as 37 (thirty-seven).

[27] The matter with respect to both accused (Sunnyboy and accused one) was postponed to 19 March 2013, both men to remain in custody. Sunnyboy to await

the availability of a bed at Weskoppies Hospital for observation in terms of section 77 and 78 of the Criminal Procedure Act 51 of 1977.

[28] Two matters which must be looked at are:

(i) Firstly, the arrest and detention of Sunnyboy.

(ii) Secondly, the age factor.

The main reason being that most of the appeal, with respect to the reasons for the application made by the applicant, revolves around these two factors.

The Arrest

[29] The applicant is alleging that the arrest of Sunnyboy was unlawful.

[30] It is common cause that Sunnyboy was arrested without a warrant on 12 February 2013, by Sargent Rengani, who was acting within the course and scope of his employment with the First Respondent.

[31] Section 40 (1) (b) of the Criminal Procedure Act No. 51 of 1977 provides:

> *"Arrest by a peace officer without a warrant*
>
> *A peace officer may without warrant arrest a person; -*
>
> *Whom he reasonably suspects of having committed an offence referred to in Schedule I, other than an offence of escaping from lawful custody".*

[32] An arrest without a warrant is only permissible where the peace officer entertains a reasonable suspicion that the person, he is arresting has committed an offence listed in Schedule 1. The jurisdictional facts for Section 40 (1) (b) offences are that:

(i) That the arrester must be a peace officer.

(ii) The arrester must entertain a suspicion.

(iii) The suspicion must be that the suspect (arrestee) committed an offence referred to in Schedule 1.

(iv) The suspicion must rest on reasonable grounds.

(v) Once these jurisdictional facts are present, the discretion whether or not to arrest arises. Duncan v Minister of Law and Order.[15]

All these jurisdictional factors were present with respect to the arrest of Sunnyboy.

(a) Sargent Rengani is a Peace Officer.

(b) Sargent Rengani entertained a suspicion based on the information which was received from the complainant, Ms Betty Topese Chauke who pointed out the suspects on 12 February 2013, within the vicinity of Jan Bantjies Street.

(c) The suspicion is that Sunnyboy committed an offence of attempted common robbery which is an offence referred to in Schedule 1.

[15] Duncan v Minister of Law and Order 1986 (2) SA805A at 818 H

(d) The suspicion was based on reasonable grounds having regard to the fact that Sunnyboy was pointed out as one of the perpetrators by the complainant, Ms Betty Topese Chauke.

[33] The arresting officer bears the onus of establishing jurisdictional facts. If he succeeds, the arrest would be lawful, unless the plaintiff is able to establish that the arresting officer exercised his discretion to arrest in a manner that was unlawful. See: *Minister of Safety and Security v Sekhoto and Another*.[16]

[34] Peace Officers who purport to act in terms of Section 40 (1) (b) should investigate exculpatory explanations offered by his suspect before they can form a reasonable suspicion for the purpose of a lawful arrest. In the matter of *Vusi Reginald Mathibela v The District Court Magistrate,* Mrs. Mokeona and Three Others. [17]

[35] It was held in *Rautenbach v The Minister of Safety and Security,* [18] that a full and complete investigation into all allegations in the complainant's statement is not

[16] Minister of Safety and Security v Sekhoto and Another [30], [38]

[17] In the matter of Vusi Reginald Mathibela v The District Court Magistrate Mrs. Mokeona and Three Others, Case No. 19156/2019 GE (Pretoria) at para 19. Sardiwalla J stated that: in Duncan v Minister of Law and Order 1986 (2) SA805A, the Court established that jurisdiction of facts must exist before such power can be exercised namely: (a) The arrestor must be a peace officer; the peace officer must entertain a suspicion; it must be a suspicion that the arrestee committed a schedule 1 offence; the suspicion must first be on reasonable grounds. Once these jurisdictional facts are present the discretion arises whether to arrest or not. Such discretion must be exercised in <u>good faith, rationally and not arbitrarily</u>. This is an objective enquiry with relation to the facts of Minister of Safety and Security v Sekhoto and Another 2011 (1) SACR 315 SCA.

[18] Rautenbach v The Minister of Safety and Security, 2017 (2) SACR 610 (WCC) at para 43. In the matter of Pelle v Minister of Police, National Director of Public Prosecutions and Boy Makola, in the Gauteng Local Division Johannesburg (Case No. 27525/14) Greenstein AJ stated at para no. 8 and 9: "…The arrest was performed

required. The arresting officer is required only to exercise his or her discretion rationally within the boundaries of the Act. Le Grange J, in this matter, stressed that the standard is not breached if the arrestor exercises the discretion and manner that is deemed less than optimal by the Court. The standard is neither perfection nor the ultimate excellence judged with the vantage of hindsight, as long as the choice made falls within the range of rationality.

[36] The onus is to prove that an arrest was lawful by an arresting officer. The Court in *Mobana and Another v Minister of Law and Order and Others,*[19] emphasised that the test for reasonable suspicion did not require that the information at the disposal of the peace officer had to be of sufficiently high quality and cogency to engender in him a conviction that the suspect is in fact guilty. The Court stated that what is required is a suspicion but not certainty. However, the suspicion has to be based on solid grounds.

[37] It can be said that Sargent Rengani exercised his discretion properly at the time when he effected the arrest.

[38] There is nothing to gainsay the following evidence:

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without a warrant of arrest having heard the evidence of the arresting officers and the Plaintiff. As such, the onus rests on the First Defendant to justify the arrest of the Plaintiff and the lawfulness thereof. Accordingly, I am called upon to determine the relation to the arrest of the Plaintiff as to whether the jurisdictional facts (the arrestor must be a peace officer who must entertain a suspicion that the arrestee committed a schedule one offence with suspicion which suspicion must rest on reasonable grounds) are present as held in Duncan v Minister of Law and Order 1986 (2) SA805A. If these judicial facts are satisfied, a peace officer may evoke the power converging him to arrest without a warrant"

[19] Mobana and Another v Minister of Law and Order and Others 1988 (2) SA 654 (SE) at (658) E-H.

(a) That he interviewed the complainant, Ms Chauke, who pointed out the two suspects as the perpetrators of the offence of attempted common robbery;

(b) That Sargent Thungwani was present, and corroborated the evidence of Sargent Rengani in all material respects.

(c) That both the complaint and the complaint's employer who were present at the scene of the crime or within the vicinity of Jan Bantjies Street implicated Sunnyboy and his co-accused in the commission of the crime.

(d) That Ms Chauke in her statement as well as during the interview which was conducted with her by the peace officers, directly implicated Sunnyboy in the commission of the crime having regard to the contents thereof.

(e) That on a proper assessment of the complainant's version, the suspects were acting in common purpose having regard to the reference of the word "they".

(f) That Ms Chauke, the complainant, Sargent Rengani as well as Chauke's employer were present when the complainant pointed out the suspects.

(g) That according to the complaint's version both suspects attempted to flee prior to being apprehended by the security officer.

(h) That the offence was committed on 12 February 2013 and the suspects were pointed out by the complainant (Ms Chauke) and apprehended the same day during daylight, in the morning.

(i) That the suspects did not give any exculpatory evidence and/or any version to exonerate themselves in the commission of their offence.

[39] Schedule 1 of the Criminal Procedure Act 51 of 1977 (as amended) it makes provision that any attempt to commit any crime listed in Schedule 1 thereof, falls within the purview of the Schedule.

[40] The version of the complainant (Ms Chauke) is consistent with the elements of the Commission of the crime of attempted common robbery as confirmed by the prosecutor Ms Mgiba.

[41] This effectively means that members of the SA Police Service did not commit any error in preferring charges of attempted common robbery against both suspects.

[42] It can therefore be seen that the First and Fourth Defendant discharged the onus cast on them to prove the lawfulness of the arrest.

[43] Sargent Ringani interviewed the complainant, Ms. Chauke, who pointed out the suspects (one being Sunnyboy) as the alleged perpetrators of the offence of attempted common robbery with respect to her handbag.

[44] In the case of the Minister of Safety and Security v Sekhoto and Another, [20] the Supreme Court of Appeal stated:

[20] Minister of Safety and Security v Sekhoto and Another 2011 (1) SACR 315 (SCA) para 25.

"It could hardly be suggested that an arrest under the circumstances set out in section 40 (1) (b) could amount to a deprivation of freedom which is arbitrary or without just cause in conflict with the Bill of Rights. A lawful arrest cannot be arbitrary. An unlawful arrest will not necessarily give rise to an arbitrary detention. The deprivation must according to Canadian juris prudence, at least be capricious, despotic or unjustified…."

Additionally, "… The fact (is) that the decision to arrest must be based on the intention to bring the arrested person to justice."

It is quite obvious from the proceedings in the magistrate's court and what in addition took place at the arrest of the two suspects (one being Sunnyboy) that the intention was to bring the alleged suspects to justice.

[45] To sum up, there was no proof before the court a quo of an unlawful arrest of Sunnyboy.

The Detention

[46] The applicant further alleges that the detention of Sunnyboy was unlawful.

[47] It is common cause that Sunnyboy was remanded in custody on 14 February 2013. His detention having been applied for by the prosecutor, was authorised by the magistrate of Pretoria North, to facilitate an enquiry into the mental capacity of Sunnyboy to understand the proceedings.

[48] In terms of section 77(1), a court is obliged, if during any stage of the proceedings, if it appears to the court that the accused is by reason of mental illness or mental defect not capable of understanding the proceedings so as to make a proper defence, to direct that the matter be enquired into and be reported on in accordance with the provisions of section 79 of the Act.

[49] In *S* v *Tom,*[21] it was decided that once there is a reasonable possibility that the accused is not able to follow the proceedings or might not have been criminally responsible for his actions, the court is obliged to direct that an enquiry under section 77 or 78 and 79 is conducted.

[50] Once the circumstances envisaged by Section 77(1) existed, the Pretoria North Magistrates Court was obliged to refer Sunnyboy for observation. The provisions of section 77(1) are mandatory, and the court cannot continue in terms of section 77 unless a report in terms of section 79 has been obtained. Likewise, the court cannot make a finding under section 78(6) without receiving a report in terms of section 79 following the procedures in section 78(2).

[51] It is appropriate to consider the provisions of section 79 of the Act.[22] Section 79 provides, *inter alia*, that where a court issues a direction under section 77(1), the enquiry shall be conducted and reported on by the psychiatric hospital designated by the court. Section 79(3) read with section 79(4) provides that the

[21] S v Tom & others 1991 (2) SACR 249 (B) at 251A-C.

[22] Section 79 was amended by the section 6 of the Criminal Matters Amendment Act 68 of 1998 which came into effect on 28 February 2002.

report must be in writing and include a description of the nature of the enquiry; a diagnosis of the mental condition of the accused; and if the enquiry is under section 77(1), include a finding as to whether the accused is capable of understanding the proceedings in question so as to make a proper defence. If the enquiry was under section 78(2), the report includes a finding as to the extent to which the capacity of the accused to appreciate the wrongfulness of his actions or to act in accordance with such appreciation, at the time of the commission thereof, was affected by mental illness or mental defect.

[52] The Pretoria North Magistrates Court, for the purposes of the relevant enquiry, referred Sunnyboy to the Weskoppies Psychiatric Hospital, for a period, of thirty days. However, due to the immediate unavailability of a bed, Sunnyboy remained in lawful custody at the Newlock Prison, until a bed became available.

[53] It was during this 30 (thirty) day observation period at Weskoppies, and before the psychiatric evaluation in accordance with section 79 of the Criminal Procedures Act could be concluded that Sunnyboy's aunt and guardian, Ms Motala, secured his release from custody, after providing the Pretoria North Magistrate's Court with proof on 03 May 2013, that Sunnyboy was a minor.

[54] It is trite in law that the effect of an arrest shall be that the person arrested shall be in lawful custody and that he shall be detained in custody until he is lawfully discharged or released from custody.[23]

[55] To sum up, there was no proof before the court a quo of the unlawful detention of Sunnyboy. Hence, the applicant's claim of unlawful detention is without merit.

Age Of Sunnyboy

[56] (a) 12 February 2013, the date of the arrest of Sunnyboy was a Tuesday, a normal working and school day. "When identifying himself at the police station, Sunnyboy held himself out to be Sunnyboy Kunene[24] from "Mamelodi" with the date of birth of "6 June 1985"".[25]

(b) On 14 February 2013, Sunnyboy was transferred to court for his first appearance.

(c) At that appearance, his age was recorded as 27 years under the J15 (prosecutor's report), which was in accordance with his date of birth as stated in the case docket.

(d) Recorded on the SAP 69(C) form, being part of the case docket, Sunnyboy's surname was incorrectly indicated as Kunene instead of Nene

[23] Section 39(3) of the Criminal Procedures Act No. 51 of 1977

[24] The correct surname on the birth certificate brought by the aunt was "Nene". Further, Sunnyboy was from Atteridgeville and not Mamelodi.

[25] Trial Court Judgement at para 37

and Sunnyboy's date of birth was recorded therein as 6 June 1985. Based on that, Sunnyboy would have been 27 (twenty-seven) years old at the date of his Pretoria Magistrates Court appearance.

(e) Sunnyboy's age according to the record in the Occurrence Book (SAPS 10) was indicated as being 18.

(f) While an issue was raised by the magistrate with respect to Sunnyboy's mental state of mind, nothing was said by the magistrate with respect to Sunnyboy's age. Hence, the magistrate accepted that Sunnyboy was not a minor. Further, it must be noted that Sunnyboy appeared before the magistrate, where the magistrate was visibly able to observe Sunnyboy.

(g) Hence the appearance of Sunnyboy, at the Magistrates Court on 18 February 2013, there was no issue raised with respect to the age of Sunnyboy. Further, Sunnyboy was referred to the District Surgeon for evaluation.

(h) On the 18 February 2013 the District Surgeon (a medical doctor) reported on his evaluation of Sunnyboy. He, recorded Sunnyboy's age as being 37 years on the "Mental Evaluation Article 78" form. This was completed and signed by Dr. Lukhozi and dated "18 February 2013". The doctor did not raise any concerns on the form about Sunnyboy's age or the possibility that he might be a minor. Sunnyboy was found not able to participate on

the trial proceedings and the assessment of Sunnyboy, and management of Sunnyboy, by a mental healthcare practitioner was recommended.

(i) The prosecutor Ms Mgiba, who was the prosecutor on 18 February 2013, testified that she completed the request for assessment by the District Surgeon, and that she received the forms completed by Dr. Lukhozi on their return. The form in question being where Dr. Lukhozi recorded the age of Sunnyboy as 37 years.

(j) Ms Mgiba further testified that Ms. Maubane, a Legal Aid Attorney, appeared on behalf of both accused (Sunnyboy being accused two) on the day and confirmed that according to her notes Ms. Maubane – Sunnyboy's legal representative did not raise any concerns about the age or majority of Sunnyboy.

(k) Ms Mgiba also testified that Sunnyboy according to her, looked like a major and her evidence was in this regard never challenged.

(l) Further, on 17 April 2013, Mr. Matihatji (the prosecutor), saw Sunnyboy for the first time. In giving evidence, he dealt with the case and testified that Sunnyboy was not looking out of the ordinary and that according to his memory seemed to be a major and that he had no reason to suspect either that Sunnyboy (or accused number one) were minors. He testified that Mr. Mawela was on that day the Legal Aid Attorney for Sunnyboy and the other accused. Further, that Mr. Mawela had no comments about Sunnyboy's age. Hence, nothing in that respect was recorded by the

Presiding Officer. Further, Mr. Matihatji also testified that there was sufficient evidence in the case docket to charge both Sunnyboy and accused one, as Ms. Mgiba had done.

[57] It is to be noted with respect to the appearances in court of Sunnyboy the following three aspects:

(i) The prosecutor followed the age on the document indicating that there was no reason to query the age of Sunnyboy.

(ii) Sunnyboy was represented by two different attorneys. Those being the representatives of Sunnyboy who also did not query the age of Sunnyboy. Both would have consulted with Sunnyboy, and neither made this a matter before the court.

(iii) The magistrate at the appearance of Sunnyboy in court, despite querying the mental ability of Sunnyboy, at no stage queried his age. The only inference that can be drawn from this is that Sunnyboy looked like a major. Hence, from the appearance factor, Sunnyboy did not appear to be a minor.

[58] To summarize, the following can be seen. Sunnyboy had three different ages, all being that of a major – namely:

(i) 18 years of age.

(ii) 27 years of age.

(iii) 37 years of age.

Not one of these reflecting that Sunnyboy was a minor (less than 18 years of age).

[59] Everyone, without any exception, in terms of the evidence, from the time of the attempted snatching of that handbag right through to the time of his release, which only took place after production of Sunnyboy's birth certificate, had any query or doubt as to Sunnyboy being the age of majority. This, in summation leads to only one conclusion. That Sunnyboy was not identifiable as a minor. This, being further corroborated by the District Surgeon, a medical practitioner who placed the age of Sunnyboy as being 37. This in particular is pertinent as the District Surgeon would have a better and fuller expertise with respect to a person's age, than most others. In different words, everyone who came into contact with Sunnyboy, identified Sunnyboy as a major including a person with far greater biological knowledge than the layman.

[60] Once, Ms Motala provided the Pretoria Magistrates Court with a copy of a birth certificate indicating as that being of a minor, from this moment forward, Sunnyboy's case was proceeded with on the basis of Sunnyboy being a minor.

Section 28 and 36 of the Constitution

[61] The applicant is alleging in paragraph 38 and 37 respectively that I:

> *"erred in not regarding the rights of Sunnyboy as paramount in terms of section 28 of the Constitution,"* and that *"… the respondents' defence to*

the claims instituted a departure, previously not recognised, from the express provisions of section 36 of the Constitution."

[62] In the Constitutional Court, in the matter of *M v S,* [26] Sach J held that:

> *"A more difficult problem is to establish an appropriate operational thrust for the paramountcy principle. The word "paramount" is emphatic. Coupled with the far-reaching phrase "in every matter concerning the child", and taken literally, it would cover virtually all laws and all forms of public action, since very few measures would not have a direct or indirect impact on children, and thereby concern them. Similarly, a vast range of private actions will have some consequences for children. This cannot mean that the direct or indirect impact of a measure or action on children must in all cases oust or override all other considerations."*

[63] The relevant factors, which are common cause, when identifying himself at the police station, Sunnyboy held himself out to be "Sunnyboy Kunene", from "Mamelodi" with a date of birth of "6 June 1985".[27] Making him 27 (twenty-seven) years of age. Under the circumstances, the provisions of section 28 of the Constitution[28] could not be considered to be applicable.

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[26] S v M (Centre for Child Law as Amicus Curiae) [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC) at para 25.

[27] Trial court judgement at para 37.

[28] Constitution of the Republic of South Africa Act No. 108 of 1996

[64] In terms of section 36, these exceptional circumstances created a reasonable and justifiable limitation on section 28 with respect of Sunnyboy's age, and in terms of law of general application taking all relevant factors into account.

[65] In the Constitutional Court, in the matter of *Le Roux and Others v Dey,*[29] Skweyiya J held that:

> *"Our constitutional order mandates special protection to be afforded to children. The exact scope of application of section 28 of the Constitution has been the subject of some debate in this Court's jurisprudence, although it is by now clear that the implication of this is not to render the "best interests" consideration absolute.*[30]

[66] Further, in the matter of *S v M*,[31] it was held that:

> *"Accordingly, the fact that the best interests of the child are paramount does not mean that they are absolute. Like all rights in the Bill of Rights their operation has to take account of their relationship to other rights, which might require that their ambit be limited."*

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[29] Le Roux and Others v Dey (CCT 45/10) [2011] ZACC 4; 2011 (3) SA 274 (CC); 2011 (6) BCLR 577 (CC) (8 March 2011) at para 210

[30] See Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development, and Others [2009] ZACC 8; 2009 (4) SA 222 (CC); 2009 (7) BCLR 637 (CC) at para 72; S v M (Centre for Child Law as Amicus Curiae) [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC) at para 26.

[31] S v M (Centre for Child Law as Amicus Curiae) [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC) at para 26.

[67] The contentions with respect of section 28 and 36 of the Constitution by the applicant, are without merit.

Document of Ms Masebe

[68] A ground in the application for leave to appeal, is the contention of the applicant that I erred in ruling that the document of Ms Masebe "*does not form part of the evidence before the court*".

[69] The document in question, was discussed in my judgment of the trial court, in detail. Hence, the matter of the document itself in the judgment is quite clear. However, a new aspect has now been brought by the applicant with respect to Ms Masebe's document, namely that if I had ruled on the document during the trial itself, the applicant would have called the author of the document to give evidence.

[70] This line of reasoning is faulty and has no merit. The applicant could have called in Ms Masebe to give evidence. The fact is that there exists no justification for the applicant's failure to call the probation officer, Ms Masebe, as a witness in order for her version to be tested under cross-examination. The failure of the applicant to call Ms Masebe, the probationary officer, to testify, certainly calls for a negative inference to be drawn.

[71] If the section of the judgment of the trial court with respect to Ms Masebe is studied, she would not have helped the applicant in any way. Under the heading

of “A report” (in the trial court judgment), the following was stated (para 66, 67 and 68):

> *“A question before this Court with respect to a “Draft Affidavit” provided on a Gauteng Province official letterhead, from the probation officer of the Pretoria North Magistrates Court Ms Masebe – dated 04 June 2013 – arose. This document was excluded from evidence before the Court by mutual agreement between the plaintiff and the four defendants. In this document, the writer of the contents, uses the following words “the patient is obviously a minor”. However, there is a second document by Ms Masebe, a letter, also on the official Gauteng Province letterhead, addressed to Colonel Khanyl on the same day. This letter the plaintiff attempted to bring before this Court, despite all the bulleted paragraphs of the letter being a duplication of what is stated in the “Draft Affidavit”.*

[72] The second defendant, in closing arguments, strongly objected to the plaintiff’s attempt to introduce this letter as evidence, stating:

> *“… in the pretrial minutes the second defendant specifically objected to that document and it was specifically stated that we dispute the contents thereof”.*

Where the probation officer made the allegations that he was a minor M’lord, it was recorded. I specifically said that it was, the affidavit deposed to by the probation officer that was specifically excluded from the above aforementioned

agreement. *"M'lord now with my colleague, now relies on a report which is not an affidavit M'lord, it is exactly the same, it is the version by the probation officer that was disputed from the outset"*.

The contents of the second document (the letter), formed part of the draft affidavit (a copy in the bundle) that has been excluded. Hence, to use the letter which was based on the draft affidavit, would be using the draft affidavit itself despite it having been excluded from evidence.

The plaintiff requested a ruling in this respect. The ruling of the Court is that the second document (the letter) does not form part of the evidence before this Court (the patient being Sunnyboy).

Further, in this regard there are three factors which can be noted:

(a) Even if the letter was admitted as evidence, its probative value would be zero, as the author (Ms Masebe the probation officer) was not a witness and hence the contents of the letter was not subjected to cross examination.

(b) A further point to note would be that the circumstances of the meeting between the writer of the document and the patient (Sunnyboy), was definitely not in any way similar to conditions surrounding the incident, and other happenings from that time up to and including Sunnyboy's release.

(c) Further on authoring the document, the writer would have had access to the birth certificate age of the patient (Sunnyboy).

[73] From the above, it can be seen and understood why, whatever was said or can be said, the particular "letter" in question, would never have had any influence with respect to the decision of the trial court. Hence, the contention now brought in as a ground for the applicant's application for leave to appeal, has no merit and takes the matter no further.

Legal Representation

[74] In the heads of argument of the applicant, with respect to the application for leave to appeal, paragraph 7.22 states:

> *"The Honourable Judge further erred in finding that the patient was legally represented, … The patient could never legally have been represented."*

[75] The base of this claim, as per the heads of argument together with the hearing which took place in court, Sunnyboy could not have appointed a legal representative, nor could he have instructed the attorney.

[76] Section 35 (3) (g) of the Constitution of the Republic of South Africa,[32] states:

> *"Every accused person has a right to a fair trial, which includes the right to have a legal practitioner assigned to the accused person by the State and at State expense, if substantial justice would otherwise result, and to be informed of his right promptly".*

[32] The Constitution of the Republic of South Africa 1996 Act 108 of 1996.

[77] In the case of *S v Saule*,[33] when discussing the right to legal representation, the court stated that legal representation will depend on the circumstances of each case.

[78] In the case of *S v Thabang Nkadimeng Vuxeka*,[34] the court stated:

> *"A criminal trial is not a game where the magistrate plays the role of an umpire. He has to ensure the fairness of the whole proceedings."*

[79] Of importance is the fact that the applicant has not shown in what way Sunnyboy was not properly represented. On the contrary, with the guidance of the magistrate, in sending Sunnyboy to the District Surgeon, every indication shows that the legal representative who was appointed for Sunnyboy, was part of the magistrate's court proceedings.

[80] Evidence is that Sunnyboy did have legal representation. Not only one, but two different legal representatives. It is further evident on the J138E Form – Warrant for Removal of Person Detained Under Provision of Chapter 13 of the Criminal Procedures Act No 51 of 1977 for Enquiry (section 77,78,79), date 25 March 2013, that Sunnyboy was represented by Ms Maubane.

[81] What the applicant is attempting to do is to re-write the historical facts of the appearance of Sunnyboy in the magistrate's court with respect to legal

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[33] S v Saule (2009) SACR (1) 96 (CKHC)

[34] S v Thabang Nkadimeng Vuxeka [2021] ZAFSHC 255 Para 15

representation (See also para 56 above). On the basis of what the applicant is attempting to state is that one would always have a situation where a party who has lost a case, can then hope to win an application to appeal based on the legal counsel not being effective and therefore having no legal representation in terms of what the applicant would like the court to have decided.

[82] Simply stated, the effectiveness or non-effectiveness of the legal representative does not and cannot constitute a denial of the fact that Sunnyboy was represented, by two different legal representatives. *De facto* the accused was represented whether the applicant likes the fact or not.

[83] The contention by the applicant, that I: *"erred in finding that the patient (Sunnyboy) was legally represented",* has no merit whatsoever. Sunnyboy was legally represented.

The Costs Order

[84] The applicant has taken issue with respect to the awarding of a costs order against the applicant on an attorney and client basis. This order, being in favour of all four respondents. The main contention of the applicant is that the four defendants did not ask for what the applicant terms a "punitive costs order".

[85] The "Dictionary of Law", Penguin Reference Library": [35]

[35] Dictionary of Law, Penguin Reference Library. 2009 Penguin Books, London p126-127.

"In civil litigation, the court has powers to make a wide range of orders in respect of the costs of litigation. Nevertheless, the general underlying principle is that the winner can normally expect to recover costs from the loser (this used to be known as the principle of "costs following the event").

"Judges will normally seek to assess costs on a summary assessment at the conclusion of the trial…." (Underlined words as done in original text).

[86] I refer to the case of *Ferreira v Levine NO and Others; and Vryenhoek and Others v Powell and Others,* [36] where Ackerman J stated:

"The Supreme Court has over the years developed a flexible approach which proceeds from two basic principles, the first being that the award of costs, unless expressly otherwise indicated, is in the discretion of the presiding judicial officer, and the second, that the successful party should as a general rule, have his or her costs. Even the second principle is subject to the first". (My underlining).

[87] In the case of *One Time Dream Team Promotions and Events Management CC v Mangaung Metropolitan Municipality*, [37] Mathebula J, with respect to the judicial "discretion" said:

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[36] Ferreira v Levine NO and Others; and Vryenhoek and Others v Powell and Others 1995 (4) BCLR 437 (W)

[37] One Time Dream Team Promotions and Events Management CC and Mangaung Metropolitan Municipality [2018] ZA FSHC 1.

"The discretion referred to should not be exercised in a vacuum. In Ward v Sulzer 1973 (3) SA 701 (A) at 706 G the court pointed out that: "in awarding costs the court has a discretion to be exercised judicially upon a consideration of all the facts; and, as between all the parties, in essence it is a matter of fairness to both sides. See Gelb v Hawkins; and Graham v Odendaal. Ethical considerations may also enter into for exercise of the discretion; see Mahomed v Nagdee".

[88] In the Appellate Division matter of *Union Government v Heiberg*,[38] Soloman AJ, stated:

"The ordinary practice is, of course, that costs follow the event, but that is subject to the general rule of our law that costs unless expressly otherwise enacted, are the discretion of the judge ….".

[89] Another pertinent case is that of *Louw v Engirex (Pty) Ltd and Others.*[39] The applicant, in an application for leave to appeal, submitted that the court a quo did not exercise its discretion judicially with respect to the costs order, it gave, stating that the Court "*did not take cognisance of all the relevant facts*". (My underlining). Further, the Court stated:

"It is trite that a court, sitting as a court of appeal, will not likely interfere with any judgment (specifically as to judgment as to costs) where the court a quo exercised a discretion when deciding on the issue, on the condition

[38] Union Government v Heiberg 1919 AD 477 at p484

[39] Louw v Engirex (Pty) Ltd and Others (1629/2020) [2022] ZAWCHC 32.

that the discretion was judicially exercised. In essence whether I exercised my discretion judicially, in terms of investigation on whether the decision is based on grounds on which a reasonable person would have reached the same conclusion".

The Court went on to quote from the Constitutional Court in the matter of *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa and Another*,[40] with reference to *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others,* [41] that:

"When a lower court exercises a discretion in the true sense, it would ordinarily be inappropriate for an appellate court to interfere unless dissatisfied that the discretion was not exercised… judicially, or that it had been influenced by wrong principles or a misdirection on the facts or that it had reached a decision which in the results could not reasonably have been made by a court properly directing itself to all the relevant facts and principles".

[90] In the matter of *Maluleko v Total SA (Pty) Ltd,* [42] the following was stated, in this Division, by Olivier AJ:

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[40] Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa and Another.

[41] Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa and Another, with reference to National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others.

[42] Maluleko v Total SA (Pty) Ltd [2023] ZAGPJHC 161 at para 5.

"In awarding costs, the court has a discretion which should be exercised judicially. A court should consider the circumstances of each case, weighing the issues in the case, the conduct of the parties and <u>any other circumstances which may have a bearing on the issue of costs and then make such order as would be fair and just between the parties</u>". (My underlining).

Olivier AJ then went on to state: "A *Court's discretion should not be fettered or curtailed in any way".*

[91] In this Division, in the recent matter of *Fairtrade Independent Tobacco Association v President of the Republic of South Africa and Another,* [43] Mlambo JP (Molefe J and Basson J concurring) stated:

"It is a basic rule of our law that an award of costs is in the discretion of the Court and such discretion must be exercised judicially. It is trite principle that in the ordinary Courts, the general rule is that "costs follow the results".

[92] Being aware that such a costs order is in the hands of the Presiding Officer, the order as awarded by myself, in the original judgment, was as a result of numerous factors.

[43] Fairtrade Independent Tobacco Association v President of The Republic Of South Africa And Another (21688/2020) [2020] ZAGPPHC 311 [para 8 and para 9].

[93] The considerations *inter alia,* were basically as follows:

(a) The applicant brought the matter of a "punitive costs order" to the trial court on a vigorous basis. In the applicant's opening address to the trial court, the applicant stated that their intent was to apply for a "punitive costs order". This request was followed up, by the applicant during the course of the proceedings of the trial, repeating that such a "punitive costs order" will be sought.

(b) The resulting impression was most definitely that the applicant regarded this case as ripe for a "punitive costs order".

(c) Further, such leads to the simple equation of what is "good for the goose is good for the gander".

(d) As it can be seen, it was the applicant who opened the door for the costs order as eventually awarded.

With reference to the applicant announcing the applicant's intent to such a "punitive costs order," counsel for the second respondent stated: *"How you make your bed, so you must lie"*. This short sentence is most apt.

[94] With a cost order being in the hands of the court, my discretion was exercised with respect to the case as it had unfolded and proceeded between the parties. Taking all the considerations into account (including what is stated above), a reasonable person would have reached the same conclusion.

The Biowatch Principle

[95] The applicant is further of the view that the court ought to have applied the Constitutional Court judgement of *Biowatch Trust v Registrar Genetic Resources and Others*[44] ("Biowatch") in determining the issue of cost.

[96] In Biowatch, Sachs J held that;

> "*Equal protection under the law required that cost awards not be dependent on whether the parties are acting in their own interests or in the public interest. Nor should they be determined by whether the parties were financially well-endowed or indigent…. The primary consideration in regard to costs in constitutional litigation had to be the way in which a costs order would hinder or promote the advancement of constitutional justice." Thus, in Affordable Medicines, this Court stated that the ability to finance the litigation was not a relevant consideration in making a costs order. It held that the general rule in constitutional litigation that an unsuccessful litigant ought not to be ordered to pay costs to the state should not be departed from simply because of a perceived ability of the unsuccessful litigant to pay. It accordingly overturned the High Court's order of costs against a relatively well-off medical practitioners' trust that had launched unsuccessful proceedings. Conversely, a party should not get a privileged*

[44] Biowatch Trust v Registrar Genetic Resources and Others [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC)

status simply because it is acting in the public interest or happens to be indigent. It should be held to the same standards of conduct as any other party, particularly if it has had legal representation. This means it should not be immunised from appropriate sanctions if its conduct has been vexatious, frivolous, professionally unbecoming or in any other similar way abusive of the processes of the Court."[45]

[97] But *Biowatch* drew a limit. The line was this – applications that are "frivolous or vexatious, or in any other way manifestly inappropriate", get no shelter from adverse costs.[46] *Biowatch* does not allow risk-free constitutional litigation.[47] The worthiness of an applicant's cause "will [not] immunise it against an adverse costs award".[48]

[98] This Court did not find that this matter was "a genuine constitutional matter" and accordingly the *Biowatch* principle does not apply. The applicant in Biowatch was acting in the public interest and in so doing sought to vindicate a constitutional right. This matter was not argued as one in the public interest, the only interest being advanced was that of the applicant.

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[45] Biowatch Trust v Registrar Genetic Resources and Others [2009] ZACC14;2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC), at para 16 to 18.

[46] Biowatch at para 24. See also Limpopo Legal Solutions and Another v Eskom Holdings Soc Limited (CCT61/17) [2017] ZACC 34; 2017 (12) BCLR 1497 (CC) (26 September 2017) at para 21.

[47] Lawyers for Human Rights above n 33 at para 18 (citing Biowatch at paras 20, 23-4 and Helen Suzman Foundation v President of the Republic of South Africa [2014] ZACC 32; 2015 (2) SA 1 (CC); 2015 (1) BCLR 1 (CC) at paras 36-8).

[48] Biowatch at para 24.

[99] In *Lawyers for Human Rights and Another v Minister of Home Affairs and Another*[49], the Court in dealing with public interest stated:

> "*Having regard to the nature of public interest litigation, litigants bringing an application in terms of Section 38(d) of the Constitution should not have as much of a substantive and financial interest in the outcome of the mater as the Applicant has in this matter. A vested interest in the matter, both financially and otherwise- clearly taints the legitimacy of the claim that the matter is in fact being brought solely in the public's interest*. "*Even if the …… as a private litigant is litigating to ventilate issues of public importance, this is not enough to shield it from an adverse costs order as noted by Sachs J in Biowatch. A constitutionally discernible right must be sought to be vindicated against the State in order for the Biowatch principle to apply*"[50]

[100] The *Biowatch* principle does not apply to this matter because the application has no impact on the public interest and is clearly not of a constitutional nature, in line with previous cases wherein this principle has been applied.

General:

[101] Some of the other facts in the application of the applicant:

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[49] Lawyers for Human Rights and Another v Minister of Home Affairs and Another 2004 (7) BCLR 775 (CC).

[50] Fair-Trade independent Tabaco Association/ President of the Republic of South Africa and others (21688/2020) [2020] ZAGPPHC 246; 2020 (6) SA 513 (GP); 2021 (1) BCLR 68 (GP) (26 June 2020)

101.1 ***If's***

Application for leave to appeal, states:

> *"……the Fourth Respondent (Officer Thabethe), was instructed by the prosecutor to ascertain the address of the patient (Sunnyboy) which he did not do or he even attempted to do" (para 9 of the Application).*

And then (in para 12 of the Application), it continues:

> *"The Honourable Judge failed to consider that it was common cause that, had the Fourth Respondent found the place of residence of the patient, (Sunnyboy), he would have been informed that the patient (Sunnyboy) was a minor, and the patient (Sunnyboy) would have been released into the care of his guardian".*

This raises a number of issues:

(a) The extent of the knowledge that the Fourth Respondent had: Firstly, of Sunnyboy's origin was an address being "Mamelodi", a town of some few hundred thousand residents. Secondly, Sunnyboy's surname being "Kunene" – not his correct surname.

(b) To look for a home address of a "Sunnyboy Kunene in Mamelodi" when he is Sunnyboy Nene of Atteridgeville (a different town consisting also of a few hundred thousand inhabitants) is the

equivalent of "instructing" someone to find a copper needle in a haystack while what is sought is a silver needle in a different haystack some 50km away.

(c) Based on "if", which "if" just did not happen and practically was an impossibility, the applicant now states that "the Honourable Judge failed to consider". This line of reasoning is faulty and has no merit.

101.2 ***Duty of care***

(a) *Maasdorp's Institute of South African Law,*[51] speaks in terms of "degree of care" where the law regards it to be the duty of a reasonable man to exercise in regard to another in particular circumstances.

(b) In the matter of *Union Government v National Bank of South Africa Ltd.,*[52] Innes CJ, said:

> *"With the degree of care under the circumstances was the duty of the person to use towards another"*

[51] Maasdorp's Institute of South African Law Vol IV (7th ed) Juta and Co. Cape Town p35.

[52] Union Government v National Bank of South Africa Ltd. 1921 A.D. 121 at p128.

Further, some 2 years later Innes CJ, in the matter of *Cape Town University v Paine,*[53] declared:

> *"… the degree of care that a reasonable man would have observed. As repeatedly being laid down by this Court."*

(c) Taking a look at English Law, Anderson B, in *Blyth v Burmingham Water Works Co.*[54] alludes to the "*conduct of human affairs or doing something which a prudent and reasonable man would do*". In other words, a duty of care is what the reasonable man would do under the circumstances.

(d) With respect to the "duty of care" as stated in the trial court judgement (i.e. paras 85, 86, 87, 88, 89 and 90):

> "[85] With respect to the issue of "duty of care", it is common cause that the four defendants owed Sunnyboy a duty to take reasonable care in carrying out their duties. The plaintiff alleges that the defendants breached this duty of care. However, a factor to be taken into account is that the plaintiff has not defined the exact nature of the duty of

[53] Cape Town University v Paine,1923 A.D. 201 at 216.

[54] Blyth v Burmingham Water Works Co. (1856) 156 E.R. 1047.

care which has allegedly been breached by each of the four defendants.

[86] According to the Cambridge English Dictionary, a duty of care means: "*A moral or legal responsibility not to allow someone to be harmed*".[55] In common law, "duty of care" is a specific concept that refers to the obligation for people to not cause harm to one another. Further, legally it means when someone has an obligation to do something, he or she must discharge his or her duties in good faith and with the same degree of care that would be used by a reasonable prudent person in the same position.

[87] In this regard reliance can be placed on the dictum of the English case of *Darnley v Croydon Health Services NHS Trust,*[56] where Lord Lloyd-Jones of The Supreme Court aptly stated:

> *"….. in considering the issue of duty of care I have been greatly assisted by a case note on the decision of the Court of Appeal in the present case by*

[55] https://dictionary.cambridge.org/pronunciation/english/duty-of-care

[56] Darnley v Croydon Health Services NHS Trust [2018] UKSC 50 par. 23: See also footnote 11 above: Sea Harvest Corporation (Pty) Ltd and another v Duncan Dock Cold Storage (Pty) Ltd and another [2000] 1 All SA 128 (A); 2000 (1) SA 827 (SCA) par 19: and Knop v Johannesburg City Council 1995(2) SA 1 (AD)

Professor James Goudkamp ([2017] CLJ 481). He considers that the parties were within an established duty category and that the only question, relevantly, was whether the defendant breached that duty. He observes that discussion as to what the reasonable person would have done in the circumstances in question indicates that the dispute is about the breach element, that being the only element of the cause of action in negligence that is concerned with the satisfactoriness of the defendant's conduct."

[88] Further, a case where the public duty of the first, second and fourth defendants was dealt with concisely, is that of the dicta in *Minister of Safety and Security and Another v Carmichele,* [57] where it was stated:

"... that the police service 'is one of the primary agencies of the State responsible for the protection of the public in general…' …. and that prosecutors 'have always owed a duty to carry out their public functions independently and in the interests of the public."

[57] Minister of Safety and Security and Another v Carmichele {2003) 4 All SA 565 (SCA) par.36

[89] Further, the reasoning as reflected in *The Premier of the Western Cape v Fair Cape Property Developers (Pty) Ltd,*[58] is applicable to this case:

> *"In determining the accountability of an official or member of government towards a plaintiff, it is necessary to have regard to his or her specific statutory duties, and to the nature of the function involved."*

[90] By way of examples, the magistrate and the prosecutor exercised a duty of care towards the Sunnyboy insofar as Sunnyboy was identified to be mentally challenged and was referred to the District Surgeon for evaluation. Two Legal Aid attorneys were appointed to serve the Sunnyboy's best interests. Sunnyboy was further referred for evaluation at Weskoppies."

In the light of the evidence before this Court, an appropriate duty of care was shown by the defendants. Any notion that no duty of care was taken is without merit.

[58] The Premier of the Western Cape v Fair Cape Property Developers (Pty) Ltd. [2003] 2 All SA 465 (SCA) para 37

101.3 ***Case References***

(a) The applicant in the application for leave to appeal has stated in paragraph 48 that I erred in finding that "*the matter of Zealand and Hofmeyr has no bearing on the matter as it was distinguishable in fact*."

(b) It is clearly enunciated in paragraph 73 of the trial court judgement that:

> "*Amongst the cases that the plaintiff brought to Court were the* Zealand v Minister of Justice and Constitutional Development and Another[59]; Mahlangu and Another v Minister of Police[60]; and Minister of Justice v Hofmeyr[61]. *These cases do not assist the plaintiff because they are, on the facts, in no ways comparable to the present case. Hence, not having any bearing on the facts before this Court. In the Zealand case, the detainee remained detained in a maximum-security block for over five years while awaiting trial. In the Mahlangu case, the detainees were tortured into making incriminating confessions, without them being warned of their rights and then held in solitary confinement for a*

[59] Zealand v Minister of Justice and Constitutional Development and Another 2008 (4) SA 458 (CC);

[60] Mahlangu and Another v Minister of Police 2002 (2) All SA 656 (SCA)

[61] Minister of Justice v Hofmeyr 1993 (3) SA 131 (A)

period of two months. In the Hofmeyr case, there was no court order for the detainee's detention, no court appearance and he was held in solitary confinement on and off for a period of approximately five months while awaiting trial."

(c) Further, in the application for leave to appeal, the applicant stated that: "*I failed to consider, at all the judgement of the Constitutional Court in De Vos N.O. and Others v Minister of Justice and Constitutional Development and Others.*"[62] Likewise, this case does not assist the applicant because it is, on the facts, in no way comparable to the present case. Hence, not having any bearing on the facts before the trial court or in this application for leave to appeal.

(d) The De Vos case turns on the constitutional invalidity of sections 77(6) (a) (i) and (ii) of the Criminal Procedures Act, [63] which was heard on 17 November 2014, and was decided on 26 June 2015.

The Constitutional Court held that:

[62] De Vos N.O. and Others v Minister of Justice and Constitutional Development and Others 1 2015 (2) SACR 217 (CC); 2015 (9) BCLR 1026 (CC).

[63] Section 77 (6) (a) (i) and (ii) of the Criminal Procedure Act 51 of 1977 were declared to be inconsistent with the Constitution and invalid.

"The declaration of invalidity is suspended for a period of 24 months from the date of this judgment in order to allow Parliament to correct the defects in light of this judgment."

(d) Sunnyboy's referral by the Child Justice Court on 18 June 2014, in terms of section 77 (6) (a) (ii) (aa), to Weskoppies as per the Charge Sheet - J15 Form, falls outside the ambit of the De Vos case. Firstly, Sunnyboy was 18 (eighteen) years old at the time. Secondly, in light of the Constitutional Court's decision a year later in the De Vos case, that sections 77 (6) (a) (i) and (ii) of the Criminal Procedures Act No. 51 of 1997, are invalid, but remained effective until June 2017. Therefore, the De Vos case has no relevance in this matter. Hence, the applicant's contentions in respect of the De Vos case, are without merit.

[102] The applicant's application for leave to appeal is basically a fishing expedition in which (conclusions like the above) are drawn from pure "if" possibilities which did not exist and further under the total circumstances of the incident, was an impossibility.

Overview

[103] The applicant has raised the issue of interest of justice.

(a) Chauke had a constitutional right not to be deprived of her property as provided for in Section 25 (1) and (4) (b) of the Constitution.[64] Section 25 of the Constitution under the heading "Property", is applicable to the complainant and states in paragraph (1) and in paragraph (4) (b):

> *"(i) No-one may be deprived of property except in terms of law of general application, and no law may permit arbitrary separation of property.*
>
> *(iv) For the purpose of this section – property is not limited to land".*

(b) A male person (Sunnyboy) attempts with a second male to snatch a women's handbag. Their attempt fails. When dealing with a woman's handbag, one is not by way of example speaking about a supermarket packet, which might contain sandwiches, a cold drink, etc for the day. One is talking about the contents, which simply stated is the identity of the lady in question. A women's handbag would in all probability contain various items including I.D. documentation, driver's licence, banking cards, and a cell phone. Such would have twofold implications. Firstly, the inconvenience and cost of replacement. Secondly the potential of another to use same for illegal activities.

[64] The Constitution of the Republic of South Africa Act 108 1996.

Summing-up

[104] There is nothing that would have alerted the various parties to the age of Sunnyboy at the time of his arrest or subsequent to the arrest. In giving evidence, all the parties were persistent, either in their version or by implication, that Sunnyboy was in fact an adult. A further factor is the question of whether any of the parties should have been enlightened. Quite the opposite, as when Sunnyboy was sent to the District Surgeon, not only did the District Surgeon not query the majority of Sunnyboy but documented his age as 37 (thirty-seven).

Other than the above, the judgment in the trial court primary revolves around whether Sunnyboy from the time of apprehension, was recognisable as a minor. Other factors, in the applicant's application, are to a large extent interwoven with the question of the age of Sunnyboy or alternatively, do not play a role. Quite simply, it is purely the equivalent of going on a fishing expedition and hoping that some fish will be caught whilst in the meantime the pond in question is devoid of any fish.

[105] The following is pertinent to note. It would be preposterous to suggest that a detained person, major in appearance, should be placed together with minors merely on a suggestion that the person may be a minor. Such would be detrimental and dangerous with respect to other minors so detained and would amount to recklessness on behalf of any official who oversees such occurring or being part thereof.

[106] The authorities would further be hampered, in their actions with respect to the administration of justice and their effectiveness curtailed, should they find themselves in a situation where visibly looking adults cannot be apprehended and/or detained due to the possibility of a belated query as to their age.

[107] Two factors which stand out when applying one's mind to the circumstances of this case are:

i. In this instance two male persons (one being Sunnyboy), acted in a manner (the attempted robbing of a lady's handbag from a woman), that was unacceptable in any civilised society. Particularly one that claims to be committed to the protection of the rights of all persons. Hence the Sunnyboy's arrest.

ii. It could not have been in the contemplation of the legislature that, a lawful arrest is to be regarded as a wrong, entitling the applicant to bring an action for damages against the defendants.

Judgment

[108] The Supreme Court of Appeal's guidance for granting leave to appeal is stated in 2016 in *MEC For Health, Eastern Cape v Ongezwa Mkhitha and The Road Accident Fund (in para 14 above)*, [65] as Leave to Appeal "must not be granted unless there (is) truly a reasonable prospect of success. Further this application

[65] MEC For Health, Eastern Cape v Ongezwa Mkhitha and the Road Accident Fund [2016] ZASCA 176 (25 November 2016) in para 14 above.

for Leave to Appeal to the Supreme Court of Appeal or to a Full Bench of this division, has not passed the bar which has been raised in terms of Section 17 of the Superior Court Act of 2013.[66] Hence, this application leads me to believe that any appeal would have no truly reasonable prospect of success. In addition, there are no compelling reasons why the appeal should be heard, including conflicting judgments on the matter under consideration.

THE ORDER

[109] I, therefore, issue the following Order:

(i) The application for leave to appeal is dismissed with costs.

L BARIT

Acting Judge of the High Court

Gauteng Division, Pretoria

Heard on 3 July 2023.

Judgement delivered on 14 November 2023.

[66] Section 17 (1) (a) of the Superior Courts Act 10 of 2013 states that: *"Leave to Appeal may only be given where the judge or judges concerned are of the opinion that the appeal would have a reasonable prospect of success (Section 17 (1) (a) (I))".*

APPEARANCES

For the Applicant:	Advocates A Granova
Instructed by:	Phuti Manamela Attorneys
For the First and Fourth Defendants:	Advocate HOR Modise SC
Instructed by:	State Attorney
For the Second Defendant:	Advocate TWG Bester SC
Instructed by:	State Attorney
For the Third Defendant:	Advocate JF Barnardt SC
Instructed by:	State Attorney